

(1983) 10 BOM CK 0033

In the Bombay High Court

Case No : First Appeal No's. 11 and 61 of 1978

Ballapur Industries Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 11-10-1983

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 35(2), 36(1), 38, 40
Foreign Compensation Act, 1950 — Section 4(4)
Limitation Act, 1908 — Article 113, 13
Limitation Act, 1963 — Article 100, 58

Citation : (1985) 4 ECC 270 : (1987) 27 ELT 414

Hon'ble Judges : Pauanikar, J;M.S. Jamdar, J

Bench : Division Bench

Judgement

Jamdar, J.—These two appeals arise out of the decree dated 30th November, 1977 passed by the Civil Judge (Senior Division). Chandrapur, in Special Civil Suit No. 3 of 1975. First Appeal No. 11 of 1978 is filed by the original plaintiff, the Ballapur Industries Limited, formerly known as "The Ballapur Paper and Straw Board Mills Ltd." (hereinafter referred to as the "plaintiff Company") and First Appeal No. 61 of 1978 is filed by the original defendant, the Union of India, in the Ministry of Finance, Department of Revenue and Insurance.

2. The plaintiff Company is engaged in the manufacture of various kinds of paper including various kind of board paper. The Company commenced production of paper for the first time in 1953 with one paper making machine called Machine No. 1. One more machine called Machine No. 2 was installed in the year 1963 and the total production of these machines was 18,000 tons of paper per annum. Two more machines styled as Machine Nos. 3 and 4 were installed on 23rd March 1964 and 29th August, 1965 respectively. In the year 1965, the plaintiff Company installed a machine called "laminating machine" for manufacturing various types of Board paper, called Duplex Board, Triplex Board, Ace Cote Art Boards etc. which are processed from manufactured paper, This laminating machine which was commissioned on 12th June, 1965, was called "Machine No.

5" till a 5th machine for production of paper was installed with effect from 11th February, 1972. Thereafter, the machine manufacturing board paper came to be called "Laminating Machine."

3. Section 3 of the Central Excise and Salt Act, 1944, (hereinafter referred to as the "Act") authorizes the Central Government to levy and collect excise duty on all the excisable goods other than salt, which are produced by the manufacturers in India at the rates fixed in the First Schedule. The excise duty includes the basic duty and the special excise duty imposed by the Annual Finance Acts. Paper is Tariff Item No. 17 of the first schedule. Rule 8 of the Central Excise Rules, 1944, which are framed by the Central Government in exercise of the powers u/s 37, lays down that the Central Government may, from time to time, by notification in the Gazette, exempt any excisable goods from the whole or any part of the excise duty under such conditions as may be specified in the notification, which has been given statutory force by Section 38 of the Act.

4. The first notification, which was issued on 1st March, 1964 exempted paper of all sorts falling under Item 17 produced in any factory which commenced manufacture for the first time on or after 1st March 1964 or produced in a factory existing immediately before 1st March, 1964 whose production capacity had been enlarged and brought into operation on or after 1st March, 1964 to the extent such production is attributable to the enlarged capacity. In a table attached to this notification, the extent of the exemption from payment of excise duty was specified in terms of percentage of the duty leviable. The exemption was to be operative for a period of 3 years under a slab system with 25% exemption for the first 12 months of the commencement of production, 20% exemption for the next 12 months of the commencement of production and 15% exemption for the next 12 months of the commencement of production. This notification was superseded by Notification No. 163/65 issued on 1st October, 1965, which provided a different method of computation of the reduced duty. While the exemption by the first notification was in terms of a percentage of the duty, the exemption given by the second notification was in terms of a certain number of paise per kg. The exemptions granted by this notification were set out in column No. 5 under three sub-clauses (a), (b) and (c), which dealt respectively with the three periods of 1st, 2nd and 3rd year of the commencement of the increased production. This notification was further amended with effect from 11th November, 1967 by which the limitation of the 3rd period of 12 months under column 3 was removed and the third slab was made operative during the period subsequent to the first 24 months of the commencement of production. The scheme of exemption, however, was revoked w.e.f. 1-4-1973.

