
(1977) 10 PAT CK 0009
In the Patna High Court
Case No : C.W.J.C. No. 1288/77

Bata India Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 14-10-1977

Acts Referred:

Central Boards of Revenue Act, 1963 — Section 3
Central Excise Rules, 1944 — Rule 8, 8(1)
Central Excises and Salt Act, 1944 — Section 3
Constitution of India, 1950 — Article 13, 13(3), 131A, 144A, 226

Citation : (1978) 2 ELT 211

Hon'ble Judges : K.B.N. Singh, C.J;B.S. Singh, J

Bench : Division Bench

Judgement

K.B.N. Singh, J.—In this writ application the petitioner has prayed for quashing the Explanation appended to Notification No. 88/77, dated the 9th May, 1977, of the Government of India, Department of Revenue and Banking (Annexure "4"), as also the directions, Trade Notice, and Demand Notice contained in letters dated the 31st May, 1977 (Annexure "6"), 16th June, 1977 (Annexure "5"), 17th June, 1977 (Annexure "8"), 13th July, 1977 (Annexure "9"), and the 14th July, 1977 (Annexure "10") demanding excise duty on "Jalsa" brand footwears purchased by the petitioner, in pursuance of Annexure "4".

2. The petitioner is a well-known public limited company, Bata India Limited, with headquarters at Calcutta, which carries on business of manufacture, sale and purchase of footwears and parts thereof. It has factories of its own in the States of West Bengal and Haryana as well as a factory at Bataganj, Patna, in the State of Bihar, in which it manufactures footwears and parts thereof. Besides manufacturing footwears in its factories, it also purchases "Jalsa" brand footwears, manufactured by Respondents Nos. 4, 5, 6 and 7, who are small manufacturers, and sells the same to public through various retail shops located throughout the country. The petitioner's case is that Respondents Nos. 4 to 7 have factories of their own, where they manufacture footwears of different

descriptions by employing their own machines and labour and each one of them is duly licensed to carry on the business of manufacture of footwears and are separate entities. These respondents do not manufacture footwears exclusively for the petitioner and their products are also sold by them to other customers. The footwears purchased by the petitioner from the aforesaid respondents are marked as "Jalsa" and "Bata" which are the trade names of the petitioner. The petitioner produces other descriptions of footwears in its own factories and no process of manufacture in respect of "Jalsa" footwears is carried on in any factories owned by the petitioner.

3. The petitioner's case is that under the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act), excise duty is levied on footwears or parts thereof at the rates set out in Item No. 36 of the First Schedule to the said Act. The Central Government, in exercise of the powers conferred under Rule 8(1) of the Central Excise Rules, 1944 (hereinafter referred to as the Rules), issued a Notification No. 93/67, dated the 26th May, 1967 (Annexure "2") exempting footwears from the whole of the excise duty leviable thereon, if such footwears were being produced in any factory where not more than 49 workers were or had been working on any day during the preceding 12 months, or, where the total equivalent Of power used in the process of manufacturing footwears did not exceed two horse power. This was with a view to help the small manufacturers. The exemption was further modified by another Notification No. 103/76, dated the 16th March, 1976 (Annexure "3") by which factories employing less than 50 workers and also using power equivalent to two horse power for the purpose of manufacture, were eligible for exemption. It is the petitioner's case that at all relevant periods the four respondents (Respondents Nos. 4, 5, 6 and 7) qualified for exemption and were being allowed exemption on footwears manufactured by them, and the "Jalsa" footwears manufactured by Respondents Nos. 4 to 7 and purchased by the petitioner were not subject to excise duty. The trouble started with the issuance of the impugned Notification No. 88/77, dated the 9th May, 1977 (Annexure "4"), by the Central Government, which superseded the earlier Notification (Annexure "3"), and which, while allowing exemption to small manufacturers as before, added an explanation stating that where a footwear, manufactured by a small manufacturer, is affixed with the brand or trade name of another manufacturer, or is purchased by another manufacturer, it shall be deemed to have been manufactured by or on behalf of such other manufacturer. By letter dated the 31st May, 1977 (Annexure "6") the Inspector of Central Excise (Respondent No. 2) directed the petitioner to furnish the stock position of Jalsa brand footwears stored in its duty paid godown and further directed it not to dispose of this brand of footwears in its stock without payment of the duty levied under Notification No. 88/77, dated the 9th May, 1977 (Annexure V). In reply, the petitioner represented to the Assistant Collector of Central Excise (Respondent No. 1) by its letter (Annexure "7"), that the petitioner being a mere purchaser of the footwears manufactured by Respondents; Nos. 4, 5, 6 and 7, and not being the

actual manufacturer thereof, was not liable to pay the excise duty. Respondent No. 1, in reply, informed the petitioner, by letter dated the 17th June, 1977 (Annexure "8"), that "Jalsa" brand footwears, by virtue of Annexure "4", cannot be cleared without payment of duty and affirmed the action of Respondent No. 2. Annexure "8" was followed by the demand notice of Respondent No. 2, dated the 13th July, 1977 (Annexure "9"), to the petitioner, demanding excise duty on 3,203 pairs of "Jalsa" footwears, amounting to Rs. 7,038.09, and by another letter dated the 14th July, 1977 (Annexure "10"). Respondent No. 2 asked the petitioner to furnish particulars of the "Jalsa" brand footwears received by the petitioner's out agencies after the 31st May, 1977.

