

(1991) 02 MAD CK 0108
In the Madras High Court
Case No : W.A. No's. 1021 to 1026 of 1988

Union of India

APPELLANT

Vs

Pillaiyar Soda Factory

RESPONDENT

Date of Decision : 22-02-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Constitution of India, 1950 — Article 226

Citation : (1994) ECR 479 : (1992) 57 ELT 261

Hon'ble Judges : Raju, J

Bench : Single Bench

Advocate : Shri A.S. Venkatachalamurthy, ACGSC, for the Appellant; Shri Habibullah Badsha, for the Respondent

Judgement

1. Six writ petitions, W.P. Nos. 12711 to 12716 of 1987 were allowed by a learned Judge, by order dated 29-7-1988 and the order of the Collector of Central Excise, Madurai, in his C.No. V/ID/15/3/82/CX-3 Order No. 66/87 dated 3-11-1987 was quashed. Six writ appeals have been filed by the Union of India and others against the order of the learned single Judge and since common questions of law and fact are involved, the same are being disposed of by this common judgment.

2. The forensic issue involved in these appeals is, whether the six writ petitioners are the manufacturers of an article having a common trade mark. The context in which the issue arises for our determination is that on 9-11-1982, the Central Excise Preventive Officer, Madurai, visited M/s. Vignesh Soda Factory, Madurai. It was found during the check that aerated waters were being filled, charged with Carbon-dioxide gas under pressure in bottles embossed with the image of "GANESH" and bottles with "GANESH" image imprinted in colour. Some of the bottles had the wordings "SHRI MAPPILLAI VINAYAGAR AERATED WATER INDUSTRY", while others had "SRI MAPPILLAI SODA FACTORY" and while some others had the labels of "SRI VIGNESH SODA FACTORY" pasted over the bottles

which were being filled up at Sri Vignesh Soda Factory premises. The Preventive Officer entertained a belief that M/s. Vignesh Soda Factory, along with five other sister concerns situated in different places of Madurai, Dindigul and Trichy, were engaged in the manufacture of aerated waters on behalf of a manufacturer under a common brand name "GANESH" and had cleared them on payment of lower concessional rate of excise duty than the one which, according to the Preventive Officer, was due on the same. Certain documents were consequently seized from M/s. Vignesh Soda Factory under a mahazar drawn on the spot. But, for the purposes of the present case, it is not necessary to take a detailed note of the documents which were so seized. The writ petitioners, of course, are independent concerns having their separate registrations under the Tamil Nadu General Sales Tax Act and are independent Income Tax assesseees. They have individual Small Scale Industry Certificates and are different partnership or proprietary concerns engaged in the manufacture and sale of aerated waters. The Superintendent of Central Excise, on 31-7-1985 issued a common show-cause notice to all the writ petitioners, alleging that they have using a common trade mark, viz., "Sri Ganesh" and since the total value of the clearance of aerated waters from the six units during the financial year 1981-82 had exceeded Rs. 15,00,000/- and they were not eligible to avail of any duty exemption in respect of the clearance made by the respective manufacturing units from 1-3-1982 onwards in terms of Notification No. 31/82 dated 28-2-1982 which had been superseded by Notification No. 148/82-C.E., dated 22-4-1982 and they had, with the intention to evade payment of Central Excise duty, suppressed the fact of using the common brand name. Therefore, the writ petitioners were called upon to show cause as to why a penalty under Rules 9(2), 52-A, 173-Q, and 226 of the Central Excise Rules should not be imposed upon the units separately and duty, as specified in the annexure to the show cause notice recovered from each unit in respect of the clearance of aerated waters made therefrom. The writ petitioners denied the charge of suppressing any fact or using a common trade mark or brand name. It was maintained that the six units did not have any common business or interest and were independent units separately approved by the Sales Tax and Income Tax authorities. It was maintained that the manufacture of aerated waters attributed to the units could not be said to be the production or manufacture on behalf of one and the same manufacturer. The use of a common trade mark or brand name was denied. The writ petitioners claimed that they were entitled to individual exemption from duty in pursuance of the Notification No. 148/82-C.E., dated 22-4-1982. The Collector of Central Excise, Madurai, by order dated 3-11-1987, held that the production of aerated waters in the six different units could not be said to be the production of one manufacturer. He, however, held that the usage of identical trade mark or closely similar brand name disentitled the writ petitioners to the individual exemption under Notification No. 148/82-C.E. and he consequently ordered payment of Central Excise duty of Rs. 6,86,134.36 by the six units and also imposed a penalty of Rs. 40,000/- on Sri Pillaiyar Soda Factory, Madurai; Rs. 5,000/- on Sri Mappillai Vinayagar Aerated Water Industry, Dindigul; Rs.

