

(1996) 09 MAD CK 0064

In the Madras High Court

Case No : Writ Petition No. 11455 of 1996 and W.M.P. No. 15347 of 1996

Madura Coats Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Madurai

RESPONDENT

Date of Decision : 09-09-1996

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AA, 35, 35B
Constitution of India, 1950 — Article 226, 35F

Citation : (1997) 91 ELT 41

Hon'ble Judges : S.M. Ali Mohammed, J

Bench : Single Bench

Advocate : Shri S. Govindswaminathan, for M/s. N.S. Sivam and others, for the Appellant; Shri K. Jayachandran, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

1. The prayer in this Writ Petition is to issue a writ of certiorari or any other appropriate Writ, Order or direction in the nature of Writ under Article 226 of the Constitution of India, calling for the records of the respondents culminated in Order No. 187/96, dated 24-6-1996 of the Customs, Excise and Gold (Control) Appellate Tribunal, South Zonal Bench at Madras Second respondent herein in Application No. E/Stay/414/96/MAS and to quash the said order.

2. The petitioner herein M/s. Madura Coats Ltd., is a public limited company registered under the Companies Act, 1956. The Manager, Excise and Transport has filed an affidavit in support of the Writ Petition. In the said affidavit, it is stated that the petitioner company is a leading manufacturer of Textiles in India. The tyre cord Fabrics of high Tenacity Yarns are used only in the manufacture of tyres. The high tenacity yarns are not manufactured in India and the same are imported by the Tyre manufactures. Since the tyre manufacture do not have the infrastructure to convert the imported High Tenacity Yarns into Tyre Cord Fabrics, the petitioners company on job work basis converts the imported High Tenacity Yarns into Tyre Cord Fabrics. The converted Grey Tyre Cord Fabrics are cleared following the due excise procedure and despatched to the concerned tyre

manufacturers. The grey tyre cord fabrics of high tenacity yarns cannot be used as such. The grey tyre cord fabrics have to be dipped in Dip solution made of resorcinol, Formaldehyde and later to impart adhesiveness to the Tyre Cord Fabrics of the High Tenacity Yarns. Only then, during the process of vulcanising the rubber compound will be finally embedded on the Tyre cord fabrics. The dipping is thus an integral process in the manufacture of tyres. The petitioner company has installed a modern dipping plant at their Madurai Unit. Most of the tyre manufacturers get the dipping of their tyre cord fabric done at the Dipping plant of the petitioner company to save the time at their end. The only cleared grey Tyre cord fabrics are dipped on job work basis and despatched again following the due excise procedures. The petitioner company are manufacturing Tyre Cord Fabrics of polyester, Rayon and Nylon Yarn. They have declared them as "Tyre Cord Fabrics of high tenacity yarn" and classified under 5902.10, 5902.20 and 5902.30 and cleared them at "Nil" rate of duty availing exemption under Notification No. 63/87-C.E. The petitioners are periodically conducting tests to find out the tenacity of the cord by taking samples from the dipped tyre cord fabric and the results of the test is recorded in a register "Summary of tyre cord cases". Tyre Cord Fabric of high tenacity yarn is classified under Chapter 59.02. If the tyre cord is made up of yarn where tenacity is below the prescribed limit of tenacity, then it is not eligible to be classified under 59.02. Between 1987 to 1989, during the 1068 working days, 14,21,000 kgs. of Tyre cord fabrics were dipped. However, during 49 days certain lots, 82,742 kgs. of Tyre Cord Fabrics because of the defects in the process of dipping failed to acquire optimum level of dipping. The first respondent initiated proceedings under the proviso to Section 11A of the Central Excises and Salt Act, 1944 (hereinafter referred to as "The Act") directing the petitioner company to show cause why these 82,742 kgs. of dipped tyre cord fabrics should not be depicted as a new product called "Tyre Cord Fabrics of other than high tenacity yarns" and the duty under the Chapter Heading 5905.20 of the Central Excise Tariff Act should not be imposed and the differential duty should not be claimed from the petitioner company. In the reply, the petitioner company submitted that such assumption of the first respondent and furnishing a new name to such lots and demanding duty under 5905.20 was contrary to law, as no product by the name "Tyre Cord Fabric of other than High Tenacity Yarn" is enumerated under the Central Excise Tariff Act and the 82,742 kgs. could not be distinguished differently from the dipped tyre cord fabrics of High Tenacity Yarns. As per the statutory provisions of Central Excise Tariff Act, these certain lots would continue only as tyre cord fabric of high tenacity yarns and not otherwise. The first respondent without considering the same, made an order of adjudication imposing the differential duty by its order, dated 2-4-1992, also with a penalty of one lakh rupees. Aggrieved, the petitioner approached this Court in W.P. No. 7793 of 1992 which was ultimately dismissed and against that W.A. No. 1101 of 1995 was filed. However, the Division Bench of this Court while setting aside the order in the writ petition, directed the petitioner company to file statutory appeal as provided u/s 35 of the Act. The Supreme Court also upheld the above directions of the Division Bench. As per the

directions of the Supreme Court, the petitioner preferred an appeal to CEGAT u/s 35B of the Act. The petitioner company also made an application to dispense with the deposit of the excise duty and penalty. By order dated 24-6-1996, the CEGAT the 2nd respondent herein allowed the application with the direction that the petitioner shall make a pre-deposit of a sum of Rs. 17,00,000/- towards duty on or before 29-8-1996. Aggrieved by the same, the petitioner has approached this Court for the reliefs as prayed for.

