

(1988) 12 AHC CK 0064

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2045 of 1988

Sharda Boiron Laboratories Ltd.

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 20-12-1988

Acts Referred:

Constitution of India, 1950 — Article 226

Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2, 3

Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 11, 12, 128

Citation : (1989) 22 ECC 7 : (1992) 42 ECR 826 : (1992) 61 ELT 601

Hon'ble Judges : R.K. Gulati, J;Om Prakash, J

Bench : Division Bench

Advocate : Ravikiran Jain and Rajindra Sachar, for the Appellant;

Final Decision : Dismissed

Judgement

Om Prakash, J.—M/s Dabur India Limited (hereinafter to be referred to as M/s. Dabur) having factory premises at Sahibabad and M/s. Sharda Boiron Laboratories Limited (hereinafter referred to as M/s. Sharda) also situated at Sahibabad, have challenged in these writ petitions the show cause notice dated 2-11-1988 jointly given to them by the District Excise Officer, Ghaziabad (Annexure 14 to the writ petition of M/s. Dabur). Anr. writ petition being Writ Petition No. 1160 of 1988 has been filed by M/s. Sharda for quashing the order of the Central Government dated 3-6-1988 (Annexure 1 to this writ petition). As all these writ petitions can be conveniently decided together, they are consolidated and are disposed of by a combined order.

2. The facts as succinctly stated are that M/s. Dabur, a public limited company, is engaged in the business of manufacture and sale of Allopathic and Ayurvedic medicines and toilet preparations. It is contended that in some medicines, alcohol is used and for the manufacture of such medicines, licence has been obtained from the State Excise Authorities. Other medicines and cosmetics are said to have been manufactured under provisions of the Central Excises and Salt

Act, 1944 (briefly the Act, 1944). In these writ petitions, relevant preparation is "Homeodent" tooth-paste being manufactured by M/s. Dabur. The contention of the petitioners is that the Homeodent does not contain alcohol, though one of the ingredients of such preparation is mother-tincture containing alcohol and the same is assessable under Item 14FF of the Act, 1944. The Assistant Collector, Central Excise, Ghaziabad took the view that the Homeodent was classifiable under sub-heading No. 3206.20 of Chapter 32 of the Central Excise Tariff Act, 1985 and on that, duty at the rate of 15% ad valorem was leviable. The duty computed at the said rate by the Central Excise authorities was paid by the petitioners on the goods manufactured from 11-1-1985. On 18-1-1988, the District Excise Officer made a surprise inspection of the units of the petitioners and then it was revealed that the Homeodent tooth-paste manufactured by M/s. Dabur, was toilet preparation containing alcohol within the meaning of Section 2(k) read with Item 4 of the Schedule, referred to in Section 3 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (for brevity's sake, the Act, 1955) and was, therefore, assessable to duty at the rate of 100% ad valorem. The District Excise Officer, Ghaziabad therefore, caused a common notice dated 17-3-1988 to be served on the petitioners requiring them to pay duty aggregating to Rs. 68,13,334.20 under the provisions of the Act, 1955 on such goods manufactured from 1-1-1985 till the date of notice. Against this notice, some representation was made by the petitioners to the District Excise Officer and thereupon the petitioners were directed to deposit provisionally the excise duty to the tune of Rs. 46,55,451.45 under the Act, 1955 and the same was deposited by the petitioners. Such demand was challenged by the M/s. Dabur in appeal before the Excise Commissioner, respondent No. 2 vide appeal memo dated 5-4-1988, being Annexure 9 to M/s. Dabur's writ petition. The Excise Commissioner vide order dated 5-5-1988 (Annexure 10 to M/s. Dabur's petition) affirmed the order of the District Excise Officer and dismissed the appeal. No appeal was filed by M/s. Sharda against the demand notice of the excise duty under the Act, 1955. However, both the petitioners approached the Central Government in revision under Rule 128 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (briefly, the Rules, 1956). The revision of M/s. Dabur was disposed of by the Central Government and the result was communicated by the Additional Secretary to the Government of India by the order dated 22-9-1988 (Annexure 12 to M/s. Dabur's writ petition). The contention of M/s. Dabur that demand was raised on it without any opportunity of being heard and in violation of principles of natural justice, was accepted and a direction was given that the case be adjudicated upon de novo after giving a show cause notice and proper opportunity of being heard to the party. The revision filed by M/s. Sharda was not entertained by the Central Government on the ground that a right of appeal was vested in M/s. Sharda which could have been exercised up to 17-6-1988 (see order dated 3-6-1988 Annexure 1 to the writ petition No. 1160 of 1988).