15,000/- on Sri Mappillai Vinayagar Aerated Water Industry, Madurai; Rs. 25,000/- on Sri Anaimugan Soda Factory, Madurai; Rs. 50,000/- on Sri Ganesh Soda Factory, Trichy; and Rs. 30,000/- on Sri Vignesh Soda Factory, Madurai. Aggrieved by the order of the Collector of Central Excise, the writ petitioners filed the writ petitions in this Court, as noticed above, and the same were resisted by the respondents to the writ petitions.

3. Basically, two objections were raised in resistance of the writ petitions. Firstly, it was argued that without exhausting the statutory remedies available under the Central Excises and Salt Act, 1944, the writ petitioners could not take recourse to filing the writ petitions and, therefore, the writ petitions were liable to be dismissed summarised. The second objection raised was that the writ petitioners had started different factories under different names only with a view a availing of the benefit of Notification No. 31/82, superseded by Notification No. 148/82-C.E., to claim duty exemption. It was inserted that the trade names used by the writ petitioners were quite synonymous to each other so as to fit in with the trade name and the image of "Ganesh" imprinted on the bottles and the use of the similar trade mark disentitled the writ petitioners from the benefit of the exemption Notification No. 48/82.

4. The learned single Judge, after referring to a number of judgments, held that the existence of the alternative remedy was not an absolute bar to the maintainability of the writ petitions and since what was involved was essentially an interpretation of Notification No. 148/82-C.E., dated 22-4-1982, the writ petitions were maintainable. The learned single Judge noticed that the matter in controversy in the writ petitions did not involve any investigation into disputed questions of fact, but only an interpretation of a statutory notification and, therefore, the writ petitions, which had been filed in 1987 and were pending on the board of the High Court, were maintainable and did not deserve to be dismissed on that ground alone. The first objection raised on behalf of the respondents to the writ petitions was negated.

5. So far as the second objection was concerned, the learned single Judge found that the finding of the Collector of Central Excise that the writ petitioners were using identical trade marks was unreasonable and that even on the own case of the Department, the writ petitioners were using "similar" trade mark or brand name and not "same" trade mark or brand name and, therefore, they could not be denied the benefit of the exemption from duty under Notification No. 148/82-C.E., dated 22-4-1982. The learned single Judge held that the writ petitioners were manufacturing and selling aerated waters under different trade marks or brand names. It was also found that the value of individual clearance of aerated waters did not exceed Rs. 7.5 lakhs and, therefore, the writ petitioners were entitled to the benefit of the individual exemption granted under Notification No. 148/82-C.E., dated 22-4-1982. Consequently, the second objection was also negated and as a result, the order of the Collector of Central Excise, levying duty and imposing penalty was set aside and the writ petitions were allowed.

6. The Revenue has come up in appeal in all the cases. Mr. Venkatachalamurthy reiterated the two submissions, which had been made before the learned single Judge, before us also. In reply, Mr. Habibullah Badsha, the learned senior counsel appearing for the respondents - writ petitioners, maintained that the findings recorded by the learned single Judge did not call for any interference at all. Learned counsel for the parties referred to some decided cases and we shall deal with the relevant ones at the appropriate place in the course of this judgment.

