

(1981) 01 PAT CK 0013

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 1092 of 1978

Shri Madhav Mill Private Ltd.

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 20-01-1981

Acts Referred:

Central Excise Rules, 1944 — Rule 52, 52A, 52A(4), 8(1), 9
Central Excises and Salt Act, 1944 — Section 2, 3, 33A, 35, 35A
Constitution of India, 1950 — Article 226, 227
Essential Commodities Act, 1955 — Section 6A
Income Tax Act, 1961 — Section 35

Citation : (1984) 17 ELT 310

Hon'ble Judges : Lalit Mohan Sharma, J; Brishketu Saran Sinha, J

Bench : Division Bench

Advocate : S.B. Sanyal and N.K. Aggarwal, for the Appellant; A.K. Sinha, Standing Counsel Central Government, for the Respondent

Judgement

Brishketu Saran Sinha, J.—Messrs Shri Madhav Mills Private Limited (hereinafter referred to as "the Mills") are engaged in the manufacture of Maida, which is item no. 1-F of the First Schedule attached to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Excise Act") and bolts, nuts and screws which are item no. 52 of the said Schedule as also certain articles which are included under item no. 68 of the Schedule. The details of the other items excluding those under items 1-F and 68 are given in annexure 4 appended to the writ application.

2. By a notification issued by the Government of India dated 10th August, 1971 item no. 1-F of the First Schedule to the Excise Act, has been exempted from payment of duty under Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (hereinafter referred to as "the rules"), copy of which is Annexure 1. Thereafter by a notification dated 18th June, 1977, under Rule 8(1) of the Rules (copy of which is annexure 2) the Government of India exempted goods falling under item 68 of the First Schedule, if to be utilised for home consumption and if the total

value of all excisable goods in the preceding financial year does not exceed Rupees thirty lakhs. The petitioner claims that under the aforesaid notification the total value of Maida manufactured by it in the preceding financial year could not be included in determining the exemption. The Assistant Collector of Central Excise (respondent no. 3), however, asserts that the value of Maida cleared in the previous financial year shall be taken into account for determining the exemption under the aforesaid notification. Hence this application.

3. The Excise Act, u/s 2(d), defines excisable goods, and Section 3 is the charging section which provides that there shall be levied and collected in such manner as may be prescribed, duties of excise on all excisable goods other than salt, which are produced or manufactured at the rates set forth in the First Schedule, and it further empowers different tariff values to be fixed for different classes or descriptions of the same article. Section 6 authorises the Central Government, by notification from such date as may be specified in it, to have the production or manufacture or any process of production or manufacture of any specified goods included in the First Schedule, licence the production or of salt petre or any specified component parts or ingredients of such goods or of specified containers of such goods in accordance with the terms and conditions granted under this Act. This First Schedule attached to the Act details the items of goods as also the basic and additional rates of duty. It appears that to begin with the First Schedule contained 11 items which has now increased to 68 items. Section 37 empowers the Central Government to make rules and u/s 38 such rules have to be laid before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one or two more successive sessions. The Houses have the power to modify or annul the Rules. Under Rule 8(1) the Central Government is authorised from time to time by notification in the official gazette to exempt, subject to such conditions as may be specified in the notification, any excisable goods from the whole or any part of the duty leviable on such goods, The aforesaid two notifications, annexures 1 and 2, have been issued under this provision.

4. Relevant facts leading to this application are that, as already pointed out earlier, by a notification copy of which is annexure I, Maida was exempted from the duty of excise leviable thereon. Thereafter, in 1977, came the notification copy of which is annexure 2, granting exemption under certain conditions to articles manufactured under item no. 68. These items manufactured by the mill are M.S. rivets, castings, machinery parts, job work etc. Item 68 under the Schedule provided at the relevant period the rate of duty as 2% ad valorem. On the 7th or 8th of December, 1979, the Superintendent of Customs and Central Excise, Patna City, respondent no. 4, issued a letter to the petitioners that since the annual turnover of the mills including the sale of Maida (which is item 1-F in the Schedule) was more than Rs. 30,00,000/- the mills were not entitled to the exemption from the payment of duty with respect to item No. 68 of the Schedule. Copy of this letter is Annexure 5. The mills did not accept the interpretation to annexure 2 and submitted in reply that the C.E. authorities

were wrong in refusing to give the exemption, whereupon the mills have been served with an order of the Assistant Collector, Central Excise, Patna (respondent no. 3) stating that the petitioners were liable for the financial year 1976-77 to Central Excise Duty at the rate of 2% ad valorem on goods manufactured by them under item 68; copy of the communication is annexure 6.

