Visal Lubetech Corpn. Vs Additional Commr. Of Cus., Coimbatore

Court: MADRAS HIGH COURT

Date of Decision: Sept. 30, 2016

Citation: (2016) 342 ELT 201

Hon'ble Judges: T.S. Sivagnanam, J.

Bench: Single Bench

Advocate: S/Shri Vijay Narayanan, Senior Counsel assisted by Hari Radha Krishnan, Counsel, for the Petitioner; Shri T.R. Senthil Kumar, Senior Panel Counsel, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T.S. Sivagnanam, J. - Heard Mr. Vijay Narayanan learned Senior counsel assisted by Mr. Hari Radha Krishnan, learned counsel for the

petitioner and Mr. T.R. Senthil Kumar learned Senior Panel counsel appearing for the Revenue.

2. The writ petitions have been filed by a Proprietorship concern and the son of the Proprietor, challenging the order-in-original, dated 29-4-2016,

passed by the respondent, by which the goods imported by the petitioner in W.P. No. 33741 of 2016, has been reclassified, its assessable value

revised and the duty payable on the redetermined value has been directed to be collected with the proposal to confiscate the goods with an option

of redemption on payment of fine, apart from imposing penalty on the concern as well as on the son of the proprietor.

3. The importer filed two bills of entries dated 21-12-2013 and 20-1-2014 at the Inland Container Depot, Irugur, through their Customs House

Agent M/s. Nippon Express (India) Pvt., Ltd., for import of certain goods declared as Carbon Black Feed Stock (CBFS), which was stuffed in

four and six containers respectively. The importer claimed classification of the goods under Customs Tariff No. 2803 00 90 attracting rate of duty

of 22.583% and self-assessed the amount of duty as Rs. 5,09,161/- and Rs. 9,20,551/- respectively with aggregate amount of duty in respect of

both the bills of entry as Rs. 14,29,712/-. In order to verify the correctness of the self-assessment and in accordance with the Alert Circular No.

12/2013, issued by the Directorate of Revenue Intelligence, samples were drawn on 30-12-2013 and it was sent for testing to the Central

Revenue Control Laboratory. The sample was returned by the Central Laboratory on the ground that it was not sealed properly.

4. It was further stated that the Assistant Commissioner of Customs, ICD, Irugur, who was present at the time of drawal of sample on 30-12-

2012, is said to have noticed that the colour and viscosity of the sample returned by the Central Laboratory was different from the original sample,

he had seen at the time of drawal of sample. Suspecting tampering the said officer had conducted enquiries with all the officers and gathered

information and brought the matter to the notice of the Commissioner of Customs, Central Excise, Coimbatore by letter dated 25-1-2014, who in

turn ordered the case to be investigated by the Customs Intelligent Unit, (CIU), who had recorded statements of all the concerned individuals

under Section 108 of the Customs Act. The Superintendent, had given a statement on 25-1-2014, stating that he was present during the drawal of

sample on 30-12-2013 and that the importer might have replaced the sample drawn with pre-filled cans at the point of drawal. However, he

denied having helped the importer in substitution of the sample. A second statement was recorded from the Superintendent on 27-1-2014, wherein

he stated to have admitted that he had received the pre-filled samples from the importer''s son (petitioner in W.P. No. 33742 of 2016) and he had

handed over the original samples taken from the containers to the importer''s son and substituted samples were handed over to the Inspector, ICD,

Irugur. Further, in the statement, the Superintendent is said to have stated that he was informed that the goods imported are inferior variety of

CBSF and that is why necessity was there for replacement of the sample. Subsequently, sample was taken and properly sealed and sent to the

Central Laboratory, who had certified that the samples were ""base oil"" vide report dated 1-6-2014.