3. Pursuant to the order of the Central Government, the District Excise Officer

issued the impugned show cause notice dated 2-11-1988 to the petitioners jointly, validity of which has been challenged by them in their writ petition and Anr. writ petition has been filed by M/s, Sharda only to challenge the order of the Central Government refusing to entertain its revision.

4. It is made clear at the very outset that the petitioners have not advanced any argument as the merits of the question whether Homeodent tooth paste is assessable to duty under the Act, 1944 or under the Act, 1955 and rightly as because that involves factual scrutiny which can hardly be gone into by this Court under Article 226 of the Constitution of India. The question whether Homeodent tooth-paste is same alcohol, cannot be adjudicated upon under the extraordinary writ jurisdiction.

5. Learned counsel for the parties were heard by us at some length. Sri Rajendra Sachar, learned counsel for M/s. Dabur made two submissions (1) that the Central Government having set aside the order passed by the District Excise Officer, Ghaziabad whereunder excise duty to the tune of Rs. 95,66,451.45 was paid, there is no justification for the respondents to retain that amount any more and a writ of mandamus be issued against the respondents directing them to refund the said amount, and (2) that under Rule 11 of the Rules, 1956 when duties have been short levied, a written demand by the proper officer being made within six months from the date on which the duty was paid, the shortfall could be recovered. The submission was that no duty can be recovered for the period anterior to six months to be reckoned from the date of payment of duty. It was therefore, urged that the show cause notice is invalid, inasmuch as the District Excise Officer, Ghaziabad, Respondent No. 3 exceeded in his jurisdiction in having recovered She duty for the period which was barred by limitation.

6. These submissions have to be considered in the back-drop of the foregoing facts. The first question is whether the petitioners can take recourse to writ jurisdiction under Article 226 of the Constitution of India when they have already yielded to statutory procedure. It may be importantly noted that M/s. Dabur filed an appeal and revision against the order of the Respondent No. 3 under the statutory provisions and M/s. Sharda, though not filed appeal but approached the highest statutory authority in revision under Rule 128 of the Rules, 1956. The petitioners having availed of the statutory remedy, cannot be permitted to take recourse to Article 226 of the Constitution of India. The Article 226 is not meant to short-circuit or circumvent the statutory procedures except where the statutory remedies are entirely ill-suited to meet the demands of extraordinary situation, as for instance where the vires of the statutes is in question and the prevention of public justice requires that recourse may be had to Article 226 of the Constitution of India. In by-passing the alternative remedy provided by the Statute, good and sufficient reason must be shown and that matters involving the revenue where the statutory remedy is available are not such matters. The question is whether the refund of duty is the automatic effect of the Central Government's order setting aside the orders of the District Excise Officer dated

17-3-1985 and 18-2-1988. Our answer is in negative. The Central Government has neither said that no duty is payable under the Act, 1955 nor has it given any direction to the Excise Authorities to refund the amount paid by the petitioners and we, therefore, do not see substance in the submission of Sri Sachar that the Central Government having directed the Excise Authority to adjudicate the whole matter de novo, the Excise Authorities under the Act, 1955, have not been rendered absolutely incompetent to retain the amount, already paid by the petitioners. The liability of payment of excise duty stems from the charging Section 3 of the Act, 1955 and it does not emerge from the demand notice dated 17th March, 1988 (Annexure 7 to the writ petition of M/s. Dabur). Therefore, it cannot be said that after the order of the respondent No. 1 having been set aside by the Central Government, the basis or the foundation of the demand of excise duty has disappeared or thereafter the duty levied under the Act, 1955 was wiped of.