5. A counter affidavit has been filed on behalf of the respondents stating that the exemption granted by annexure 2 would not exempt the liability of the mills from paying the duty upon goods, under the head, item no. 68, manufactured by them, inasmuch as the value of Maida produced in the previous financial year had to be taken into account. It is not necessary to refer in detail to the counter affidavit as the facts are not in dispute.

6. Before proceeding to consider the merits of the rival claims made, a preliminary point raised on behalf of the respondents by the learned Standing Counsel for the Union of India has to be disposed of. It was submitted that as the Mills had not availed of the alternative remedies provided under the Excise Act itself, the present application was not maintainable. Reference was made to Sections 35 and 35A as also 36 of the Act, which provide for appeals and revisions to the Central Board of Excise and Customs as also to the Central Government itself. This preliminary objection was resisted by Sanyal, who submitted that where a fundamental right is involved, consideration of alternative remedy is irrelevant, and he referred to a number of decisions in support of this submission.

He further submitted that once a writ petition had been admitted it could not be thrown away on the ground of alternative remedy. In support of this, learned counsel relied upon a Bench decision of this Court in *Loba Kant v. State of Bihar*, 1976 BBC J 1 where it was held :

"...it is well established by several authorities of the Supreme Court that alternative remedy is not a bar to the exercise of power by this Court under Articles 226 and 227 of the Constitution. Whether such an application should not be entertained, as there is an alternative remedy, should be considered at the time of admission of the writ application, and once the writ application is admitted and heard on merits, it should not be rejected merely on that ground."

In this connection it was further observed that at the stage of final hearing a writ application should not be dismissed on the ground that the petitioners have not availed of the alternative remedy provided under the enactment itself. In support, reliance was placed upon the case of *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, where it was observed that merely because a revision application could have been moved u/s 35 of the Income Tax Act but was not moved, the High Court would not be justified in dismissing as not maintainable a petition which was entertained and was heard on merits. Therefore, it would not be permissible now to reject this application on the ground that the petitioners have availed of the alternative remedies provided under the Excise Act itself.

7. It may further be pointed out that in paragraph 27 of the writ petition it has been asserted that the petitioners have learnt that a communication bearing No. F.No. 3.36/8/77-TRU, dated 20th July, 1977, the Under Secretary to the Government of India in the Ministry of Finance, Department of Revenue has advised all the Collectors of Central Excise in India that in computing the sum of Rupees thirty lakhs as per the proviso to the notification copy of which is annexure 2, the value of all excisable goods whether exempted or not exempted, should be taken into account, and in that view of the advice, the remedy before any of the superior officers of the Department would be futile. In the counter-affidavit filed by the respondents in paragraph 21 it is stated that the aforesaid statement is not admitted and that the decision of respondent no, 3 is based upon a correct interpretation of the notification. If there be such a communication as mentioned above, it is obvious, any appeal or revision to the authorities as contemplated in Sections 35, 35A and 36 would be of no avail.

8. In support of this application on merits, Mr. S.B. Sanyal has made two submissions ; namely, that Maida having been exempted from excise duty was not "excisable goods" the value of which could be taken into account for the annual turnover. The second submission is that even after Maida has been exempted from the excise duty, it cannot be included in the expression "all excisable goods cleared" used in the first proviso to the notification (annexure 2).

9. For the sake of convenience I will first consider the second submission made on behalf of the petitioners. Before doing so, it would be relevant to quote the notification which reads thus :-

"In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 the Central Government hereby exempts goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) and cleared for home consumption on or after the first day of April in any financial year, by or on behalf of manufacturer from one or more factories from the whole of the duty of excise leviable thereon, if an officer not below the rank of an Assistant Collector of Central Excise is satisfied that the sum total of the value of the capital investment made from time to time on plant and machinery installed in the industrial unit in which the goods, under clearance, are manufactured, is not more than Rupees Ten lakhs :

Provided that this exemption shall not be applicable to a manufacturer if the total value of all excisable goods cleared by him or on his behalf in the preceding financial year had exceeded Rupees Thirty Lakhs :

Provided further that the exemption contained to this notification shall apply only to the first clearance for home consumption by, or on behalf of, the manufacturer referred to in this notification, from one or more factories, upto a value not exceeding Rupees Thirty Lakhs during a financial year subsequent to 1977-78 and upto a value not exceeding rupees Twenty-four lakhs during the period commencing on the 18th day of June, 1977 and ending on the 31st day of March,

1978.

Explanation :-For the purposes of determining the value of any capital investment, only the face value of such investment at the time when such investment was made shall be taken into account."

