
(2009) 03 RAJ CK 0029
In the Rajasthan High Court

Rob Mathys India Pvt. Ltd. and Another	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 17-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2009) 4 RLW 2876

Hon'ble Judges : R.C. Gandhi, Acting C.J.; Munishwar Nath Bhandari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.N. Bhandari, J.—These three writ petitions involve common issue, thus were heard together and are decided by common order.

2. Learned Counsel appearing on behalf of the petitioner Company submits that the petitioner Company is manufacturing Orthopedic Implants for rehabilitation of handicapped persons. Therefore, Company was exempted from the excise duty in view of the notification issued by the respondents. The specific reference is given to the Schedule providing Tariff under the relevant Chapter and referring Item No. 90.21 of the Tariff Act, 1985 (for short the Act of 1985"), it is submitted that items or implants manufactured for rehabilitation aids to handicapped persons were excluded from the purview of the excise duty. It is submitted that despite of exemption, the authorities have passed orders imposing excise duty on the implants manufactured by the petitioner Company. For the convenience the facts pertaining to writ petition No. 4031/1990 are referred herein. In this case, an order was passed by the Additional Collector imposing demand of excise duty on the petitioner Company along with penalty.

3. Learned Counsel for the petitioners submits that while passing the order by the authorities, it was not noticed that implants manufactured by the petitioner Company are excluded from the purview of excise duty and this was with the object to help the handicapped persons and it is for that reason that even,

import of such articles were exempted from the custom duty. Contrary to the Tariff, order was passed by the authorities. Thus, such orders should be treated to be without jurisdiction being without authority of law. It is submitted that if an authority having no jurisdiction to impose excise duty or authority acts contrary to the provisions of law, then the petitioner Company is not required to further prefer an appeal rather in such circumstances, jurisdiction of this Court under Article 226 & 227 of the Constitution of India can be invoked.

4. Learned Counsel appearing on behalf of respondent- Union of India, on the other hand, submits that the petitioner Company is having an efficacious and alternative remedy under the provisions of Central Excise Tariff Act, 1985. However, without exhausting such a remedy, these writ petitions have been filed and the admission of these writ petitions made ex-parte. Thus, the objection regarding maintainability of the writ petitions taken at the first instance while filing the reply. It is also stated that this is not a case where the exercise of the powers can be said to be without jurisdiction or without authority of law. It is further stated that in reference to Item No. 90.21 of the Tariff, an expert opinion was sought by respondent-Union of India from All India Institute of Physical Medicine and Rehabilitation under the Ministry of Health and Welfare to Government of India. The expert opinion shows that the implants manufactured by the petitioner Company cannot be said to be rehabilitation aids for disabled. Thus, the petitioner Company was not exempted from the excise duty. It is stated that the aforesaid issue is otherwise a question of fact, which has already taken note of and once a finding of fact has been recorded by the competent authority, it can be questioned in appeal, but the writ petition jurisdiction cannot be invoked for recording a finding of fact more so when there exists an expert and technical opinion from the experts. The reference of sub-para D of Para 8 of reply is made in the specific term. According to learned Counsel for the respondents, these writ petitions deserve to be dismissed on the preliminary ground itself and otherwise this Court cannot be asked to sit over the opinion given by the medical experts showing implants manufactured by the petitioner Company, not qualifying to the relevant item of the Tariff, which is exempted from the excise duty.

5. In rejoinder, learned Counsel for the petitioners submits that Company has also taken opinion of the expert, which have been enclosed with the writ petition showing implants manufactured by the petitioner Company to be part of rehabilitation aids for disabled. Thus, even if the respondent-Union of India has sought an expert opinion, then there exists another expert opinion. Hence, it is prayed that the opinion so taken by Union of India should not be accepted. It was lastly urged that if this Court comes to the conclusion that the petitioner Company having an alternative remedy, then at least an observation may be made regarding period of limitation so that petitioner Company may invoke the jurisdiction of the appellate forum.

6. We have considered the rival submissions of the parties and scanned the

matter carefully. .

7. Though the matter was admitted at the initial stage and said admission is without calling the other party. Thus, on first available opportunity for the respondents to raise objection for maintainability of these writ petitions was at the time of filing of the reply. Looking to the aforesaid situation and also looking to the provisions of Act of 1985, it is not doubt that the petitioner Company is having an alternative remedy in the shape of appeal against the order impugned herein and it is also a fact that said remedy has not been exhausted by the petitioner Company. The argument raised in that regard by the petitioner Company is that the order under challenge is nonest, without authority of law and otherwise without jurisdiction. Thus, the petitioner Company was not under an obligation to invoke the jurisdiction of the appellate forum and in those circumstances, these writ petitions are maintainable and should not be thrown on the ground of alternative remedy.

8. We have considered the aforesaid argument. The perusal of the record shows that the petitioner Company is invoking Item/Chapter No. 90.21 of the Tariff to show that under the aforesaid Item, the implants manufactured by the petitioner Company are exempted from the excise duty. For ready reference the aforesaid Item is quoted hereunder:

90.21 - Artificial limbs and rehabilitation aids for the handicapped.

9. The petitioner Company claims that the implants manufactured by them are nothing but rehabilitation aids for handicapped persons. On the aforesaid point, the respondents had taken an opinion from All India Institute of Physical Medicine and Rehabilitation under the Ministry of Health and Welfare to and Rehabilitation under the Ministry of Health and Welfare to Government of India and therein the opinion is that the implants manufactured by the petitioner Company are not rehabilitation aids for handicapped persons. Against the said opinion, the petitioner Company has also taken opinion for the expert at their own level, confirming that the implants manufactured by the petitioner Company are rehabilitation aids for handicapped persons. Thus, there exists two opinions on the aforesaid factual aspect though opinion in favour of the petitioner Company has been given or was taken by the petitioner at the stage of filing of the writ petition. In any case, this Court while exercising the jurisdiction under Article 226 & 227 of the Constitution of India cannot decide the aforesaid question of fact which otherwise can be decided by the appellate authority. It is settled proposition of law that while exercising the jurisdiction under Article 226 & 227 of the Constitution of India, this Court cannot exercise the same power as otherwise vested in the appellate authority or forum. Thus, looking to the aforesaid, we hold that not only petitioner Company is having effective alternative remedy to challenge the order impugned herein but facts and circumstances discussed above further show that the factual aspect involved in the present matter can be decided by the appellate authority and as Union of India had taken an expert opinion regarding implants manufactured by the

petitioner Company before passing of the order. Thus, it cannot be said that the orders impugned herein are either nonest or without authority of law as the authority was having no jurisdiction to impose excise duty. It is not doubt that this Court while exercise the jurisdiction under Article 226 & 227 of the Constitution of India is having discretion to ignore the objection of alternative remedy but looking to the controversy involved in the present matter, such discretion cannot be exercised in favour of petitioner Company because if this Court exercises jurisdiction under Article 226 & 227 of the Constitution of India, | t is required to give a finding of fact on the issue as to whether the implants manufactured by the petitioner Company are rehabilitation aids for handicapped persons, which issue can be otherwise decided by the appellate authority after taking note of rival submissions as the jurisdiction of the appellate authority is wider than of this Court. Thus, looking to the aforesaid position, we cannot use our discretion in favour of petitioner Company and accordingly we are of the view that petitioner Company is having an efficacious and alternative remedy under the Act of 1985 and without availing such a remedy, writ petitions are not maintainable. Hence, same are dismissed as the orders impugned cannot be said to be without authority of law or without jurisdiction.