7. Then the question is whether the writ petitions raise any jurisdictional issue. Sri Sachar submitted that any demand for the period anterior to six months from the date of the payment of duty is barred by limitation under Rule 11 of the Rules, 1956 and, therefore, no jurisdiction is vested in the respondents to demand the duty which is barred by limitation. In our view, the point of limitation is not a jurisdictional fact. The show cause notice dated 2-11-1988 (Annexure 14 to the writ petition of M/s. Dabur) can be quashed only when the petitioners prima facie, establish that the show cause notice suffers from inherent lack of jurisdiction. The question of limitation does not give rise to a jurisdictional fact. There is a cardinal principle of law that a claim never dies and it is only the remedy which becomes unenforceable if a claim is barred by limitation. The petitioners had paid duty under the Act, 1955. They would have argued the point of limitation when the duty was demanded. For the reasons known to the petitioners, the point of limitation was not pleaded when the duty was demanded, but that had been paid and thereafter the statutory remedies by way of appeal and revision were pursued. On these facts, the petitioners cannot successfully urge that the Excise Authorities suffer from lack of jurisdiction as recovery of duty for the period beyond six months from the date of payment was barred by limitation. Moreover, the point of limitation can be and ought to be agitated before the statutory authorities [See Lalji Hari Das v. Income Tax Officer and Anr. - (1961) 43 ITR 287].

8. The matter may be looked from Anr. angle. Rule 12 of the Rules, 1956 provides that where these rules do not make any specific provisions for the collection of any duty or to any deficiency in duty if the duty has for any reason been short levied, such duty, deficiency in duty shall on written demand made by the proper officer be paid, as the proper officer may specify. Now this is a residuary rule. The question, whether the case falls under Rule 11 or Rule 12 of the Rules, 1956, is highly debatable one and can be urged before the statutory authorities where the petitioners have full opportunity to put forward their case with all the supporting materials. After the orders have been passed under the

statute, only in the cases of patent wrongs, recourse can be had to Article 226 of the Constitution of India and the instant case is not the one.

9. Sri R.K. Jain appearing on behalf of the M/s. Sharda reiterated the submissions canvassed by Sri Sachar and he further urged that levy of duty at the rate of 100 per cent ad valorem under the Schedule to the Act, 1955 was unconstitutional. Also, he submitted that duty having already been paid under the Act, 1944 right from the beginning, the recovery of duty under the Act, 1955 and the Rules, 1956 amounts to double taxation which is prohibited by the fiscal laws. He then argued that the Central Excise Authorities having concluded that the preparation in question was assessable to duty under the Act, 1944, the State Excise Authorities have no jurisdiction to review the decision of Central Excise Authorities. So far as M/s. Sharda is concerned at the very outset we would like to observe that no refund in any case can be ordered in its favour for the simple reason that the amount sought to be refunded was not paid by it but by M/s. Dabur only. It is noteworthy that vires of the provisions of the Act, 1955 or the Rules, 1956 has not been challenged in the instant petitions and therefore, we refrain from going into the question whether the levy at the rate of 100% ad valorem is unconstitutional.

10. It is not the stand of the authorities that the Homeodent tooth-paste is liable to duty under both the Acts of 1944 and 1955. The matter is sub judice and when the claim of the petitioners that the Homeodent is assessable to duty only under the Act, 1944, is adjudicated upon, then the refund may be claimed. So the plea of double taxation has to be rejected.

11. Both the Acts of 1944 and 1955 operate in different fields and there is no overlapping between the two. If the Homeodent tooth-paste is found to be assessable to duty under the Act, 1955, then it will not amount to the review of the order of the Central Excise Authorities. In any case, adjudication by the Central Excise Authorities does not stop the State Authorities from considering the case under the provisions of the Act, 1955. Both the Acts are mutually exclusive and the authorities thereunder are fully empowered to consider the assessability separately.

