

(1992) 10 AP CK 0003

Andhra Pradesh High Court

Case No: Writ Petition No. 5613 of 1985

Bhadrachalam Paper Boards Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Oct. 21, 1992

Citation: (1993) 1 AnWR 139 : (1994) 46 ECC 98 : (1994) 69 ELT 482

Hon'ble Judges: S.S. Mohammed Quadri, J; B. Subhashan Reddy, J

Bench: Division Bench

Advocate: M.S.K. Sastry, for the Appellant; P. Innayya Reddy for the Central Government, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Syed Shah Mohammed Quadri, J.

The petitioner challenges the validity of the order of the Assistant Collector, Central Excise, Warangal Division, Warangal, the 2nd respondent herein, in Proceedings No. C. No. V/17/30/11/84/MPI/Adjudication Order No. 4/85 (M.P.) dated 29-5-1985 and the consequential order of the 3rd respondent in letter dated 3-6-1985, by praying for a Writ of Mandamus declaring the said orders as illegal, null and void.

2. The first petitioner is a limited company incorporated under the Indian Companies Act. The 2nd petitioner is one of the shareholders. Under Rule 8(i) of the Central Excise Rules, the Central Government issued Notification No. 201/79, dated 4-6-1979. It was subsequently amended by Notification No. 105/82 dated 28-2-1982, granting certain exemptions. The petitioner filed declarations for the excisable goods i.e. paper and paper boards of different varieties from time to time, under the said notification, the 1st petitioner-company was availing proforma credits in respect of 12 items including burnt lime (hereinafter referred to as the "lime input"). The 3rd respondent issued a show cause notice No. 4/82 dated 3-7-1982 calling upon the 1st petitioner-company to show cause as to why credits taken for the inputs mentioned therein should not be disallowed in terms of the notification. The

1st petitioner-company filed its explanation. After giving opportunity of oral hearing, the 3rd respondent ordered that the company was entitled to take proforma credits in respect of ten items out of twelve items, in Adjudication No. 3/82 MP dated 31-12-1982. After about two years thereafter the 2nd respondent issued a show cause notice dated 16-8-1984 stating that the proforma credits availed by the 1st petitioner-company appears to be incorrect. The 1st petitioner-company replied to the show cause notice stating inter alia that the notice is without jurisdiction. It was also stated that the inputs of the said twelve items, were used in the manufacture of paper and paper boards. By order dated 9-5-1985 the 2nd respondent set aside the order of the 3rd respondent dated 31-12-1982 and ordered for withdrawal of the amount standing to the credit of the 1st petitioner- company under the heading "Wire, burnt lime and alfloc powder of all grades" and directed demand of all the credits availed during the period commencing from 1-7-1982. This order was purported to be passed u/s 11A of the Central Excises and Salt Act. Consequent upon that order the 3rd respondent issued a demand on 3-6-1982 directing payment of Rs. 10,87,581.03. These orders are assailed in the Writ Petition.

3. The 2nd respondent filed a counter-affidavit stating inter alia that under T.I. 68 read with Notification No. 201/1979, the following materials were notified : (1) Alum, (2) Resin, (3) China clay, (4) Sodium sulphate, (5) Sodium sulphide, (6) Sodium aluminate, (7) Talcum powder, (8) Glue, (9) Alpholoc powder, (10) Cepol powder, (11) Wires, and (12) Burnt lime. The Superintendent of Central Excise who is incharge of the 1st petitioner-company by order dated 31-12-1982, allowed set-off after inspection of items mentioned at Serial Nos. 1 to 8, 10 and 12 and disallowed set-off in respect of Serial Nos. 9 and 11. In respect of these items no appeal was preferred. On 16-8-1984 the 2nd respondent issued a show cause notice to the 1st petitioner-company to explain as to why the set off permitted by the Superintendent in his order dated 31-12-1982 should not be withdrawn and the amount of Rs. 25,83,895.53 being the credit for the period between 1-7-1982 to 15-8-1984 should not be adjusted as laid down in the proviso 4 to the Notification No. 201/79. After considering the reply of the 1st petitioner-company, the 2nd respondent upheld the order of the 3rd respondent with regard to allowing of set-off of item 1 to 8 and 10 but set aside set-off in respect of burnt lime, wires and alpholoc powder and demanded duty in respect of those three items from 1-7-1982. It is stated that where proforma credits are availed the officers scrutinise the credits. It is further stated that the impugned order was not passed either u/s 11A or u/s 35E of the Act. On merits it is submitted that the burnt lime is used in the soda recovery cycle to convert the sodium carbonate in the green liquor to sodium hydroxide. It is not a raw material used for the manufacture of the pulp. It is added that the petitioner had to file an appeal against the said impugned order and as the alternative remedy of appeal is available, the Writ Petition is not maintainable.