7. As already noticed, the pivotal question which requires our consideration is, whether the writ petitioners can be said to be manufacturers of an article having the same trade mark or brand name. If the answer to the question is in the affirmative, then, obviously the writ petitioners would not be entitled to individual exemption from duty on the basis of Notification No. 148/82-C.E., dated 22-4-1982, whereas if the answer is in the negative, they would be so entitled. It would, therefore, be desirable at this stage to notice some of the relevant features of Notification No. 148/82-C.E., dated 22-4-1982, which superseded the earlier Notification No. 31/82, dated 28-2-1982.

8. Notification No. 148/82-C.E., dated 22-4-1982 was issued in exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944 and in supersession of the earlier notification of the Government of India, No. 31/82-C.E., dated 28-2-1982. By the said notification, the Central Government exempted aerated waters, falling under Item 1-D of the First Schedule to the Central Excises and Salt Act, 1944 and cleared for home consumption on or after the 1st of April in any financial year by or on behalf of a manufacturer from one or more factories in the following manner :

(A) In the case of first clearance of aerated waters upto an aggregate value not exceeding Rs. 7,50,000.

(a) on common trade mark aerated waters forming part of such first clearance from so much of the duty of excise leviable thereon as is in excess of 50% of such duty.

(b) on other aerated waters forming part of such first clearance from the whole of the duty of excise leviable thereon.

(B) In case of the clearance (being clearances of aerated waters of an aggregate value not exceeding rupees seven and a half lakhs) immediately following the said first clearance of the value specified in clause (a) -

(a) on common trade mark aerated water forming part of such clearance from so much of the duty of excise leviable thereon under the said item as is in excess of fifty per cent of such duty;

(b) on other aerated waters forming part of such clearances, from so much of the duty of excise leviable thereon under the said item as it in excess of seventy-five per cent of such duty;

(c) "Common trade mark aerated waters" means aerated waters -

(i) which were sold under a trade mark, registered under the Trade and Merchandise Marks Act, 1958 (43 of 1958) or not or under a brand name; and

(ii) which are manufactured with the same trade mark or brand name in more than one factory (whether belonging to one or more manufacturers); and

(iii) the aggregate value of clearance whereof from all such factories taken together had exceeded rupees fifteen lakhs during the preceding financial year."

9. On the basis of the contents of the notification, the Collector of Central Excise, in the order impugned in the writ petitions, formulated the following two questions to be decided in the case :

"(i) Whether the production of aerated waters in respect of the six units charged can be considered to be the production of one manufacturer for and on behalf of other units which would disentitle the units to claim individual exemptions under Notification No. 31/82, dated 28-2-1982 and subsequently under Notification 148/82 dated 22-4-1982; and

(ii) whether the six units have used common trade mark or brand name which would disentitle them the exemption envisaged under the said Notifications."

10. In regard to the first point, then Collector opined that there was no doubt that all the six units are owned by related persons of Shri M. A. Kandasami, the head of the family and that the partners and proprietors of the six units are blood-relatives. He, however, observed that this alone would not disentitle them from availing the exemption if they are otherwise entitled to it. The Collector answered the first question thus :

"There is no doubt that all the six units are owned by related persons of Shri M. A. Kandasamy, the head of the family, and the Partners and proprietors in the six units are his blood relatives. But this evidence alone would not disentitle them from availing the disputed exemption. There is no doubt that these six units are properly constituted as separate proprietary/partnership concerns and they have got their own separate sales tax registrations and they are assessed differently for the purpose of Income Tax etc. Even the Central Excise Department itself have either granted licences to them or separately accepted their declarations for the purpose of availing the exemption. There is no suppressions of facts or furnishing of any misstatement by the licensees in this regard. So the charge as per the first allegation is not proved for want of evidence."

