

(1991) 11 RAJ CK 0012
In the Rajasthan High Court
Case No : Civil Writ Petition No. 5353 of 1991

Nihon Nirman Ltd.

APPELLANT

Vs

Assistant Collector, Central Excise

RESPONDENT

Date of Decision : 22-11-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 173B(2A), 173B(4), 173CC, 9B
Central Excises and Salt Act, 1944 — Section 35B
Constitution of India, 1950 — Article 14, 226, 227, 32

Citation : (1992) 61 ELT 268 : (1992) 3 WLC 513

Hon'ble Judges : Milap Chandra Jain, J

Bench : Single Bench

Advocate : L.M. Lodha, for the Appellant; N.M. Lodha, for the Respondent

Judgement

Milap Chandra Jain, J.—This writ petition has been filed with the following prayers :

"(i) accept the writ petition,

(ii) direct the respondents to accept revised classification list filed by the petitioner for the white cement being produced by it to be treated as rapid hardening cement/ordinary portland cement under sub-head 2502.20,

(iii) direct the respondents to make assessment of the petitioner and pass the order to that effect under sub-head 2502.20,

(iv) restrain the respondent from realising excise under sub-head 2502.90 at the rate of 40% ad valorem,

(v) direct the respondents to give benefit of the notification dated 25-7-1991 holding the petitioner liable to pay excise at the rate of Rs. 90/- P.M.T.,

(vi) direct the respondents to refund the excess excise duty realised from the petitioner in excess of the excise leviable as per sub-head 2502.20 and the notification dated 25-7-1991,

(vii) direct the respondents to abide by the orders passed by the Collector, Central Excise, Delhi, a superior authority of the respondent No. 2 and to make assessment in accordance with the direction contained in the order directing the respondents to clear its production under sub-head 2502.20 till the disposal of the writ petition,

(viii) grant any other appropriate relief which the petitioner may be found entitled to in the fact and circumstances of the case, and

(ix) allow the cost of the writ petition to the petitioner."

2. The averments made in the petition may be summarised thus. The petitioner Company manufactures white rapid hardening cement at Gotan (Nagaur) since November, 1990. So far, white rapid hardening cement was being classified under sub-head 2502.90 of the Schedule-I of the Central Excise Tariff Act, 1985 (hereinafter to be called "the 1985 Act"). The excise duty was being paid at the rate of 40% ad valorem. On realising the mistake, the manufacturers namely, J.K. Cement Works and Indian Rayon & Industries, filed revised classification lists putting white rapid hardening cement under sub-head 2502.20 and claiming payment of excise duty at the rate of 215/- per metric ton (P.M.T.). The petitioner also filed revised classification list Annexure-1. By his order dated September 19, 1991 passed in the case of J.K. Cement Works, the Collector, Central Excise (Appeals), New Delhi has held that white cement is rapid hardening cement, it falls under sub-head 2502.20 and excise duty at the rate of 215/- P.M.T. is leviable on it. Despite knowing this order, the Assistant Collector, Ajmer (respondent No. 1) has refused to treat the petitioner's white cement under sub-head 2502.20 by his order dated October 7, 1991 (Annexure-2). The petitioner Company has been set up in collaboration with M/s. Nohoan Cement Co. Ltd., Japan and it has its shares. It is a company of international reputation in the field of manufacturing rapid hardening cement. The physical properties and chemical composition of the white cement manufactured by the petitioner conform to all tests of rapid hardening cement. Writ petition No. 5207/91, Indian Rayon & Industries v. Union of India, has been admitted on 9-10-1991 on identical question relating to the interpretation of the said sub-heads 2502.20 and 2502.90 on the ground of discrimination and also on the ground that subordinate authorities are bound by the decisions of the superior authority and it has been allowed to clear its white cement under the sub-head 2502.20.