4. Respondents Nos. 4 to 7 have filed counter-affidavit supporting the stand of the petitioner and asserting that they are independent small scale manufacturers, entitled to exemption, employing less than 50 workers in their factories and using less than two horse power and are not the labour contractors, nor do they work as a part of or captive, of the petitioner.

5. Respondents Nos. 1 to 3 have also filed a counter-affidavit supporting the impugned annexures and justifying the levy. They have also asserted that Respondents Nos. 4 to 7 manufacture footwears mostly for the petitioner from the parts supplied by the petitioner and the petitioner has contracts with these manufacturers (Respondents Nos. 4 to 7) as regards labour charges. The maintainability of the writ application has also been challenged in the counter-affidavit on three grounds. Firstly, it has been asserted that the writ application has become infructuous in view of Notification No. 269/77, dated the 9th August, 1977 (Annexure "A" to the counter-affidavit) by which the offending Explanation contained in Annexure "4", deleted. Secondly, it has been submitted that the constitutional validity of a Central law could not be challenged in view of Articles 226A, 131A and 228A of the Constitution of India, brought in by the Constitution (Forty-second Amendment) Act, 1976. Thirdly, it has been urged that the petitioner not having exhausted the alternative remedy by way of appeal or revision under Sections 35, 35A and 36 of the Act, the writ application is barred by the provisions of Article 226(3) of the Constitution. These very objections as to the maintainability of the writ application have been raised by learned Standing Counsel, appearing on behalf of the first three respondents, at the hearing.

6. I shall first take up the questions raised by the learned Standing counsel as to the maintainability of the writ application. The first question raised is that this application has become infructuous, in view of the issuance of Notification No. 269/77, dated the 9th August, 1977 (Annexure "A"). This notification, issued during the pendency of the writ application, has, no doubt, deleted the offending explanation contained in Annexure "4", and has substituted the following Explanation in its place, which does not affect the petitioner, so far as the present writ application is concerned : -

"Explanation. - For the purposes of this notification, where footwear,

manufactured by a manufacturer is registered or not, of another manufacturer or trader, it shall not, merely by reason of that fact, be deemed to have been manufactured by or on behalf of such other manufacturer or trader."

7. Mr. Sidhartha Shanker Ray, learned Counsel appearing on behalf of the petitioner, has urged that the Notification at Annexure "A" not having retrospectively deleted the offending explanation contained in Annexure "4", the petitioner's grievance with regard to demand of excise duty on "Jalsa" footwears for the period from the 9th May, 1977 to the 8th August, 1977, i.e., prior to the issue of the notification (Annexure "A") on the 9th August, 1977, subsists. It has rightly not been contended by the learned Standing Counsel that Annexure "A" is retrospective. The notification being not retrospective, this writ application has not become infructuous on the issuance of Annexure "A".

8. The second ground of attack regarding the maintainability of the writ application is based on the provisions of Articles 226(3), 131A, 226A and 228A of the Constitution, brought in by the Constitution (Forty-second Amendment) Act, 1976. Learned Standing Counsel has urged that the constitutional validity of a Central law could not be challenged in this Court and the proper forum for the petitioner was the Supreme Court of India.

9. It is no doubt true that under the amended provisions of the Constitution, the power that the High Courts can exercise under the amended Article 226 of the Constitution has been circumscribed and fettered. The amended Article 226 itself says that the power to be exercised by the High Court under Article 226 is "subject to the provisions of Article 131A and Article 226A". Clause (1) of Article 131A reads as follows :-

"(1) Notwithstanding anything contained in any other provision of this Constitution, the Supreme Court shall, to the exclusion of any other Court, have jurisdiction to determine all questions relating to the constitutional validity of any Central law."

The other clauses of this Article, dealing with the powers of the High Courts to refer questions for decision of the Supreme Court, where questions of "constitutional validity" of a Central law or of a Central law and State law both, are raised before it or before a court subordinate to it, etc., are not very relevant for the purpose of the instant case. Article 226A provides as follows :-

"Notwithstanding anything in Article 226, the High Court shall not consider the constitutional validity of any Central law in any proceedings under that article."

Clause (1) of Article 228A, [this article deals with special provisions regarding the disposal of questions relating to constitutional validity of State laws] runs as follows :-

"(1) No High Court shall have jurisdiction to declare any Central law to be constitutionally invalid."