4. Mr. M.S.K. Sastry, the learned counsel for the petitioners, contends that the impugned order is wholly without jurisdiction; as in the counter itself the 2nd

respondent categorically stated that the order was not passed u/s 11A or 35E of the Act, there is no power in the 2nd respondent to set aside the order of the 3rd respondent dated 31-12-1982. He further contends that the lime is an input within the meaning of Notification No. 201/79 as amended by Notification No. 105/82. Therefore, the order of the 2nd respondent is unsustainable.

5. Mr. Innayya Reddy, the learned Standing Counsel for the Central Government, contends that the petitioner has an alternative remedy of appeal, which he did not avail, therefore the Writ Petition is liable to be dismissed. He submits that the impugned order is passed by the 2nd respondent under Para 4 of Appendix to Notification No. 201/79 dated 4-6-1979, therefore the order is not without jurisdiction. On merits also the learned Standing Counsel submits that lime cannot be taken as an input for purposes of extending the benefit of proforma credits within the meaning of the notifications.

6. We shall first take up the contention of the learned Standing Counsel that the petitioner has an effective alternative remedy. We may observe that the rule that before invoking extraordinary jurisdiction of the High Court alternative remedy should be exhausted, is a rule of convenience and discretion and not a rule of law. This rule has no application if the impugned act is without jurisdiction. Further in exercise of its jurisdiction under Article 226, the High Court will ordinarily reject a Writ Petition on the ground of alternative remedy at the earliest stage at the time of admission. But where it was admitted on merits and the matter is taken up after seven years, in our view, it will not be just and proper exercise of discretion to non-suit the petitioner on the ground of not availing the alternative remedy, particularly when the questions of fact are not in dispute.

7. Now we shall consider the contention of the learned counsel for the petitioners that the 2nd respondent has jurisdiction to pass the impugned order dated 5-9-1985.

8. From the above narration of the facts it is clear that the 3rd respondent exercised power u/s 11A of the Act after issuing the show cause notice dated 3-7-1982 and passed orders allowing the proforma credits in respect of 10 items out of 12 items, by Adjudication Order No. 3/82 dated 31-12-1982. No power of suo motu revision is available to the 2nd respondent against the said order. The 2nd respondent himself stated in the counter-affidavit that he did not exercise the power u/s 11A or 35E of the Act. However, the impugned order is sought to be sustained by the learned Standing Counsel under Para 4 of Appendix to Notification No. 201/1979, dated 4-6-1979. The said para reads as follows :

"4. If the credit of duty paid on inputs has been taken wrongly, the credit so taken may be disallowed by the proper Officer and the amount so disallowed shall be adjusted in the credit account or the account- current or if such adjustment is not possible for any reason, by a cash recovery from the manufacturer of the said

goods."

9. From a perusal of the para extracted above it is clear that it provides that if the credit of duty paid on inputs has been taken wrongly, the credit so taken may be disallowed by the proper officer and the amount so disallowed shall be adjusted in the credit account or the account-current or if such adjustment is not possible for any reason, by a cash recovery from the manufacturer of the said goods. A plain reading of the said para makes it abundantly clear that it does not confer any revisional power on the 2nd respondent. As no other provision is pointed out under which the 2nd respondent could have passed the impugned order to sustain the order, we are constrained to hold that the impugned order of the 2nd respondent is without jurisdiction. In the result, the impugned order of the 2nd respondent dated 29-5-1985 and the consequential order of the 3rd respondent dated 3-6-1985 are declared as illegal and void.

10. The Writ Petition is accordingly allowed with costs. Advocate's fee Rs. 500/-.