
(1995) 11 MAD CK 0041

In the Madras High Court

Case No : Writ Appeal No's. 1101 and 1102 of 1995

Madura Coats Ltd.

APPELLANT

Vs

CCE, Madurai

RESPONDENT

Date of Decision : 13-11-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1996) 56 ECC 18 : (1996) 81 ELT 201

Hon'ble Judges : K.A. Swami, C.J.;Raju, J

Bench : Division Bench

Advocate : Shri S. Govind Swaminathan for N.S. Sivan, for the Appellant; Shri K. Jayachandran, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

K.A. Swami, C.J

1. These two appeals arise out of the common order dated 8.2.1995 passed by the learned single Judge in W. P. Nos. 7793 and 7588 of 1993

respectively. Petitioner is the same in both the writ petitions and it has sought for quashing the order of the Collector of Central Excise dated

2.4.1992 adjudicating the excise duty payable by the petitioner for the period from 1.4.1987 to 7.10.1990 and also the order of the Assistant

Collector of Central Excise dated 26.6.1992 adjudicating the excise duty payable by the petitioner for the period from 8.10.1990 to 29.2.1992.

2. Even though before the learned single Judge a preliminary objection was raised that as the petitioner has substantive right of appeal against both

the orders, the exercise of jurisdiction under Article 226 of the Constitution is not warranted and it was brought to the notice of the learned single

Judge a decision of a Division Bench of this Court, the learned single Judge has overruled the preliminary objection and has gone into the merits of

the matter and dismissed the writ petitions holding that the tyre cord fabric in question falls under the Heading 59.05 of Chapter 59 of the Central

Excise Tariff Act as found in page 502 of the Central Excise Tariff of India 1986-87, IV Edition published by the Central Law Office, New Delhi.

Aggrieved by the common order, the petitioner in the writ petitions has come up in appeals.

3. Learned Senior Counsel Shri Govind Swaminathan appearing for the appellant-petitioner contended that the Collector and the Assistant

Collector of Central Excise had no jurisdiction to adjudicate that the tyre cord fabric in question fell under Heading 59.05, when the excise duty

had already been paid on the basis that the tyre cord fabric in question fall under Heading No. 59.02, that the whole thing has been considered

ignoring the law bearing on the point and that, therefore, it is not necessary for the appellant to avail the remedy of appeal under the Central

Excises and Salt Act, 1944. In support of the aforesaid submissions, the learned Senior Counsel has placed reliance on the decisions in A.V.

Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, and L. Hirday Narain Vs. Income Tax Officer,

Bareilly, and also the decision of a learned single Judge of the High Court of Delhi in Swastic Rubber Products v. Union of India 1995 59 ECR

31(Del.).

4. On the contrary, Mr. Jayachandran, learned Additional Central Government Standing Counsel placed reliance on the decision of the Supreme

Court in Madura Coats Ltd. v. Collector of Central Excise, Madurai 1994 71 ELT 347 (SC) and also the decisions of a Division Bench of this

Court in Indian Steel Rolling Mills Ltd. Vs. Union of India, and Collector of Customs, Madras Vs. Madras Electro Castings P. Ltd., .

5. Though both the counsels have made their submissions on the merits of the case also, as we are not inclined to accept the contention of the

learned Senior Counsel for the appellant that it is not necessary for the appellant to avail the remedy of appeal as the Collector and the Assistant

Collector of Central Excise have acted without jurisdiction, we do not consider it necessary to deal with the contentions having a bearing on the

merits of the case.

6. In both these cases, the Collector and the Assistant Collector of Central

Excise, Madurai, respectively have made an adjudication in exercise of the powers conferred upon them under the Central Excises and Salt Act (hereinafter referred to as "the Act"). That they have jurisdiction to adjudicate is not disputed before us. What is disputed is that they have no jurisdiction to determine as to whether the tyre cord fabric in question falls under the Heading 59.02 or 59.05 of the Central Excise Tariff Act. It may be pointed out here that on such determination only, the quantum of liability to pay the excise duty depends. In the event if it is held that the tyre cord fabric in question falls under the Heading 59.02, there is a vast concession that is available to the assessee, whereas if it is held that it falls under the Heading 59.05, the petitioner would be required to pay the excise duty heavily. It is required to pay not only the basic duty, but also the additional duty. In order to point out as to how much difference it makes, we only extract the Headings 59.02 and 59.05, which are as follows :

Heading No.

Sub-Heading No.

Description of goods

Rate of duty

Basic Addl.