In all these articles, I have underlined the relevant expressions "constitutional validity" and "constitutionally invalid"

10. On a reference to the aforesaid articles, it is manifest that the Supreme Court has the exclusive jurisdiction to determine all questions relating to the constitutional validity of a Central law, and the High Court has no power under Article 226 of the Constitution to adjudicate on the constitutional validity of a Central law in a proceeding under that article. As the expressions "constitutional validity" or "constitutionally invalid" occur in these four articles, the limitation is against challenge to the constitutional validity of a Central law. A question arises as to what is meant by the term "constitutional validity" of Central law. Is it synonymous or coterminous with the mere validity of a Central law, which may be invalid on any ground whatsoever, or it means where a Central law is challenged as being contrary to or offending against any of the provisions of the Constitution, such as the provisions relating to fundamental rights contained in Part III or relating to distribution of powers contained in Part XI of the Constitution, etc. The expression "validity" has been defined in words and phrases, permanent Edition, Volume 44, as follows : -

"Validity, when applied to legal matters, is defined to be legal strength or force, the quality of being good in law. City of Cairo-Vs-Bross 8 III. App. 296." "Constitutional validity", therefore, obviously means good under the Constitution.

11. The expression "constitutional invalidity" in the context in which it has been used also obviously means invalidity on the ground of the provisions of the Constitution. If the intention was to make no distinction between the "constitutional invalidity" and "invalidity" simpliciter, the Parliament could not have used the expression "constitutionally invalid" but would have used the simpler expression "invalid". Both the expressions "invalid" and "constitutionally" have to be given their full meaning. It is well settled principle of interpretation of the constitutional provisions that the words used have to be given their ordinary meaning and full effect has to be given to every word used therein, unless the context otherwise warrants. There is nothing in these provisions or in the other provisions of the Constitution to indicate that the bar envisaged by the expression "constitutional validity" against exercise of powers by the High Courts under Article 226 of the Constitution merely meant "validity" of a Central law simpliciter. The expression "constitutional validity" cannot be squeezed into mere "validity".

12. A reference to Article 13, which has given a wide and all comprehensive meaning to the expression "law", as well as to the special provisions made in the Constitution as to the disposal of questions of constitutional validity of Central and State laws in Article 144A as regards the Supreme Court, and in Article 228A as regards the High Court, will make it abundantly clear that it was not intended by the Constitution (Forty-second Amendment) Act, 1976, that seven Judges of the Supreme Court and five Judges of High Court were to sit for determining the validity of a Central law or a State law, as the case may be, on any ground

whatsoever. On the other hand, the provisions of the Constitution unmistakably lead to one and the only conclusion that the constitutional validity means validity appertaining to the Constitution, or, in other words, the bar comes in where the High Court is required to determine the validity of a Central law in the context as to whether it is contrary to or in consonance with the constitutional provisions, that is to say, constitutionally invalid or valid. By the Forty-second Amendment, special provisions has been made as to the disposal of questions relating to the constitutional validity of any Central or State law. Article 144A, which is relevant, reads thus-

"(1) The minimum number of Judges of the Supreme Court who shall sit for the purpose of determining any question as to the constitutional validity of any Central law or State law shall be seven.

(2) A Central law or a State law shall not be declared to be constitutionally invalid by the Supreme Court unless a majority of not less than two-thirds of the Judges sitting for the purpose of determining the question as to the constitutional validity of such law hold it to be constitutionally invalid."

Similarly, special provision has been made under Article 228A for the disposal of questions relating to constitutional validity of State laws, that the minimum number of Judges of the High Court required to sit for determining any question of constitutional validity of any State law shall be given, and, where the High Court consists, of less than five Judges, then all the Judges are required to sit for determining such questions, and, any State law cannot be declared to be invalid, where the High Court consists of five Judges or more, by less than two-third majority of the Judges sitting for the purpose and where the High Court consists of less than five Judges, unless all the Judges of the High Court sitting for the purpose hold it to be so.

13. Article 13(3)(a) of the Constitution gives an exhaustive meaning of the term "law" so as to include within it "any Ordinance, Order, Bye-law, Rule, Regulation, Notification, custom or usage having in the territory of India the force of law". Then again, as defined in Clauses (4A) and (26A), respectively, of Article 266. "Central law" and "State law" not only include an Act of the Legislature, or an Ordinance promulgated by the Governor, but all notifications, orders, schemes, rules, regulations or by-laws or any other instrument having the force of law, or any other law, including any usage or custom having the force of law. In this background, therefore, it cannot be imagined that Parliament, in its wisdom, while enacting the Constitution (Forty-second Amendment) Act, 1976, intended that challenge to any Central notification or order etc. will require seven Judges of the Supreme Court to sit to determine any question arising with regard to its validity, or five Judges of the High Court to sit for the same purpose, in relation to a State notification or order, especially in view of the heavy congestion of cases in the different High Courts of the Country. In my considered opinion, therefore, it is only in those cases where the validity of a Central law was challenged on the ground of not being in conformity with the Constitution or

being repugnant to the provisions of the Constitution, that the High Court will have no jurisdiction to entertain a writ application under Article 226 of the Constitution, and the expression "constitutional validity" of a Central law or a State law has not been treated as synonymous with "validity" simpliciter of a Central law or a State law.

