
(1960) 03 CAL CK 0032
In the Calcutta High Court
Case No : Appeal No. 46 of 1958

Brojendra Kumar Saha

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 17-03-1960

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 8, 97
Central Excises and Salt Act, 1944 — Section 37(1), 37(2), 38
Sea Customs Act, 1878 — Section 23

Citation : AIR 1961 Cal 217 : 65 CWN 670 : (1961) 1 ILR (Cal) 501

Hon'ble Judges : P.B. Mukharji, J;H.K. Bose, J

Bench : Division Bench

Advocate : M.N. Banerji and P.N. Chowdhury, for the Appellant; B.C. Ghose and D. Pal, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, J.—This is an appeal from the judgment and decree of Mr. Justice G. K. Mitter, dismissing the plaintiff's suit against the Union of India for the recovery of a sum of Rs. 12,415-10- as refund of salt duty paid by the plaintiff to the Government before the 1st April, 1957. The learned trial Judge dismissed the suit on a preliminary ground on which alone the only issue in the suit was framed in the following terms:

"Are the Notifications being Nos. 1/Customs/47, 1/Salt/47 and 2/Salt/47 dated the 28th February, 1947 and published in the Gazette of India (Extraordinary) on the 1st March, 1947, binding on the defendant? "

2. Following a decision of Kapur, J. in Union of India (UOI) Vs. F. Gian Chand Kasturi Lal, , the learned Judge came to the conclusion that these Notifications were not made under any of the sections of the Central Excises and Salt Act, 1944 and were, therefore, not binding on the Government itself which issued that Notification.

3. There were other pleas taken in the written statement of the Union of India but no issue was raised before the trial judge in respect of such issues by the Union of India. The learned Counsel Mr. B. K. Ghosh appearing for the Union of India before us in this Appeal abandoned formally all the pleas taken by the Union of India in its written statement and relied only on this issue on which the learned Judge found in his favour.

4. Before discussing the essential points in the controversy, a short view of the relevant facts will not be out of place. The plaintiff as a purchaser of salt paid Rs. 12,556-6- as and by way of suit duty on 8,036 maunds 4 seers and 8 chhataks of salt. Such payment of duty was made before the 1st April, 1947. The plaintiff held that quantity of salt in stock on the 1st April, 1947. The above Notifications issued by the Government, and particularly Notification No. 2/Salt/47, expressly provided that a refund of duty paid on stocks of salt held on the 1st April, 1947 would be admissible subject to the conditions set out in the Rules published there. According to these published Rules and the Notification, the Government invited applications for refund of salt duty, and the plaintiff on the 3rd April, 1947 submitted an application to the office of the Central Excise at Narayangunge, Dacca, now in Eastern Pakistan, for refund of this sum of Rs. 12, 556-G. The Customs and Excise Authorities checked and verified the stock and issued a certificate to that effect and sanctioned for payment at the Narayangunge Station the sum of Rs. 12,415-10-; a sum which was slightly less than the sum claimed by the plaintiff. Leaving aside the many pleas of the Union of India in the written statement as they are no longer relevant for our purposes having been abandoned by the learned counsel for the Union, it is necessary only to state that so far as the material defence now is concerned, the Government's defence is that the Notifications are not binding upon the Government because the Notification for refund of salt duty was ultra vires the power of the Central Government under that Act and, therefore, not binding. It is also pleaded in the written statement that the Government's offer sanctioning and refunding the duty was only an ex gratia offer to refund without any legal obligation.

5. Throughout the correspondence, the Government never took up this defence. It never said that the Notifications and the Rules granting refund for the exempted salt were not binding on them. In fact, the whole of their conduct and action is just the contrary. Not only did they invite applications for refund under those very Rules which they now say are not binding on them but they also sanctioned payment of a specific sum after verification of the Appellant's stock. It is said by the Government that it was done ex gratia but the document itself does not say so. Even after the notice u/s 80 of the Civil Procedure Code, where also the plaintiff expressly pleaded these Notifications and Rules, the Government said nothing in any answer to suggest that their own Rules and Notifications were not binding on themselves. In fact, there are letters on record saying that the general question regarding the procedure for refund of excise duty on salt held in stock on the 1st April 1947 in the areas in Pakistan was under consideration of the Government of Pakistan and the Government of India

by its letter dated the 29th October 1949 informed the plaintiff that it would be sometime before a decision was arrived at and the plaintiff would be informed of the result in due course. Nothing, of course, happened until when the limitation was about to expire the plaintiff had to file this suit.