5. Relying on these Notifications the plaintiff Company claimed concession in respect of the production of the laminating machine which, as mentioned above, was then called Machine No. 5 and submitted to the Assistant Collector Central Excise Nagpur, on 13/14 November, 1969 refund claim for Rs. 38,818.59 Ps. The

Assistant Collector, Central Excise, I.D.O. Nagpur rejected the claim on the ground that the paper used for laminating purposes had inter alia come from Machine Nos. 1 and 2 the production from which was not entitled to the concession under the relevant notification and since the plaintiff Company had not maintained any log-book in respect of the laminating machine showing the quantity of paper utilised out of the machine other than Machine Nos. 1 and 2, the plaintiff Company was not entitled to the said concession.

6. Being aggrieved by this order, the plaintiff Company preferred an appeal to the Collector, Central Excise, Nagpur. The Collector upheld the order of the Assistant Collector holding that as the plaintiff Company had not maintained log-book for laminating machine showing the exact quantity of paper produced on Machine No. 4 and laminated on Machine No. 5, the concession under the relevant notification cannot be granted. The revision petition filed by the plaintiff Company to the Joint Secretary, Ministry of Finance against the order in appeal was also rejected on the ground that the plaintiff Company was not able to substantiate its plea that it was possible to ascertain the production attributable to machine Nos. 3, 4 and 5 and used for laminating purposes. As a result of these orders and consequent to the procedure prescribed for payment of excise duty, the plaintiff Company was required to pay excise duty to the tune of Rupees 1,28,271.51 on the production of the laminating machine during the period from 12-6-1965 to 28-3-1973. Out of this Rupees 1,18,931.08 constitute excise duty attributable to the paper produced on machine Nos. 3 and 4 and utilised for manufacturing laminated boards on the laminating machine. The plaintiff Company, therefore, filed a suit on 24-1-1975 for a declaration that the entire production of the laminating machine was entitled to the concession in excise duty on account of increased production and for recovering Rs. 1,28,271.51 or in the alternative Rs. 1,18,931.08 from the Union of India.

7. The defendant Union of India inter alia contended that the claim of the plaintiff Company was rejected only on the ground that the company was not able to substantiate its plea that the paper used for laminating purposes was exclusively produced on machine Nos. 3 and 4, the production of which was entitled to concession in view of the decision in Special Civil Application No. 498 of 1972. The defendant further contended that the Central Excises and Salt Act, 1944, is a complete Code in itself providing a special forum for adjudication of the rights and liabilities arising out of the said Act and hence, the suit is not tenable in view of the provisions of Section 40 of the Act. The defendant also contended that the suit for declaration is barred by limitation under Article 58 of the Limitation Act and it was filed more than 3 years after the right to sue first accrued on 16th February 1970 when the representation of the plaintiff Company dated 13/14th November, 1969 was rejected by the Assistant Collector, Central Excise, Nagpur.

8. The learned Trial Judge held that the plaintiff Company did maintain an account of the paper taken from respective machines for the purpose of lamination. He also held that the entire production on laminating machine was

entitled to concession in excise duty but the claim beyond 3 years prior to filing of the suit was barred by time. He rejected the contention that the suit was barred by limitation either by virtue of Section 40(2) of the Act or under Article 58 or Article 113 of the Indian Limitation Act. He also rejected the contention that after having exhausted the special remedies provided by the Act, which is a complete Code in itself, it was not open to the plaintiff Company to file a suit to reagitate the question before the Court and the jurisdiction of the Civil Court stood ousted in view of the provisions of Section 40 of the Act. On the basis of these findings, the learned Trial Judge decreed the claim to the extent of Rs. 21,560.83 only rejecting the rest as being barred by limitation though granting a declaration that the entire production on laminating machine was entitled to concession. Being aggrieved by the rejection of the most of its claim, the plaintiff Company has preferred First Appeal No. 11 of 1978 while the Union of India has preferred First Appeal No. 61 of 1978 to challenge the decree to the extent of the relief given to the plaintiff company.