14. The crucial question then arises, as to whether the attack on the impugned notification (Annexure "4") and the orders issued in pursuance thereof, raise any question of determining their "constitutional validity" in other words, whether the attack is on the ground of their being invalid under some of the provisions of the Constitution. If so, then this court will have no jurisdiction to go into that question.

15. It is not disputed before us that the notification Annexure "4" is a Central law, within the meaning of the expression "law" under Article 13, read with Article 366 of the Constitution, as already discussed. The challenge in this writ application to the "explanation" contained in Annexure "4" is on its being in excess of the powers under Rule 8(1) of the Rules of the Central Government to grant exemption as also contrary to the charging section, i.e., Section 3 read with Section 2(f) of the Act. Rule 8(1) of the Rules merely authorises the Central Government to exempt any excisable goods from the whole or any part of the excise duty leviable on such goods. By the impugned notification (Annexure "4"), under Rule 8(1) of the Rules, the Central Government has, no doubt, granted exemption to small manufacturers of footwears employing less than 50 workers and also using less than two horse power of energy, but while granting the exemption to small manufacturing units, it has added an "explanation" to the said notification, and in its garb it has made the footwears manufactured by small manufacturers as having been manufactured by some one else, and has made a non-manufacturer of those footwears the manufacturer for the purpose of levying excise duty, which the Central Government cannot do in exercise of the power under Rule 8(1) of the Rules. Learned Counsel for the petitioner has further submitted that the notification is also ultra vires the provisions of the charging Section 3, read with Section 2(f) of the Act, as under the charging section the incidence of the tax is on manufacturer" of an excisable goods. The challenge to the explanation contained in the notification (Annexure "4") is thus on the ground that it is ultra vires the rule making power as also the charging section of the Act. The attack on the notification, therefore, does not involve any question of its being contrary to any provisions of the Constitution.

16. The learned Standing Counsel has not been able to point out that the aforesaid ground of attack on the validity of the explanation in Annexure "4" raises any question of its constitutional invalidity, so as to oust the jurisdiction of this Court to entertain the writ application. The stand of the Respondents (Department) in Paragraph No. 22 of the counter-affidavit is also the same that it does not suffer from any constitutional invalidity. Where the attack on a particular notification is founded on the ground of its being in excess of the

power or authority conferred by a Rule or an Act on the authority issuing the notification, such an attack is really an attack on the power of the authority concerned in going beyond its power or in acting in excess of the power conferred by any enactment or Rule. It is a settled law that a delegated authority is bound by the terms of its delegated or derived authority, and the Courts of law, as a general rule, will not give effect to its action which is beyond its delegated authority, as it would be ultra vires the powers of the delegated authority; such an attack is not on the ground of constitutional validity. Therefore, the attack in the instant case on the impugned notification is not on the ground of its constitutional validity which the High Court is prohibited, under the amended Article 226 from determining. Thus, there is no substance in the third objection of the learned Standing Counsel, that the writ application is not maintainable in view of the amended provisions of Articles 226, 131A, 226A and 228A of the Constitution.

17. The first two grounds of attack regarding the maintainability of the writ application having failed, the third ground of attack now remains to be considered. It is urged that the writ application is not maintainable as the petitioner has failed to avail of the alternative remedy by way of appeal or revision under Sections 35, 35A and 36 of the Act.

18. Clause (1) of Article 226 of the Constitution authorises the issuance of directions, orders or writs in the following three circumstances :

"(a) for the enforcement of the rights conferred by the provisions of part III; or

(b) for the redress of any injury of substantial nature by reason of the contravention of any other provision of this Constitution or any order, rule, regulation, by-law or other instrument made thereunder; or

(c) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (b) where such illegality has resulted in substantial failure of justice."

Clause (3) of this Article, which is relevant, reads thus-

"(3) No petition for the redress of any injury referred to in Sub-clause (b) or Sub-clause (c) of Clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force."

It is thus manifest that where the attack is under Sub-clauses (b) or (c) of Clause (1) and not one relating to the fundamental rights, unless the alternative remedy, as envisaged under Clause (3), has been availed of, no writ application will be entertained.