6. For a proper determination of this question, a critical analysis of the Central Excise and Salt Act, 1944 and the Rules made thereunder will be essential. This Act in its preamble states that "it is an Act to consolidate and amend the law relating to central duties of Excise and to Salt." Section 3 of the Act provides for the levy and collection of excise duties on

"all excisable goods with the exception of salt produced or manufactured in India and a duty on salt manufactured in or imported by land into any part of India and at the rates set forth in the First Schedule of that Act."

The Finance Act annually fixes the rates. All duties on salt were, however, removed by Section 2 of the Indian Finance Act (Act XX of 1947) which provided that

"For the year beginning on the 1st day of April 1947, no duty shall be levied on salt manufactured in India or imported by sea or by land into Part A States and Part B States."

as adapted by the Adaptation of Laws Order, 1950. Section 37 of the Act provides power to the Central Government to make rules. Section 37(1) of the Act provides as follows:

"The Central Government may make rules to carry into effect the purposes of this Act."

7. The Act then proceeds in Sub-section (2) of that section to provide particular powers of rule-making. Section 37(2) of the Act provides : "In particular, and without prejudice to the generality of the foregoing power, such rules may provide for" any of the functions and duties" described in detail in Sub-clauses (i) to (xx). Sub-clause (xvii) is relevant for the purpose of this appeal. Section 37(2) (xvii) provides as follows: "Exempt any goods from the whole or any part of the duty imposed by this Act."

8. It is the contention of the Government that these specific powers u/s 37(2) of the Act do not authorise any rule making by the Central Government in respect of refund of duty paid on salt. This argument is enforced by a reference to the detailed provisions relating to a particular kind of refund under Clause (xvi) dealing with rebates but not mentioning refund of duty paid on salt. Therefore, it is contended that this particular notification granting refund of duty already paid on salt is beyond the powers u/s 37 of the Act. Before dealing with this argument it will be necessary to refer also to one more section of the Act and to some of the rules made thereunder.

9. Section 38 of the Central Excises and Salt Act, 1944 provides as follows :

"All rules made and notifications issued under this Act shall be made and issued by publication in the official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act.

"Provided that every such rule shall be laid as soon as may be after it is made before Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions and if before the expiry of that period, Parliament makes any modification in the rule or directs that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be."

10. A large body of rules has been made under Sections 37 and 38 of the Act. They are known as the Central Excise Rules, 1944. They deal with many matters. Chapter III of these rules and particularly Rule 13, therein deals with refund of duties. Rule 11 provides that no refund of duties or charges erroneously paid could be claimed unless they were claimed within three months. Rule 11 actually provides :

"No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rule 9, and of which no repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconception, shall be refunded unless a written claim is lodged with the proper officer within three months from the date of such payment or adjustment, as the ordinary be. One argument on behalf of the Government of India is that this is the only rule with regard to refund of duties and is limited to specific cases of overpayment due to (1) inadvertence, (2) error and (3) misconception. As in the present case the duty was paid not under any of these three events, of inadvertence, error and misconception, no refund could be claimed under this Rule 11. Incidentally, however, it affects the Government of India's other argument noticed previously that there is no power in the Central Government to make rules for refund at all u/s 37 of the Act because here is a rule obviously for refund and it has not been challenged even by the Government as being ultra vires the Statute.

11. Continuing with the Rules, again Chapter V of the Central Excise Rules, sub-heading F. --"Refunds -- General" contains Rules 97 to 100 relating to refund of duty. Rules 97 to 99 relate to refund of duty on goods returned to factory and Rule 100 relates to refund of duty on sugar received for refining. It is, therefore, again contended that these are the general rules for refund even if there be any rule making power for refund in the Central Government, but these rules for refund do not cover the present case of refund of duty already paid on salt.

12. I shall now come to the three actual notifications with which we are concerned in this issue under determination.

13. The first Notification is No. 1 -- Customs/47, dated New Delhi, the 28th February, 1947. It reads as follows:

"In exercise of the powers conferred by Section 23 of the Sea Customs Act, 1878, the Central Government is pleased to exempt with effect from the 1st April, 1947, salt specified in item No. 25(1) of the First Schedule to the Indian Tariff Act, 1934, and imported by sea into British India from the Customs duty leviable thereon under the last mentioned Act."

