

(1980) 07 MAD CK 0014

In the Madras High Court

Case No : Writ Petition No. 4446 of 1977

A.P. Arumugasamy

APPELLANT

Vs

Deputy Collector of Central Excise, Madras

RESPONDENT

Date of Decision : 30-07-1980

Acts Referred:

Central Excise Rules, 1944 — Rule 173(H), 173F, 173G, 173Q, 52A
Central Excises and Salt Act, 1944 — Section 40, 40(1), 40(2)

Citation : (1984) 16 ELT 82

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Advocate : C.D. Sekkizhar, for the Appellant; U.N.R. Rao, for the Respondent

Judgement

1. The facts in this writ petition may be briefly set out as follows : The petitioner is the proprietor of Brilliant Match Works, Sivakasi, and is a

licensee under the Central Excises and Salt Act, hereinafter referred to as the Act, holding licence L. 4 No. 4/M/71. On 14-3-1973, he received a

show cause notice from the Assistant Collector of Central Excise, Sivakasi. The show cause notice stated that in contravention of Rules 173-F,

173-G(4) read with 52-A of the Central Excise Rules, 1944, the petitioner had cleared 13250 gross of 50''s matches without payment of duty and

without bringing them into the statutory accounts maintained for Central Excise purposes by them and without a gate pass. The petitioner was

therefore called upon to explain why a penalty should not be imposed on him under rule 173-Q of the Central Excise Rules and why duty on

13250 gross of 50''s matches should not be demanded under rule 173-Q. This show cause notice was obviously based on a surprise check of the

accounts of the petitioners made by the Officers of the Central Excise on 21st

July, 1972. It is stated as follows in the annexure that was sent to the petitioner along with the show cause notice -

During the course of the surprise check of accounts maintained by Messrs. Brilliant Match Works, Sivakasi, an illicit disposal of 13250 gross of

50's matches from the above factory to various dealers as detailed below has come to notice.

The petitioner thereupon sent an explanation. An enquiry was held. On 20-7-1974, the Deputy Collector of Central Excise, Madurai passed an

order levying a penalty of Rs. 750 on the petitioner. He also levied a duty at the rate of Rs. 4.30 per gross on 13250 gross of safety matches said

to have been cleared by the petitioners without payment of duty. The petitioner then preferred an appeal to the Appellate Collector of Central

Excise, Madras. The appeal was dismissed by the Appellate Collector by his order dated 2-3-1976. Thereafter the petitioner filed a revision

before the Government of India, and the Government of India by its order dated 29-10-1977, dismissed the revision. In these circumstances, the

petitioner has filed this writ petition for the issue of a writ of certiorari to quash the order of the respondent levying a penalty of Rs. 750 and a duty

on 13250 gross of safety matches at the rate of Rs. 4.30 per gross.

2. Mr. Sekkizhar, learned counsel for the petitioner, raised various contentions challenging the correctness of the impugned order, both on ground

of limitation as well as on merits. The first contention of the learned counsel was that the proceedings initiated against the petitioner were barred u/s

40(2) of the Act. Section 40 as it stood prior to its amendment in 1973, read as follows -

1. No suit shall lie against the Central Government or against any officer of the Government in respect of any order passed in good faith or any act

in good faith done or ordered to be done under this Act.

2. No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of

six months from the accrual of the cause of action or from the date of the act or order complained of.

3. Mr. U. N. R. Rao, learned Senior Central Government Standing Counsel did not dispute that at the relevant time when proceedings were

initiated against the petitioner it was the above section that was applicable and

not the section which was subsequently introduced by way of amendment. While the learned counsel for the petitioner contended that Section 40(2) as contrasted with Section 40(1) applied to all persons irrespective of the fact whether he was an officer of the Government or not, Mr. U. N. R. Rao, learned Senior Central Government Standing Counsel contended that Section 40(2) must also be confined to Central Government or Officers of the Central Government.

4. This question came up for consideration before the Supreme Court in Public Prosecutor, Madras Vs. R. Raju and Another, etc., Ray, J. (as he

then was), observed as follows -

Counsel on behalf of the appellant contended that the provisions of the section did not apply to prosecution for offences committed by individuals

in contravention of the Act and the Rules made thereunder. It was said that the section was intended for prescribing limitation in respect of

prosecution only against departmental officers or Government servants.

The section consists of two sub-sections. The first sub-section speaks of a bar of suits against the Central Government or against any officer of the

Government in respect of any order passed in good faith or any act in good faith done or ordered to be done under the Act. The second sub-

section speaks of limitation of suits, prosecution or other legal proceeding for anything done or ordered to be done under the Act after the

expiration of six months from the accrual of the cause of action or from the date of the act or order complained of. The two sub-sections operate in

different fields. The first sub-section contemplates bar of suits against the Central Government or against the officers by protecting them in respect

of orders passed in good faith or acts done in good faith. It is manifest that the second sub-section does not have any words of restriction or

limitation of class of persons unlike sub-section (1). Sub-section (2) does not have any words of qualification as to persons. Therefore, sub-section

(2) is applicable to any individual or person.

5. The learned Judge further observed as follows with regard to the question whether the words "anything done or ordered to be done" under the

Act in Section 40(2) could be extended to illegal omissions and infractions of the requirements of the statute :-

These decisions in the light of the definition of the word "act" in the General

Clauses Act, establish that non-compliance with the provisions of the statute of omitting to do what the Act enjoins will be anything done or ordered to be done under the Act. The complaint against the respondents was that they wanted to evade payment of duty. Evasion was by using and affixing cut and torn banderols. Books of accounts were not correctly maintained. There was shortage of banderole in stock. Unbanded matches were found. There are all infraction of the provisions in respect of things done or ordered to be done under the Act.

