
(1961) 09 CAL CK 0013
In the Calcutta High Court
Case No : Matter No. 281 of 1960

Marwari Mills Stores Co.

APPELLANT

Vs

A.K. Bandopadhyay and Others

RESPONDENT

Date of Decision : 28-09-1961

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1962 Cal 180 : 66 CWN 170

Hon'ble Judges : D.N. Sinha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.N. Sinha, J.—The facts in this case are shortly as follows: The petitioner firm carries on business in the importation of diverse Mill Stores and Accessories, On or about the 19th December, 1958 and 31st December, 1958 respectively the petitioner was granted two Import Licences by the Joint Chief Controller of Exports and Imports Calcutta. By the said licences, the petitioner was authorised to import spare parts of jute mill machinery as per lists attached thereto. under Sl. No. 37 (2) of Part II of the Import Trade (Control) Schedule, valid from October, 1958 to March, 1959. The petitioner was thereby authorised to import spares, components and parts of jute mill machinery falling under Sl. No. 37 (2) but excluding components for machinery included in Appendix XXXV of the said schedule, and Sl. 68 in part V. In September. 1960 the petitioner imported certain Cork Covers for jute mill machinery ex. S. S. Alwaki, from Germany. According to the petitioner, the goods imported were covered by the licences, as they were intended for Roll Former Machines, used in Jute Mills, and as such came under the heading of component parts of jute mill machinery. The Roll Former Machines were not excluded by the Schedules, not coming within any item mentioned in Appendix XXXV of the said Schedule or Sl. No, 68 in Part V. On the 5th September, 1960 the petitioner received a notice from the Assistant Collector of Customs for Appraisement, Calcutta, a copy whereof is Exhibit "C" to

the petition. It was stated in the notice that on examination of the documents relating to Cork Covers for Jute Mill Machinery imported by the petitioner ex. S. S. "Alwaki", from Germany, it was found that the goods could be used in machines banned under Appendix 35, Thus, they were not covered by any Import Licence and the importation was in contravention of the law. The petitioner was called upon to show cause why the goods should not be confiscated and action taken against them u/s 167(8) of the Sea Customs Act, read with Section 3(2) of the Import and Export (Control) Act. The petitioner thereupon showed cause. On the 26th September, the Collector of Customs for Appraisement made an order, a copy whereof is Exhibit "E" to the petition. It was held that the cork covers which were imported were for the purpose of being used in the banned type of machineries, as by slight cutting or adjustment they could be used in the banned type of machines. The goods were accordingly confiscated u/s 167(8) of the Sea Customs Act, but the petitioner was given an option u/s 183 of the Sea Customs Act to clear the same on payment of a fine of Rs. 18,520/-. Against the said order, the petitioner has actually preferred an appeal before the Central Board of Revenue under the Sea Customs Act, but that appeal is still pending. Nevertheless, this application has been made for the issue of a writ in the nature of certiorari quashing the said order and also for a writ in the nature of mandamus directing the respondents not to give effect to the same. As appears from the affidavit in opposition affirmed by Sudhir Chandra Ghosh, on the 8th March, 1961 these cork covers were imported, as being required to be used in machines called Roll Formers. It is further stated that they were imported so that with slight modifications they could be used as roller covers for push bar drawing frames and spiral roving frames, being Jute Mill Machineries banned under Appendix XXXV and were being actually used as such. It is alleged that if this kind of thing is permitted, then the whole prohibition or ban under Appendix 35 would be defeated. I find also as mentioned in the order dated 18th October, 1960 that there was a personal hearing and the stand taken by the petitioner was that the Customs Department should go by the goods as they were imported and not by their subsequent use in any other form. I do not see how it is possible for me to decide this disputed question of fact namely as to whether these goods were really meant for the purposes for which they were imported, or as a cloak for avoiding the ban. However, what is said is that the Customs Authorities have acted without any evidence and it now appears from the affidavit that they had made enquiries from the mills which enquiries were not done in the presence of the petitioner. Mr. Kar has taken a preliminary objection in this case, namely that there is an alternative remedy by way of an appeal to the Central Board of Revenue, and in fact the petitioner has filed an appeal which is still pending. Therefore, this application does not lie and is misconceived. Mr. Ginwalla admits that an appeal has been filed and it is still pending. His client intends to proceed with the appeal. Nevertheless, he argues that this application is competent. He says that in the appeal preferred, his client has taken certain point, namely corruption on behalf of the staff, which matter could not be decided by this Court, and further, if his client did not prefer the

appeal it would have been barred by limitation by the time this application came to be heard and disposed of, In my opinion, none of these grounds are adequate, and the preliminary objection should be made between two propositions. Normally, an application for a writ in the nature of mandamus will not lie if there is an alternative remedy which grants adequate relief. In the case of a writ of certiorari or prohibition, the existence of an alternative remedy is by itself no bar to an application in this jurisdiction, provided certain factors exist e.g. an initial "lack of jurisdiction, violation of the rules of natural justice, etc. But the Court is not bound to entertain such an application. In neither case is the Court's jurisdiction to entertain, an application ousted by the existence of an alternative remedy, and in a suitable case such an application may be entertained. For example, where there are facts which obtrude themselves into the view of the Court, requiring relief, the Court will not refuse to entertain the application. In *State of Uttar Pradesh v. Md. Noon* AIR 1958 SC 86, Das C. J., said as follows:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of the statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari. Where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what. *ex facie* was a nullity for reasons aforementioned."

