

(1965) 11 PAT CK 0003

In the Patna High Court

Case No : Misc. Judl. Case No. 178 of 1962

Hindusthan General Electrical Corporation Ltd.

APPELLANT

Vs

Superintendent of Central Excise and Another

RESPONDENT

Date of Decision : 17-11-1965

Acts Referred:

Central Excise Rules, 1944 — Rule 52, 9, 9B

Central Excises and Salt Act, 1944 — Section 14, 2, 35, 36, 37(2)

Constitution of India, 1950 — Article 265

General Clauses Act, 1897 — Section 3

Citation : AIR 1966 Patna 248

Hon'ble Judges : R.L. Narasimham, C.J;S.N.P. Singh, J

Bench : Division Bench

Advocate : Advocate General and Bindbashini Prasad Sinha, for the Appellant;
Standing Counsel, for the Respondent

Judgement

Narasimham, C.J.—This is an application under Article 226 of the Constitution to quash the orders of the Superintendent of Central Excise, Ranchi, (Annexures I and II), dated the 13th March, 1961, and 17th March, 1961, directing the petitioner to pay the full excise duty on 1186 radio sets before removing them from the factory. The petitioner appealed against the said orders of the Superintendent of Excise to the Collector of Central Excise, Patna, who by his order dated the 30th June, (Annexure II-A) 1961, rejected the appeal. The (petitioner then moved the Central Government in revision and specially requested the Government by its letter dated the 22nd August, 1961, to give it an opportunity of being heard before disposing of the revision petition (Annexure V). The Central Government, however, by their letter dated the 27th September, 1961 (Annexure VI) informed the petitioner that they did not consider it necessary to grant a personal hearing at the revision stage and further intimated that if the petitioner had any further submissions to make they may be sent in writing. Thereafter, on the 21st December, 1961 (Annexure III), the Central Government rejected the revision application.

2. By the Finance Act, 1961, the following new item, item 33A, was inserted in the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act")".

"Item No. Description of goods. Rate of duty.

33A

Wireless Receiving Sets, all sorts including Transistor Sets and Radiograms, with or without loud speaker.

20 per cent ad valorem."

Though the Finance Act came into effect only from the 1st April, 1961, in respect of several items, nevertheless by virtue of the declaration under the Provisional Collection of Taxes Act, 1931, made in the Bill itself, the aforesaid insertion of item 33A in Schedule I of the Act came into effect from the midnight of the 28th February--1st March, 1961. Hence excise duty at the rate mentioned above would be payable in respect of wireless sets whose manufacture was completed after the said date; but if the sets had been fully manufactured prior to that date, the said duty will not be payable.

The petitioner's contention was that these sets were fully manufactured prior to 1st March, 1961, and that, consequently, no duty was payable. But its factory was inspected by an officer of the Central Excise Department on the 9th March, 1961, and that officer reported that 1186 radio sets were lying in the godown of the Radio Assembly Shop of the factory in a dismantled condition. The wired chassis wherein some of the wires were still to be soldered were stored separately and the cabinets in which the sets were to be fitted were also kept separately. The wireless valves and the magic eye and the wires leading to the speaker were also not fitted to the sets. Hence the Superintendent of Excise held that the manufacture of the said wireless sets were not completed prior to the 1st March, 1961, and that consequently excise duty was payable by virtue of the said amendment to the Schedule of the Act. The contention of the petitioner was that in the commercial sense the manufacture of the wireless sets had been completed prior to the 1st March, 1961, and that, consequently, no duty was payable. This contention was, however, overruled by all the officers of the Central Excise Department, including the Central Government exercising their powers of revision.

3. Several constitutional questions, including the vires of the Central Excise Rules (hereinafter referred to as "the rules") made under the Act, have been raised by Mr. Lal Narain Sinha on behalf of the petitioner. To appreciate these points it is necessary to refer to the relevant provisions of the Act and the rules made thereunder.