3. The respondent No. 1 entered caveat and filed his interim reply against the writ petition reserving his right to file detailed reply to the writ petition. It is admitted by him that the petitioner Company manufactures white cement, its classification list was approved under sub-head 2502.90, excise duty at the rate of 40 per cent ad valorem is now being paid under protest by it and being accepted by the department and the petitioner Company has set up its factory in collaboration with a Japanese Company. It has further been averred that the petitioner has stated in its application dated 28-9-1991 (Annexure-1) that it will continue to pay excise duty under sub-head 2502.90 under protest, the

petitioner has made incorrect statement in para No. 4 of the writ petition to the effect that the respondent No. 1 has refused to treat the petitioner's white cement under sub-head 2502.20, the writ petition is premature as the matter regarding revision of the classification list is still pending consideration, alternative remedy is provided under the Central Excises & Salt Act, 1944 (hereinafter referred to as "the 1944 Act") by way of appeal, it is the consistent view of this Court that such matters should be left for the consideration and decision of the officer/authority under the 1944 Act, no cause of action has arisen in favour of the petitioner and the writ petition involves many disputed and complicated questions of fact. It has also been averred that the petitioner should have submitted its application Annexure-1 through the concerned sector/range office and not directly to him (respondent No. 1), as a result thereof, comments have been sought from the Superintendent of the concerned Range, white cement manufactured by J.K. Cement Works has been held to be rapid hardening cement on the basis of the reports of the various tests regarding its physical properties and chemical composition, no such report has been filed by the petitioner before him (respondent No. 1), it has also not been established that the white cement manufactured by the petitioner Company is similar to the white cement manufactured by the J.K. Cement Works, the petitioner Company is registered with Bureau of Standard Institution (B.S.I.) under the head 8042 of 1978 relating to white portland cement, it has not so far filed the certificate of B.S.I, issued under the head 8041 relating to the rapid hardening cement as stated in its letter Annexure-1 and until and unless it is adjudicated that the white cement manufactured by the petitioner is rapid hardening cement the petitioner is not entitled to get its classification list revised to sub-head 2502.20.

4. In its rejoinder dated 29th October, 1991, the petitioner has stated that the payment of excise duty under sub-head 2502.90 is being made under protest under Rule 173B, Central Excise Rules (hereinafter to be called "the Rules"), it cannot go to debar the petitioner from claiming rights and reliefs in the writ petition, no misstatement of fact has been made in para No. 4 of the writ petition as a copy of the order dated October 7, 1991 has been enclosed with the writ petition itself as Annexure-2, the question of alternate remedy by way of appeal u/s 35B of the 1944 Act is not applicable in this case as the petitioner Company is being discriminated and provisions of Article 14 of the Constitution are being violated, copies of a page of the Register and letter dated 5-10-1991 of the petitioner filed by the respondent No. 1 have no material bearing, the letter is not happily and properly worded, so far licence for manufacturing the rapid hardening cement is not possessed by any of the manufacturers and neither any disputed question of fact is involved nor any further inquiry or investigation is required in this case as the material on record is sufficient to establish that the white cement manufactured by the petitioner is squarely covered under sub-head 2502.20. It has further been averred that there are, in all, four to five white cement manufacturers in whole of India, three of them are located at Gotan (Nagaur), out of these three manufacturers two are being assessed under sub-

head 2502.20 and only the petitioner is being assessed under sub-head 2502.90, as a result thereof the petitioner is being singled out and is bound to face closure of its factory and to finish the employment of hundreds of its workers and it is entitled to get the benefit of the order of Collector, Central Excise (Appeals), New Delhi passed in the case of J.K. Cement.