9. Obviously, the learned Trial Judge erred in granting a declaration that the entire production of laminating machine was entitled to the concession. The laminating boards are manufactured by the plaintiff Company by processing manufactured paper. The entire paper which is used as raw material for manufacture of laminated boards was not exempted from excise duty. What was exempted under the relevant notification, referred to above, was paper of all sorts produced in any factory which commenced manufacture of the first time on or after 1st March, 1964 or produced in a factory existing immediately before 1st March, 1964 whose production capacity had been enlarged and brought into operation on or after 1st March, 1965 to the extent such production is attributable to the enlarged capacity. Obviously, therefore, the concession was not available to paper, manufactured on machines Nos. 1 and 2 which were admittedly installed before 1st March, 1964, and used as raw material for manufacturing laminated boards on the laminating machine. The learned Trial Judge has rightly come to the same conclusion but while granting the declaration, wrongly assumed that the plaintiff Company has not included in the suit claim the concession on paper produced on Machine Nos. 1 and 2. It is pertinent to note that as a consequence of the declaration that the entire production on laminating machine is entitled to concession in excise duty on account of the increased production, the plaintiff Company has claimed a sum of Rs. 1,28,271.51 as amount of concession due to it. This amount includes Rupees 9,34.43 which is the excise duty paid on paper used out of production of machine Nos. 1 and 2. Hence, if the declaration, as claimed, is granted the consequential relief will have to be granted in toto. As a matter of fact, the learned Trial Judge himself observed that the plaintiff Company is entitled to claim the benefit of the concession given by the defendant under the notifications Exhs. and 40 in respect of the paper used from Machine Nos. 3 & 4. He, therefore, committed an obvious error in declaring that the entire production on laminating machine was entitled to concession in excise duty. The proper declaration, therefore, should

have been that the plaintiff Company is entitled to concession in excise duty in respect of the paper from machines Nos. 3 & 4 used for lamination and that this concession amounted to Rs. 1,18,931.08. The defendant has admitted this position in unmistakable terms in Para 6 of the written statement. The relevant averments are as follows :

"Thus from the above facts, it may kindly be seen that the claim of the plaintiffs was rejected only on the ground namely that they had not been able to substantiate their plea that the papers used for laminated purposes was exclusively produced on machine Nos. 3 and 4, the production of which is certainly entitled to concession in view of the judgment and order of the High Court referred to above."

10. The order to which reference is made in the written statement was passed in Special Civil Application No. 498 of 1970, which the plaintiff Company was obliged to file because the officers of the department of Revenue and Insurance interpreted the above referred notifications to mean that the concession was available only to the first enlargement of capacity and first increase in production effected by any factory after 1st March, 1964 and was not available for subsequent enlargements of capacity and increase in production and on the basis of this wrong interpretation granted concession to the plaintiff Company only to the production on machine No. 3 and denied the same in respect of production on Machines Nos. 4 and 5. The writ petition was allowed and the interpretation put by the officers of the defendant was held to be wrong.

11. The defendant has pleaded bar of Section 35(2) and Section 40(1) of the Act. As mentioned above, the Assistant Collector, Central Excise, I.D.O., Nagpur rejected the refund claim made by the plaintiff Company. The Assistant Collector passed this order on 16th February, 1970. Being aggrieved by this order, the plaintiff Company preferred an appeal to the Collector, Central Excise, u/s 35(1). This appeal was rejected by the Collector on 17-11-1970 and the revision preferred by the plaintiff Company u/s 36(1) of the Act to the Central Government was rejected by the Joint Secretary, Ministry of Finance on 21-2-1974. Sub-section (2) of Section 35, which is invoked by the defendant lays down that "every order passed in appeal under this section shall, subject to the power of revision conferred by Section 36, be final." It is urged on behalf of the defendant that this provision bars a suit for claiming the relief, which was the subject matter of the appeal. It is contended that once the appeal is rejected, there is no remedy except to file a revision application to the Central Government u/s 36(1).