59.02

Tyre Cord fabric of high tenacity yarn of polyamides, polyesters or viscose rayon

5902.10

-Of polyamides

Nil

Rs. 4 per Kilogram

5902.20

-Of polyesters

Nil

Rs. 4 per Kilogram

5902.30

-Of viscose rayon

Nil

Rs. 2 per Kilogram

59.05

Rubberised textile fabrics other than those of Heading No. 59.02

5905.10

-Of Cotton

8%

5%

5905.20

-Of man-made textile materials

8%

10% plus Rs. 2 per Kilogram square metre

Thus from the aforesaid extract, it is clear that in the event if it is held that tyre cord fabric is found to be of high tenacity yarn of polyamides,

polyesters or viscose rayon, the appellant is not liable to pay basic duty and even in additional duty, there is a concession depending upon whether

it is polyamides or polyesters or viscose rayon, whereas in the case it falls under rubberised textile fabrics other than those of Heading No. 59.02,

if it is a cotton fabric, the basic duty is 8% and additional duty is 5% and if it is of man-made textile materials, the basic duty is 8% and the

additional duty is 10% plus Rs. 2/- per square metre. Any other fabric falling under the Heading 59.05 and not falling under the Heading 59.02, the

basic duty is 12%. Further, the Collector and the Assistant Collector of Central Excise are, under the provisions of the Act, the authorities to

adjudicate u/s 11A of the Act which provides recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

These cases fall under the category of short-paid and the power under the proviso to Section 11A of the Act has been exercised within a period of

five years. The ""adjudicatory authority"" has been defined u/s 2(a) of the Act to mean any authority competent to pass any order or decision under

the Act, but does not include the Central Board of Excise and Customs

constituted under the Central Boards of Revenue Act, 1963, Collector of Central Excise (Appeals) or Appellate Tribunal. The expression ""Central Excise Officer"" used in Section 11A of the Act has also been defined u/s 2(b) of the Act to mean any officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under the Act.

7. In these cases, the aforesaid Collector and the Assistant Collector have been authorised to exercise power u/s 11A of the Act. In addition to that, proviso to Section 11A further states that if the power u/s 11A of the Act is to be exercised within a period of five years it has to be exercised by the Collector of Central Excise. The case relating to the period from 1.4.1987 to 7.10.1990 is beyond six months and within a period of five years therefore, the adjudication has been made by the Collector of Central Excise, whereas in the other case relating to the period from 8.10.1990 to 29.2.1992, as the proceedings have been initiated within a period of six months, the adjudication has been done by the Assistant Collector of Central Excise. We find it very difficult to accept the contention of the learned senior counsel for the appellant that it is not at all open to the Central Excise Officer to determine whether a particular produce falls under the Heading 59.02 or 59.05. Without such power, the adjudicatory authority will not be able to discharge his functions effectively inasmuch as if no such power is given to the adjudicatory authority, whatever the producer chooses on his own option to classify the produce either falling under the Heading 59.02 or 59.05 would be final. This is not the position in law. It is the adjudicatory authority, namely the Central Excise Officer, is entitled to determine as to whether the particular goods falls under the Heading 59.02 or 59.05. The contention of the learned counsel for the appellant that the adjudicatory authority is not right in holding that the tyre cord fabric in question falls under the Heading 59.05 or 59.02 and such decision of the adjudicatory authority is illegal and not in accordance with the provisions contained in the Act is not acceptable.

8. As against the adjudication made u/s 11A of the Act, there is a right of appeal provided under Sections 35 and 35B of the Act. If the order is

passed by the Assistant Collector of Central Excise, the appeal would lie to the Collector (Appeals) u/s 35 of the Act and if the order is passed by

the Collector of Central Excise, the appeal would lie to the Appellate Tribunal u/s 35-B of the Act. The scope of appeals under both the provisions

is the same, as both of them lie on facts and law. It may also be pointed out here that as against the order passed by the Appellate Tribunal, appeal

lies to the Supreme Court under certain circumstances and no appeal is provided to the High Court. If it is necessary, the Tribunal can make a

reference on a question of law to the High Court u/s 35G. Further, along with the appeal, as per Section 35F of the Act, the appellant is required

to deposit the duty as well as penalty. If the deposit of duty and penalty is going to cause undue hardship to the appellant, it is open to the

Collector (Appeals) or the Appellate Tribunal to consider such question and decide whether in the facts and circumstances of each case,

depositing of duty and penalty causes undue hardship to the appellant. The provisions u/s 35F of the Act are made with a view to safeguard the

interest of revenue. Therefore, what is stated above makes it clear that the matters falling u/s 11A and other provisions of the Act relating to

adjudication of the excise duty and penalty payable by a particular party, no jurisdiction is conferred upon the High Court to deal such matters. The

aggrieved party will have to invoke the appellate jurisdiction, i.e. the Collector (Appeals) or the Appellate Tribunal, as the case may be, and if

aggrieved by the orders passed in the appeals, they can approach the Supreme Court, in case it is an order by the Appellate Tribunal, whereas if it

is an order passed by the Collector (Appeals), further appeal is provided to the Appellate Tribunal. Even against that order also, the remedy is by

way of appeal to the Supreme Court in certain circumstances or reference by the Appellate Tribunal to the High Court on a question of Law. Such

being the scheme of the Act, interference in exercise of jurisdiction under Article 226 of the Constitution overlooking the provisions regarding

appeal, is not at all warranted and it would be opposed to the very scheme and policy of the law.