14. The second Notification is No. 1 -- Salt/47, dated New Delhi, the 28th February, 1947. It provides as follows :

"In exercise of the powers conferred by Sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government is pleased to exempt with effect from the 1st April, 1947, salt manufactured in or imported by land into British India from the whole of the duty leviable thereon u/s 3 of the Central Excises and Salt Act, 1944."

15. The third Notification is No. 2--Salt/47, New Delhi, the 28th February, 1947. It provides as follows :

"By Notification Nos. 1 -- Customs/47 and 1 --Salt/47 of the 28th February, 1947, salt imported into or manufactured in British India is with effect from the 1st April, 1947 exempted from payment of duty leviable thereon. A refund of duty paid on stocks of salt held on the 1st April, 1947 or in transit on that date will also be admissible subject to the conditions set out in the following rules :

"Rules governing the refund of duty on salt manufactured in or imported into British India and held in stock on the 1st April, 1947 or in transit on that date.""

Then followed six different rules, the first rule dealing with limitations, the second rule dealing with notice to be given of the claim, the third rule dealing with maintenance of stock record, the fourth rule dealing with the form of application, ,the fifth rule dealing with the grant of refund and the sixth rule dealing with cases of mis-declaration or false entry in the application.

16. All these three notifications dated the 28th February 1947, including the forms of applications and declarations were published in the Gazette of India, Extraordinary, March 1, 1947.

17. It is, therefore," clear from the provisions under Notification No. 2 -- Salt/47, dated the 28th February, 1947 that actual Rules were framed governing the refund of duty on salt. If, therefore, the Central Government has power to make rules under the Act for refund, then these rules of refund duly published in the Gazette u/s 38 of the Act are parts of the Statute and therefore, are binding on the Government. The fact that previous rules and other rules dealt with different kinds of refund and refund in specified cases and not refund of duty on salt manufactured in or imported into India and held in stock on the 1st April, 1947 does not in the least matter, for the new rules published in the Gazette of India, Extra-ordinary of March 1 of 1947 permit such refund of duty on Salt.

18. The question whether the Central Government has at all any power to make

rules for refund under the Act has to be judged independently. As I said before, there are rules for refund in the Central Excise Rules, 1944. It is not the Government's case that these pre-existing rules are ultra vires the Statute. That being so, then there must be somewhere this power of refund and therefore the necessary power to make rules for such refund. It is quite true that Section 37(2) of the Central Excises and Salt Act in enumerating particular powers does not specify a power to grant refund of duty in the case of salt subsequently exempted from duty. This in our view is not the whole picture of the rule-making power of the Central Government. These particular powers u/s 37(2) of the Act are expressly said to be without prejudice to the generality of the foregoing power mentioned in Sub-section (1) of Section 37 of the Act. Section 37(1) of the Act gives power to the Central Government to make rules "to carry into effect the purposes of this Act." Therefore, this wide general power to make a rule to carry into effect a purpose of the Act exists with the Central Government. The question then is, is a rule for refund in the circumstances and facts that have occurred in this case a rule to carry into effect the purpose of the Act. Expressly u/s 37(2)(xvii) of the Act power is given to the Central Government to make rules to exempt any goods from the whole or any part of the duties imposed by this Act. A power to exempt any goods from the whole or part of the duty would, in our view, by necessary implication carry the incidental and ancillary power to grant refund in respect of such exemption in case the duty imposed by the Act had already been collected.

19. Kapur, J. in the decision of Union of India (UOI) Vs. F. Gian Chand Kasturi Lal, apparently proceeds on the basis that Notification in question does not fall under any of the Statutory Rules or Notification and that Notification No. 2/SaIt/47 makes no reference to any section or to any Rule providing for refund, although on that very page the learned Judge notices Rule 11 which we have discussed.