5. The importer was examined under Section 108 of the Customs Act and statement was recorded on 11-8-2014, wherein he appears to have

denied all the charges. The Test Reports dated 10-9-2014, were received from Central Revenue Control Laboratory (CRCL) on 11-9-2014, in

respect of all the six samples sent on 12-8-2014. Among the six samples, two samples covered under Test Memos No. 1(3)/2014-15 (CIU) and

1(2)/2014-15(CIU), have been tested as ""Process Oil"" and ""Base Oil"" respectively. The test reports of CRCL in respect of the four remaining

samples indicated that they are ""off-specification"" products and that they could be termed as Carbon Black Feed Stock (CBFS) only if they are

used for manufacture of Carbon Black. Further, after noting that the importer in his statement stated that he does not use the goods for the

manufacture of Carbon Black and it is used for making lubricants only and taking into consideration the other factors, a show cause notice was

issued to the petitioners as well as the Superintendent of Customs one S. Karthikeyan. Proposing among other things, as to why the imported

goods should not be reclassified as ""Base Oil"" and ""Rubber Process Oil"" as the case may be based on the test reports issued by the CRCL, New

Delhi, apart from, proposing to revise the assessable value and reclassification of goods and redetermination of the duty with proposal to

confiscation the goods and imposed penalty. The petitioner has submitted their objection and an opportunity of personal hearing was granted and

the order-in-original was passed.

6. The learned Senior counsel for the petitioner pointed out that test reports have given contrary findings and to demonstrate the same, reference

was made to the report, dated 16-9-2014, by the Chief Examiner of the CRCL and it is stated that precisely for this reason, the petitioner sought

for cross-examination of the person, who submitted the test report and this was not considered by the respondent, while passing the impugned

order and in spite of the petitioner having specifically referred to the decision of this Court in Thilagarathinam Match Works v. Commissioner

of Central Excise, Tirunelveli reported in [2013 (295) E.L.T. 195 (Mad.)], adjudicating authority did not even deal with the said order in the

impugned order. It is, therefore, submitted that the valuable right of the petitioner to cross examine the said authority, who gave the test report, has

been denied and this is a good ground for the petitioner to approach this Court, since the defect is an inherent defect, which goes to the root of the

matter. To support such proposition, the learned Senior counsel referred to the decision of the Hon''ble Supreme Court in Civil Appeal No. 5278

of 2006, dated 4-9-2015, in Commissioner of Central Excise, Nagpur v. Mattel Toys India Private Ltd. [2015 (325) E.L.T. A157

(S.C.)], wherein the appeal filed by the Revenue as against the order of the CESTAT reported in 2015 (320) E.L.T. 628 (Tri.-Mumbai)

[Gujarat Small Scale Industries Corporation v. Commissioner of Customs, Ahmedabad] was dismissed. It is submitted that in the said

case also, the Hon''ble Supreme Court confirmed the order of the Tribunal, which accepted the case of the assessee that denial of the right of the

cross-examination, has infringed the principles of natural justice. On the above submission, the learned Senior counsel submitted that the matter

may be remanded to the respondent for fresh consideration and the respondent may be directed to afford an opportunity to the petitioner to cross

examine the officer who submitted the test reports.

7. The learned Senior Panel counsel appearing for the Revenue contended that the Writ Petition is not maintainable, as the petitioner has not

exhausted the alternate remedy available to them before the Commissioner and all the issues raised by the petitioner are factual and therefore, the

petitioner should be relegated to file an appeal.

8. After hearing the counsels appearing for the parties and perusing the materials placed on record, the first issue to be considered is with regard to

the legal position as to how the Courts have viewed such matters, when the assessees seek to by-pass the remedies available under the Act and

approach this Court invoking its jurisdiction under Article 226 of the Constitution of India.

9. The Hon''ble First Bench of this Court in the case of Nivaram Pharma Private Limited v. The Customs Excise and Gold (Control),

Appellate Tribunal, South Regional Bench Madras and Ors., reported in (2005) 2 MLJ 246 : 2006 (205) E.L.T. 9 (Mad.) : 2008 (12)

S.T.R. 98 (Mad.), took note of the various decisions on the said point and held that when an alternative and equally efficacious remedy is open to

a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative Writ. It will

be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution, unless there are good grounds to do

otherwise. At this stage, it is beneficial to refer to the operative portion of the judgment :-

5. It is well settled by a series of decisions of the Supreme Court that particularly in tax matters there should be no short circuiting of the statutory

remedies, vide Titaghur Paper Mills Co. Ltd. v. State of Orissa, Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Limited,

etc.