11. So far as the second question is concerned, the Collector found that though the brand names for the six units were somewhat different, all the brand names were deceptively common and that since the bottles required by the units were procured centrally and single orders were placed with the bottle manufacturers, it went to establish that the units had issued "identical trade marks", which were "deceptively similar" to each other. On the basis of this finding, the Collector

found the writ petitioners as not entitled to individual and separate exemption under Notification No. 148/82.

12. The learned single Judge did not subscribe to the view of the Collector on the second question. The finding in respect of the second question is, in fact, the bone of contention between the parties in these appeals. Therefore, before we proceed further, it would be relevant to consider as to when different manufacturers can be said to be manufacturing and selling "common trade mark aerated waters" so as not to be able to avail of the individual exemptions. The term "common trade mark aerated waters", as already noticed, has been defined in Explanation I to clause 5 of Notification No. 148/82-C.E., dated 22-4-1982. Even at the cost of repetition, it is extracted hereunder :

""Common trade mark aerated waters" means aerated waters -

- (i) which are sold under a trade mark, registered under the Trade and Merchandise Marks Act, 1958 (43 of 1958) or not, or under a brand name; and
- (ii) which are manufactured with the same trade mark or brand name in more than one factory (whether belonging to one or more manufacturers); and
- (iii) the aggregate value of clearances whereof from all such factories taken together had exceeded rupees fifteen lakhs during the preceding financial year."

13. A bare reading of the explanation unmistakably shows that the expression "common trade mark aerated waters" implies aerated waters which are sold under the same trade mark or under the same brand name in more than one factory, whether belonging to one or more manufacturers. Thus, the sale must be with the "same" trade mark or brand name in order to attract the categorisation of "common trade mark aerated waters", for the purpose of the notification. Can the use of a "similar" or "deceptively similar" or "deceptively identical" trade mark used by a manufacturer be said to be the manufacture and sale with the "same" trade mark or brand name ? Notification No. 148/82-CE has used the expression that "common trade mark aerated waters" would mean aerated waters which are manufactured with the "same" trade mark or brand name in more than one factory. The notification does not use the word "similar" or "identical" but "same". The intention of the authorities in issuing the notification is, therefore, quite clear and unambiguous. The concept of "similar" or "deceptive similar", or "more or less identical", is a concept borrowed from the Trade and Merchandise Act or the Copyright Act, which is not of exactitude but of latitude. That concept has relevance to an action in "passing off" etc. It is aimed for the protection of innocent or unwary customers. In our opinion, it would not be proper to import that concept while interpreting a notification issued under the Central Excise Rules, as it would have the effect of enlarging or restricting the scope of the notification. Fiscal laws, it is trite, must be strictly construed. The notification issued under the fiscal laws have equally to be strictly construed. The words used in the notification must be understood according to their plain phraseology. Nothing should be presumed. Nothing should be implied. The true

test must always be the language used. The authorities used the expression "same" in the Explanation to explain as to when manufacture can be said to be under a "common trade mark". The authorities did not use the word either "similar" or "identical". The word "same" has an absolutely different meaning than the word "similar" or "identical". For example, if it were said that "A and B live in the "same" house", it would imply that they were living in "one" house, while if it were said that "A and B" live in "similar" houses or in "identical" houses, obviously, the implication would be that A and B live "separately". Therefore, the word "same" cannot be construed to be synonymous with "similar" or "identical", or even deceptively similar and deceptively identical. Since the language used in the notification is clear, it is not permissible to interpret the meaning of the word occurring therein by taking recourse to modes other than the plain language. The expression "same" had to be understood in the context of the intention of the authorities issuing the notification. The authorities intended to deny the benefit of individual exemptions only where one or more manufacturers sell the product under the "same" trade mark or brand name. It is a fundamental rule for the construction of statutes, that where the language is plain and clear, the words must be held to have been used, according to the plain and ordinary meaning of the term to determine their connotation or meaning. Therefore, using the well settled rule of interpretation, the conclusion is irresistible that the Collector fell in error in construing "same" as "similar" or even "deceptively similar" to deny the benefit of individual exemption to the writ petitioners under the notification.