12. The question of exclusion of jurisdiction of the Civil fell for the consideration of their Lordships of the Privy Council in AIR 1940 105 (Privy Council) in which provision of Section 188 and Section 191 of the Sea Customs Act, 1878 (which are respectively analogous to Sections 35 and 36 of the Act) were interpreted. Their Lordships laid down as follows :

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of the judicial procedure."

The observations of Lord Thankerton, who delivered the opinion of the Board, were explained by their Lordships of the Supreme Court in *Subbayya Chetty and Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, in which the plaintiff firm instead of following the elaborate procedure made in the Madras General Sales Tax Act, which provided a complete Code for redress of grievances of the parties aggrieved by the assessment, straightway filed a suit to challenge the assessment. Their Lordships observed as follows in Para 12 of the judgment.

"It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taxing statute, its validity can be "challenged by suit on the ground that it is correct on the merits and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question."

In the aforesaid case, while holding that the civil suit was barred in view of Section 18-A of the Madras General Sales Tax Act which provides that "no suit or other proceedings shall, except as expressly provided in this Act, be instituted in any Court to set aside or modify any assessment made under this Act," Gajendragadkar J. (as he then was) speaking for the court made the following observations in para 6 of the judgment about the legal position in respect of exclusion of the jurisdiction of the Civil Court :

"In dealing with the question whether Civil Courts" jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind "the fact that there is a general presumption that there must be a remedy in the ordinary civil court to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of Civil Courts to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may

not by itself necessarily exclude the jurisdiction of the civil courts to deal with a case brought before it in respect of some of the matters covered by the said statute."

13. In the *The Provincial Government of Madras Vs. J.S. Basappa*, the Supreme Court, while interpreting Sections 11 and 12 of the Madras General Sales Tax Act (which are analogous to Sections 35 and 36 of the Act), considered the question whether the Madras General Sales Tax Act period to the amendment, wherein a specific provision was made in Section 18-A, excluded the jurisdiction of the Civil Court. While dealing with this question, their Lordships quoted with approval the above-mentioned observations of Gajendragadkar J; and held that but for the provision like Section 18-A the Civil Court's jurisdiction would not be barred if the impugned action is wholly outside the law. They also held that the finality contemplated by provisions contained in Sections 11 and 12 did not make valid any action which was not warranted by the act.

14. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, the Supreme Court summarised the law on this point and laid down the following principles :

"(1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. Such provision, however, does not exclude, those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunal so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under the Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunal.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In earlier case the scheme of the particular Act must be examined because it is relevant enquiry.

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

15. The question as to when an authority can be said to have acted in non-compliance with the provisions of the statute under which it derives its authority was considered by the Supreme Court in *Shree Raja Kandregula Srinivasa Jagannatha Rao Pantulu Bahadur Garu Vs. State of Andhra Pradesh*, The suit filed by the appellants disputed the legality of the notification reducing the rates of land in respect of the dry delta ryoti lands in a village on the ground that the class of land had been determined to be "delta ryoti lands" on a basis only of the settlement register which did not contain an entry with respect to the village in question, that the settlement register could not be treated as conclusive and that proper factual enquiry was necessary. The High Court held that the suit was not maintainable by reason of Section 8 of the Madras Estates Land (Reduction of Rent) Act, 1947, which provided that no order passed u/s 3(2) could be challenged in a Civil Court in an appeal. The Supreme Court held that as the Special Officer had based his determination on a report of this Assistant, who had considered the entry in the Settlement Register of another village, the determination was based on no evidence with the result that it was in violation of the fundamental principles of judicial procedure.