2. But what happens in a case where an appeal lies and such an appeal has been

filed and the appellant is proceeding with the appeal and at the same time has preferred an application in this jurisdiction? In my opinion, the law applicable to such cases has now been firmly established. The first case to be cited is a Full Bench decision of this Court, to which I was also a party *Abanindra Kumar Maity and Another Vs. A.K. Majumdar and Others*, . In that case *Chakravartti C. J.*, said as follows:

""In our opinion, the position taken up by the petitioners is utterly untenable. It has been held by this Court more than once that although the existence of an alternative remedy is not an absolute bar to the entertainment or maintenance of an application under Article 226 of the Constitution, still, if a party had availed himself of the alternative remedy, he could not alter having exhausted these remedies or gone a certain way in their pursuit switch round to Article 226 of the Constitution and start a fresh line of proceeding under that provision."

3. I now come to a Supreme Court decision *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, . In this case *Mahajan C. J.* said as follows:

"We think that it is not necessary for us to express any final opinion in this case as to whether Section 8(5) of the Act is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under Article 226 of the Constitution.

For purposes of this case it is enough to state that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved- party can have an adequate or suitable relief elsewhere. So far as the present case is concerned, it has been, brought to our notice that the appellants before us have already availed themselves of the remedy pro-vided for in Section 8(5) of the Investigation Commission Act and that a reference has been made to the High. Court of Allahabad in terms of that provision which is awaiting decision, in these circumstances, we think that it would not be proper to allow the appellants to invoke toe discretionary jurisdiction under Article 226 of the Constitution at the present stage, and on this ground alone we would refuse to interfere with the orders made by the High Court."

4. It will be remembered that this is a matter under the Sea Customs Act. In a case under the same Act -- *Radha Kissen More and Others Vs. E. Rajaram Rao and Another*, , *Chakravartti C. J.* said as follows:

".... the appeal must fail on two technical grounds). I shall take the simpler of them first. It appears that before this Court had been moved for a writ under Article 226 of the Constitution, the appellants had already preferred an appeal u/ s 188, Sea Curiums Act and that appeal was then and is still pending. It is quite true. that when there is an alternative remedy, the mere existence of such remedy is not an absolute bar to the entertainment of an application under Article 226, but far different is the case when the party moving the Court under Article 229 hag already availed himself of the alternative remedy and whether or

not he is entitled to any relief in that chain has not yet been decided. I am clearly of opinion that having preferred an appeal from the impugned orders u/s 188, Sea Customs Act, the appellants could not be allowed to move this Court under Article 226 and that at a time when their appeal was still pending and undecided. The present application was not, therefore, maintainable."''

5. This Appeal Court judgment is fully binding on me. Mr. Ginwalla appearing on behalf of the petitioner has cited a number of cases to the effect that the bar against coming to this Court, where there is an alternative, remedy, is not an absolute bar. He has cited the case of AIR 1958 SC 86 (Supra). He has also cited a decision, of Bose J. (as he then was Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others, . In that case, the learned Judge stated that he did not propose to go into a detailed discussion of the cases on the question as to whether the adoption of a number of remedies as prescribed in the Public Demands Recovery Act precluded the petition from invoking the jurisdiction of this Court under Article 226 of the Constitution, as different courts had taken different views on the point, and no hard and fast rule could be laid down as to when a party should be forced to have recourse to an alternative remedy and when not. The learned Judge held on the merits of that case that the petitioner was not entitled to any remedy. This decision does not deal with the question as to the legal position when a person has an alternative legal remedy and is actually following the same. In my opinion the legal position has been well established by the decisions cited above, and must be held against the petitioner. While" it is deliberately pursuing the alternative remedy provided for in the Sea Customs Act, it is not entitled to make an application under Article 226 of the Constitution. There are no special facts in this case which make it desirable that this application should be decided while parallel proceedings are pending before a tribunal constituted under the Sea Customs Act. Therefore, on this preliminary point, this application should fail.

6. The result is that this application fails. The Rule is discharged. Interim orders if any, are vacated. There will be no order as to costs. I must make it clear that I have not gone into the merits of the case.