
(1988) 03 KL CK 0040
In the High Court Of Kerala
Case No : O.P. No. 6929 of 1982-E

Punalur Paper Mills Ltd.

APPELLANT

Vs

Assistant Collector of C. Ex.

RESPONDENT

Date of Decision : 04-03-1988

Acts Referred:

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

Citation : (1988) 17 ECC 259 : (1989) 39 ELT 11

Hon'ble Judges : V. Bhaskaran Nambiar, J;K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : S.A. Nagendran and N.N.D. Pillai, for the Appellant; P.V. Madhavan Nambiar, for the Respondent

Final Decision : Allowed

Judgement

V. Bhaskaran Nambiar, J.—The petitioner is a public limited company manufacturing paper and paper boards. Under Rule 173-B of the Central Excise Rules, every assessee under the Central Excise Act has to furnish a list showing the full description of ail excisable goods produced or manufactured by it, all other goods produced or manufactured by it and intended to be removed from his factory and all ex cisable goods already deposited or likely to be deposited from time to time without pay ment of duty in its warehouse. When once the list is so published, the proper officer conducts the necessary enquiries and may approve the list with such modifications as are considered necessary by him. The classification so made, in respect of the excisable goods manufactured by the petitioner-company, by the Collector of Customs and Central Excise, was taken in appeal before the Appellate Collector of Central Excise, Madras, by the petitioner u/s 35 of the Central Excises and Salt Act. The appellate authority by its order dated 19-2-1979 (Ext. P4) set aside the assessment orders in three cases and remanded them for adjudication by the Assistant Collector. When the matter went back, he passed a fresh order on 30-11-1979 (Ext. P5) fixing the

classification of the various items of paper manufactured by the petitioner and the duty payable on the basis of such classification. Ext. P5 was also taken in appeal and the Appellate Collector of Central Excise passed an order dated 24-11-1980 (Ext. P6). As per Ext. P6 the Appellate Authority directed the assessing authority to re-examine the petitioner's case in the light of the result of the Chemical Examiner. Under the assessment order passed by the Assistant Collector of Central Excise, Ext. P7 dated 9-2-1981, pursuant to the remand, the petitioner got substantial relief. It is also stated that the petitioner also obtained some refund of the amounts paid by it. The order, Ext. P7, was sought to be revised by the Collector of Customs and Central Excise u/s 35-A(2) of the Central Excises and Salt Act, as it then stood, and Ext. P8 notice was issued to the petitioner. The petitioner submitted his explanation Ext. P9. After this, an order has been passed, Ext. P11. The petitioner challenges Ext. P11 dated 6-8-1982.

2. Section 35-A(2) at the relevant time reads thus :

"35-A. Revision by Board or Collector. (1) ** ** **

(2) The Collector of Central Excise may, of his own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the Rules made thereunder by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as he thinks fit."

It is, therefore, clear that the Collector of Central Excise has got suo motu power of revision under this provision only in respect of orders passed by the Central Excise Officers subordinate to him. He has no jurisdiction to take suo motu action in respect of a decision or order passed in appeal u/s 35. The Appellate Authority who passed the remand order on 24-11-1980 as per Ext. P6, was not a Central Excise Officer subordinate to the Collector of Central Excise. We are told that the Appellate Collector of Central Excise who issued Ext. P6 is one of the Senior Collectors of Central Excise. The Collector of Central Excise could not therefore have taken action u/s 35-A(2) to revise the order dated 24-11-1980, Ext. P6. In the show cause notice issued by him, Ext. P8 also, he has not mentioned and rightly too, that he was proposing to revise the order of the appellate authority, Ext. P6. He only stated that he was proposing to revise the order passed by the assessing authority after remand as per Ext. P7 dated 9-2-1981. This is clear from Ext. P8. If the Collector of Customs and Central Excise cannot take suo motu action in respect of the Appellate Order, Ext. P6, as that power is expressly excluded by Section 35A(2), he cannot achieve the same result even indirectly. Thus by purporting to revise Ext. P7 dated 9-2-1981 issued after remand, the Collector cannot nullify the order of the Assistant (sic) Collector in appeal (Ext. P6) indirectly. The petitioner contends that Ext. P11 in effect sets at naught the earlier remand order which has become final and the Collector of Central Excise did not have jurisdiction to issue such an order. We

shall examine this contention.

3. The petitioner is manufacturing more than 101 categories of paper and board. In the first assessment order Ext. P5 the assessing authority held that the petitioner was manufacturing paper known in commercial circles as "kraft" and these have to be classified as "kraft" and assessed on that-basis. The appellate authority in Ext. P6 noticed that the Chemical Examiner of the Department had visited the petitioner's premises in the meanwhile, taken samples and given his opinion in respect of some of the categories of paper manufactured by the petitioner. Having noted that, the appellate authority stated thus:-

"On a perusal of the impugned order, I do not find that the lower authority, before entering into the findings as contained therein, has sought the opinion of the Chemical Examiner relating to the paper in question. On the other hand the appellants during the course of personal hearing have argued that the Chemical Examiner visited their factory after issue of the impugned order, drew the samples and gave his opinion, and in light of his opinion, the Assistant Collector passed order in his C. No. V/17/17/4/79 dated 1-10-1980 and also the approved classification list No. 1/80 filed by the appellants. Therefore, unless the products are examined by an expert, i.e., Chemical Examiner, the lower authority, is not correct in rejecting the claims of the appellants. I have also looked into the classification list No. 1/80 approved by the Assistant Collector, and find that almost all the items covered by the impugned order find place therein. In view of the above, I set aside the impugned order with directions that the matter may be re-examined in the light of the result of the Chemical Examiner and in respect of papers for which there was no opinion by the Chemical Examiner, may be subjected to chemical examination and a fresh order issued after giving an opportunity to the appellants to file a written representation and also after hearing them, if they so desire."