3. Mr. S. Govindswaminathan, learned Senior Counsel appearing for the petitions company contended that the 2nd respondent CEGAT has not exercised its discretion, in accordance with law, viz., in accordance with the proviso to Section 35F of the Act. He further contended that by Finance Act, 1995, Section 11AA was inserted to the Act, with effect from 25-8-1995 and the insertion of Section 11AA to the Act, a change has taken place in the exercise of discretion given under the proviso to Section 35F of the Act. Learned Senior Counsel further submitted that the interest of the revenue has been adequately safeguarded by providing interest on the assessed excise duty if the same is not paid within three months from the date of determination and as such there is no need at all to deposit any amount before the appeal is entertained by the appellant authority, u/s 35B of the Act, and as such the impugned order of the Respondent 2 directing the petitioners to make a pre-deposit of a sum of Rs. 17,00,000/- is without jurisdiction and in any way it is not a proper exercise of discretion by the 2nd respondent, under proviso to Section 35F of the Act.

4. On the other hand, Mr. K. Jayachandran, the learned Counsel for the respondents contended referring to Section 35F of the Act dealing with the provisions for pre-deposit and Section 11AA dealing with imposing of interest if the assessed excise duty is not paid within 3 months and that submitted Section 11AA deals with a different aspect of the matter, viz., the assessment of excise duty and its payment within a period of three months from the date of assessment and if the excise duty is not paid within three months, the duty assessed is subject to an interest payment not below 10% p.a. and not exceeding 30% p.a. Section 35B deals with the right of appeal conferred by the said Act on any aggrieved party, whereas Section 35F deals with pre-requisite of deposit before the appeal u/s 35B is taken on file. Hence the above sections deals with different aspects of the matter. Learned Counsel further submitted that proviso to Section 35F gives a discretion to appellate authority to dispense with the pre-deposit of excise duty assessed and any penalty levied thereon. Learned Counsel further submitted that there is no infirmity in the impugned order directing the petitioner to deposit a sum of Rs. 17,00,000/-.

4. Learned Counsel for the respondent placed reliance on the following decisions :

- (1) Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, ;
- (2) V.C. Soundarrajan Vs. Collector of Customs,

(3) Aurelec Trust Vs. Superintendent of Central Excise, .

In Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, , the Supreme Court observed as follows :-

"Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

***** It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory without any right of appeal, as such. If the statute gives a right to appeal upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and exercisable to the appellant."

In V.C. Soundarrajan Vs. Collector of Customs, K.S. Bakthavatsalam, J., followed the ruling the Supreme Court in Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, . In Aurelec Trust Vs. Superintendent of Central Excise, , Mishra, J., observed as follows :-

"The power to dispense with the deposit of the duty demanded or the penalty levied is circumscribed by the words, "opinion that the deposit would cause under hardship "and"..... subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue". The first requirement is the formation of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to the person who has come in appeal against the revenue demand. Under hardship has to be understood not merely in the sense of a cash demand that the person in appeal is required to deposit, but would depend upon facts of each case, for example, a person, who realised from the customers a certain amount of revenue and appropriated is, cannot be heard to say that he would be subjected to hardship if he was required to deposit the amount of duty demanded or the penalty levied. Hardship of every kind thus may not justify stay of the demand, pending appeal. The pre-deposit of duty is the rule. Dispensing with such deposit is an exception. Even if there are materials to show that the deposit of duty demanded or penalty levied would cause undue hardship to the appellant, the Appellate Authority [Collector (Appeals) or the Appellate Tribunal] shall not waive the pre-deposit condition without taking notice of the interests of the revenue and without imposing such conditions which would protect the interests of the revenue.

Viewed with this and the rule in this behalf indicated in the judgment of the Supreme Court in the case of Empire Industries Limited and Others Vs. Union of India and Others, , it is difficult to find any legal error in the order of the Tribunal. The Tribunal has said,

"..... we find that no ground of financial hardship has been made out. The appellants have stressed only the merits of the case in their favour. But, prima

facie the merits are not so clear in view of Paragraph 47 of the Supreme Court judgment in the case of Empire Industries Limited and Others Vs. Union of India and Others, , according to which the full intrinsic value of an article has to be assessed for the purpose of levy of central excise duty."

5. I have carefully considered the contentions of Mr. S. Govindswaminathan, learned Senior Counsel for the petitioner and that of Mr. Jayachandran, learned Additional Central Government Standing Counsel on behalf of the respondents.