The Act was made in 1944 for the purpose of consolidating and amending the law relating to central duties of excise on goods manufactured or produced in India. Section 3, which is the charging section, says that the duty shall be levied

and collected in such manner as may be prescribed in the rules, in respect of excisable goods which are produced or manufactured in India, at the rates set forth in the First Schedule. We may leave out of consideration goods which are produced, because in the present case we are concerned only with goods which are manufactured, with a view to remove any ambiguity that may arise as to the precise stage when the manufacture of certain class of goods may be said to have been completed, the definition Clause (f) of Section 2 was specially inserted in the Act in the following terms, namely, "manufacture" includes any process incidental or ancillary to the completion of a manufactured product". From this definition it may be fairly inferred that the stage of completion of a manufactured produce is not reached until all the processes incidental or ancillary have also been completed. The rate of excise duty was mostly on the a] valorem basis and hence Section 4 laid down the principles to be followed in calculating the value of an article. Clause (a) of that section stated that the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty shall be the value of the article. If such wholesale market does not exist for such article at such price at the place of manufacture, the wholesale price existing at the nearest place where such market exists shall be the. relevant factor. Clause (b) of that section provided for a special contingency which may arise if such wholesale price is not ascertainable at all. In such circumstances the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer at the time of removal of the article chargeable with duty, was deemed to be the value of the article.

Unlike other taxing statutes, such as, the Sea Customs Act, the Income Tax Act, the Sales Tax Act, etc., the Act did not contain detailed provisions for the assessment of the excisable goods to duty and their collection. This power was conferred on the Central Government by the rule-making power in Section 37(2) (i), which is as follows:

"(2) In particular, and without prejudice to the generality of the foregoing power, such rules may-

(i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duty shall be payable, and the recovery of duty not paid;"

But Section 14 of the Act conferred power on any Central Excise Officer, duly empowered, to summon any person to give evidence or to produce documents in any inquiry that may be made for the purposes of the Act. Certain provisions of the CPC were made applicable to such inquiries, and Sub-section (3) of Section 14 further stated that the inquiry shall be deemed to be a "judicial proceeding" for the purpose of Sections 193 and 228 of the Penal Code. Powers of search, arrest, etc. were provided in the Act which need not be referred to in detail here.

Section 35 conferred a right of appeal against "any decision or order" passed by the Central Excise Officer, either under the Act or under the rules made thereunder. The appellate authority's powers were made plenary, subject to certain limitation mentioned in the proviso to Sub-section (1) of Section 35, which is not material here. Section 36 conferred On the Central Government powers of revision against any decision or order passed by subordinate Central Excise Authorities. As most of the functions were thus conferred on the Central Government in exercise of their rule-making power, the Act became a small one of forty sections only. But the Legislature took care to retain some sort of control over the rule-making power conferred on the Central Government by Section 38 of the Act which is as follows:

"38. 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 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."

4. Turning to the relevant rules, I may refer to Rule 9 which prohibits the removal of any excisable goods from the place at which it is manufactured until the excise duty leviable thereon has been paid in the manner provided in the rules. Provision was, however, made for storing in an approved warehouse the goods without payment of duty. Similarly, removal on part-payment of duty was also provided for in Rule 49. There is also provision for an account current of the duties to be maintained by the manufacturer by virtue of which goods may be removed regularly, provided that sufficient deposit is kept in the account to cover the duty payable on the goods. Where a doubt may arise when assessment of certain class of goods involves two or more alternative basis, Rule 9B provided for provisional assessment at the lower or the lowest of the rates, and the removal of such goods after the payment of duty so provisionally assessed pending further investigation about the exact amount of duty payable. The manufacturer was required to execute a bond with a view to safeguard the Government revenue. Sub-rule (5) of Rule 9B provided for final assessment of such goods after obtaining complete information or proof of information already furnished from the manufacturer concerned.