Ext. P7, the subsequent order of the assessing authority was issued on the basis of Ext. P6 and in the light of the Chemical Examiner's opinion and keeping in view "the declared end use of each of the variety of paper". In the order passed in exercise of the suo motu power, Ext. P 11, the Collector of Customs and Central Excise set aside Ext. P 7 on the ground that:

"It may be mentioned here that the Chemical Examiner has only expressed his opinion, which was not entirely based on scientific tests, etc., as all tests could not be carried out in his laboratory. It is well settled that in the matter of classification of goods, the general rule-shall be the acceptance by the people, in the trade and use of such goods, i.e., in other words, what is commonly known and understood of the goods. Therefore, the contention of the assessee that the Collector is bound by the opinion of the Chemical Examiner and that he has no jurisdiction for this review, has not much substance."

4. When the appellate authority as per Ext. P6 directed that the assessment should be made with reference to the report of the Chemical Examiner, an

authority of co-ordinate jurisdiction, the Collector of Central Excise, cannot ignore that remand order and hold in suo motu revisional proceedings that the opinion of the Chemical Examiner need not be followed and respected. This is plainly contrary to the remand order which has become final. The Collector is not an authority superior to the Appellate Collector of Central Excise.

5. There is no quarrel with the principle that when goods are classified for purposes of imposing tax, duty or cess, they are invariably identified as they are known in general parlance or commercial circles. This was the principle adopted when the assessment was made on 30-11-1979 as per Ext. P5. When, however, there were more than hundred varieties of paper and paper board produced by the petitioner, the appellate authority decided that in the present case, that an analysis by the Chemical Examiner of the Department would be more decisive to ascertain the class and category of the products manufactured, the name given by the manufacturer being relatively unimportant. The appellate authority also noticed that a Chemical Examiner had already visited the factory and taken samples of some of the products. It was, therefore, directed he should take samples of other products as well. Thus the appellate authority held that the basis for classification was the report of the Chemical Examiner. It was for this purpose that the matter was remanded. That order is Ext. P6. That has not been set aside in any proceeding. That has become final. Ext. P6 is beyond the revisional jurisdiction of the Collector of Central Excise. The Collector cannot therefore set aside Ext. P6. If he cannot set it aside, he cannot set aside Ext. P7, the consequential order passed in pursuance of Ext. P6. What the Collector has stated is that the basis for assessment should be the description of the goods as understood in general parlance and that the Chemical Examiner's report has to be ignored. This is directly opposed to the earlier remand order, Ext. P6, is sued by an authority, at least of the same status as that of the Collector, if not higher. Ext. P7 has thus been set aside by the Collector clutching at jurisdiction, which he did not have. Purporting to set aside Ext. P7, what the Collector has done is in effect to nullify Ext. P6, the order of the appellate authority. He cannot be allowed to do so.

6. The principles stated by the Supreme Court in *The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal*, are very apposite :

"Where the Income Tax Officer has virtually refused to carry out the clear and unambiguous directions which a superior Tribunal like the Income Tax Appellate Tribunal, had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him, such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is on the hierarchy of Courts. In such a case a writ of mandamus should issue ex debito justitiae to compel the Income Tax Officer to carry out the directions given to him by the Income Tax Appellate Tribunal. The High Court would be clearly in error if it refused to issue a writ on the ground that no manifest injustice had resulted from the order of the Income

Tax Officer in view of the error committed by the Tribunal itself in its order. Such a view is destructive of one of the basic principles of the administration of justice."

It is therefore, clear that it will be destructive of the basic principles in the administration of justice based on hierarchy of Tribunals if the Collector is allowed to ignore the earlier remand order, Ext. P6, simply because he was inclined to take a different view. It has to be noted that no authority higher than the Appellate Collector of Central Excise has so far taken any action to revise Ext. P6 remand order. It is only when it was found that the remand order and the report of the chemical examination benefited the assessee, that the Collector found reasons to invoke his revisional jurisdiction, when none existed under the Act and the Rules in the present case.

7. The counsel for the Department contended that Ext. P6 did not direct that the Chemical Examiner's Report should be the only guiding factor in making the classification of goods or making the assessment. We have extracted Ext. P6 in full earlier. A reading of Ext. P6 will show that the Appellate Authority has directed that the assessment should be based on the report of the Chemical Examiner. If that was not required, there was no necessity for him to set aside the order of the original authority.

8. Lastly it was contended that the petitioner has got an alternate remedy by way of revision. In all cases where an alternate efficacious remedy is provided under any statute, this Court invariably does not exercise jurisdiction under Article 226 of the Constitution. But where, as in this case, the authority has absolutely no jurisdiction to take suo motu revision in the circumstances and facts of this case, this Court is well within its bounds to interfere and correct the mistake at the earliest opportunity. Moreover, this writ petition has been admitted in 1982 and has been pending in this Court for six years and now a direction to resort to the remedies available under the statute will do no justice to either of the parties. In the circumstances, we are inclined to exercise our jurisdiction under Article 226 of the Constitution in the peculiar circumstances in this case. We are, therefore, of the view that Ext. P11 was issued without jurisdiction. Ext. P11 dated 6th August, 1982 issued by the Collector of Customs and Central Excise, respondent No. 2, is therefore quashed and this writ petition is allowed to that extent. No costs.