

Cether Vessels Ltd. Vs. Assistant Collector of Central Excise

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Court : Chennai

Decided On : Oct-29-1991

Reported in : 1993(41)ECC94; 1993LC93(Madras); 1992(60)ELT214(Mad)

Judge : K.S. Bhakthavatsalam, J.

Acts : Central Excise Rules, 1944 - Rules 9(2), 173 and 173B; [Central Excise Act, 1944](#) - Sections 11A, 11A(1), 35 and 37B; [Constitution of India](#) - Articles 14, 19 and 265

Appeal No. : W.P. Nos. 15015-15017 of 1991

Appellant : Cether Vessels Ltd.

Respondent : Assistant Collector of Central Excise

Advocate for Pet/Ap. : Shri C. Natarajan, Adv.

Judgement :

ORDER

1. The reason for filing W.P. No. 15015 of 1991 is that a show cause notice has been issued to the petitioner on 20-03-1991 to show why a duty of Rs. 1,65,25,983-97 should not be demanded from it by invoking the proviso to Section 11A(1) of the Central Excises and Salt Act, 1944 read with Rule 9(2) of the Central Excise Rules, 1944 apart from the penalty to be imposed under the Central Excise Rules, 1944. The petitioner is a manufacturer of boiler components and has

entered into contracts with purchasers of boilers at site. One type of such boilers is Cether Fluidix Boiler which uses fluid bed combustion system for converting water into steam. The petitioner has classified the same in 1985-'86 claiming exemption from the duty under Notification 120 of 1981 dated 16-05-1981 as amended by Notification 209 of 1982 dated 09-08-1982. Subsequently, it claimed exemption under another Notification 205 of 1988 dated 25-05-1988. On investigation, it was found out that the petitioner was not eligible to avail exemption under Notification 205 of 1988 inasmuch as it cleared only boiler components and that the boiler after erection is capable of being fired both by agricultural waste as also conventional fuel like coal. In these circumstances, the show cause notice has been issued. The petitioner has also filed a reply on 28-08-1991 and a notice of personal hearing on 30-10-1991 was given by letter dated 7-10-1991. At this stage, the petitioner has come up with the writ petition No. 15107 of 1991 challenging the validity of Section 37B of Central Excises and Salt Act, 1944 in so far as it empowers the Central Board of Excise and Customs with powers to legislate on classification of excisable goods as ultra vires of the provisions of the Central Excises and Salt Act, 1944 and ultra vires of Section 11A and Section 35 of the Act and Rule 173B of the Central Excise Rules, 1944 and are liable to be struck down as violative of Articles 14, 19(1)(g) and 265 of the Constitution.

2. W.P. No. 15016 of 1991 is filed to direct respondents 1 and 2 to implement the circulars of 1986 especially for the period from 14-04-1986 upto 25-09-1991 in the matter of clearance of Fluidised Bed Combustion Boilers and confer the benefits of notification issued in 1981 and 1988 in so far as the petitioner is concerned. The other writ petition, W.P. No. 15017 of 1991 is filed by the petitioner to quash the circular dated 8-6-1990 issued under Section 37B of the Central Excises and Salt Act, 1944.

3. I have heard Mr. C. Natarajan, learned counsel for the petitioner in extenso. After hearing Mr. Natarajan, learned counsel for the petitioner, it is better to deal with the petition which challenges Section 37B of the Central Excises and Salt Act, 1944. The sum and substance of the contention made by the learned counsel for the petitioner is that in so far as Section 37B confers power on the Board to interfere with the quasi judicial function of the authorities under the Act with regard

to the classification, the section is bad and has got to be struck down.

4. I am not able to agree with any of the contentions raised by Mr. Natarajan, learned counsel for the petitioner. The scope of Section 37B has been considered by Kanakaraj, J. in an unreported decision in W.P. No. 74 of 1991 dated 10-04-1991 [since reported in : 1991ECR476(Madras) . The learned Judge after considering the decision of the Supreme Court in Rajagopal Naidu v. The State Transport Appellate Tribunal, Madras and others : [1964]7SCR1 , and in Orient Paper Mills Ltd. v. Union of India : 1973ECR1(SC) and two judgments of the Gujarat High Court in Genest Engineers Pvt. Ltd. v. Union of India : 1991ECR401(Gujarat) and Air Control and Chemical Engineering Co. Ltd. and Another v. Union of India and Others : 1991(51)ELT265(Guj) has held that the circular under Section 37B cannot go beyond the limited scope of Section 37B and it shall not bind the quasi judicial authorities. The learned Judge has held that a circular under Section 37B cannot interfere with the power of quasi judicial authorities in so far as the quasi judicial authorities apply the statutory provisions.

