
(1989) 10 GUJ CK 0019
In the Gujarat High Court

Natwar Textiles Processors Pvt. Ltd. and Another	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 16-10-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 226, 227

Citation : (1990) 1 GLR 338

Hon'ble Judges : J.U. Mehta, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—The petition has its roots in a show cause notice dated December 28, 1983, alleging that the petitioners have illicitly removed powerloom cotton fabrics (worth about rupees sixty two crores) without payment of Excise Duty. Petitioners lost upto Supreme Court in first round. In second round the petitioners retreated and withdrew the petition unconditionally without permission of the Court to file fresh petition. This is third round, initiated in May, 1986. Petition has. remained at the threshold and the proceedings pursuant to show cause notice have also got stuck up on account of ad interim order passed by this Court.

Is the petition maintainable ? While examining and answering the question let us also try to understand as to why and how the matter has remained at the admission stage till today.

2. The petitioner No. 1 is a Private Limited Company carrying on the business of Cotton Textile and more particularly textile fabrics, manufactured in power loom sector. Petitioner No. 2 is a share-holder and Director of petitioner No. 1-Company. Sometime in the month of October, 1983 the petitioner's factory premises were searched and pursuant thereto a show cause notice dated December 28, 1983 has been served upon the petitioner. The allegation in show cause notice is that the petitioners have wrongfully availed of exemption notification in respect of power loom cotton fabrics manufactured and cleared by

them illicitly between 24-11-1979 and 31-7-1983. As disclosed in the affidavit-in-reply, goods valued at Rs. sixtytwo crores seventy seven lakhs fiftythree thousand and ninetyseven (Rs. 62,77,53,097/-) are alleged to have been removed illicitly. (As stated at the Bar, Excise Duty payable on this much quality of cotton fabrics would be around ten crores of rupees). After the service of the notice upon the petitioner, the petitioner challenged the legality and validity of the notice by filing Special Civil Application No. 4611 of 1984.

3. While disposing of the aforesaid petition on September 13, 1984, the Court (Coram: P.S. Poti, C.J. and R.C. Mankad, J.) observed as follows:

No final action pursuant to the show cause notice had been taken. It is for the petitioners to show cause. Their complaint before us is that certain documents on which they would like to rely, though the excise authorities have indicated that they do not propose to rely on them, are not made available to them despite their request and this may vitiate the proceedings now taken as it would be in violation of the principles of natural justice. Though we have been addressed elaborately by the petitioners' counsel, we have not been persuaded to agree that interference at this stage is called for. It is open to the petitioners to urge all their contentions in answer to the show cause notice including their contention as to why the copies of the documents sought for by them are necessary for the proper conduct of their defence and as to how non-supply of those copies would vitiate the proceedings. We expect the excise authorities to properly look into all the contentions taken by the petitioners including the contention of non-supply of copies. It is not necessary to consider in this petition whether those copies would be relevant and whether if not supplied now, the proceedings would have been held to be bad.

We do not think, on the facts averred in the petition, any case has been made out for interference. Hence we are dismissing the petition as pre-mature. Dismissed.

4. Against the aforesaid order of this Court, the petitioner preferred Special Leave to Appeal (Civil) No. 11569 of 1984 before the Supreme Court. The Supreme Court dismissed the Special Leave to Appeal (Civil) No. 11569 of 1984 by passing the following order on 6th May, 1985:

The point as to the limitation before us can be raised in reply to the show cause notice received by the petitioners. The request for inspection of documents can so be raised by the petitioners, before the Collector of Customs, Central Excise. We trust that the request will be duly considered. The SLP is dismissed accordingly.

Be it noted that this Court passed order on September 13, 1984 and the Supreme Court dismissed the SLP on May 6, 1985. When these orders were passed, petitioner's letter dated 16th July, 1984 (Annexure "D" to the petition) requesting for inspection of certain documents was already submitted to the appropriate officer of the Excise Department. After the decision of this High Court

and after the decision of this High Court and after the decision of the Supreme Court on December 16, 1985, appropriate Excise Officer rejected the request made in letter dated July 16, 1984. Thereafter the petitioner again approached this Court by way of Special Civil Application No. 317 of 1986 inter alia challenging the decision of the Excise Officer rejecting the application for inspection of documents.

5. When this petition, (i.e. Special Civil Application No. 317 of 1986) came up for hearing before this Court on March 18, 1986, the petitioner requested for withdrawal of the petition and the Court (Coram: P.R. Gokulakrishnan, C.J. & S.B. Majmudar, J.) passed order as follows:

Mr. V.N. Nair on behalf of Mr. S.I. Nanavati wants permission of the Court to withdraw this petition as not pressed reserving liberty to agitate this matter as and when he files an appeal to the Tribunal against the order of the Collector if at all such an eventuality arises. Permission to withdraw is granted with the above said observations and as such this writ petition is dismissed as withdrawn.