6. It is well settled that when there is an alternative remedy ordinarily writ jurisdiction of this Court under Article 226 of the constitution should not

be invoked. This principle applies with greater force regarding tax proceedings. As observed by the Supreme Court in Titaghur Paper Mills Co.

Ltd. v. State of Orissa :

Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be

availed of.

7. A Constitution Bench of the Supreme Court in G. Veerappa Pillai v. Raman and Raman Ltd., held that as the Motor Vehicles Act is a self-

contained code and itself provides for a forum for appeal/revision, the writ jurisdiction should not be invoked in matters relating to its provisions. A

similar view was taken in Assistant Collector of Central Excise Chandan Nagar v. Dunlop India Limited.

8. In Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Limited (Supra) the Supreme Court observed :

In Titaghur Paper Mills Co. Ltd. v. State of Orissa, A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ. held that where the statute itself provided

the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and

thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the

Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is

indeed a matter of tragic concern to us. Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory

remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or

where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that

recourse may be had to Article 226 of the Constitution. But, then the Court must have good and sufficient reason to by pass the alternative remedy

provided by statute. Surely, matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial

notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim

orders and thereafter prolong the proceedings by one device or the other. The practise certainly needs to be strongly discouraged.

9. In C.A. Ibraham v. ITO, H.B. Gandhi v. Gopinath & Sons, 1992 (Suppl) 2 SCC 312 and in Karnatak Chemical Industries v. Union of

India, the Supreme Court held that where there is a hierarchy of appeals provided by the statute the party must exhaust the statutory remedies

before resorting to writ jurisdiction. All these decisions are related to taxing statutes, and are hence apposite to the present context.

10. In Sheela Devi v. Jaspal Singh, and Punjab National Bank v. D.C. Krishna, the Supreme Court held that if the statute provides for remedy of

revision or appeal, writ jurisdiction should not be invoked.

11. In Union of India v. T.R. Verma, the Supreme Court held that it is well settled that when an alternative and equally efficacious remedy is open

to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It will

be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution unless there are good grounds to do

otherwise.

10. In Dr. K. Nedunchezhian v. The Deputy Commissioner of Income Tax, Central Circle, Salem reported in (2005) 2 MLJ 243, the

Hon"ble First Bench of this Court was considering a matter arising under the Income Tax Act in which the Court framed a question as to whether

in Tax matter when alternate remedy is provided in the Act itself should there be short circuiting of the statutory remedy. This issue was considered

after elaborately referring to several decisions and it was held that it is well settled by the series of decisions of the Hon"ble Supreme Court that

particularly in tax matters, there should be no short circuiting of the statutory remedies (Titaghur Paper Mills Company Ltd. v. State of Orissa

reported in AIR 1983 SC 603 & Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Limited reported in AIR 1985

SC 330 : 1985 (19) E.L.T. 22 (S.C.).

11. Further, it was pointed out that the Hon"ble Supreme Court in the case of Titaghur Paper Mills Company Ltd. (supra), held that the appellant

therein had pleaded that there was violation of natural justice and the impugned order was without jurisdiction, yet the Supreme Court held that the

petitioner should avail his alternate remedy of appeal.

12. If the above legal principles are applied, then the only conclusion that can be arrived at is to relegate the petitioner to avail the alternate remedy.

However, it has to be seen as to whether there are any good and valid reasons for not doing so, and the Court proposes to test the contentions

raised in this regard.

13. It is brought to the notice of this Court that as against the order passed in W.P. No. 24350 of 2016, filed by the Superintendent of Central

Excise against the very same order-in-original, dated 29-4-2016, he has filed W.A. No. 1171 of 2016 and the Hon"ble Division Bench has

granted an order of stay. On a perusal of the interim order granted by the Hon"ble Division Bench, dated 22-9-2016, it is seen that the Writ

Appeal has been admitted and only that portion of the interim order, in so far as the said appellant is concerned, and that too, to the extent of

imposition of penalty under Section 114AA alone is stayed and not the rest of the order-in-original.