20. We do not think that in order to justify a Rule, the Rule itself has to show on its face under what particular section of the Act it is being made. So long as the Rule can be justified under the rule-making power, the non-recital of the fact that it has been so made will not make the Rule bad or invalid. The general powers of rule making u/s 37(1) must be read with the particular powers u/s 37(2) to provide the whole field of rule making operation in respect of refund of duty. If Government is empowered to make a Rule for any purpose of the Act u/s 37(1) of the Act and if u/s 37(2)(xvii) one of the express purposes of rule making is in respect of exemption of goods, then power to make Rule for refund of duty in respect of exempted goods must in my judgment necessarily follow as an incidental power.

21. The question here is more fundamental than what appears on the first examination of these Notifications. The first Notification No. 1/Customs/47 exempts salt imported by sea with effect from 1st April, 1947. The second Notification No. 1/Salt/47 similarly exempts salt manufactured in and imported by land with effect from 1st April, 1947. These two Notifications are respectively

made u/s 23 of the Sea Customs Act and Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944. They are not challenged by the Government of India, nor can they be in fact or in law challenged at all. What is the effect of these two Notifications? Do they or do they not exempt salt in stock on the relevant date, the 1st April, 1947? In my opinion, they do. It is precisely to make that clear that the third Notification No. 2/SaIt/47 was issued and in such Notification there was therefore express recitation of these two previous Notifications. The recitation of these two previous Notifications in the Notification No. 2/Salt/47 would be wholly unnecessary unless the exemption also covered salt held in stock on the 1st April, 1947 and by such express recital of these two Notifications the Notification No. 2/Salt /47 impliedly incorporates reference to the respective rule-making sources in Section 23 of the Sea Customs Act and Rule 8(1) of the Central Excise Rules 1944. I, therefore, consider that in addition to the new Rules for Refund Notification No. 2/Salt/47 to be doing nothing more than explaining what the other two Notifications had done, and, therefore, there was no particular need, if need there at all was, to recite particular section of the Act under which this Notification No. 2/Salt/47 was issued. This is also clear from the language of the Notification where it says that salt held on the 1st April, 1947 or in transit on that date will "also" be admissible. The word "also" suggests that this was really an explanation to the first two Notifications.

22. These are our reasons for not being able to follow the decision in Union of India (UOI) Vs. F. Gian Chand Kasturi Lal, and we do not find that the problem was discussed in the light of these arguments. We, therefore, with great respect dissent from the view expressed by the Punjab decision.

23. Mr. Ghosh, learned counsel for the Union of India, has contended before us that these Rules for refund which were published in the Gazette of India (Extraordinary) on March 1, 1947 under Notification No. 2/Salt/47 are bad, first, on the ground that these Rules are ultra vires the Act; secondly, on the ground that these Rules were published or made at a time when the power to make the Rule was not there; thirdly, that in so far as the Rule gives retrospective effect in the sense that it grants refund of the duty already paid and collected, it was beyond the powers of delegation permitted by the section; and, lastly, that these Rules are bad because they were not placed before Parliament as required by the proviso of Section 38 of the Central Excises and Salt Act, 1944.

24. This last submission of Mr. Ghosh can be disposed of straightaway. The language of the proviso of Section 38 of the Act, which I have already quoted elsewhere, makes it plain that (not?) laying before Parliament in this case on the express language of this particular Section 38 of the Statute does not invalidate the Rule or the Notification. The first part of Section 38 of the Act by use of the word "thereupon" makes it abundantly and indubitably clear that the Notification or the Rule immediately on its publication in the official gazette has the effect of being enacted in the Act. That means that it acquires statutory force immediately on the publication in the official gazette. It has not to wait for its

statutory force to be laid before Parliament. This view is supported also by the observation of Chakravarti, C. J. in the Court of Appeal in *Munna Lal Tewary Vs. Harold R. Scott and Others*, . Certain statutes may by suitable language indicate that before the Rules or Notifications come into force they must be laid before Parliament. But that is not the language used in Section 38 of this Act. The type or pattern of delegated legislation with which this Appeal is concerned is entirely different. All that the proviso here means is that as soon as may, be such Rule shall be laid before Parliament and, Parliament is given the right to modify or annul such Rule within the time and session specified in the proviso. It is really a proviso in defeasance in the sense that these Rules or Notifications although they become part of the Statute immediately on their publication will go out of the Statute book if Parliament modifies or annuls them within the time and during the sessions mentioned therein. Otherwise if Parliament does not do any of these things, they continue to have the force of a statute from the date of their publication in the Official Gazette.

