

(1996) 11 OHC CK 0015
In the Orissa High Court
Case No : OJC No. 4532 of 1992

N.K. Chemicals and Industries	Vs	APPELLANT
Asstt. Collector of Central Excise		RESPONDENT

Date of Decision : 08-11-1996

Acts Referred:

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

Citation : (2003) 155 ELT 245

Hon'ble Judges : P.C. Naik, J;Dipak Misra, J

Bench : Division Bench

Advocate : J. Das, B.S. Tripathy, S. Mallick, K.P. Mishra and A. Das, for the Appellant; A.B. Mishra, Standing Counsel (Central), for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.—In this writ application the petitioners call in question the validity of the impugned demand notice dated 21-5-1991 issued by the Superintendent, Central Excise and Customs, Bargarh Range, Bargarh (opposite party No. 2), as well as the legality of the order dated 20-1-1992 passed by the Assistant Collector, Central Excise and Customs, Sambalpur Division, Sambalpur, (opposite party No. 1).

2. The facts giving rise to the present writ application may be shortly stated :-

3. Petitioner No. 1, a registered partnership firm engaged in manufacture of washing powder having brand name "Naya Kiran" and "Nilma" cleaning powder with effect from 8-2-1990 had submitted a classification list on 8-2-1990 claiming classification of its products under sub-heading No. 3401.10 under Chapter Heading/sub-heading 34.01 under Chapter 34 having rate of Duty Basic 5% ad valorem, and special 50% under Notification No. 175/86-C.E., dated 1-3-1986 as amended from time to time read with Notification No. 33/88-C.E., dated 1-3-86. Without considering the matter in depth and without considering the contentions of the petitioners, opposite party No. 1 classified the products of

the petitioners under Tariff sub-heading 3402.90 with basic Excise Duty @15% ad valorem and special service duty 5% of the Basic. Feeling aggrieved by the denial of exemption the petitioners preferred an appeal u/s 35 of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act") before the Collector Appeals opposite party No. 3. During the pendency of the appeal opposite party No. 2 issued a demand notice (Annexure-6) directing the petitioners to pay Rs. 5,23,589.40 as differential Duty. As there was non-compliance of the provisions enjoined u/s 11A of the Act and without issuance of notice to show cause, the petitioners preferred another appeal against the aforesaid order of demand passed by Annexure-6 before the appellate authority praying therein for quashment of the impugned demand on the ground that there had been flagrant violation of the mandatory provisions of Section 11A of the Act. Along with the appeal a petition was filed for dispensing with the requirement of pre-deposit as contemplated under the Act. At this juncture, opposite party No. 1 issued a demand-cum-show cause notice u/s 11A of the Act vide Annexure-9 dated 31-8-91. It was mentioned in the said notice that the same was to be read in continuation of the demand letter issued on 21-5-91. While the matter stood thus the appellate authority by order vide Annexure-10 directed the appellants to deposit 50% of the demanded amount within 10 days from the receipt of the said order. At the hearing of the said application it was contended before the appellate authority that by issuance of a further notice on 31-8-91 (Annexure-9) the impugned demand (Annexure-6) had become inoperative, but the said contention was not dealt with. Challenging the demand made under Annexure-6 and the conditional order of stay passed by the appellate authority the petitioners had approached this Court. During the pendency of the writ application opposite party No. 1 passed another order confirming the demand amounting to Rs. 5,23,589.40 (the sum covered under Annexure-6) which was purported to have been passed u/s 11A of the Act. The said order was received by the petitioner No. 2 on 29-6-92 though it was passed on 20th January, 1992. The said order has been annexed as Annexure-11. As the fact situation reveals after issuance of show cause notice by Annexure-9 the petitioners had submitted a representation to opposite party No. 1, inter alia, indicating therein that they had preferred an appeal before the appellate authority challenging the validity of the impugned demand under Annexure-6 and, therefore, the authority should not proceed with the matter and wait till the disposal of the appeal. Despite such a representation and the prayer for deferment of the personal hearing, opposite party No. 1 passed the order of confirmation which has made the petitioners aggrieved for redressal of which they have approached this Court.

4. A return has been filed by opposite parties indicating that the order which was passed by Annexure-6 on 21-5-91 is a demand in terms of Rule 173(1) of the Central Excise Rules and therefore, there was no necessity for issuing a notice u/s 11A of the Act prior to raising of a demand of the said nature. A further stand has been taken that as the petitioner did not comply with the demand made

under Annexure-6 within the stipulated time, notice under Annexure-9 was issued to avoid difficulties for the department to realise the aforesaid amount. It has also been stated that the petitioner having approached the appellate authority against the order passed in Annexure-6, they have to prosecute the appeal by complying with the pre-deposit as directed in Annexure-10 to the writ application. The averments in the petition have also been controverted indicating that though by abundant caution notice to show cause was issued by Annexure-6, the petitioners are liable to pay the amount as it is a final assessment order under Rule 173(1) of the Rules. An additional counter-affidavit has been filed by the opposite parties indicating that as the petitioners did not comply with the conditions imposed under Annexure-10 the appeal filed against the order challenging Annexure-6 has been dismissed and therefore the petitioners' writ application has become infructuous and the petitioners can prosecute their case in the alternative forum.