14. The sheet anchor of the submission of the learned Senior counsel for the petitioner is based on the denial of opportunity to cross examine. The

further grievance being that though they relied upon an order of this Court in that regard, the authority did not even take note of the same. The

person, whom they seek to cross examine is an officer/Government servant, working as a Chemical Examiner in the Central Revenue"s Control

Laboratory under the control of the Department of Revenue, Ministry of Finance, Government of India. The said officer is not a witness to the

proceedings. No statement has been recorded by the Department from such an officer either prior to the issuance of show cause notice or

thereafter. Thus, the duty exercised by the Chemical Examiner of the Central Laboratory is in effect discharging a statutory duty and therefore, he

is not a witness to the proceedings. The petitioner seek to take advantage of certain observations made by the test report to state that it is

inconsistent with the other averments made therein. It is not in dispute that no statement was recorded from the Officer, who submitted the report.

In other words, there is no ""examination in chief"", for permitting cross-examination. At best, the report can be taken as it is and the petitioner has to

contest his case based on the findings recorded in the report. The petitioner requested an opportunity to cross examine the Officer, who submitted

a report. This was considered by the respondent and an order was passed on 29-1-2016, rejecting such a request. This order was not put to

challenge.

15. The contention of the petitioner is that during the course of personal hearing once more they reiterated the said request. In the considered view

of this Court such alleged reiteration is of little avail, since the respondent has already taken a decision on the request made by the petitioner and

rejected the same and communicated to the petitioner under letter dated 29-1-2016 (copy not filed along with writ petition). Thus, as long as the

petitioner has not questioned the letter, it would be too late for the petitioner to put forth the case that their request at the time of personal hearing

for cross-examination should be considered. This argument raised by the learned Senior counsel for the petitioner is therefore rejected.

16. Nextly, it has to be seen as to whether the decision rendered in Thilagarathinam Match Works (supra), will in any manner advance the case of

the petitioner. The said Writ Petition was filed by an assessee challenging the order passed by the Enquiry Officer rejecting the request for cross-

examination of certain officers and persons in an enquiry, in pursuance of the show cause notices issued under Section 11A of the Central Excise

Act, 1944. In the annexures to the show cause notices, the respondents therein relied upon the reports of the Energy Auditor as well as the

statements of some officers and witnesses and therefore, the petitioner made a request for cross-examination of those officers and witnesses. This

request was rejected stating that the petitioner therein did not state the reason for cross-examination. This order was faulted and set aside stating

that no reasons need be given for requesting cross-examination and the Writ Petition was allowed.

17. Two factual aspects will render the decision inapplicable to the facts of the present case. Firstly, the Writ Petition was challenging an order

passed by the Enquiry Officer rejecting request for cross-examination. In the instant case, a separate order was passed by the respondent rejecting

the request for cross-examination which has not been challenged. The second reason is that in Thilagarathinam Match Works (supra), the

annexures to show cause notices referred to the statements of officers and witnesses. Therefore, the petitioner therein wanted to cross examine

those witnesses. In the instant case, the officer, who submitted the test report was not examined by the Department nor he is a witness nor any

statement has been recorded from him. In fact, the report can be treated as a public record and the contents of the report are a proof to

themselves. In such circumstances, the petitioner cannot seek for cross-examination of the officer, who gave the report. Therefore, the decision in

Thilagarathinam Match Works (supra), does not render any support to the case of the petitioner.

18. With regard to the decision of the Hon''ble Supreme Court in Mattel Toys India Private Ltd., (supra), once again, the request of the assessee

therein was to give opportunity to cross examine the witnesses, whose statement was relied on by the Department and the facts of the present case

is clearly distinguishable.

19. In the light of the above discussion, the contention raised by the petitioner that they have to be permitted to cross examine the Chemical

Examiner of the Central Laboratory is a misconceived plea. For the above reasons, such a request made by the petitioner was rightly rejected by

the respondent by passing a separate order dated 29-1-2016 and the petitioner having not challenged the said order, cannot raise the same ground

while questioning the impugned order-in-original that too by-passing the appellate remedy.

20. Hence, for all the reasons the Writ Petitions are dismissed and the petitioners will not be entitled to canvass the issue regarding their right to

cross-examine the Chemical Examiner of the Central Revenue''s Control Laboratory, but are entitled to file an appeal as against the impugned

order on all other issues before the Commissioner of Customs and Central Excise (Appeals), Coimbatore. No costs. Consequently, connected

Miscellaneous Petitions are closed.