6. In *Amalgamated Electricity Co. (Belgaum) Ltd. Vs. Municipal Committee, Ajmer*, the meaning of "omission" of a statutory duty was explained by this court. Hegde J. speaking for the Court said : "The omission in question must have a positive content in it. In other words, the non-discharge of that duty must amount to an illegality. The positive aspect of omission in the present case is evasion of payment of duty. The provisions of the Act require proper affixing of banderols. Cut or torn banderols were used. Unbanded match boxes were found. These provisions about use of banderols are for collection and payment of excise duty. The respondents did not pay the lawful dues which are acts to be done or ordered to be done under the Act.

7. It may be stated in fairness to Mr. U. N. R. Rao, learned Senior Central Government Standing Counsel that the cases before the Supreme Court related to criminal offences for failure to pay the duty as enjoined by the Act.

8. The next case that has to be cited in this context is that decided by Ramaprasada Rao J., as he then was, reported in *Loganatha v. Secretary to the Govt. of India*, 1974 L.W. 32, the petitioner before the learned Judge was a wholesale trader carrying on trade in manufacturing non-duty paid tobacco under Central Excise Licence No. 31/64. On 28-5-1965 the Central Excise officials inspected the petitioner's warehouse and found that 1730 Kgs of tobacco in the warehouse. Consequently a show cause notice was issued on 21-12-1967 calling upon the petitioner to show cause why 1730 Kgs of tobacco said to have been substituted be not confiscated and a penalty under the appropriate rules and duty levied on 7408 Kgs of tobacco which were found to be missing. The petitioner's explanation was called for. It was accepted as regards the charge of

substitution and was rejected as regards the alleged shortage. Consequently an adjudication order was passed calling upon the petitioners to pay a

duty of Rs. 11000 besides other ancillary penalties levied on him. The petitioner's appeal and a further revision to the higher authorities proved

unsuccessful, except to a certain insignificant extent. Consequently he filed a writ petition before this court for the issue of a writ of certiorari for

question the order of the Collector passed on 22-12-1968. The question of bar of limitation u/s 40(2) of the Act was raised before the learned

Judge and the learned Judge accepted the plea. In so doing the learned Judge observed as follow -

The text of this provision is clear that no statutory functionary under the Act can take any proceeding or institute a suit or prosecute for an alleged

offence any person who failed to do anything which he was ordained under the Act to do if the Act complained of is beyond the period of six

months from the date when action is initiated. The limit of time is positive and inescapable. After the expiry of this period of time, even though there

is an apparent cause of action as is seen from the record or from the materials available, such a cause of action cannot be furthered by any overt

action such as a suit, prosecution or other legal proceeding under the Act. The words "anything done or ordered to be done" under this Act is all

embracing and would include any statutory duty which a person has to perform under the Act. One such statutory duty which a licensee under the

Act has to do is to pay the excise duty over the stock removed from the warehouse. If he unauthorisedly removes the same without subjecting such

goods to excise duty and without accounting for such duty in any manner and in the result evades such duty, then the cause of action to bring to

book such actions of the delinquent licensee would arise on the date of that act or on the date when a complaint is made about such an act. In such

cases of evasion of duty it would be rather difficult to find out the date of the act. But when the warehouse is inspected and if the removal is

detected then at that point of time the department secures knowledge of the act because they begin to complain of that act and as soon as they

secure such knowledge and they are in a position to complain of such an act done by the licensee, then the limit of time begins to run and the

cause of action has accrued on that date and automatically it would expire with a period of six months from such accrual of cause of action.....

Therefore, the department has not jurisdiction to resurrect a dead cause and issue a show cause notice on 21-12-1967 and deal with the subject-

matter as if it was a live cause of action on which adjudication proceedings could be undertaken.

The decision of Ramaprasada Rao J., as he then was, affords a clear answer to the contention of Mr. U. N. R. Rao, that the date of checking and

detection by the Central Excise officers could not be taken as the starting point of the proceeding and that unless and until the officials of the

department are able to collect the entire facts on the basis of which they could say that the petitioner had evaded duty on 13250 gross of match

boxes it could not be said that the limitation provided u/s 40(2) has started. The following principles emerge from the decision of the Supreme

Court in Public Prosecutor, Madras Vs. R. Raju and Another, etc., and the decision of Ramaprasada Rao J. in Loganatha v. Secretary to the

Government of India - 1974 L.W. Cri. 32 -

1. Section 40(1) of the Central Excises and Salt Act prior to its amendment in May 1973, is not limited to Central Government or officers of the

Government but applies to all individuals or persons.

2. The words "anything done or ordered to be done, found in Section 40(2) refer to illegal omissions and infractions of the requirements of the

statute.

3. Any suit, prosecution, or other legal proceeding for any illegal omission or infraction under the Act has also to be initiated within six months of

the accrual of the cause of action or from the date of the act or order complained of. Legal proceeding also embraces proceedings taken by the

authorities under the Act.

9. In this case I have already referred to the fact that in the annexure sent to the petitioners along with the show cause notice it has been stated that

during the course of surprise check of accounts maintained by Messrs Brilliant Match Works illicit disposal of 13250 gross in the above factory to

varying dealers as detailed therein has come to the notice of the officers. Therefore, the Assistant Collector was clear that even on the date of the

surprise check of accounts of the petitioner it came to light that the petitioner had cleared 13250 gross of 50's matches without payment of duty.

This is also made clear in paragraph 2 of the counter-affidavit. Admittedly the

date of check was on 21-7-1972. The show cause notice was issued on 14-3-1973, after the expiration of six months prescribed u/s 40(2) of the Act. I have therefore no hesitation to hold that the proceedings initiated against the petitioner were barred u/s 40(2) of the Act. The impugned order is therefore quashed and the writ petition is allowed. There will be no order as to costs.