5. Shri B.S. Tripathy, learned Counsel for the petitioners raises the following contentions :-

(a) The demand notice dated 21-5-91 under Annexure-6 was passed in violation of mandatory requirement as envisaged u/s 11A of the Act and its ad hoc nature becomes apparent because of the show cause notice issued under Annexure-9. Once notice to show cause was issued u/s 11A of the Act the alleged finality attached to the demand vanished and the appeal preferred against the said order was really uncalled for. The notice in Annexure-6 took away the effect of Annexure-9 as the competent authority realised its mistake and took steps to rectify the same. The appellate authority, as contended by Shri Tripathy, should have taken note of this fact and should have treated the appeal as premature and should not have dismissed it.

(b) The demand made vide Annexure-11 is unsustainable as the petitioners in effect did not file their show cause in proper sense of the term, but made a representation to the adjudicating authority to stay its hands as they had gone up in appeal. Ignoring the aforesaid petition as the order has been passed as submitted by the learned Counsel for the petitioner, there is violation of principle of natural justice and as the department in its anxiety to fill up the lacunae and to cover up its mistake has passed the order of confirmation/affirmation of the earlier demand, adequate opportunity should have been afforded to the petitioners. It is highlighted by Shri Tripathy that the procedure adopted by the department from time to time baffled the petitioners and therefore the present situation has emerged. His submission is that the petitioners are prepared to cooperate with the proceeding before the adjudicating authority by filing a regular show cause and this Court can fix a time-limit for disposal of the proceeding.

6. Shri A.B. Misra, learned Senior Standing Counsel appearing for the Central Government authorities has submitted that the petitioner has an alternative remedy by way of appeal and therefore this Court in exercise of its extraordinary

jurisdiction should not interfere. Mr. Mishra has also contended that once the appellant had challenged the demand notice in appeal and the same having been dismissed for non-compliance of the conditional order of stay it is not open to him to challenge the said demand notice in this writ application by passing the appellate forum. The learned Counsel has supported the order of affirmation/confirmation of the demand passed in Annexure-11 contending that the same has been done by abundant caution though there was no necessity for the same.

7. The rival submissions of the learned Counsel for both the sides require careful and anxious consideration.

8. We have perused the demand notice passed by Annexure-6. The said notice reads as follows :-

"In pursuance of Assistant Collector, Central Excise and Customs, Sambalpur order dated 1-5-91 wherein classification list was approved and communicated under letter C. No. V (34) 17-VC/11/90-3479, dated 7-5-91, the R.T. 12 from the period February, 1990 to March, 1991 are finalised which were assessed provisionally previously. Accordingly Rs. 5,23,589,40 of differential duty (i.e. B.E.D. Rs. 4,98,656,74 + S.E, Duty Rs. 24,932.66) is due to pay as Central Excise Duty by you. In this respect a detailed calculation sheet is enclosed herewith. Therefore you are requested to pay the differential central excise duty as mentioned above within 15 days on receipt of this letter."

No doubt the aforesaid order was challenged in appeal and as indicated earlier the appeal was dismissed for non-compliance of the conditional order of pre-deposit. While the appeal was pending the show cause notice by Annexure-9 was issued. It is worthwhile to refer to the show cause notice in detail as the stand of Senior Standing Counsel is that the said show cause was not necessary and has no relevance to Annexure-6. The relevant portions of the show cause are produced hereunder :-

"Whereas, it appears that M/s. N.K. Chemical Industries At :- Radharanipara, P.O./Dist. Bolangir, hereinafter called as the party, required to pay C.E. Duty amounting to Rs. 5,23,589.40 which has been not levied/short-levied by way of mis-classification of their produce washing/cleaning powder removed from their factory during the period from February '90 to March '91.

The aforesaid classification list has subsequently been approved by the Assistant Collector, C. Excise & C, Sambalpur classifying the aforesaid products of the party under chapter sub-heading No. 3402-90 by Order-in-Original No. 14/Ch. 34/VC/90, dt. 27-3-91 [communicated under C. No. V(34) 17/VC/11/90, dt. 2-5-91] after due observation of all formalities as required under the laws. As per aforesaid approval of the classification list by the aforesaid competent authority the said product of the party, the washing/cleaning powder is liable to be charged to Basic Excise duty @ 15% Adv. as an S.S.I. Unit availing Modvat instead of at the rate of 5% ad valorem at which the duty has originally been paid during the relevant period. Accordingly an amount of differential duty of Rs.