It is not disputed that the goods falling under item no. 68 of the First Schedule relating to the mills are for home consumption and that the capital investment made from time to time on plant and machinery installed in the industrial unit of the mills in which the goods are manufactured is more than Rupees Ten Lakhs. In other words, the conditions to be fulfilled under paragraph 1 of the notification are fulfilled. The controversy arises with regard to the meaning and effect of the proviso thereafter, which says that the exemption shall not be available to a manufacturer if the total value in the preceding financial year of "all excisable goods cleared by him" had exceeded Rupees Thirty lakhs. Obviously in calculating the amount of Rupees Thirty lakhs the goods manufactured by the mills under item 52 has got to be included. The question is whether, in computing this amount of Rupees Thirty lakhs, Maida manufactured and sold during the period by the mill will be included or not. According to Mr. Sanyal, the word "cleared" in the Rules and Notifications issued thereunder is used only for those "excisable goods" on which excise duty is actually paid and as no excise duty has to be paid on Maida, it would not be included in the expression "all excisable goods cleared". Learned counsel says that even if Maida in spite of the exemption, is "excisable goods" as defined in Section 2(d) of the Excise Act, it cannot be referred as excisable goods cleared. "Cleared" in the context means, free from obstruction or to free from obligation or encumbrance. Therefore, excisable goods cleared will only mean those excisable goods on which excise duty is payable and has been paid, that is, is free from obstruction or obligation or encumbrance.

10. In this context, reference was made to Rule 9 of the Rules, which provides that excisable goods shall not be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require. Rule 52 further provides that when a manufacturer desires to remove the goods on payment of duty either from the place or premises specified under Rule 9 or from a store room or other place of storage approved by the Collector he shall make an application in triplicate to the proper officer in the proper form and shall deliver it to the officer at least 15 hours before it is intended to remove the goods. The officer shall thereupon assess the amount of duty due on the goods and on production of evidence that the same has been paid into the treasury or paid to the account of the Collector in the Reserve Bank of India or the State Bank of India, allow the goods to be "cleared". Placing reliance upon this provision, Mr. Sanyal submitted that the

word "cleared" is used to signify permission to remove such excisable goods only after payment of excise duty, meaning thereby, only after excise duty levied has already been paid.

11. Rule 52-A provides for goods to be delivered on gate pass and sub-rule (4) reads thus :-

"Gate passes shall be maintained in two sets ; one for clearance for home consumption and the other for clearance for export. Each gate pass shall bear a printed serial number running for the whole year beginning on the first January or such other date as approved by the proper officer as may correspond to the accounting year of the factory. Only one gate pass book of each type shall be used by a factory for an excisable commodity at any one time unless otherwise specially permitted by the Collector in writing in respect of factories having more than one section from which clearances take place."

Mr. Sanyal submitted that the word "clearance" has been used here for the removal of such goods on which either excise duty has to be paid or which are being permitted to be removed for export. It has, therefore, been urged before us that the word "cleared" as used in the notification signifies the removal of an obstruction which is in the way on account of the imposition of excise duty and which obstruction is removed when the excise duty has been paid.

12. The learned Standing Counsel on the other hand contends that the word "cleared" used in the notification has no special or particular meaning. It refers to all excisable goods which are moved out. According to him "all excisable goods "cleared" in the proviso would mean all such goods removed irrespective of the consideration whether excise duty has been paid or such duty is exempted. In other words, Standing Counsel submits that if Maida comes within the definition of "exacisable goods" then even if payment of excise duty is exempted, its value would be included in computing the amount of Rupees Thirty Lakhs.

He further emphasises that the word "cleared" as used in the proviso could not relate to excise duty actually paid as the expression used in the proviso is "all excisable goods cleared by him". It is said that the clearance refers to the clearance by the manufacturer and, therefore, the word "cleared" here means "removed".

13. The submissions made by both sides are plausible. In A.V. Fernandez Vs. The State of Kerala, Bhagwati, J., speaking for the Court ruled :-

"It is no doubt true that in construing fiscal Statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the Statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxaing Statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of

the legislature and by considering what was the substance of the matter."

In the case of *Diwan Bros. Vs. Central Bank of India, Bombay and Others*, , it was laid down ;

"It is well settled that in case of fiscal Statute the provisions must be strictly interpreted giving every benefit of doubt to the subject and lightening as far as possible the burden of court fees on the litigant".

Therefore, by strictly interpreting and giving every benefit of doubt to the subject, I am of the opinion that the proviso to annexure 2 refers only to such excisable goods on which excise duty has been paid. The contention that out-turn of Maida in the preceding financial year by the mills could not be taken into account for calculating the total output of "excisable goods cleared" must be sustained and Annexure 6 appended to the writ application is quashed and set aside.