16. In *Union of India v. Tarachand Gupta & Bros.* 1983 ELT 1456 : AIR 1971 SC 1958, the Supreme Court held that the words "Decision or Order passed by an officer of Customs under this Act" used in Section 188 of the Sea Customs Act (which is analogous to Section 35(1) of the Act must mean a real and not a purported determination. Their Lordships also emphasised that the determination which takes into consideration, factors which the officer has no right to take into account, is no determination. While laying down this proposition, their Lordships observed that, that was also the view taken by the Courts in England and referred to the decision of Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission* reported in (1969) 1 All. ER 208.

17. In the case of *Anisminic Ltd.* where all the argument was that by reason of provision of Section 4(4) of the Foreign Compensation Act, 1950, which provided that "the determination by the commission of any application made to them under this Act shall not be called in question in any Court of law", the Court were precluded from considering whether the commissioner's determination was a nullity and, therefore, it must be treated as valid whether or not enquiry would

disclose that it was so. While considering this question, Lord Reid, who spoke for the majority, observed that it is a well established principle that a provision ousting ordinary jurisdiction of the Court must be construed strictly - meaning that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserved the ordinary jurisdiction of the Court. The learned Judge then went on to explain how the word "jurisdiction" is to be understood when a contention is raised that the decision of the Tribunal is a nullity as it had acted without jurisdiction. The relevant observations, which appear on pages 213 and 214 of the report and which were quoted by the Supreme Court in Tarachand Gupta's case 1971 Tax LR 706 (citation supra) are as follows :

"It has sometimes, been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such a case, the word "jurisdiction" has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as such entitled to decide that question wrongly as it is to decide it rightly."

18. It is contended on behalf of the plaintiff Company, and in our view quite rightly, that all the excise authorities, whose orders are challenged in the suit, refused to take into consideration the most material evidence on the question involved, thus acting in breach of the fundamental principles of judicial procedure and hence the determination made by them was no determination at all. As mentioned above, it is an admitted position that the excise authorities rejected the claim of the plaintiff Company for refund of the excess excise duty solely on the ground that the plaintiff Company was not able to substantiate its plea that the paper used for laminated purposes was exclusively produced on machines Nos. 3 and 4. All the excise authorities, the Assistant Collector of the Central Excise I.T.D., the Collector of Central Excise, M.P. and Vidarbha, Nagpur and the Joint Secretary, Ministry of Finance, Department of Revenue and Insurance, proceeded on the wrong assumption that the petitioner did not maintain a separate account of the quantity of paper attributable exclusively to machines

Nos. 3 and 4. As ably demonstrated by the learned Trial Judge, not only such record was maintained by the plaintiff Company but also it was made available to all the above-mentioned authorities, who chose to ignore this most material documentary evidence, which completely established the claim of the plaintiff Company.

19. The relevant log-books were produced in the suit along with the list Exh. 16. The files (Art. Nos. 5 to 8) were produced and they are marked as Exhs. 71 to 74 and the relevant entries in the log-books.

(Arts. Nos. 9 to 15) which are also produced along with the same list are collectively exhibited as Exh. 75. The entries in the files were duly checked by the excise department on 2nd February, 1971. The list of record maintained by the plaintiff Company was exhibited on admission. This list, which is at Exh. 69, makes mention of the log-books separately maintained for the laminating machine. The letters Exhs. 53 and 55 respectively dated 31st December, 1971 and 19/20th January, 1971, which were produced along with the list Exh. 16 and were exhibited on admission vide Pursis Exh. 38 were addressed by the General Manager of the plaintiff Company to the Collector of Central Excise. By the first letter, the plaintiff Company offered to produce various papers and statements in support of the fact that almost the entire production on the laminating machine was out of the production on machines Nos. 3 and 4. In the letter dated 20th January, 1971, it is clearly mentioned that the plaintiff Company did produce the relevant records before the Collector of Central Excise. It will also be seen from grounds Nos. 1, 3 and 4 of the memo of revision filed by the plaintiff Company to the Central Government that the plaintiff Company disputed the position that the exact quantity of paper produced on machines Nos. 3 and 4 and used for laminations purposes could not be ascertained and emphatically asserted that from the records maintained by the plaintiff Company, the said position could be easily ascertained. In paras 3 and 4, the General Manager went on to assert as follows :

