

(1992) 02 KAR CK 0034

In the Karnataka High Court

Case No : Writ Petition No's. 35972 and 35973 of 1982

Falcon Tyres Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-02-1992

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 4 (4) (ii)
Central Excise Rules, 1944 — Rule 10, 173C (3)

Citation : (1992) 38 ECC 182 : (1992) 60 ELT 116 : (1992) ILR (Kar) 829 :
(1992) 2 KarLJ 172

Hon'ble Judges : S.P. Bharucha, C.J.;Shivraj V. Patil, J

Bench : Division Bench

Advocate : Shri Naganand, for the Appellant; Shri Shylendrakumar, C.G.S.C., for the Respondent

Judgement

This Judgment has been overruled by : Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others, AIR 2000 SC 811 : (2000) 68 ECC 1 : (2000) 119 ELT 257 : (2000) 1 JT 453 : (2000) 1 SCALE 369 : (2000) 2 SCC 536 : (2000) 1 SCR 518 : (2000) AIRSCW 364 : (2001) AIRSCW 2399 : (2000) 1 Supreme 412

S.P. Bharucha, C.J.—These write petitions have been referred for hearing to a Division Bench. They challenge the vires of Section 4(4)(ii) of the Central Excises and Salt Act, 1944. This challenge is not pressed in this Court in view of the decision of a Division Bench in Mangalore Chemicals and Fertilizers Ltd. and Others Vs. Assistant Collector of Central Excise, Mangalore and Others, read with the decision of a Full Bench in Union of India Vs. Alembic Glass Industries Ltd.,

2. What remains to be considered in these writ petitions is a question upon which there is a divergence of opinion between various High Courts.

3. The first petitioner was served with notices dated 13th June, 1977 by the Superintendent of Central Excise under Rule 10 of the Central Excise Rules, as it

then read, to show case why the price lists submitted by it under Rule 173C(3) of the said Rules should not be revised and why it should not be required to pay excise duty allegedly short-levied in the sums therein mentioned. The first petitioner showed cause, but the notices were made absolute by the Asstt. Collector of Central Excise. The first petitioner preferred appeals, which were rejected by the Appellate Collector of Central Excise and Customs. Its Revision Application to the Government of India met the same fate.

4. The show cause notices and orders of these authorities are under challenge in these writ petitions. The argument is that Rule 10 as it then stood was substituted on 6th August, 1977. Since the proceedings that commenced upon the show cause notices dated 13th June, 1977 had not been completed by 6th August, 1977 when the old Rule 10 was substituted, the proceedings could not be continued, there being no saving clause.

5. At the outset, we must set out the provisions of the old Rule 10, that is, as it read until it was substituted on 6th August, 1977. It read. :

"Recovery of duties or charges short-levied, or erroneously refunded.

(1) When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty or charges due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow".

6. The substituted Rule 10, so far as it is relevant, read thus :

"Recovery of duties not levied or not paid or short-levied or not paid in full or erroneously refunded :

(1) Where any duty has not been levied or paid or has been short levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid, or which has been short-levied, or to whom the refund has erroneously been made; or which has

not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice.

Provided that :

(a) where any duty has not been levied or paid, has been short-levied or has not been paid in full, by reason of fraud, collusion or any wilful misstatement or suppression of facts by such person or his agent, or

(b) where any person or his agent, contravenes any of the provisions of these rules with intent to evade payment of duty and has not paid the duty in full, or

(c) where any duty has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by such person or his agent, the provisions of this sub-section shall, in any of the cases referred to above, have effect as if for the words "six months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the period of six months, or five years, as the case may be.

(2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served, under sub-rule (1), determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined".

7. We may also note that on and from 17th November, 1980 the substituted Rule 10 was omitted and Section 11A was introduced in the Act. The relevant portion of Section 11A reads thus :

"Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded :-

(1) when any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted.

Explanation. - Where the service of the notice is stayed by an order of a Court,

the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under subsection (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined".