14. Reverting to the first submission, Section 2(d) reads "excisable goods" specified in the First Schedule as being subject to duty of excise and includes salt. On behalf of the petitioners it is said that excisable goods under the definition has two attributes, namely : (i) goods which are specified in the First Schedule of the Act, and (ii) which are subject to a duty of excise. The argument proceeds that all the goods specified in the First Schedule are not necessarily subject to a duty of excise. There are some goods mentioned therein where the duty of excise is nil, as for example item No. 4 (1) (7) i.e. unmanufactured tobacco if used for agricultural purpose. It is further submitted that even if there are goods in the First Schedule which are subject to a duty of excise, such duty, at times, is exempted under Rule 8(1) of the Rules. Therefore, excisable goods not only refer to goods specified in the First Schedule but those goods must also be subject to duty of excise and where either of the conditions is missing, it is not excisable goods. In support of this contention, reliance is placed on a Single Judge decision of the Delhi High Court in the case of *Sulekh Ram and Sons v. Union of India* and Ors. 1972 Tax Law R 1771. This report was not available here but a copy of the judgment was given to us where it was observed :

"On this observation, it is arguable that the goods manufactured by the petitioner ceased to be "excisable goods" after they were exempted from payment of duty, for the exemption notification was entitled to be regarded as part of the Act itself. If the Act and the Notification are read together, the effect is the goods exempted were not "excisable goods" within the meaning of Section 2(d) of the Act."

15. The Standing Counsel, on the other hand, submitted that the expression "as being subject to a duty of excise" is descriptive of the goods mentioned in the First Schedule and its purpose is to include in the definition of excisable goods only those goods which are subject, to a duty of excise under the Schedule itself. He has submitted that from the year 1944 itself when the Act was first made, there was at least one item in the Schedule where the duty of excise was nil

which was item 8 (3) Palmyra Sugar. It is further argued that when the rate of excise duty is prescribed under the Schedule of the Act then such goods are subject to a duty of excise and if some of those goods are exempted by a notification under Rule 8(1) they still continue to be excisable goods on which excise duty is exempted. Exemption of such duty, it is submitted, is the result of an eclipse caused by the notification under Rule 8(1). The Standing Counsel relied upon a Bench decision of the Madras High Court in the case of Tamil Nadu (Madras State) Handloom Weavers Cooperative Society Ltd. v. Assistant Collector of Central Excise, Erode 1978 ELT (J 57) a copy of which has been given to us, as the report is not available, where it was held that the character of excisable goods does not depend on the actual levy a duty but on the description as excisable goods in the First Schedule to the Act and any exemption does not change the nature and character of the goods as excisable goods within the meaning of the Act.

16. As I have already held that the petitioners are entitled to the relief sought for in this application, as at present advised, I do not consider it necessary to decide this point.

17. In the result, this application is allowed and the impugned order is quashed and set aside. In the circumstances of the case, however, I would make no order as to costs.

Lalit Mohan Sharma, J.

I agree with my learned brother on both the questions decided by him but I would like to add a few words.

19. With respect to the preliminary objection taken by the Standing Counsel, appearing on behalf of the Central Government, regarding the maintainability of the writ application, Mr. S.B. Sanyal contended that in the facts and circumstances of the case, the provisions for appeal and revision do not provide an effective alternative remedy and since no investigation of fact is involved in the case, this Court should not refuse to exercise its constitutional powers. The notification (Annexure 2) has been erroneously interpreted by the authority and the impugned order must, therefore, be held to be without jurisdiction. This Court, therefore, should not decline to give to the petitioner the relief under Article 226 of the Constitution. He also cited a number of decisions in support of his argument.

20. Mr. Sanyal advanced a further argument that as the writ application was admitted by this Court, it should not be dismissed on the basis of the preliminary objection now. He placed reliance on the decisions in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, and *Durlabh Kumar Vs. The District Judge, Indore* and Another, .

21. The appellant in *Hirday Narain Singh v. Income Tax Officer (supra)* was aggrieved by the assessment order passed under the Income Tax Act and applied

for rectification of a mistake in the order of assessment which he claimed, was apparent from the record. The Income Tax Officer declined to grant any relief and the assessee moved the Allahabad High Court under Article 226 of the Constitution challenging the order of the Income Tax Officer. Having lost the case before the High Court, he approached the Supreme Court and was granted special leave. The Supreme Court accepted the claim of the appellant, allowed the appeal and while so doing held as under:-

"It is true that a petition to revise the order could be moved before the Commissioner of Income Tax. But Hriday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hriday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition which was entertained and was heard on the merits".