"3. The Collector, before disposing of our appeal, had deputed his officers to ascertain whether this could be verified from the records maintained by us. That the officers who come to verify this, were shown sufficient evidence in support of our claim. The records maintained by us since inception were produced before them.

4. The Collector does not appear to have been correctly informed in regard to the records maintained by us for our laminating machine. Even since the commencement of the production of our laminating machine, all the requisite records necessary to indicate production of the machine, consumption of paper etc., have been maintained by us which were duly produced before the Excise authorities. Further, we can furnish sufficient evidence to support the fact that almost all the production of our laminating machine was out of the paper produced on machines No. III and IV."

20. Brijendranath Shambhu, witness No. 2 for the plaintiff Company, who was working as Manager (Sales) in the Ballarpur Paper Mills and in that capacity was in charge of central excise assessment, appeal and other proceedings, has specifically asserted in his evidence that he had produced the files Arts. Nos. 5 to 8 (Exhs. 74 to 78) and log-books Arts. Nos. 9 to 15 before the Asst. Collector, Central Excise and also before the Collector, Central Excise. He further asserted that when he found on reading the appellate order of the Collector that he made a misstatement of facts regarding the production of documents, he along with Mr. Lal met the Collector and brought to his notice the said mistake whereupon the Collector advised them to submit a revision petition to the Government through him, and also deputed his officer to check the documents. The letters Exhs. 53 and 54 completely support this evidence. Badriprasad Kalindinath Shrivastava, who at the material time was in charge of paper finishing plant including the laminating machine, asserted in his evidence that the log-books Arts. Nos. 9 to 15 which pertain to the pest in machine (laminating machine), were maintained by him the ordinary course of business and the entries therein are correct. He also asserted that the Superintendent and Inspectors of Central Excise stationed in the paper mills upto August 1969 till the self-removal procedure was adopted, used to visit the paper mills even after their office was shifted to Chanda to watch the production and that they supervised and checked the account books in that respect from time to time to prevent the leakage of revenue. He further asserted that the said officers used to visit the paper mills from time to time to check the base papers accounts and production log-books.

He also proved the endorsements on page 67 of Exh. 71 and page 65 of Exh. 72 made by the Superintendent, Shri Zusthi, in 1971 in token of his having seen the entries upto pages 61 and 65 respectively. Shrivastava has further asserted that in February 1971, some officers from the Nagpur Collectorate had visited his section and that the said officers had checked the log-books and base papers and made endorsement "verified" on several pages in Exh. 71 on 2-2-1971. The evidence of Shri Dhar and Shrivastava is corroborated by Vinod Sharma, the third witness for the plaintiff Company, who is in charge of sales department of the plaintiff Company since 1967. No evidence in rebuttal was led by the defendant in this case. It is, therefore abundantly clear that the complete record maintained by the plaintiff Company showing the quantity of paper manufactured on different machines used for laminated purposes was totally ignored by all the three authorities, whose orders are challenged. The determination made by these officers, therefore, was no determination at all. The orders, therefore, are nullities being without jurisdiction in the wider sense of the term and hence, the jurisdiction of the Civil Court to entertain and try the suit filed by the plaintiff Company was not ousted.