25. In that view of the matter, it is unnecessary to discuss in this case whether this statutory provision for laying before Parliament is directory or mandatory.

26. Before leaving this point, I think it must be emphasised that the learned counsel for the Union of India, although he submitted that the Rule or the Notification was not laid before Parliament, produced no proof either at the trial or before us from any official records to support his submission on the point of fact that it was not so laid before Parliament. In fact, there is nothing on the record to show that these Rules or Notifications were not placed before Parliament. In such circumstances, this Court is entitled to presume that official acts have been performed in their regular course. This presumption will not only be justified u/s 114, Illustration (e) of the Evidence Act and Section 23(5) of the General Clauses Act but also by the observations of the Court of Appeal in *Munna Lal Tewary Vs. Harold R. Scott and Others*, .

27. Before leaving this point, a reference is necessary to the observation made by Chagla, C. J. in a Division Bench decision of the Bombay High Court in *D.A. Koregaonkar Vs. The State of Bombay*, where the learned Chief Justice of the Bombay High Court expressed the view:

"Now, even though the Regulations may come into operation before they are placed before the Legislature, that does not, in any way, detract from the duty and obligation of the Government to place these Regulations before the Legislature and it would be difficult for Government to resist an application on the part of any person to compel the Government to place these Regulations before the Legislature if the Government failed to carry out its duty under Article 320(5)."

These observations of Chagla, C. J. do not, in any way, affect the view that we are taking for all that the learned Chief Justice appears to suggest by that particular observation is that the Government may be compelled to place these

Rules and Notifications before Parliament but he does not say that before they are so placed they would have no effect nor does his Lordship say that failure to do so will make these Rules and Notifications invalid. The essential point on which this decision was rendered by the Bombay High Court is perhaps no longer good law having regard to the Supreme Court decision in *State of U.P. Vs. Manbodhan Lal Srivastava*, .

28. Coming back to Mr. Ghose's arguments that these rules and notifications are ultra vires the Act, it is necessary to preface our decision by indicating the true purport and effect of Section 37 and Section 38 of the Act. We are of the opinion that on a proper construction of Sections 37 and 38 of the Act the Central Government has power to make rules for refund of duty paid on salt subsequently exempted, by reason of not only the general provisions u/s 37(1) of the Act but also the ancillary power incidental in the power to exempt goods from the whole or any part of the duty u/s 37(2)(xvii) of the Act read with Rule 8(1) of the Central Excise Rules, 1944 granting power to authorise exemption from duty in special cases and providing in express terms as follows :

"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 the duty leviable on such goods".

29. The rules which I have quoted under Notification No. 2 -- Salt/47 expressly mention these conditions by using the language "refund of duty paid on stocks of salt held on 1-4-47 or in transit on that date will also be admissible subject to conditions set out in the following Rules." These Rules therefore lay down these very conditions for exemption. The argument therefore that these Rules were made or published at a time when the power to make the Rules was not there cannot be upheld. The power to refund exists in our judgment in section 37 of the Act read with Rule 8(1) of the preexisting Central Excise Rules 1944 read with Section 23 of the Sea Customs Act, and in any event all the Notifications for exemption were simultaneously made and published with the new Rules for Refund of duty already paid on salt but subsequently exempted.

30. We, therefore, are of the opinion that the learned Judge was wrong in thinking that these rules did not call for consideration in this case or that no such rule for refund was in fact made.

31. Lastly, dealing with Mr. Ghose's argument that the retrospective rule making is ultra vires the Statute, it is necessary to clear the ground by pointing out that all these rules and notifications mentioned in the Issue under consideration were dated the 28th February, 1947 and they were indicating a state of affairs not retrospective but prospective on the 1st April, 1947. What may perhaps be more accurately described in Mr. Ghose's submission is that the rule in this case is not so much retrospective as retroactive. His contention in "essence is that when the duty was imposed and collected such duty, and its collection were legal under the