8. Great reliance was placed by the learned Counsel for the petitioners upon two judgments of the Gujarat High Court. The first is in the case of Amit Processors Pvt. Ltd. Vs. Union of India and Others, The Gujarat High Court placed reliance upon the Supreme Court's judgment in M/s. Rayala Corporation (P) Ltd. and Another v. The Director of Enforcement, New Delhi (AIR 1970 SC 494) to hold that Section 6 of the General Clauses Act would not save proceedings under the old Rule 10. No action, in its view, could have been taken in pursuance of a notice issued under the old Rule 10. It also relied upon the same judgment of the Supreme Court to hold that Section 11A which was introduced simultaneously with effect from 17th November, 1980, would not save a proceeding under the old Rule 10. The decision of the Allahabad High Court in Ajanta Paper Products Vs. Collector of Central Excise and Another, to the same effect was approved by the Gujarat High Court. The Amit Processors' decision was followed by the Gujarat High Court in Mehendra Mills Ltd. Vs. Union of India,

9. The Allahabad High Court judgment in the case of Ajanta Paper Products also placed reliance upon the Supreme Court judgment in the case of M/s. Rayala Corporation (P) Ltd. and, based thereon, held that, within the omission of Rule 10, a notice issued under that rule would lapse and no proceedings under that provision could be continued. The notification omitting Rule 10 did not contain any provision for the continuance of proceedings already taken, nor did the amending Act which introduced Section 11A adopt the legal device of creating a fiction by which proceedings under Rule 10 would be deemed to be proceedings u/s 11A.

10. Since much reliance has been placed upon the Judgment in the Rayala Corporation case, we must refer to it immediately. The contention that was raised before the Supreme Court was that a charge had been made against the appellants of violation of Rule 132A(2) of the Defence of India Rules, which was punishable under Rule 132A(4); Rule 132A had been omitted by a Notification dated 30th March, 1965, so that a prosecution in respect of an offence punishable under that rule could not be instituted on 17th March, 1968 when it had ceased to exist. Even if there was a contravention of Rule 132A(2) by the appellant when that rule was in force, the act of contravention could not be held to be a "thing done or omitted to be done under that Rule", so that, after that rule had been omitted, no prosecution in respect of that contravention could be instituted. Counsel for the appellants conceded the possibility that if a prosecution had already been started when Rule 132A was in force, that

prosecution might have been competently continued, but once the rule was omitted altogether, no new proceeding by way of prosecution could be initiated even though it might be in respect of an offence committed during the period that the rule was in force. The Supreme Court accepted the contention and held that Clause 2 of the Defence of India (Amendment) Rules, 1965, could only afford protection to action already taken while the rule was in force, but could not justify the initiation of a new proceeding which would not be a thing done or omitted to be done under the rule, but would be a new act of initiating a proceeding after the rule had ceased to exist. Upon this basis, the complaint against the appellants for the offence under Rule 132A(4), made after 1st April, 1965, when the rule was omitted, was held to be invalid.

11. We may at this stage also note that the Supreme Court in the Rayala Corporation case held that Section 6 of the General Clauses Act could apply only when there was a repeal of a Central Act or Regulation but not of a Rule. Having regard to this finding of the Supreme Court, we cannot follow the judgments cited by counsel on behalf of the excise authorities of the Delhi and Bombay High Courts. In Kolhapur Cane Sugar Works Ltd. and another Vs. Union of India and others, the Delhi High Court based itself upon the provisions of Section 6 of the General Clauses Act and held that a proceeding commenced under the old Rule 10 could validly continue subsequent to the insertion of the substituted Rule 10. This was also the view taken by a Division Bench of the Bombay High Court in Jam Shri Ranjit Singhji Spg. and Wvg. Mills Co. Ltd. Vs. Union of India.,