9. Even in the case of A. V. Venkateswaran (supra), the Supreme Court has made it clear that existence of an alternative remedy is a bar to the

entertainment of a petition under Article 226 of the Constitution unless there is complete lack of jurisdiction in the officer or authority to take the

action impugned, or where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could,

therefore be treated, as void or non-est and that in all other cases, courts should not entertain petitions under Article 226. In *L. Hirday Narain's*

case (supra), it has been held that in a case where the remedy that is available is only a revision, it is well settled that revision is not an adequate

remedy and therefore, even though an alternative remedy of revision is available, the High Court can exercise jurisdiction under Article 226 of the

Constitution, subject to the facts of each case. In *Madura Coats Ltd.'s* case 1994 71 ELT 347 in which the order of the Collector was challenged

before the Supreme Court, it was held that there was no reason as to why the petitioner should not avail the alternative remedy of appeal available

to it. The situation of the case that was decided by the Supreme Court and the cases which we are now called upon to decide is the same. In

addition to this, a Division Bench of this Court in *Indian Steel Rolling Mills Ltd. Vs. Union of India*, has held as follows :

When the appeal lies on facts and law and the Appellate Authority is also entitled to take into account the subsequent events that take place

during the pendency of or subsequent to the order challenged in the appeal, we are of the view that the alternative remedy of appeal cannot at all

be considered to be either inadequate or inefficacious. In fact, the Appellate Tribunal has been specifically created in order to ensure that such

matters are specifically dealt with and there is speedy and effective disposal of such matters, therefore it would be in the interest of the appellant to

avail the remedy of appeal".

In *Collector of Customs, Madras Vs. Madras Electro Castings P. Ltd.*, , a Division Bench of this Court has also taken the same view. The

decision in the case of *Swasthic Rubber Products* 1995 59 ECR 31 (supra), does not deal with the question of alternative remedy. Therefore, we

do not consider it necessary to refer to it in detail.

10. We, accordingly, hold that there is no justification to exercise jurisdiction under Article 226 of the Constitution. There is also one more reason

to decline to exercise the jurisdiction under Article 226. The learned Senior Counsel appearing for the appellant submitted that the question as to

whether the tyre cord fabric in question falls under the Heading 59.02 or 59.05 is

a mixed question of fact and law. If that be so it is all the more necessary that the appellant should avail the remedy of appeal and the Collector (Appeals) or the Appellate Tribunal can decide the issue of fact and law. Such being the position, the learned Single Judge ought to have refrained from going into the merits of the case. In the view we take it also becomes necessary to permit the appellant to avail the remedy of appeal and further to direct the Appellate Tribunal as well as the Collector (Appeals) to entertain the appeals, if the same are filed within the period as may be stipulated by us and decide the same on merits and in accordance with law, without going into the question of limitation.

11. We, accordingly, allow the writ appeals and set aside the common order dated 8.2.1995 passed by the learned Single Judge in Writ Petition

Nos. 7793 of 1992 and 7585 of 1993 and decline to exercise jurisdiction under Article 226 of the Constitution of India and dismiss the writ

petitions. We keep open all the contentions having a bearing on the merits of the cases. We further direct that if the appellant files an appeal before

the Appellate Tribunal against the order dated 2.4.1992 in C. No. V/59.05/15/47/90-Adjun. passed by the Collector of Central Excise, Madurai-

2, within a period of thirty (30) days from today, in accordance with the provisions contained in the Central Excises and Salt Act, the Appellate

Tribunal shall decide the appeal on merits and in accordance with law, without going into the question of limitation. We also further direct the

Collector (Appeals) in the event the appellant files an appeal against the order passed by the Assistant Collector of Central Excise, Madurai, dated

26.6.1992 in C. No. V/59/30/14/91 within a period of thirty (30) days from today, in accordance with the provisions contained in the Central

Excises and Salt Act, to decide the appeal on merits and in accordance with law, without going into the question of limitation. We also further

make it clear that our direction to consider the appeals on merits and in accordance with law shall not be construed as exempting the appellant

from complying with the provisions contained in Section 35F of the Central Excises and Salt Act. There will be no order as to costs.