22. In *Loba Kant v. State* 1976 B.B.C. J. 1 the petitioner challenged before this Court an order of confiscation passed u/s 6A of the Essential Commodities Act and it was pointed out that Section 60 of the Act provided for an appeal against such an order to be filed within one month from the date of its communication, which the petitioner had failed to avail. The petitioner had approached the High Court within the period prescribed for filing the appeal and the writ application was admitted and was heard after the expiry of the said period. Relying upon the decision of the Supreme Court in *Hriday Narain Singh's case* (supra) the High Court held that the writ petition could not be dismissed on the ground of alternative remedy.

23. In the present case also, the petitioner filed a writ application before the expiry of the period of limitation which is admittedly three months as mentioned in Section 35 and the case was admitted and an interim order was passed. Now when the period of limitation is over, it will not be a proper exercise of the jurisdiction to dismiss the application merely on the ground that the petitioner should have filed an appeal. The preliminary objection raised on behalf of the respondents must, therefore, be rejected.

24. I entirely agree with the view expressed by my learned Brother on the second point urged on behalf of the petitioner, as discussed in paragraphs 9 to 12 of his judgment.

25. I wish to express my opinion on the first question raised on behalf of the petitioners also as formulated in paragraph 3 of the judgment of my learned Brother.

26. The expression "excisable goods" has been defined in Section 2(d) in the following terms :

"Excisable goods means goods specified in the First Schedule as being subject to a duty of excise and includes salt".

Mr. Sanyal contended that after exemption was granted with respect to Maida by Annexure 1, the article ceased to be subject to a duty of excise and consequently cannot be assumed to be covered by the expression. The factual position in this case admittedly is that if the sale of Maida in the preceding financial year is taken into account, the total turnover would exceed Rs. 30 lakhs but if Maida be excluded, the turnover will be below that figure, and consequently the first proviso in annexure 2 would have no application at all. The question to be answered, therefore, is as to whether Maida continued to be excisable goods even after Annexure 1. According to the petitioner, the liability in regard to the payment of excise duty is an essential condition for bringing an article within the expression, and, as by Annexure 1, Maida was exempted from duty in 1971, it cannot be treated as excisable goods since then. The learned counsel also tried to take help from the language used in Section 6 as it stood earlier and as it now stands after amendment. He said that if the intention was to include within the expression all the articles specified in the First Schedule then there was no necessity of including the "words "as being subject to a duty of excise" in the definition. Mr. Sanyal strenuously contended on the well-established principles of interpretation that the legislature must be presumed to have used each word in a Statute for a purpose and that every part of a statutory provision should be given effect to. It was urged that if the intention had been to, treat every article mentioned in the schedule as excisable goods without reference to the question as to whether duty was payable or not, it could have been expressed in a more direct straight forward manner without unnecessarily making a reference to payment of duty.

27. On a close examination of the Act along with the First Schedule and the rules, I do not find myself in a position to accept the petitioner's stand. It is true that the expression is not intended to include every article mentioned in the First Schedule, but at the same time it is also clear that the definition is not entirely dependent upon liability to pay duty for if that were so, the sub-section would not have mentioned the First Schedule. A reference has been made to both the First Schedule and to the liability in regard to the excise duty and they have been connected by the every significant words "as being". Giving effect to every word in the sub-section, its meaning appears to be that all goods which are subject to duty by virtue of being included in the First Schedule must be treated as excisable. The second part is merely descriptive. Whether a particular article is subject to duty or not by reason of any other provision does not appear to be relevant. What has to be seen is whether by reason of its being included in the First Schedule, it is subject to a duty or not. A reference to the Schedule indicates that Maida is still retained there as item 1 with the rate of duty as 10 paise per kilogram in column 3. It is, therefore, specified in the First Schedule as being subject to a duty and comes squarely within the definition.

28. Let us test the conclusion to which I have arrived above in the light of the argument addressed on behalf of the petitioner. It has been contended that on this view the words "as being subject to duty of excise" are rendered superfluous. The fallacy in this argument is that it is assumed that every item mentioned in the First Schedule is automatically subject to duty. It is not so. In Item No. 60, several articles are excluded from the duty and even before this item was included in the Schedule, there were other articles not subject to duty. Presently, against tobacco if used for agricultural purpose as mentioned in item 4(7), the rate of duty is mentioned as nil. In the past, Palmyra Sugar, now mentioned in item 1(3) earlier at one point of time as mentioned in item 8(3) also was not subject to duty.

29. I, therefore, do not find any substance in the first point urged on behalf of the petitioner. However, since the second question has been decided in its favour, the writ application succeeds.