21. The next limb of the argument on the question of exclusion of the jurisdiction of the Civil Court is based on Section 40 of the Act. Section 40, which was substituted for the old section by Amendment Act No. 22 of 1973, which came into force on 19-5-1973 reads as follows :-

"Protection of action taken under the Act :- (1) No suit, prosecution or other legal proceedings shall lie against the Central Government or an officer of the Central Government or a State Government for anything which is done, or intended to be done, in good faith, in pursuance of this Act or any rule made thereunder.

(2) No proceedings, other than a suit, shall be commenced against the Central Government or any officer of the Central Government or a State Government for anything done or purported to have been done in pursuance of this Act or any rule made thereunder, without giving the Central Government or such officer a months previous notice in writing of the intended proceeding and of the cause thereof or after the expiration of three months from the accrual of such cause."

Before the aforesaid amendment, the caption of Section 40 was "Bar of suits and limitation of suits and other legal proceedings". By the amendment, it was changed to "Protection of action taken under the Act." So far as sub-section (1) is concerned, the only change effected by the amendment was that the protection given by the said provision was extended to officers of the State Government also. Hence, the decisions about class of suits which attracted the bar of Section 40(1) are equally applicable to the interpretation of new S. 40(1) also.

22. A plain reading of Section 40(1) will show that it applies only to suits for damages and compensation in respect of the acts said to be done under the Act. The section merely enacts immunity or protection against the claims of damages against the Government itself or any of its officers for acts done in good faith under the Act. The question of collection of illegal duty and/or its recovery or refund are not questions covered by the said provision. *Bommidala Poornaish Vs. The Union of India*, *Union of India (UOI) Vs. Balabhadra Ramaiah and Others*, *Rohtas Industries Ltd. Vs. Union of India (UOI)*, *Moolijibhai v. Union of India* 1962-3 Guj LR 762 and *Union of India v. Mansingka Industries Pvt. Ltd.* 1979 ELT (J) 158 : 1976 Tax LR 1791, the last one being that of a Division Bench of this Court are some of the authorities on this point. There is, therefore no substance in the contention that the suit is barred by sub-section (1) of Section 40 of the Act.

23. This brings us to the question of limitation. It is urged on behalf of the defendant that the suit is barred by limitation by virtue of Section 40(2) of the Act and also by virtue of Art. 100 of the Limitation Act, 1963. It is, however, pertinent to note that sub-sec. (2) as amended does not govern a suit. It is applicable only to a legal proceedings "other than a suit". Clearly therefore, the period of limitation mentioned in sub-section (2) of Section 40 is not applicable to a suit which would be governed by the ordinary law of limitation.

24. Shri Natu, the learned counsel for the defendant, urged that the suit will be governed by Art. 100 of the Limitation Act, 1963, and as the suit is not filed within one year from the date of the order of the Assistant Collector, it is barred

by limitation. Article 100 of the Limitations Act consists of two parts. The first relating to a suit for setting aside a judicial order and the second relating to a suit to set aside any act or order of officer of Government in official capacity. The first part is analogous to Article 13 of the Limitation Act, 1908, while the second part is analogous to Article 14 of the said enactment.

25. In support of the proposition that the limitation would start from the date of the order of the Assistant collector and not from the date of the order passed by the Joint Secretary in the revision application, reliance is sought to be placed on two decisions of this court in *Ganesh Shesho v. Secretary of State* AIR 1920 Bom 105 (1) and *Bruusgaard Kiosteruds Dampskibs Aktieselskab Vs. The Secretary of State for India in Council*, . In the first case, the suit was filed by the plaintiff for a declaration that the proceedings of the revenue authority in respect of the forfeiture of his land and in respect of its subsequent disposal were illegal and ultra vires and not binding on him. The order of forfeiture was made by the Collector of 6th May, 1971 and the plaintiff had not put his plaint on the file within one year of that date. It was held that the suit was barred by limitation. However, in that case, the plaintiff had not availed of the various appeals allowed to the revenue authorities and had straightway filed the suit to challenge the forfeiture.