5. Though the learned Judge has not dealt with the validity of Section 37B, I am of the view that Section 37B has to be held valid for the very same reason that no direction can be issued to any quasi judicial authority and the Board also cannot do so. It is well settled that a statute can be declared to be valid where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within the jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act. In the case reported in Delhi Transport Corpn. v. D.T.C. Mazdoor Congress : (1991)ILLJ395SC , Ramaswamy, J. speaking for the Court held :-

'The Courts though have no power to amend the law by process of interpretation but do have power to amend it so as to be in conformity with the intendment of the legislature. Doctrine of reading down is one of the principles of interpretation of statute in that process.'

The Supreme Court at page 201 further held

'Reading a provision down when permissible.

The question emerges whether the doctrine of reading down would be applied to avoid a void law vesting with arbitrary power with a naked hire and fire rule. It is difficult to give acceptance to extract contention raised by Sri Garg and Sri Rama Murthy that the Courts cannot in the process of interpretation of the Statute (and) would not make law but leave it to the legislature for necessary amendments. In an appropriate case, Judges would articulate the inarticulate major premises and would give life and force to a Statute by reading harmoniously all the provisions ironing out the creases. But the object is to elongate the purpose of the Act. In this regard I respectfully agree with my learned brother, my Lord the Chief Justice, on the principle of statutory construction. The question is whether Legislature intended to confer absolute power or would it be construed in such a way that would supplant the law but not supplement the law made by the Legislature.'

Division Bench of the Gujarat High Court has held in *Genest Engineers Pvt. Ltd. v. Union of India* : 1991ECR401(Gujarat) that Section 37B of the Central Excises and Salt Act has taken particular care to see that the authorities who will be acting as quasi judicial authorities, are protected from such type of directions or instructions. The Gujarat High Court has further held that Section 37B empowering Central Board to issue orders or directions to Central Excise Offices is not ultra vires. In view of the observations of the Supreme Court and the order of Kanakaraj, J. in W.P. No. 74 of 1991 : 1991ECR476(Madras) and the Division Bench judgment of the Gujarat High Court, I am of the view that the section cannot be said to be invalid or ultra vires of the Constitution, as it is well settled that any direction issued cannot interfere with the power of the quasi judicial authorities. It has been held so by the Supreme Court as early as in *Rajagopal Naidu v. The State Transport Appellate Tribunal, Madras and Others* : [1964]7SCR1 . As such, taking the view that the wording of Section 37B can be construed by applying the doctrine of reading down, it can be held valid. The result is that any direction issued which will hamper the power of quasi judicial authorities who have to exercise the powers under the Act, is not bound by the instructions and if at all any instructions are issued, they are only administrative in character and cannot be taken as binding on the quasi judicial authorities who have to decide the issue

before them independently without any outside interference.

6. With regard to the other contention that the petitioner has been enjoying the benefit of the Notification 120 of 1981 dated 16-05-1981 and Notification No. 205 of 1988 dated 25-05-1988 so far and the respondents are estopped from denying the benefits, I am of the view that the petitioner can raise the question of promissory estoppel which the petitioner is seeking to invoke before the authorities concerned. It is not necessary for this Court to issue a writ of mandamus to implement the circulars under which the petitioner claims benefit for the period from 14-04-1986 till 25-09-1991. It is for the petitioner to raise the question before the authorities concerned and argue the matter based on the principle of promissory estoppel. If the petitioner raises the question, I hope the authorities have to consider the arguments on merits and pass orders.

7. With regard to the circular dated 8-6-1990, I have already held that Section 37B has to be read down and in that view of the matter, the circular dated 8-6-1990 also cannot bind the authorities exercising quasi judicial functions especially the Revisional or Appellate Authority under the Central Excises and Salt Act, 1944.

8. Taking the view that Section 37B of the Central Excise and Salt Act, 1944 is valid and need not be struck down as violative of Articles 14 and 19 of the Constitution and that the petitioner can raise all the objections before the authorities including the question of promissory estoppel with regard to the period 14-04-1986 to 25-09-1991, these writ petitions stand dismissed.

9. Learned counsel for the petitioner wants some more time to raise all the objections before the authorities and the respondents are directed to grant the petitioner a further time of six weeks from today for filing detailed objections.