5. In his reply dated 29-10-1991 to the rejoinder, the respondent No. 1 has also stated that it is incorrect that Writ Petition No. 5207/91 Indian Rayon & Industries v. Union of India has been admitted, it has not so far been admitted, this writ petition (No. 5207/91) and the present writ petition are not similar, the petitioner has been asked to substantiate its application (Annexure-1) by producing material but till 27th October, 1991 no material has been produced, there is no question of violation of Article 14 of the Constitution of India as the petitioner has failed to prove that the cement produced by it is similar to the cement produced by the J.K. Cement Works, it is not clear from the chart/statement (Annexure-7) as to who has prepared it and it is also not correct, it is clear from the petitioner's letter dated 5-9-1991, paper No. 49/4, that it wants to produce one more product i.e., rapid hardening port land cement showing that the petitioner Company is not still producing rapid hardening cement and the petitioner has not produced any of these documents before him which have been produced in this case before the Court.

6. Learned counsel for the respondents raised various preliminary objections against the maintainability of the writ petition. Firstly, he contended that the writ petition involves various disputed and complicated questions of fact. This is correct. It is not the case of the petitioner that white cement is known in common and trade parlance as rapid hardening cement. Its case is that white cement possesses the physical properties and chemical composition as those of rapid hardening cement which is included in the sub-head 2502.20. This is disputed by the respondent No. 1 in his replies to the writ petition and rejoinder. Admittedly, white cement manufactured by the J.K. Cement Works has been held to be rapid hardening cement by the Collector, Excise (Appeals), New Delhi. The petitioner's case is that the white cement manufactured by it is similar to the white cement manufactured by the said J.K. Cement Works. This is also disputed by the respondent No. 1 in his replies. It is not in dispute that the Collector, Excise (Appeals), New Delhi has held the white cement of J.K. Cement Works as rapid hardening cement on the basis of reports of various tests filed before the competent authority by it. The petitioner has filed certain reports, papers No. A9/6-7 and A10/4, and statements, papers No. A5/40 (unsigned) & A9/5 & A9/11 (unsigned). They have been denied and contested by the respondents. Thus several disputed and complicated questions of fact are involved in this case and they cannot be decided by this Court while exercising jurisdiction under Article 226 of the Constitution of India.

7. The second preliminary objection was that the writ petition is premature. He relied upon Mrs. Kunda S. Kadam Vs. Dr. K.K. Soman and Others, O.N.G.C. v.

Sahdev Singh 1987 W.L.N. 7, Prem Cables Pvt. Ltd. v. U.O.I. 1987 (32) E.L.T. 363 (Raj.) and Vijayanta Travels and Another Vs. R.P. Ghatnekar, It has specifically been averred by the respondent No. 1 in his replies to the writ petition and rejoinder that the matter regarding the revision of classification list, namely, white cement manufactured by the petitioner is exigible to excise duty under sub-head 2502.20 and not under sub-head 2502.90 is still pending before him for adjudication. It is correct that in the writ petition it has been pleaded that the respondent No. 1 has refused to revise the classification list by his order dated 7-10-1991 (Annexure-2). This averment has been denied in the reply. On the contrary, it is stated that an incorrect statement to this effect has been made. In the rejoinder, the petitioner has averred that no incorrect statement has been made and a copy of the order dated 7-10-1991 has been enclosed with the petitioner's writ petition and it is question of interpretation of the said order dated 7-10-1991. The letter dated 7-10-1991 (Annexure-2) coupled with the reply of the respondent No. 1 leaves no manner of doubt that the matter in dispute is still pending before the respondent No. 1 and he has not refused to revise the classification list Annexure-1. The reported decisions relied upon by the learned counsel for the respondents fully support him on this point. As such the writ petition is premature.

8. The third preliminary objection is that the petitioner had an alternate remedy by way of filing an appeal u/s 35B of the 1944 Act if the order Annexure-2 amounts to refusal to revise the classification list. This preliminary objection has also great force. It is not the case of the petitioner that the respondent No. 1 has no jurisdiction to entertain its application Annexure-1 for revising the classification list. When he has jurisdiction to entertain and decide the application, it cannot be said that the order rejecting it would be without jurisdiction and the bar of alternate remedy would not apply. Learned counsel for the petitioner has relied upon Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, Coffee Board, Bangalore v. Joint Commercial Tax Officer. Both these cases relate to Article 32 of the Constitution. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, Calcutta Discount Co. Ltd. v. I.T.O. Companies District-I, Calcutta, the impugned order was without jurisdiction.