19. Section 35 of the Act lays down that any person aggrieved by any decision or order passed by a Central Excise Officer under the said Act, may, within three months from the date of such decision or order, appeal therefrom to the Central Board of Excise and Customs constituted under the Central Board of Revenue

Act, 1963 (54 of 1963), or, in such cases as the Central Government directs, to any Central Excise Officer, not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. u/s 35A the Central Board of Excise and Customs is authorised to call for an examine the records of any proceedings, in which any decision or order has been passed under this Act, and to pass such order thereon as it may think fit. u/s 36, the Central Government has been empowered to revise or modify, on an application, any decision or order passed under this Act by the Central Excise Officers or the Central Board of Excise and Customs, from which no appeal lies. It is thus apparent that an appeal may lie against an order of the Central Excise Officer either before the Central Board of Excise and Customs or before any such Central Excise Officer, not below the rank of an Assistant Collector of Central Excise, as the Central Government may direct. The Central Board of Excise and Customs can also revise non-appealable orders of Central Excise Officers. The orders of the Central Board of Excise and Customs itself or any officer of the Central Excise may be revised in the non-appealable cases by the Central Government. In such a situation, can the petitioner either in the appeal or in the revision against the demand notice, expect any relief ? This question itself will depend on the question, whether the appellate or the revisional authority can declare the explanation contained in the notification, Annexure "4", as ultra vires the power under Rule 8(1) of the Rules or Section 3 of the Act. It is idle to expect that the Central Excise Officers or the Central Board of Excise and Customs being creatures of the Central Government could declare the notification issued under the Act or the Rules to be ultra vires. That they have no such power finds support from the decisions of the Supreme Court in the cases of (1) The Bengal Immunity Company Limited Vs. The State of Bihar and Others, , and (2) K.S. Venkataraman and Co. v. The State of Madras AIR 1977 SC 1089. In the last decision it has been held that the creatures of the statute can only decide disputes between the assessee and the taxing authority in terms of the provisions of the Act and the question of ultra vires of the Act or the Rules or the notifications issued thereunder is foreign to the scope of its jurisdiction. I am not, for a moment, suggesting that the power to declare a notification issued under the Rules ultra vires could not be delegated to such an authority, but, no such provision has been pointed out by the learned Standing Counsel either in the Act or in the Rules, under which the appellate or the revisional authority could declare a notification to be ultra vires. He has, however, submitted that the Central Board of Excise and Customs is not constituted under the Act but it is constituted under a different Act, namely, the Central Boards of Revenue Act, 1963 (54 of 1963), and, therefore, it is not a creature of the Excise Act. It is true that the Central Board of Excise and Customs is constituted u/s 3 of the Central Act 54 of 1963, but while exercising powers under the Excise Act, it is nonetheless an authority created by the Excise Act and is an authority under the Excise Act. A statute may create a distinct authority of its own for carrying out the purposes of the Act, or it may be incorporation about an authority created under some different statute, as its authority. That will not mean that authority

so adopted will not be creature of the statute for the purpose of the Act, although initially created under a different statute. Apart from that, the said Board is constituted u/s 3 of the Central Act 54 of 1963 by the Central Government and, subject to the control of the Central Government can exercise powers and perform such duties as may be entrusted to the Board by the Central Government or by or under the law. In such a situation, it will be idle to contend that even if a revision were to lie before the Central Board of Excise and Customs, it could declare any notification of the Central Government to be ultra vires. In such a situation, the right of appeal or; revision of the petitioner, either to the Central Excise Officer or the Central Board of Excise and Customs, would be merely an appeal or revision from Caesar to Caesar. So on both the grounds, namely, that the authorities under the Act could not declare a notification of the Central Government to be ultra vires also on the ground that the right of appeal or revision was an illusory remedy a question" arises, as to whether the bar contained in clause (3) of Article 226 of the Constitution would still start in the face of the petitioner and he must undergo the futile formality of appeal or revision before approaching this Court under Article 226 of the Constitution for redress of his grievances.

20. Even before the incorporation of this restrictive provision, the High Courts, in exercise of their powers under Article 226 of the Constitution refused to entertain writ application where an alternative remedy was available to the petitioner for the redress of his grievances, but the alternative remedy had to be convenient, beneficial and effective. Where the alternative remedy was not so, writ applications were entertained in spite of there being provision for an alternative remedy in a particular statute. This was a self-imposed limitation on the exercise of the powers under Article 226 by the High Courts and approved by the Supreme Court. In the case of (3) M.G. Abrol Vs. Shantilal Chhotalal and Co., the Supreme Court also emphasised that the alternative remedy has to be effective. The principle of refusal of the writ on the ground of alternative remedy now seems to have been put in the form of a fetter under Clause (3) of Article 226 of the Constitution. A question arises, what is its true scope. Has it still to stand the test of adequacy of the remedy ? A remedy has to be a real remedy and not an illusory one or useless one and when the Constitution speak of a remedy it must mean so. The question has been fully considered and examined in some detail in a Full Bench decision of the Gujarat High Court in the case of (4) Abad Cotton Manufacturing Co. Ltd. v. Union of India AIR 1977 Guj 113, wherein it has been observed as follows:

"Even though the words "any other remedy" has to be for redress of the injury for which this writ jurisdiction is conferred and, therefore, it must be equally adequate of efficacious so that qualitatively and quantitatively the same relief would be given for redress of the injury to the petitioner. Therefore, the adequate efficacious remedy is always implicit if the remedy is to be for redressing the injury as effectively as could be done in the petition."