law for the time being. The duty having, been lawfully imposed and such duty having been lawfully collected, the matter ended and therefore the subsequent refund from the public exchequer was really a retroactive effect given to a situation already concluded. The argument is attractive but unsound for two main reasons. The language of Section 37(2)(xvii) of the Central Excises and Salt Act, 1944 uses the words "exempt any goods from the whole or in part of the duty imposed by this Act". In terms this language does not exclude the case where the duty is not only imposed but also collected. It may reasonably be construed that the words "duty imposed" include also the case of duty imposed and collected. If that view is correct, then the power to make a rule retroactive is implied in the language so construed. It is also consistent with the very idea of a refund which ex-hypotheses implies something is returned which has already been paid. Secondly, there is really neither retrospective nor retroactive effect in the views that I have taken of Notifications Nos. 1 --Customs/47 and 1 --Salt/47 they are so construed as to make even such goods which are in stock on the 1st April, 1947 which though had already paid duty would still come within the ambit of the exemption granted by those two Notifications. Ordinarily any provision whether in a statute or a statutory rule or a statutory notification must be read as prospective unless expressly or by necessary implication a different conclusion is indicated. The answer to the argument on this branch of the case is that in the first place neither the rules nor the notifications are in this case really retroactive or retrospective and in the second place the question of refund on goods which had paid duty is not a question of retrospective or retroactive legislation because the question of refund can only arise subsequent to the event of payment.

32. Reference was made in this connection to the case reported in *Modi Food Products Ltd. Vs. Commr. of Sales Tax, U.P.*, where Rhargava, J. at page 39 says :

"A legislature can certainly give retrospective effect to pieces of legislation passed by it but an executive Government exercising subordinate and delegated legislative powers cannot make legislation retrospective in effect unless that power is expressly conferred."

33. In that case, however, this question did not arise because the notification in question was clearly prospective and the observations are only obiter, although I am inclined to agree with that observation with this addition that the power may not only be "expressly conferred" but may also follow by necessary implication. Here however on the facts before us we are satisfied in the first place that there is no retrospective or retroactive operation in the strict sense of the term, although it has an appearance of it and secondly, on the construction of the general powers and the special powers u/s 37 of the Act, we are of the opinion that the delegate under the terms of delegation of the statute can in this case make a rule relating to refund of a duty on salt already paid.

34. In conclusion it is only necessary to add that Mr. Ghose's general argument that these rules and the notifications are ultra vires the Act in one sense

disregards the legal effect of the expression "shall thereupon have effect as if enacted in this Act" in Section 38 of the Statute. Once these rules and notifications are published in the official Gazette these must be regarded as being incorporated in the Act itself. They become then part of the very Statute. No further question, therefore, arises of the rules being ultra vires the Act thereafter. The learned Editors of Maxwell's Interpretation of Statutes, 10th Edition at pages 50 and 51 refer to *Wicks v. Director of Public Prosecutions* 1947 AC 862, approving *Willingale v. Morris* (1909) 1 KB 57, *Minister of Health v. Rex ex parte Yaffe* 1931 AC 494, at p. 503 and *Institute of Patent Agents v. Lockwood* 1894 AC 347 at p. 360 for saying that instruments made under an Act which prescribes that they shall be laid before Parliament for a prescribed number of days, during which period they may be annulled by a resolution of either House, but that if not so annulled, they are to be of the same effect as if contained in the Act, and are to be judicially noticed, must be treated for all purposes of construction exactly as if they were in the Act; if there is any conflict between one of these instruments and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act would be dealt with; and if reconciliation is impossible, the subordinate provision must give way, and probably the instrument would be treated as subordinate to the section. That in our view presents the correct picture of law on this point. The view that we have taken of the Central Excises and Salt Act, 1944 and the Rules made thereunder creates no conflict between the Rules and the Act.

35. This no doubt, however, cannot mean that the Court cannot go into the question of the rules being ultra vires on the ground that the impugned rule or notification was not "under this Act" within the meaning of Section 38 of the Central Excises and Salt Act, 1944. In fact that was how Viscount Dunedin distinguished the case of 1931 AC 494 at pp. 502-503, from the case of 1894 AC 347 by observing:

"The House of Lords held (1894 AC 347) that the provision as to the rules being of like effect as if they had been enacted in the Act, precluded enquiry as to whether the rules were ultra vires or not.

"Now, there is an obvious distinction between that case and this, because there Parliament itself was in control of the rules for forty days after they were passed and could have annulled them if motion were made to that effect, whereas here there is no parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. Yet, I do not think that that distinction, obvious as it is, would avail to prevent the sanction given being an untouchable sanction. I think the real clue to the solution of the problem is to be found in the opinion of Herschell L. C. who says this (1894) AC 347 at p. 360); No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must

give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it".