6. The point for consideration in this writ petition is whether the insertion of Section 11AA to the Central Excise and Salt Act, 1944 with effect from 25-8-1995 by Finance Act, 1995 affects the exercise of discretion under proviso to Section 35F of the said Act ?

7. According to the contention of the learned Senior Counsel appearing for the petitioner company, once Section 11AA is inserted and came into force, the appellate authority has no discretion to insist upon the deposit of duty demanded or the penalty levied and ought to exercise its discretion by not insisting on pre-deposit of duty as the interest of Revenue has been adequately safeguarded by provision of interest u/s 11AA of the Act. The submission of the learned Senior Counsel is that once Section 11AA has been inserted and came into force, the discretion given under provision to Section 35F is to be exercised without insisting on any pre-deposit of amount for the duty demanded and the penalty levied thereon and both the Sections 11AA and 35F have to be construed harmoniously to the effect. On the other hand, Mr. Jayachandran, the learned Additional Central Government Standing Counsel appearing for the respondents contended that Section 11AA has to be read separately as it deals with the demand of duty and the delay in collection of the duty and the interest payable for such duty whereas Section 35F deals with pre-requisite to the right of appeal, subject to certain conditions that have to be fulfilled before the appeal is entertained by the appellate authority. Section 11AA reads as follows :-

"Section 11AA. Interest on delayed payment of duty :-

Where a person, chargeable with duty determined under sub-section (2) of Section 11A, fails to pay such duty within three months from the date of such determination, he shall pay in addition to the duty, interest at such rate not below ten per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Board, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty :

Provided that where a person chargeable with duty determined under sub-section (2) of Section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then such person shall be liable to pay interest under this section from the date immediately after three months from such date till the date of payment of such duty."

Section 35F reads as follows :-

"Section 35F. Deposit, pending appeal, of duty demanded or penalty levied :-

"Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the Collector (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Collector (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as her or it may deem fit to impose so as to safeguard the interests of revenue."

A perusal of Section 11AA makes it clear that the said section deals at the stage of assessment proceedings after the duty has been assessed or the penalty has been levied and in order to safeguard the interest of the Revenue an obligation is cast to pay the amount assessed or the penalty levied, within certain period and if they are not paid within three months, an interest at the rate not below 10% and not exceeding 30% is payable. Whereas Section 35B confers a statutory right of appeal to the aggrieved party. The procedure to entertain the appeal is given u/s 35F. It is clear that the right of appeal conferred by Section 35B is subject to the procedures given u/s 35F. As observed by the Supreme Court in *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , the right of appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory without any right of appeal, as such. If the Statute gives a right to appeals upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and exercisable to the appellant.

8. The condition precedent for the exercise of the right of appeal as per Section 35F is the deposit of duty assessed and penalty if any, by the appellant. A discretion is given to the appellate Tribunal to dispense with such deposit subject to certain condition, if the same would cause undue hardship to such a person. It is well settled that the appellate Authority has to exercise its discretion in accordance with law and in view of Section 35F proviso, the appellate Authority has to exercise its discretion with regard to prima facie case and several other vital considerations, such as interest of revenue and undue hardship to assessee and there can be and there are no hard and fast rules and circumstances of the case in accordance with law. I am unable to accept the contention of Mr. S.

Govindswaminathan, learned Senior Counsel for the petitioner-company to the effect that the mere insertion of Section 11AA to the Act by Section 7 of Finance Act, 1995 with effect from 26-5-1995 by providing interest on the amount assessed is not paid within the time specified, the interest of revenue has been adequately safeguarded and as such discretion u/s 35F of the Act ought to be exercised in favour of the appellant without insisting any pre-deposit amount. In my considered view, the payment of interest on the excise duty is only made so that the duty is paid within the specified time to the Revenue and not to postpone the payment of duty for a long time by utilising the amount for various business purposes of the assessee. Whereas Section 35F of the Act deals with condition precedent to be fulfilled before right of appeal becomes vested u/s 35B of the Act by pre-deposit of duty assessed or penalty levied. It clearly establishes that the assessee has to pay the entire amount of duty and the penalty, if any levied, as a pre-requisite to entertain appeal u/s 35B of the Act. However, a discretion is given to the Tribunal to dispense with such pre-deposit on the facts and circumstances of the case. As the right of appeal is statutory right, the aggrieved party has to comply with the condition precedent for exercising of such a statutory right and this restriction given u/s 35F of the Act has not been amended or modified by the insertion of Section 11AA to the Act. In view of the above, the appellate authority can only dispense with the deposit of duty and the penalty levied thereon by exercising its discretion with regard to the prima facie case and hardship upon the facts and circumstances of the cases. In the instant case, the second respondent has considered the case of the petitioner-company and has granted the relief by exercising its discretion in accordance with law by way of directing the petitioner to deposit a sum of Rs. 17,00,000/-. Hence, I see no infirmity in the order impugned. Accordingly, the writ petition is dismissed. No costs. Consequently, W.M.P. 15347 of 1996 is also dismissed.