5,23,589.40 (Details as per Annexure - "A" enclosed) is payable by the party.

M/s. N.K. Chemical Industries are therefore required to show cause to the Assistant Collector, C. Ex. and Customs, Sambalpur as to why the above amount of C.E. duty amounting to Rs. 5,23,589.40 should not be paid by them/recovered from them u/s 11A of the C. E. A. 1944.

This notice is be read in continuation of this office demand letter issued vide C. No. FE-13/D/1/BGH/91/1103-1105, dated 21-5-91."

From the aforesaid show cause it is crystal clear that the period referred to is February, 1990 to March, 1991, the amount as same and the notice refers to the earlier demand letter dated 21-5-91. The aforesaid show cause notice does not leave any room for doubt that the show cause has been issued by the authority. The purpose of this show cause can also be found from the order dated 20-1-92 passed in Annexure-11. It is essential to quote the relevant portion from the aforesaid order which is as follows :-

"Accordingly a demand-cum-show cause notice was issued by the Superintendent, Central Excise and Customs, Bargarh, vide his letter C. No. FE-13/D/BDE/91/1643-44, dated 31-8-91, asking them to show cause to the Assistant Collector, Central Excise and Customs, Sambalpur as to why the above amount of duty short-paid should not be paid by them under Rule 9(2) of Central Excise Rules, 1944 read with Sec. 11A of Central Excises and Salt Act, 1944.

Under the circumstances, I confirm the demand amounting to Rs. 5,23,589.40 on M/s. N.K. Chemical Industries, Radharanipara, At/P.O. Bolangir u/s 11A of Central Excises and Salt Act 44."

Reading the notice of demand, the show cause notice and the order it becomes clear as day that though demand notice was issued by Annexure-6 later on the authorities took recourse to Section 11A as it was essential for making a demand. In this connection, we notice that Section 11A of the Act contemplates calling for a show cause while issuing Annexure-6, as Section 11A was not complied with the competent authority took recourse to the said provision. A notice to show cause should not have been challenged in appeal. What is challengeable in appeal is an order passed by the competent authority. The petitioners were compelled to challenge Annexure-6 as that was an order of demand. When the authorities themselves again issued a notice as envisaged u/s 11A of the Act, the grievance of the petitioners in respect of the demand made under Annexure-6 was no more alive. The appellate authority should have accepted this position and treated the appeal as infructuous as the original adjudicating authority had taken steps to rectify his mistake. In view of this position we are of the considered view that Annexure-6 does not subsist in the eye of law.

9. We may now deal with the contention of the learned Counsel with regard to the impropriety of Annexure-11, the order on adjudication after issuance of

notice to show cause as per Section 11A. The learned Senior Standing Counsel has serious objection for entertaining this grievance of the petitioner. He has strenuously urged before us that the order passed by Annexure-11 is appealable and the petitioner should be asked to seek his relief before the appropriate appellate forum. We are conscious of our self-imposed restraint and disciplines. Ordinarily, we are not inclined to interfere when a statutory appeal is provided for. Though there is no prohibition for entertaining a writ application against an original order, but as a matter of prudence and propriety the courts are required to be extremely slow while exercising the jurisdiction under Articles 226 and 227 of the Constitution. But the facts of the present case are quite different. We cannot shut our eyes to the factual backdrop and the resultant scenario. On perusal of Annexure-11 we notice that the petitioners in effect have not filed their show cause challenging or disputing the demand. In fact, their prayer before the adjudicating authority was for adjournment and deferment of adjudication. The said prayers were made as the appeal was pending and they were in a state of bafflement. We also find, the adjudicating authority having issued the notice of demand without adjudication was in a hurry to rectify the mistake. Adjudication before any statutory authority has to be effective adjudication. Litigations are to be conducted in fairness without any kind of reflection of arbitrary attitude. No litigant should be allowed to nourish a feeling that he has not been given a fair deal, a proper opportunity and adequate chance of hearing. We find, in the case at hand the determination of demand is really the result of an ex parte confirmation. The aforesaid order has been challenged before us and the writ application has been pending since 1992. We are of the view that the petitioners under compelling circumstances could not file their show cause and the authority concerned was in a hurry to rectify/amend its mistake. We do not think it proper to send the petitioners to agitate their grievance before the appellate forum. Such a direction, in our view, would amount to denial of justice and we do not intend to bury the fine flowers of justice at the altar of technicality. As we are taking this view, we quash the order of demand passed under Annexure-11 and permit the petitioners to file their proper show cause within six weeks from today. On show cause being filed the competent authority shall adjudicate the matter after giving an opportunity of personal hearing to the petitioners. The entire adjudication shall be completed within two months from the date of filing of the show cause. We may hasten to add, if no show cause is filed within the stipulated period the order of demand passed in Annexure-11 shall become operative.

10. In the result, the writ application is allowed. However, there shall be no order as to costs.