36. This disposes of all the arguments advanced to us by Mr. Ghosh, learned Counsel for the Union of India. It only remains to add that independently of all Rules and Statutes, the Union of India in this case by the terms of its sanction admitted the liability to pay the sum of Rs. 12,415-10- to the Appellant. That amount was sanctioned for payment after verification and examination of the Appellant's stock. The only plea as against this sanction is that it was made ex gratia. The sanction itself does not say so. The correspondence does not support that. therefore, in any event it seems that the Union of India is liable for the amount on this admission.

37. The judgment and decree of G. K. Mitter, J. are, herefore, set aside. The appeal is allowed. There will be a decree for the sum of Rs. 12,415-10-with interest from the date of institution of the suit till realisation at 6 per cent and costs of both this Court and the Court below. The costs are certified for two Counsel. The Union of India will have four months" time to pay this money.

H.K. Bose, J.

38. The only question that arises for determination in this appeal is whether the Notification No. 2/Salt/47 dated 28-2-1947 and published in the Gazette of India (Extraordinary) of 1-3-1947 is a valid Notification and is binding on the Union of India. This Notification has been set out in extenso in the judgment of my learned Brother and so need not be quoted again. It appears that on the very same date two other notifications bearing No. 1/Customs/47 issued by the Central Government u/s 23 of the Sea Customs Act, 1878 and dated 28-2-1948 and No. 1/Salt/47 issued under Rule 8(1) of the Central Excise Rules, 1944 and also dated 28-2-1947 were published in the Gazette of India (Extraordinary). They have also been quoted in the judgment of my learned Brother. The Customs Notification No. 1/Customs/47 exempts salt imported by sea into British India from Customs duty leviable under the Indian Tariff Act, 1934. The Notification No. 1/Salt/47 exempts salt manufactured in or imported by land into British India from duty leviable u/s 3 of the Central Excises and Salt Act, 1944. In Notification No. 2/Salt/47 there is a reference to both the Customs Notification No. 1/Customs/47 and to the Notification No. 1/Salt/47 and the addition of the last sentence that refund of duty paid on stocks of salt held on 1-4-47 or in transit on that date will also be admissible subject to the conditions set out In the following Rules make it abundantly clear that the whole object and effect of the second Notification was to extend the exemption also to stocks held on 1-4-47 so that a dealer in salt who had previously paid duty on stock held by him on 1-4-47 might not be in a position worse than the dealer who acquired stock after 1-4-47 and who would not have to pay any duty by reason of the total abolition of duty with effect from 1-4-47. The framers of the Notification realised that a person who

had already paid duty on stocks could not possibly dispose of or sell the stock at the same rate as the person who had not to pay any duty on stock and so with a view to place both such dealers on an equal footing, the dealers who had stocks on 1-4-47- were also brought within the ambit of the exemption. The Notification No. 2/Salt/47 is nothing but a continuation of and a part of the two Notifications Nos. 1/Customs/47 and 1/Salt-/47. That is why the substance and net effect of the two Notifications No. 1/Customs/47 and No. 1/Salt/47 are reproduced in the Notification No. 2/ Salt/47 and the words "will also be admissible" are used in the last Notification. Moreover, it is plain that the only effective way in which grant of an exemption in respect of goods on which duty has already been paid can be made is by providing for refund of duty already paid; otherwise, the whole object of the granting of the exemption in respect of such goods is frustrated. So the Notification No. 2/Salt/47 is nothing but one dealing with "exemption" as contemplated by Section 23 of the Sea Customs Act, 1878 and Rule 8 of the Central Excise Rules, 1944. This Notification was perhaps issued separately though intended to be part of the said two Notifications because the refund of duty already paid in respect of salt held in stock on the 1st of April, 1947 was made subject to certain special conditions and Rules which would be applicable only to salt held in stock and not to stock to be acquired on or after 1-4-1947. The primary matter dealt with in all the three Notifications, their true nature and character, their direct, primary and dominant object is the exemption from duty of salt in stock held by merchants on 1-4-1947, and salt to be acquired on or after 1-4-1947. To use the words of the Privy Council in the case of *Charles Russel v. Queen* (1882) 7 A. C. 829 at p. 839 we must find what is the "primary matter dealt with." We must find "the true nature and character of the legislation in the particular instance under discussion in order to ascertain the class or subject to which it really belongs."