9. In Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, Central Circle II, Calcutta and Anr., relied upon by the learned counsel for the petitioner, it has been observed in para No. 11 as follows :

"We may observe that we have proceeded to decide this case on the footing that the business of the firm was discontinued on dissolution of the firm. It is however necessary once more to observe, as we did in C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, that the Income Tax Act provides a complete machinery for assessment of tax, and for relief in respect of improper or erroneous orders made by the Revenue Authorities. It is for the

Revenue Authorities to ascertain the facts applicable to a particular situation, and to grant appropriate relief in the matter of assessment of tax. Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognised by the Constitution in matters relating to assessment, levy and collection of Income Tax may be permitted only when questions of infringement of fundamental rights arise, or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting to bypass the provisions of the Income Tax Act by inviting the High Court to decide questions which are primarily within the jurisdiction of the Revenue Authorities, the party approaching the Court has often to ask the Court to make assumptions of facts which remain to be investigated by the Revenue Authorities."

10. In *Hy Lay Poultry Farms Vs. State of Haryana*, *Hy Lay Poultry Farms v. State of Haryana*, relied upon by the learned counsel for the petitioner, it has been observed in para No. 2 as follows :

"Now it is true that ordinarily the High Court would not be justified in entertaining a Writ Petition which seeks to challenge the assessment for a particular assessment year, if there is an alternative remedy available to the applicant under the sales-tax law and it would not be a valid argument for the applicant to say that a reference on a similar point in respect of an earlier assessment year is pending before the High Court. That is a situation which is bound to arise in a number of cases and many assessments would be held up, resulting in great detriment to the revenue, if the High Court were to start entertaining writ petitions merely on the ground that a reference on the same question is pending in respect of an earlier assessment year. The High Court should ordinarily in such cases, ask the applicant to pursue his remedy under the statute and come up before it by way of a reference."

Obviously, these observations are against the petitioner. In AIR 1956 Allahabad 147, *Lokesh Chandra v. Commissioner, Rohilkhand Division, Bareilly and Ors.*, the appeal was pending for long and it was not being decided. In *Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others*, it has been observed that the question depends on the facts and circumstances of each case and it was a case under the Employees Provident Fund Act. In *Madan Mohan Maharaj Vs. State of Rajasthan and Others*, the pending civil suit has no concern with the matter in dispute in the writ petition. It is thus clear that the aforesaid cases, relied upon by the learned counsel for the petitioner, are quite different and distinguishable and they do not go to help him.

11. In D.B. Civil Writ Petition No. 732/90, *Dalmia Industries Ltd. v. Union of India*, decided on January 3, 1991 by a Division Bench of this Court at Jaipur, it has been held as follows :

"After careful consideration of the rival submissions of the parties, we think that it will not be proper to express opinion on the merits of the classification to the New Product of the petitioners under a particular heading or sub-heading in

Chapter 4 of the Schedule appended to "1985 Act". Expression of opinion on this aspect would prejudicially affect the case of either of the parties. In our considered opinion, an equally effective and efficacious remedy is available to the petitioners under "1944 Act". This Court will not ordinarily interfere in such matters unless an aggrieved party has exhausted alternative remedies available under the Statute. Most of the taxing statutes contain a complete code containing machinery for deciding the disputes relating to levy and collection of tax or imposition of penalties. Hierarchy of authorities are provided and even Tribunals have been constituted for adjudication of disputes in such matters. This Court cannot substitute itself in place of various authorities and the Tribunals constituted under the Act. The Supreme Court as also this Court has time and again held that this Court should not interfere in exercise of its extraordinary jurisdiction under Article 226 and 227 of the Constitution when the aggrieved person has an effective alternative remedy available under a particular statute by way of appeal or revision for redressal of his grievance.