12. In the cases where the parties fully acquiesced with the matter and subjected themselves to the statutory procedure, no action should be taken under Article 226 of the Constitution of India unless the case is patently without jurisdiction. The orders having been made under the statutory provisions, the Court should be loathe to interfere under Article 226 of the Constitution of India. Once the parties chose the statutory procedure, they must go to the logical end. The Central Government directed the State Excise Authorities to adjudicate the case de novo and, therefore, the District Excise Officer, Ghaziabad has no option but to issue the show cause notice. So the show cause notice dated 2-11-1988 was jointly given to the petitioners pursuant to the direction of the Central Government much after the orders had been passed initially or in appeal. Therefore, the common show cause notice to the parties cannot be characterised

as sparking point and from the back-drop of the case stated above, it is amply clear that the Excise Authorities have not assumed jurisdiction to proceed against the petitioners for the first time by virtue of the show cause notice dated 2-11-1988, rather it has been issued at a much subsequent stage pursuant to the direction of the Central Government. The show cause notice having been given in accordance with the direction of the Central Government in the revisional jurisdiction which the petitioners themselves subjected to, cannot be assailed under Article 226 of the Constitution. So the show cause notice dated 2-11-1988 cannot be equated with the show cause notice given at the initial stage to assume jurisdiction in the matter.

13. No writ can be issued in favour of the parties who remain sitting on the fence and take a chance of the proceedings taken up under the statutory provisions being gone in their favour. The petitioner who resorted to statutory remedies on their own, cannot be permitted to take recourse to Article 226 of the Constitution of India in the event of their not having become successful under the former.

14. Then, we come to the other petition of M/s. Sharda being writ petition No. 1160 of 1988 wherein the order of the Central Government refusing to entertain the revision of M/s. Sharda has been challenged. The Central Government refused to entertain the revision of M/s. Sharda on the sole ground that right of appeal that vested in M/s. Sharda could be exercised thereby. Sri Ravi Kiran Jain appearing in this writ petition for M/s. Sharda submitted that filing of appeal would have made no difference because the appeal of M/s. Dabur which squarely covered the same point, was dismissed by the Excise Commissioner. This argument does not impress us. No doubt, the case of M/s. Dabur is that it has been manufacturing the Homeodont tooth-paste on job basis under the loan licence of M/s. Sharda under the specification and control and with the raw material of the latter, but factually both the petitioners are different entities under the law, and therefore, each petitioner has to pursue its own remedy. If the reasoning of Sri Ravi Kiran Jain that the case of the petitioners being common and appeal having been filed by one of them there was no need for M/s. Sharda to file a separate appeal before the Excise Commissioner, is accepted, then there was no need for M/s. Sharda to go in revision even, but it availed of the final remedy and chose not to avail the remedy of appeal. We do not see any patent wrong in the order of the Central Government refusing to entertain the revision of the M/s. Sharda on the ground that right of appeal vested in the party which could be pursued. Moreover, the appeal lay from the order of the District Excise Officer to the Excise Commissioner and, therefore, under Rule 128 no revision could lie before the Central Government against the order of the District Excise Officer. The remedy of revision is open only against those orders from which no appeal lies. Against the order of the Excise Commissioner, no appeal lay and, therefore, the revision was entertained by the Central Government in the case of M/s. Dabur.

15. Before parting with the case we would like to take cognisance of one more

important fact that M/s. Dabur addressed a communication dated 4-10-1988 to the District Excise Officer, Ghaziabad requesting him to refund the entire amount deposited with interest.

From the order dated 1-11-1988 (Annexure 13 to the writ petition) passed by the Government of India, Ministry of Finance (Department of Revenue), it appears that a similar communication was also sent to the Government of India which by the said order, asked M/s. Dabur to contact the Commissioner of Excise, Government of Uttar Pradesh for giving effect to the order of the Government of India. No decision is said to have been taken yet on such request of petitioner by the Excise Authorities. Since the request for refund was made by M/s. Dabur to the District Excise Officer as early as 4-10-1988 vide Annexure 18 to the writ petition, we hope and trust that the Excise Authorities will take a decision on such request of the petitioner as expeditiously as possible according to law.

16. For the reasons, we are of the view that these are not the fit cases to invoke our extraordinary writ jurisdiction under Article 226 of the Constitution of India. All the writ petitions are, therefore, dismissed in limine.