39. It is also a well known rule of construction of Statutes that when an Act confers a power, it impliedly grants also the power of doing all such acts or employing such means as are essentially necessary for its execution. Such ancillary powers are truly incidental to the main powers and are impliedly included in the grant. The principle on which implied power is given confines it within the limits of what is required by assumed necessity. If refund of duty cannot be made, the exemption granted in respect of salt held in stock on 1-4-1947, would be illusory. That a claim for refund on repayment of tax paid and a claim for exemption can in a particular context mean one and the same thing is clear from the decision of the case of *Ex parte, Linen Industry Research Association* (1937) 21 Tax Cas 108. The relevant portions of the observations of Lord Justice Best which were made in construing certain provisions of the Northern Ireland Income Tax Act, may be set out hereunder:

"Sections 37, 38 and 39 all deal with exemptions. In each case the side note begins with the word "exemption". But although this is the case, yet if we look at Section 40 which contains the machinery by which effect is to be given to Sections 37, 38 and 39 we find that the side note is "provisions as to claiming

repayments." Now the side note is not part of the Act of Parliament. But for the purpose of interpretation it was used by Baron Martin in *Nicholson v. Fields* (1862) 31 LJ Ex. 233 and by Collins, M. R. in *Bushell v. Mammond* (1904) 73 LJ K. B. 1005 where the latter learned Judge is reported as having said that the side note although it forms no part of the section is of some assistance inasmuch as it shows the drift of the section. The drift then of Section 40 is that Sections 37, 38 and 39 are concerned with claims for repayment. But the matter is not left merely to drift, for Section 40, Sub-section (3) provides that where the Special Commissioners allow a claim under Sections 37, 38 or 39 they shall issue an order for repayment.

From a consideration of these sections I arrive at the conclusion that although the claim to be made u/s 37 is called a claim for exemption, it is in reality a claim for repayment of tax for the payment of which there is already a liability. This conclusion is, I think, borne out if we examine closely the claim made by the Association in the present case and read it alongside the provisions of Section 37(1)(a) of the Act of 1918."

40. The decision of Kapur J. on which reliance has been placed on behalf of the respondent overlooks this aspect of the matter, namely, that the Notification No. 2/Salt/47 is really a Notification dealing with exemption and the consequences resulting from such exemption, as apparently, the learned judge's attention was not drawn to this aspect of the matter at all.

41. Rule 11 and Rules 97 to 100 of the Central Excise Rules, 1944 also indicate that the Central Government can frame Rules with regard to refund of duty paid, although "refund" is not one of the matters specifically mentioned in any of the clauses under Sub-section (2) of Section 37 of the Central Excises and Salt Act, 1944. It is obvious that the general power preserved u/s 37(1) of the Act makes it competent for the Central Government to frame Rules with regard to matters not expressly covered by the different clauses in Sub-section (2) of Section 37. The Notification No. 2/Salt/47 can from this point of view be also treated as containing Rules of refund validly made u/s 37(1) of the Act.

42. It was submitted by Mr. Ghosh on behalf of the respondent that Executive Government cannot by Notification give retrospective effect to a legislation and as the Notification No. 2/Salt/47 purports to exempt salt in respect of which duty has already been paid before 1-4-47, it is invalid being retrospective in operation. The attention of the Court was drawn to the case, reported in *Modi Food Products Ltd. Vs. Commr. of Sales Tax, U.P.*, . But it may be pointed out that the power of exemption as given u/s 23 of the Sea Customs Act or u/s 37(2) (xvii) read with Rule 8(1) of the Central Excise Rules is an unrestricted power. There is no limit or restriction imposed on such power. Moreover, the Notification has really no retrospective operation in the strict sense of the terms, as has already been pointed out by my learned Brother. The Notification affects only stock of salt existing in the hand of the dealers or merchants on 1-4-47. In my view, the Notification No. 2/Salt/47 is not invalid and it is binding on the

respondent Union of India, and the respondent is liable to refund the duty paid by the appellant. I agree that the appeal should be allowed with costs as directed by my learned Brother.