14. In order to be entitled to the benefit of the individual exemption granted under Notification No. 148/82-C.E., dated 22-4-1982, all that the writ petitioners were required to establish was that they were manufacturing and selling aerated waters, not under the common trade mark and that the value of the individual clearance of aerated waters did not exceed Rs. 7.5 lakhs. Since the Collector clubbed the turnover of all the six writ petitioners, treating them as manufacturing under a common trade mark, he denied to them the benefits of exemption, except to the extent of the first Rs. 15,00,000/- (composite). The Collector construed "same" as "deceptively similar". That was a wrong approach, particularly when there was no evidence or material to hold that one trade mark was used by the manufacturers of different units. The construction placed by the Collector would result in inequitable consequences. On the Collector's own finding, on the basis of the material on record, that the production of aerated waters in six different units by the writ petitioners could not be said to be the production of one manufacturer, the construction placed on the notification by equating "same" with "deceptively similar" demonstrates the misconception in interpreting an exemption provision. The learned single Judge was, therefore, fully justified in rejecting the plea of the Revenue and holding the writ petitioners to be entitled to the benefit of individual exemptions granted under Notification No. 148/82-C.E., dated 22-4-1982.

15. However, in so far as the writ petitioners, respondents in W.A. Nos. 1022 and

1023 of 1988, are concerned, in fairness to the learned counsel for the respondents it must be recorded that he very fairly conceded that both the units in these two cases were manufacturing aerated waters under a common trade mark. Therefore, so far as the respondents in those two writ petitions are concerned, while the Collector's order which clubbed them along with the other writ petitioners to deny the benefit of the notification would go, the liability of the respondents in W.A. Nos. 1022 and 1023 of 1988 to pay the appropriate duty, since their turnover is beyond the permissible limit as envisaged by the exemption notification, would remain and they would be liable to pay the duty.

16. Thus, except to the extent as hereinabove noticed, the plea of the appellants in regard to the non-availability of the benefit under the exemption Notification No. 148/82-CE fails and we concur with the view of the learned single Judge in that behalf.

17. Coming now to the second question, i.e., whether the writ petitions were not maintainable as the petitioners therein had not exhausted the alternative remedies provided under the statute. Learned counsel for the appellants, basically relying upon the judgments of the Supreme Court in *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, ; and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , urged that since the writ petitioners had an alternative remedy available to them under the statute, the learned single Judge should have dismissed the writ petitions on that short ground holding the same not to be maintainable. In reply, learned counsel for the respondents submitted that notwithstanding the availability of the alternative remedy, the writ petitions were maintainable and keeping in view the nature of the controversy involve in the case, where no dispute on facts existed, recourse to the writ jurisdiction to resolve the controversy was appropriate and proper. In support of the submission, learned counsel relied upon *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, ; *Ram and Shyam Company Vs. State of Haryana and Others*, ; and *Tamil Nadu Betelnut Packers Vs. Union of India*, .

18. At the outset, we would like to observe that the judgments cited by the learned counsel at the Bar support their respective contentions and we need not, therefore, extract any passages from those judgments. The question, however, is, should the existence of alternative remedy inevitably result in the dismissal of writ petitions, where the hearing has taken place on merits.