"The aforesaid discussion clearly reveals that every Act would have to be examined when such a question of the existence of alternative remedy arises and it would have to be found out as to what is the amplitude Of the normal Act remedies for appeal or revisions so that the question of real or purported order would be decisive. If the Act remedy is so wide as to cover even purported orders so that no part of the activity of the authority is a collateral activity, the Act having provided for direct remedies to such a wide extent, that remedy would have to be first exhausted. On the other hand, where the Act remedies are not of such wide amplitude but only for orders under the Act, in cases of such purported orders, the appeal remedy could not corns in the way of the petitioner as it could not be said to have been provided for such purported orders which are null and void and which it would not be obligatory for the petitioner to exhaust for the simple reason that such an appeal remedy would not be able to cure the defect even if the appeal confirms the original order bearing this indelible mark of nullity."

I am in respectful agreement with the views expressed by the learned Judges of the Gujarat High Court in the aforesaid decision and need not examine in detail the various decisions on the point.

21. As held by me earlier, the alternative remedy under the Act being not adequate, the third ground of attack to the maintainability of the writ application has also to be rejected.

22. Coming to the merit of the case, Mr. Ray has contended that the Explanation contained in the notification at Annexure "4" is ultra vires of Rule 8(1) of the Rules, under which this notification has been issued, as also Section 3, the charging section, read with the definition of "manufacture" in Section 2(f) of the, Act. Learned Counsel has submitted that u/s 3 of the Act, excise duty has to be levied and collected on manufacture or production of goods in the country at the rates set forth in the First Schedule to the Act, and the taxable event is the "manufacture" of goods. This now falls for consideration.

23. u/s 3 of the Act, excise duty is a tax on articles manufactured or produced in the country, at the rates set forth in the First Schedule to the Act. Item No. 36 of the First Schedule to the Act is the relevant item, dealing with tariff on footwears and parts thereof, with which we are concerned. Under this item, tariff on footwears is at the rate of ten per cent ad valorem and that on parts thereof is at the rate of fifteen per cent ad valorem. Sub-section (1) of Section 37 of the Act authorises the Central Government to make rules for carrying into effect the purposes of the Act and Sub-section (2) enumerates the particular items with reference to which rules could be framed. Relevant for our purpose is sub-item (XVII) of Sub-section (2), which authorises the Central Government to make rules to ""exempt any goods from the whole or any part of the duty imposed by this Act;". The relevant rules made by the Central Government in this regard is Rule 8 of the Rules, which reads as follows:-

"(1) ... The Central Government may, from time to time, by notification in the Official Gazette, exempt, subject to such conditions as may be specified in the notification, any excisable goods from the whole or any part of duty leviable on such good. (2) The Central Board; of Excise and Customs may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

It is in exercise of the powers under Rule 8(1) of the Rules that the Central Government has issued the notification (Annexure "4"), allowing exemption from payment of whole of the excise duty leviable on manufacture of footwears by small manufacturers, subject to the following conditions :-

"Provided that-

(i) such footwear is produced by or on behalf of a manufacturer in one or more factories, including the precincts thereof, wherein not more than 49 workers are working, or were working on any day of the preceding 12 months;

(ii) the total equivalent of power used in the manufacture of such footwear by or on behalf of a manufacturer in one or more factories does not exceed 2 Horse Power.

Explanation.-Where footwear, manufactured by a manufacturer, is affixed with the brand or trade name, registered or not, of another manufacturer or is purchased by another manufacturer, it shall be deemed to have been manufactured by or on behalf of such other manufacturer."

24. On a reference to the Explanation contained in the notification (Annexure "4") it is manifest that a footwear, manufactured by an exempted manufacturer, if affixed with the brand or trade name of another manufacturer, or purchased by another manufacturer, shall be deemed to have been manufactured by the manufacturer whose brand or trade name has been affixed or who has purchased the same. This is characterised to be changing the character of impost of excise duty from a manufacturer of a footwear to one who is not the manufacturer of the same, under the deeming clause in the explanation, in the wake of granting exemption to the real manufacturer. Mr. Ray is right in his submission that the Central Government could not do in exercise of the power for granting exemption under Rule 8(1) of the Rules. As already discussed, a delegated authority must act within the limits of the delegation. The condition which the Central Government could impose, while granting exemption, must be qua manufacturer to whom the exemption is being granted and it could not indirectly rope in a non-manufacturer of those footwears. The notification (Annexure "4"), therefore, is in excess of the power delegated to the Central Government under Rule 8(1) of the Rules, because it has no rationale with the exemption granted and could not validly be an integral part of the exemption granted to a manufacturer, there being no nexus between the two. Not only that, it is also not in conformity with the charging section (Section 3) of the Act, as it impose duty on a non-manufacturer.