In the second case, the suit was filed against the order issued by the Government of India confirming the order passed by the Collector of Customs in an appeal challenging the order of the Assistant Collector. The Assistant Collector's order was not specifically challenged and it is in this context, the learned judge observed that the order of the Central Government only confirmed the order of the Collector and the order of the Collector confirmed the order of the Asst. Collector, which was the order imposing the penalty and hence, it is the Assistant Collector's order ordering the payment which the plaintiff was required to set aside. The question whether the limitation contemplated by Article 14 commenced from the date of the order of the Assistant Collector or from the date of the order of the commissioner confirming the order of the Collector was not specifically decided because even excluding the period of the notice required to be given u/s 80 Civil P.C. the suit was beyond one year from the date of the order of the Commissioner.

26. Moreover, Article 14 of the Limitation Act, 1908 did not apply to a case where the order of the officer was null and void. As observed by Chagla C.J., in *Lady Dinbai Dinshaw Petit and Others Vs. The Dominion of India and Another*, "Article 14 applies only to those orders or acts which were valid until they were set aside and not to an order which was bad from its inception."

27. In *Tarachand Gupta and Bros. Vs. Union of India (UOI)*, , the Division Bench of this Court consisting of Kotwal C.J., as he then was, and Modi J., after holding that as in arriving at their decision, extraneous considerations had prevailed with the customs authorities, they exceeded their jurisdiction and hence, the Civil Court had jurisdiction to interfere with their decision, considered the question of

limitation. On this point, the learned Judges observed that once it is held that the action of the authorities was in excess of their jurisdiction, the question of limitation practically resolves itself. They further observed that even if Article 14 of the Limitation Act was applicable to the suit, the suit was not barred by time because excluding the period of statutory notice u/s 80, it was filed within one year from the date of the final order, passed by the Board of Revenue rejecting the plaintiff's appeal. They, however, proceeded to hold that the case was governed by Article 62 of the Limitation Act, 1908. The Supreme Court confirmed this decision in an appeal preferred by the Union of India. In the penultimate paragraph of the judgment, which is reported in Union of India (UOI) Vs. Tarachand Gupta and Bros, The Lordships have observed as follows (Para 25) :

"In this view the order was in non-compliance of the provisions of the statute and, therefore, was covered by the exceptions laid down in AIR 1940 105 (Privy Council) It was not an order in respect of which the Collector was invested with jurisdiction. That being so, the provision excluding the jurisdiction of Civil Courts was not applicable. Indeed, the order was nullity and Article 14 of the Limitation Act of 1908 could not be applied to hold the suit time barred. Even if Article 14 applied, it would not be time barred, if, as the High Court pointed out, the date of the appellate order was taken into consideration."

Hence, even if Article 100 is held to be applicable to the present suit, it is within time. The order passed by the Joint Secretary rejecting the revision application preferred by the plaintiff Company to the Government is dated 21-2-1974 and the suit was filed on 27-1-1975.

28. However, in view of our finding that all orders were nullities, the suit would be governed by Article 113 of the Limitation Act, the starting point of the limitation being the final order passed by the Joint Secretary rejecting the revision application of the plaintiff Company because the defendant having wrongly recovered the excess excise duty refused to refund the amount by orders which were nullities. The learned Trial Judge, therefore, was wrong in restricting the claim for refund to 3 years before filing of the suit. The entire alternative claim of the plaintiff Company pertaining to the excise paid on quantity of paper manufactured on machines Nos. 3 and 4 and used for lamination was within time.

29. In the result, therefore, we allow First Appeal No. 11 of 1978 with costs throughout, dismisses with no order as to costs First Appeal No. 61 of 1978, declare that the plaintiff Company is entitled to refund of all the excise duty paid on paper manufactured on machines Nos. 3 and 4 and used for lamination on the laminating machine and direct the defendant Union of India to pay to the plaintiff Company Rs. 1,18,931.08 with future interest at 6% per annum from the date of the suit till realisation with costs of the suit and this appeal.