In *Shikha Footwears Commissioner of Central Excise* (S.B. Civil Writ Petition No. 4203/89) decided on December 18, 1990 by one of us (G.S. Singhvi, J.) reference has been made to the decisions of the Supreme Court in *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, *Assistant Collector of Central Excise v. Dunlop India Ltd.* (A.I.R. 1985 S.C. 33) and of this Court in *Jaipur Syntex Ltd. v. Union of India and Ors.* (S.B. Civil Writ petition No. 626/86 decided on 19-7-1986), *D.B. Civil Special Appeal No. 254/86 Aditya Mills Ltd. v. Union of India*, decided on 19-9-1986; *National Engineering Industry v. Union of India* (D.B. Civil Special Appeal No. 1/87) decided on 30-6-1987; *Central India Machine Manufacturing Company Ltd. v. Union of India and Ors.* (D.B. Civil Writ Petition No. 1121/82, decided on 27-10-1990) and after a detailed consideration, it has been held that there is no warrant for exercise of extraordinary jurisdiction of this court at the stage of show cause notice or where the remedy of appeal or revision is available to the party concerned."

12. The fourth preliminary objection was that two parallel remedies cannot be allowed to be pursued. This objection has also substance. Para No. 2 of the petitioner's application Annexure-1 runs as under :

"We are accordingly submitting herewith a revised classification list (under Rule 173B) classifying our product rapid hardening cement (white) under sub-head 2502.20 assessable to duty at the rate of Rs. 215/- P.M.T. (plus 10 per cent S.E.D.) for your kind approval."

Similar relief has been claimed in the writ petition vide prayer No. ii, quoted above. As held in para No. 7 (supra), the matter in dispute is still pending for adjudication before the respondent No. 1. Two parallel remedies cannot be allowed to be availed of. Reference of *Jai Singh Vs. Union of India and Others*, *Purshottam Thackersey Vs. K.N. Anantarama Ayyar, Commissioner of Wealth-tax and another*, and *Supra Dye Chem Vs. Union of India*, may be made here.

13. The fifth preliminary objection raised by the learned counsel for the respondents was that in such matter the Court should not invoke its jurisdiction under Article 226 of the Constitution. This objection has also great force. It has been observed in the said D.B. Civil Writ Petition No. 732/90 Dalmia Industries v. Union of India, decided on January 3, 1991 by Jaipur Bench of this Court as follows :

"Suffice it to say, that there is a consistent view of this Court that in such like matters it should be left to the Officer/authorities under the Act and hierarchy of the Tribunals to have their say and adjudicate the disputes finally. We do not find any reason to take a different view in the matter."

14. Learned counsel for the respondent also raised a few other preliminary objections. It is not necessary to refer and discuss them as they were either very technical or minor in nature.

15. As the aforesaid preliminary objections have been found to have great force, the above-quoted prayers No. (i) to No. (vii) made in the writ petition cannot be granted.

16. However, under the facts and circumstances of the case, prayer No. (viii) deserves consideration. It has been averred in para No. 8 of the rejoinder as follows :

"8. That there are in total 4 to 5 White Cement manufacturers in whole of India. 3 of them are located near Gotan, Rajasthan. Out of these 3 the other two are being assessed under head 2502.20 and only the petitioner is left out. The physical and chemical properties of the white cement put the same under head 2502.20, irrespective of the fact that who is the manufacturer. On account of the petitioner being singled out, the petitioner is bound to face closure of the factory shortly. To avoid unemployment of hundreds of factory workers the benefit of the order of the Collector Excise, dated 19-9-1991 must also be given to the petitioner."

In the reply to the rejoinder, it has not been denied by the respondents that out of the three manufacturers of white cement, two manufacturers (J.K. Cement Works & Indian Rayon & Industries) are being assessed under sub-head 2502.20 and the remaining one manufacturer, namely, the petitioner is being assessed under sub-head 2502.90.