25. It is well settled that excise duty is primarily a duty on production and manufacturer of goods by a series of decision of the Supreme Court (Vide decisions in the cases of (5) R.C. Jall Vs. Union of India (UOI), ; (6) Sea Customs Act AIR 1963 SC 1760; (7) A.B. Abdul Kadir and Others Vs. State of Kerala, ; and (8) McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, . The following observations made in R.C. Jall Vs. Union of India (UOI), , by the Supreme Court, after referring to the observations of Lord Simonds in (9) AIR 1945 98 (Privy Council) . may be quoted :-

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumers, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

The above observations were relied upon by the Supreme Court in (Supra) and their Lordships observed as follows :-

"This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the Act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production, while in the other it is on the act of sale. In neither case, therefore, can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax."

The above observations have been relied upon by their Lordships of the Supreme Court in (Supra).

26. The submission of learned Standing Counsel in this regard needs to be noted. Learned Standing Counsel has relied upon Paragraph Nos. 8 and 9 of the counter-affidavit filed on behalf of Respondent Nos. 1 to 3, to show that Respondent Nos. 4 to 7 are really ancillaries of the petitioner. Those respondents have been supplied with machines and materials by the petitioner for the manufacture of Jalsa brand footwears and they manufacture footwears mostly for the petitioner, for which the petitioner pays them labour charges, and there is no question of sale and purchase of those footwears by the petitioner from those respondents. In support of the stand of the Department, learned Standing Counsel has placed reliance on Annexures "B", "B/1", "C" and "D" filed with their counter-affidavit. Annexures "B" and "C" are letters from Messrs Vaishali Enterprises (Respondent

No. 7) and Messrs Hindustan Footwear Corporation (Respondent No. 6), dated July 1976, standing that they are registered Small scale units employing below 49 workers and using less than two horse powers and that they have labour contracts with the petitioner and they manufacture Jalsa footwears for the petitioner from the materials supplied by them. Annexure "D" is a statement of one Nebu Das, proprietor of Respondent No. 4, dated the 2nd August, 1976, made before the Inspector of Central Excise, stating that he gets materials and machines from the petitioner and manufactures Jalsa footwears therefore for the petitioner and gets only labour charges. Annexure "B/1" is a statement dated the 2nd May, 1977, which shows that leather components and micro-sheets 5 mm. and 7 mm. were supplied to different parties, including Respondents Nos. 4 to 7 by the petitioner on certain rates on different dates, during the month of April, 1977.

27. This assertion of the respondents is not only contrary to the assertions made in the writ application, but has also been denied on behalf of the petitioner in reply to the counter-affidavit. The petitioner has also filed Annexure "11" series to show that it was really the Department who encouraged the petitioner to supply some machines and parts of footwears to those small scale manufacturers. Annexure "11/D" is a letter dated the 15th November, 1967 from the Assistant Collector of Central Excise, Patna, to the petitioner, relevant portion of which may usefully be quoted :-

"2. The matter has been reconsidered. There is no objection to your getting completed footwear manufactured with the non-excisable parts supplied by you in outside factories. The completed footwears so manufactured will not attract Central Excise Duty provided the outside factories where these are manufactured are in the exempted sector, i.e., they work with less than 50 workers and/or 2 H.P. It should be noted that such finished footwears should not be allowed to be received within the factory premises."

The new ground urged in the counter-affidavit of the Respondents is not the ground on which the levy of excise duty on Jalsa footwears was made. It is not necessary to go to the question as to whether Respondents Nos. 4 to 7 could be treated as ancheries of the petitioner, which raises controversial questions of fact, inasmuch as the demand of excise duty on Jalsa footwears from the petitioner is not on the footing, that the actual manufacturers of Jalsa footwears (i.e., Respondents Nos. 4 to 7) are ancillaries of the petitioner but on the basis of the explanation contained in Notification No. 88/77, dated the 9th May, 1977 (Annexure "4") as will also be apparent from Annexures "5", "8" and the demand notice (Annexure "9").

28. From the aforesaid discussions, it is apparent that the Central Government, while granting exemption, in exercise of its power under Rule 8(1) of the Rules could not make a non-manufacturer of a footwear its manufacturer by mere use of its brand or trade name or by its purchases under the deeming provision contained in the impugned explanation. The Explanation contained in Notification

No. 88/77, dated the 9th May, 1977, (Annexure "4"), therefore, must be held to be ultra vires the powers conferred under Rule 8(1) of the Rules as also Section 3 of the Act and has to be quashed. The trade notice No. 27/1-Footwear/77, dated the 16th June, 1977 (Annexure "5") as also the demand notice N 0-037365, dated the 13th July, 1977 (Annexure "9") have also to be quashed.