The only liberty reserved to the petitioners was to agitate the matter as and when the petitioners file appeal to the Tribunal against the order of the Collector.

6. The petitioners thereafter approached the Customs, Excise and Gold (Control) Appellate Tribunal ("CEGAT") by way of appeal. In appeal the petitioners also applied for stay of further proceedings before the appropriate Excise Officer pursuant to the show cause notice. While deciding the application for stay of further proceeding, the Tribunal inter alia observed that there was no prima facie case and expressed its doubt about the maintainability of appeal. The petitioner unconditionally, without any reservation whatsoever, withdrew the appeal. The Tribunal dismissed the appeal as withdrawn on May 15, 1986.

7. Thereafter within two weeks the petitioners approached this Court some time in the last week of May, 1986 (that is during summer vacation in the Court). The petitioners have made the following substantive prayers in this petition and obtained ad interim relief by order dated June 23, 1986.

(A) This Hon"ble Court may be pleased to issue a writ of mandamus and/ or any other writ in the nature of mandamus directing the respondents to give the inspection of the documents mentioned at Serial Nos. 1, 2 and 4 in the letter dated 16th July, 1984 which is at Annexure "D" to this petition.

(B) This Hon"ble Court may issue an appropriate writ, mandamus or direction or order quashing and setting aside the order passed by the Collector of Central Excise and Customs, Baroda dated 16th December, 1985 which is at Annexure "C" to this petition.

8. Challenge to the order Annexure "C" dated December 16, 1985 was subject matter of the petition before this High Court in Special Civil Application No. 317 of 1986. The aforesaid petition has been withdrawn by the petitioners only with a liberty to file appeal before the CEGAT. As stated hereinabove the petitioners

have also withdrawn the appeal. Now the petitioners want to agitate the same question and challenge the legality and validity of the order which was the subject matter of the earlier petition i.e. Special Civil Application No. 317 of 1986 which was withdrawn. In fact even in first petition Spl. C. A. 4611 of 1984 which was rejected by this Court, this very question by necessary implication was also the same subject matter of the petition. The order passed by this Court was challenged before the Supreme Court and the petitioners lost therein also. Thereafter, in the same subject matter petitioners started second round by filing S.C.A. No. 317 of 1986 which as stated hereinabove was withdrawn by the petitioner. Now this is third round.

9. Principles analogous to the provisions of Order 23 Rule 1 of CPC are applicable to the proceedings under Article 226/227 of the Constitution of India also. It is true that there would not be bar or res judicata, but on the grounds of public policy a second petition in the same cause of action cannot be permitted to be filed. Similar question arose before the Supreme Court in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, . Therein the Supreme Court inter alia observed that in considering the effect of withdrawal of writ petition under Article 226/227 of the Constitution of India without permission of the High Court to file a fresh petition, the provisions of CPC are not in terms applicable to the writ proceedings although procedure prescribed therein, as far as it can be made applicable to the same, is followed by the High Court in disposing of writ petitions. Rule 1 of Order XXIII of the CPC provides for withdrawal of suits and consequences of such withdrawal. Thereafter the Supreme Court has elaborately referred to the provisions of Order XXIII Rule 1 of Civil Procedure Code. In paragraph 7 of the judgment the Supreme Court has observed as follows:

Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in Sub-rule (3) of Rule 1 of Order XXIII.

The Supreme Court further observed that the aforesaid grounds is not the same as the rule of res judicata contained in Section 11 of the Code, but it is founded on public policy. In para 9 of the judgment the Supreme Court further observed that the principles underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata, but on the ground of public policy.

Further observations made by the Supreme Court in the same para is reproduced below:

It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to

invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to *res judicata*, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission.

10. In the instant case the petitioner withdraw the earlier petition on the same subject matter. Permission of this Court for filing fresh petition on the same subject matter was not sought. The petitioner sought permission only to file appeal before the Tribunal on the same subject matter and on the same grounds. The petitioners filed appeal but withdrew the appeal unconditionally. Thus the petitioners have withdrawn and/or abandoned the remedy of appeal as well as the remedy of writ petition in this High Court.

11. The facts are eloquent to show as to why and for what purpose the petitioners have moved from one forum to another. The allegation in the show cause notice issued against the petitioners is that the petitioners have cleared goods worth more than Rs. 62 crores without paying Excise Duty. We are told at the Bar that if the petitioners are required to pay the Excise Duty it would be around rupees ten crores. In such circumstances who would not like to see that the final decision is delayed ? Inference is obvious. However we would not like to elaborate on this point.