17. Para No. 2 of the application of the petitioner dated 4-11-1991, paper No. A12/1-4, runs as under :

"2. That the petitioner's factory is practically taking no production for last more than a fortnight and in future also it will not be possible for the petitioner to take production in the factory for the reason of pendency of the writ petition before this Hon'ble Court. There are more than 500 workers daily working in the factory and they have been rendered idle including the administrative and management staff. The reason for not taking production is obvious, as the other two factories

namely, J.K. White Cement Factory and the Birla White Cement Factory located in the same vicinity have been paying excise duty at the fixed rate of Rs. 215/- per metric ton under sub-head 2502.20 of the Central Excise Tariff Act, 1985, one under the order of the Collector, Central Excise, Delhi and the other one under the order of this Hon"ble Court dated 9-10-1991 passed in S.B.C.W. P. No. 5207/91. Contrary to it, the petitioner has not been able to secure any order on the stay petition despite the case being similar to the other manufacturers of white cement and the petitioner is required to pay excise ad valorem 44% of the price which come to around Rs. 1,300/- per metric ton. With such a great disparity in the excise duty it is impossible for the petitioner to run the factory and to sell the product in the market. If now during the pendency of the writ petition, the petitioner is not allowed to clear the goods under sub-head 2502.20 at the fixed rate of excise against the Bank Guarantee for the differential amount, the factory shall have to closed down permanently rendering a large number of employees and workers unemployed."

In the reply, papers No. A13/1-4, it is not denied by the respondents that the strength of the workers in the petitioner's factory is 500 and there is a great disparity in the rate of excise duty which is being levied and realised by the respondents from J.K.Cement works and Indian Rayon on the one hand and the petitioner on the other hand. This difference is about one thousand rupees per metric ton. In the competitive market, the petitioner would not be able to stand and the closure of the factory would be imminent resulting in the retrenchment of 500 workers. It is correct that in its letter Annexure-1 the petitioner has stated to continue to pay duty under protest under sub-head 2502.90. If this would not have been done, refund could not be claimed by it. This fact is admitted by the respondent No. 2 in para No. 2 of his reply.

18. Rule 173B(4) of the Rules permits alteration of an approved list of classification. This sub-rule also provides that same provisions apply in the alteration of approved list as in the approval of the first list of classification of goods. Rule 9B(1) of the Rules runs as under :

"9B. Provisional assessment to duty. - (1) Notwithstanding anything contained in these rules, -

(a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, the proper offices deems it necessary to make further enquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal) for assessing the duty

the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or inquiry, be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed."

19. Rule 173B(2A) of the Rules states:

"(2A) All clearances shall, subject to the provisions of Rule 173CC, be made only after the approval of the list by the proper officer. If the proper officer is of the opinion that on account of any inquiry to be made in the matter or for any other reason to be recorded in writing there is likely to be delay in according the approval, he shall, either on a written request made by the assessee or on his own accord, allow such assessee to avail himself of the procedure prescribed under Rule 9B for provisional assessment of the goods."

20. Sub-rule (1) of Rule 9B of the rules starts with a non obstante clause. Under it, the respondents may direct that the duty leviable on the petitioner's white cement be provisionally assessed under sub-head 2502.20 if the petitioner executes a bond in the proper form with surety or furnishes sufficient security for payment of the difference between the amounts of duty leviable under sub-head 2502.90 and 2502.20.

21. Under the facts and circumstances of the case, it would be just and proper to direct the respondents to provisionally assess the excise duty under sub-head 2502.20 till the dispute regarding the revision of the rate of excise duty leviable on the petitioner's white cement is finally decided if the petitioner executes bond in the proper form to the satisfaction of the respondent No. 1 and furnishes bank guarantee for the payment of the difference between the amounts of duty as provisionally assessed and as finally assessed with interest at the rate of 15 per cent per annum and also to direct the Collector, Central Excise to pass necessary order under Rule 9B(3) of the Rules if the petitioner approaches him for an order thereunder. Directions are accordingly given.

22. Consequently, the writ petition is disposed of with the above directions. No order as to costs.