29. In the result, this application is allowed to the extent indicated above and the explanation contained in Notification No. 88/77, dated the 9th May, 1977 (Annexure "4"), Trade Notice No. 27/1-Footwear/77, dated the 16th June, 1977 (Annexure "9") are quashed. In the circumstances of the case, however, I shall make no order as to costs.

B.S. Sinha, J.

30. I agree but wish to make certain observations with regard to some of the submissions made on behalf of Respondent Nos. 1 to 3.

31. One of the prayers in this writ application is for a declaration that the Notification, dated the 9th May, 1977, copy of which is Annexure "4" appended to the writ application, is ultra vires and void and if necessary the same be set aside and/or quashed. It was urged on behalf of Respondent Nos. 1 to 3 that the constitutional validity of a Central law could not be challenged in view of Articles 226A, 131A, and 228A of the Constitution engrafted in the Constitution by the Constitution (42nd Amendment) Act, 1976. As the relevant provisions of the three Articles have been quoted in extenso in the judgment of the Hon'ble the Chief Justice I do not consider it necessary to quote them. Article 226A provides that the High Court shall not consider the Constitutional validity of any Central law in any proceeding under that the High Court shall not consider the constitutional validity of any Central law in any proceeding under that Article and Clause (1) of Article 228A imposes a restriction upon the High Court inasmuch as it has been deprived of the jurisdiction to declare any Central law to be constitutionally invalid. The power to determine all questions with regard to the constitutional validity of any Central law has been exclusively given to the Supreme Court by Article 131A of the Constitution. From a plain reading of the above Articles, it is manifest that now the Supreme Court alone has jurisdiction to determine all questions relating to the constitutional validity of a Central law. It is settled that the unconstitutionality of a statute might arise, either because the law is in respect of a matter not within the competence of the legislature or although the matter is within its competence the provisions offends or infringes Fundamental Rights. It, therefore, follows that the High Court cannot declare a Central law to be invalid on the ground that the matter was not within competence of the legislature or because the provisions of the Statute offend or infringe the fundamental rights.

32. There is, however, an essential difference between subordinate legislation and statute law. The distinction lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and, as such,

the validity of a delegated legislation as a general rule may be enquired from the point of view whether the rule making power has been exercised in accordance with the provisions of the statute by which it is created either with respect to the procedure adopted the form or substance of the regulation or the sanction, if any, attached to the regulation. The Courts may, therefore, reject as invalid and ultra vires a delegated legislation which fails to comply with the statutory essentials. It is not disputed that the impugned notification is an instance of delegated legislation in as much as the notification has been issued by the Central Government in exercise of the powers conferred on it by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944. Hence, it cannot be successfully urged on behalf of Respondent Nos. 1 to 3 that this Court cannot enquire into the validity of the Explanation to the impugned notification on the ground that it fails to comply with the statutory essentials.

33. Under Sub-rule (1) of Rule 8 of the Rules, the Central Government has been authorised to exempt, on such conditions as may be specified in the notification, any excisable goods from the whole or part of the duty leviable on such goods by a notification in the Official Gazette. A plain reading of this provision, which has been quoted in the judgment of the learned Chief Justice, it is manifest that the power given to the Central Government is to exempt whole or part of a duty leviable. In other words, the power given to the Central Government to grant exemption and not to impose any excise duty. By the explanation attached to the impugned notification it seems obvious to me, that the Central Government has provided for the imposition of excise duty on a manufacturer who has not manufactured the footwear. In other words the Explanation has attempted to give an extended meaning to the word manufacture as it has been defined in the Central Excises and Salt Act, 1944. Section 2(f) of that Act provides that manufacture includes any process incidental or ancillary to the completion of a manufactured product. By the explanation appended to the impugned notification the word manufacture has been deemed to include any footwear which is affixed with the brand or the trade name registered or not of any manufacturer. By this explanation, the word "manufacture, has been included to mean a purchaser of a manufactured product i.e. the footwear as also such footwear to which is affixed the brand or trade name registered or not of any manufacturer. In doing this, the Central Government has, to my mind gone beyond the four corners of the Statute itself and has acted in excess of the corners of the Statute itself and has acted in excess of the power delegated to it under Sub-rule (1) of Rule 8. The submission, of the learned Standing Counsel, appearing on behalf of Respondent Nos. 1 to 3, that the explanation appended to the impugned notification was merely a condition as contemplated under Rule 8(1) imposed by the Central Government for exemption of certain footwears from the duty leviable on such goods, cannot in view of what I have stated above, be accepted.