12. There is a judgment delivered by the Madhya Pradesh High Court in the case of Gwalior Rayon Mfg. (Wvg.) Co. Vs. Union of India (UOI) and Others, that fully supports the stand of the excise authorities. The Madhya Pradesh High Court noted the judgment of the Allahabad High Court in the case of Ajanta Paper Products and of the Supreme Court in the case of Rayala Corporation. In its view, the decision in the case of Rayala Corporation did not conclude the point. That was a case, it said, relating to an offence under Rule 132A(2) of the Defence of India Rules, which was made punishable under sub-rule (4) thereof. Rule 132A as a whole ceased to be in existence from a specified date and the question was whether proceedings could be validly taken for that offence after its omission. The Supreme Court had held that Section 6 of the General Clauses Act applied to repeals of Central Acts and Regulation but not of Rules and, for this reason, Section 6 of the General Clauses Act was held to be inapplicable to save a prosecution under Rule 132A after its omission. The Supreme Court had also held that the amended Rules, by which Rule 132A had been omitted, did not save a prosecution under the omitted Rule 132A. In the Madhya Pradesh High Court's opinion, the Supreme Court decision did not apply to the case before it. The rule in respect of which the Supreme Court had to decide was a rule which provided for the offence itself and did not deal with an ancillary matter. In the case before the Madhya Pradesh High Court the liability of the petitioner was based on the short levy of excise duty and the provisions for the levy of excise duty contained in the Act and the Rules framed thereunder remained unaffected by the change

of Rule 10; so also the provision for penalty. In the Madhya Pradesh High Court's opinion, the distinction on facts was sufficient to distinguish the decision in Rayala Corporation's case and to indicate that the result reached in the Allahabad decision in Ajanta Paper Products case did not automatically flow therefrom. It followed that, with the introduction of Section 11A in the Act on 17th November, 1980, when Rule 10 ceased to exist, there was a maintenance of continuity. There was neither any repeal nor omission of an enactment but the continuance of the same throughout, the only difference being that prior to 17th November, 1980 the provision was in one part of the Act, that is to say, in the Rules which were framed under the Act, and subsequent to that date it was in the Act itself. In the circumstances, it was found difficult to appreciate how the principles relating to repeal or omission of an enactment could apply or to hold that a saving clause was needed to continue proceedings initiated prior to the change being brought about.

13. The Rayala Corporation case related to a situation where the substantive provision for the alleged breach of which the proceedings were initiated was itself removed from the Defence of India Rules by the time the proceedings were initiated. It is no one's case in the matter before us that the substantive provisions of law in respect of which the breach was alleged were in any way altered. In our view, therefore, the decision in the Rayala Corporation case cannot be determinative of the issue before us.

14. The old Rule 10, that is to say, Rule 10 as it stood prior to 6th August, 1977, empowered the proper officer to serve a notice upon the person from whom the alleged deficiency in duty charged was to be recovered to show cause to the Assistant Collector of Central Excise why he should not pay such amount. The time limit specified in that behalf was 3 months from the date upon which the duty or charge was paid or adjusted. The Assistant Collector of Central Excise was required to determine whether such amount was payable by such person and, if an amount was found to be payable, the person was required to pay it within 10 days or such further period as the Assistant Collector might allow. The substituted Rule 10, that is to say, Rule 10 as it read after 6th August, 1977, altered only the time limit within which the proper officer could issue the show cause notice; he could do so ordinarily within 6 months and, in the three cases specifically set out, within 5 years. For the rest the rule remained the same. The substituted Rule 10 was omitted with effect from 17th November, 1980 and simultaneously Section 11A was introduced into the Act. Section 11A was almost identical to the substituted Rule 10. Even the periods of time aforementioned remained the same. There was, therefore, prior to 6th August, 1977, between 6th August, 1977 and 17th November, 1980 and after 17th November, 1980 power vested in the proper officer to issue notice to show cause why a person should not pay duty or charges short-levied and power vested in the Assistant Collector of Central Excise to determine whether any amount was in fact payable by such person.

15. In these circumstances, we are respectfully inclined to agree with the aforementioned judgment of the Division Bench of the Madhya Pradesh High Court and, respectfully, to disagree with the view taken by the two Division Bench judgments of the Gujarat High Court and the Division Bench judgment of the Allahabad High Court aforementioned. In our view, therefore, the contention raised on behalf of the writ petitioners that the Assistant Collector of Central Excise could not continue proceedings against it subsequent to 6th August, 1977 must fail.

16. The writ petitions are accordingly dismissed. There shall be no order as to costs.