12. As indicated hereinabove ad interim order staying further proceedings was obtained by petitioners in the last week of May, 1986 (that is, during summer vacation, when a learned single Judge taking up urgent admission matters has no power to reject a matter which is required to be heard and decided by Division Bench). Thereafter this Court passed the following order on September 1, 1986:

Mr. Qureshi, learned Counsel appearing for the respondents has no objection for extending the stay. Hence the stay granted is extended till further order. Post this matter for admission on September 22, 1986.

Thereafter the matter does not seem to have come on Board for pretty long time. Respondents moved the Court by filing a note and requested for appropriate directions. As per order dated 7-10-1989 passed by this Court the papers had to be reconstructed and that is how the matter is placed on Board. It is rather shocking and much painful to note that the matter filed in the year 1986 has remained at the admission stage till today. The facts disclosed *prima facie* reveal a very distressing state of affairs. Had it been a matter pertaining to lower Court, or any other Government Department we ourselves would have given appropriate directions for holding inquiry and for suitable actions to be taken against persons responsible for such lamentable lapse. However since the

question pertains to the administration of the High Court itself, we ourselves would rather refrain from passing any such order. But we direct the Registrar of the High Court to place a copy of this judgment before the learned Chief Justice drawing his attention to this aspect. We hope and trust that the learned Chief Justice will take suitable effective actions in the matter, with a view to find out as to who is responsible for the disappearance of the papers and why this was not brought to the notice of the learned Chief Justice or to the notice of the Court taking up such matters and what steps are required to be taken for preventing recurrence of such incidents. We hope and trust that suitable effective actions will be taken against persons who may be found responsible for causing disappearance of the papers and also against persons who did not and/or could not prevent such things to happen.

13. Learned Counsel for the petitioner did make submissions on merits of the order passed by the Collector refusing grant inspection of the documents. However, we are of the opinion that since the petitioner withdrew the previous petition without reserving liberty to file fresh petition in the same subject matter, this petition is not maintainable. Therefore, we are not going into the merits of this contention. In above view of the matter the learned Counsel for the petitioner requests that the petitioners may be permitted to urge that the order passed by the Tribunal, dated May 15, 1986, Annexure "B" to the petition, be permitted to be challenged. There is no prayer to this effect in the petition. Even so, the order passed by the Tribunal is considered as a part of the petition and forming subject matter of this petition, we find no merits on this submissions also. The Tribunal has not decided the appeal on merits. In fact the request was made before the Tribunal to withdraw the appeal. Permission to withdraw the appeal has been granted by the Tribunal. Therefore, the order permitting to withdraw the appeal is eminently just and proper. The contention that the observations made by the Tribunal regarding prima facie case of the petitioners and the doubts regarding the maintainability of the appeal are not just and proper and the Tribunal ought to have granted stay by entertaining the appeal pales into insignificance. The petitioner has withdrawn the appeal. Had the petitioner without withdrawing the appeal challenged the legality and validity of the order refusing stay before appropriate forum the question would have been different. In that case, there might have been occasion to consider as to whether the observations and the ultimate conclusion arrived at by the Tribunal were just and proper or not. But such a contingency does not arise in view of the fact that the petitioners have withdrawn the appeal without reserving liberty to file fresh appeal in the same subject matter.

14. No other contention is raised. In above view of the matter, petition is rejected. Notice discharged. Interim relief granted earlier stands vacated.

15. As regards the disappearance of the papers of this matter and inordinate delay caused in hearing of the matter at the admission stage, we direct the Registrar to take immediate actions pursuant to the observations made in para

12 of the judgment.

16. At this stage the learned Counsel for the petitioner requests that the ad interim relief granted by this Court against the further proceedings be continued for some time so as to enable the petitioners to challenge the legality and validity of the aforesaid order passed by this Court before the appropriate forum as may be available to the petitioner. The request is made mainly on the ground that (1) on question occasion when on September 1, 1986 learned Counsel appearing for the respondents Mr. Qureshi had consented to extension of operation of stay; and (2) normally the statutory proceedings before the Collector would take at least three to four months" time. Therefore it is submitted that the stay as prayed for may be granted. As far as the first submission is concerned, the consent must have been given by learned Counsel on the assumption that the later part of the order passed by this Court will be effective. In the later part of the order the Court directed that the matter be placed for admission on September 23, 1986. We are in October, 1989. The matter did not come up for admission at all. The unfortunate part of the proceedings is that the original papers are not traceable in the office of the High Court. The respondents had to move this Court by way of note dated October 7, 1989 requesting for appropriate orders. Therefore, as per order dated 7th October, 1989 the matter has come on Board.

17. In above view of the matter the circumstance that the consent was given By the learned Counsel for the respondents pales into insignificance. If the Collector is to start proceedings pursuant to the show cause notice after three or four months, the question of continuation of ad interim relief does not arise. Therefore the request is rejected.