19. The Courts have, generally speaking, imposed a rule of self-restraint on the exercise of their jurisdiction under Article 226 of the Constitution of India where the party invoking the jurisdiction has an effective and adequate alternative remedy available to it under a statute, more particularly in fiscal matters. This rule, however, is a rule of convenience and discretion and not a rule of law. At any rate, it does not oust the jurisdiction of the Court to deal with a matter in exercise of the writ jurisdiction and it depends upon the facts and circumstances of each case as to whether the party should be nonsuited only on the ground

that it had failed to take recourse to the efficacious alternative remedies available under a statute. No hard and fast rule of general application can either be enunciated or evolved. It all depends upon the facts and circumstances of each case. The nature of the dispute involved, the stage when the writ petitions are sought to be dismissed, i.e., whether at the stage of admission or after hearing the parties in full on merits or at the appellate stage, are all relevant considerations which have to be taken into account to determine whether the existence of the alternative remedy should disentitle the party to invoke the writ jurisdiction. It was for this reason, perhaps, that even after the constitution of the Special Tribunal for cases under the Customs, Excise and Gold (Control) Act, the Legislature did not, by law, exclude the jurisdiction of the High Courts under Article 226 of the Constitution of India to deal with the matters.

20. In the facts and circumstances of the instant case, we find that the writ petitions were admitted in 1987. They were heard on merits, more than a year after they were admitted. The basic question involved in the writ petitions related to the interpretation of an exemption Notification No. 148/82-C.E., dated 22-4-1982. An important question of law as to whether it was permissible to import the concept of "deceptively similar" trade mark, as contained in the Trade and Merchandise Marks Act, to interpret the expression "same trade mark" used in a notification under a fiscal statute, was required to be decided in the writ petition. No questions of fact, much less disputed questions of fact were required to be dealt with or investigated. An interpretation of the exemption notification, pure and simple, in our opinion, did merit consideration by the High Court and, therefore, the writ petitions at the instance of the respondents herein, under article 226 of the Constitution of India, were maintainable. The learned single Judge rightly did not reject the same only on the ground of the existence of an alternative remedy. (See in this connection with advantage *Ram and Shyam Company Vs. State of Haryana and Others*, . That apart, we are of the opinion that since the existence of the alternative remedy does not affect the jurisdiction of the Court to entertain the writ petitions and, at the time when the writ petitions were filed, the period prescribed for taking recourse to the statutory remedies had not expired, it would have complicated the matters if the writ petitions were rejected at the time of final hearing in 1988, when the item prescribed under the statute for taking recourse to the alternative remedies had expired. Had the writ petitions not been entertained at all the stage of admission on the ground of the existence of alternative remedy, perhaps, the writ petitioners could have moved the authorities under the statute within the prescribed period. But, to non-suit them after so much of time had expired would not have been fair. Technicalities cannot be permitted to defeat the cause of substantial justice. There was no case law available on the question involved in the writ petitions and, therefore, an authoritative pronouncement by the High Court in exercise of the writ jurisdiction was not only appropriate but also desirable. The learned single Judge was conscious of the rule on convenience arising out of the availability of alternative remedies and in the peculiar facts and

circumstances of the case and the nature and importance of the issue involved, rightly held that the writ petitions could not be dismissed at the stage of final hearing. We have not been persuaded to hold that the view of the learned single Judge on that aspect can be said to be unreasonable or patently erroneous. In any even, it would, at this stage, not be fair to interfere with the discretion exercised by the learned single Judge, while hearing the writ appeals where elaborate arguments have been addressed on merits. At this stage to non-suit the writ petitioners and leave them to take recourse to the alternative remedy would not be a proper course to be adopted, in the peculiar facts and circumstances of these cases. The second ground of attack, therefore, also fails.

21. Thus, from the aforesaid discussion, it follows that the answer to the question posed in the earlier part of this judgment has to be in the negative. We, accordingly, hold that the six writ petitioners cannot be said to be the manufacturers of an article having a common trade mark or brand name. The writ petitioners were, therefore, entitled to the benefit of individual exemptions under Notification No. 148/82-C.E., dated 22-4-1982. The judgment of the learned single Judge, thus, does not call for any interference. Consequently, the writ appeals, except to the extent of our observations with regard to W.A. Nos. 1022 and 1023 of 1988, fail and are dismissed. There will, however, be no order as to costs.