Rule 49, by way of special concession to a manufacturer, stated that payment of duty shall not be required in respect of excisable goods made in a factory until they are about to be issued from the place of manufacture or from the warehouse where they are stored. Sub-rule (3) of Rule 49 provided for removal of goods on part-payment of duty in special circumstances on the execution of bond by the manufacturer. Rule 52 which deals with assessment to excise duty is

extremely cryptic. It says that when the manufacturer desires to remove goods on payment of duty he shall submit an application in Form A. R. 1 to the proper officer and deliver the same to that officer at least twelve hours before it is intended to remove the goods. The form itself provides for the assessment to be made by the Central Excise Officer, described as "Assessment Memorandum", and Rule 52 merely says "the officer shall, thereupon, assess the amount of duty due on the goods".

Rule 52A provides for removal of goods on production of a gate pass and other consequential matters. It will be noticed that there is no provision, either in the Act or in the, rules, expressly authorising the holding of an inquiry by the assessing officer where there is controversy as to whether the goods were really manufactured goods, or else, whether they come under a particular item of Schedule I to the Act, and such other matters. But the assessing officer is required to pass an order of assessment, and Rule 214 says that every appeal or application for revision shall be accompanied by a copy of the decision or order by which the party is aggrieved.

5. The main contentions of Mr. Lal Narain Sinha on behalf of the petitioner may now be summed up:

(i) the provision of the machinery for assessment and collection of excise duty was essentially a legislative function, and the Legislature has abdicated this function by leaving it entirely to the rule-making power of the Central Government, without giving any guidance in the Act. He used the word "assessment" in its comprehensive sense, as including the whole procedure for imposing liability upon the tax-payer, as pointed out by the Privy Council in (1938) 6 ITR 414 (Privy Council) .

2. The rules have been so framed as to practically deny the assessee a reasonable opportunity of being heard whenever there is a dispute about the amount of duty payable, and hence the rules impose an unnecessary and unreasonable restriction on freedom of trade and thus offend Article 19(1)(g) of the Constitution and are not saved by Clause (6) of that Article.

3. The action of the Central Government in refusing to give a personal hearing to the petitioner in respect of the revision application and merely allowing the petitioner to submit a written representation was tantamount to refusal to give a hearing, and consequently violates the rule of natural justice, namely audi alteram partem.

6. Mr. Lal Narain Sinha could not satisfy us that in a taxing statute the assessment and collection of tax is essentially a legislative function which cannot be constitutionally delegated to the rule-making authority. He relied on Article 265 of the Constitution, which says "no tax shall be levied or collected except by authority of law". It was urged that "levy" and "collection" of tax were placed on the same pedestal in this article and that, consequently, the collection of tax also was essentially a legislative function which cannot be abdicated by the

Legislature. The obvious answer to this argument is that in Article 265 the relevant word used is "law" and not "an Act of a Legislature". The expression "law" is wider than the expression "an Act of a Legislature", as will be clear from the definition of "Indian law" given in Clause (29) of Section 3 of the General Clauses Act. It will include not only the Act of a Legislature but also the rules validly made thereunder. Hence no strength can be derived from the language of Article 265 of the Constitution in support of the argument that the levy and collection of tax should always be treated on the same footing as essentially legislative functions. There seems nothing unconstitutional if a taxing statute while providing for levy in the Act itself delegates to the rule-making authority the power of providing for the collection of tax.

7. It is also not correct to say that the rule-making power conferred by Section 37(2)(i) of the Act was excessive and that no guidance was conferred by the Act. While making assessment the assessing officers have to bear in mind the definition of "manufacture" as given in Section 2(f) and the principles for the determination of the value of the goods as laid down in Section 4. They have also to bear in mind that any order or decision passed by them is appealable u/s 35 to the superior authority and also revisable by the Central Government u/s 36. The power of assessment thus conferred on the assessing officer by the rules cannot be exercised arbitrarily or capriciously. Moreover, by conferring extensive power to summon witnesses to give evidence and to produce documents, Section 14 of the Act, in effect, made it clear that the assessing officers perform quasi-judicial functions.

8. Apart from thus giving some guidance as aforesaid, the Legislature took special care in the proviso to Section 38 of the Act to require that all the rules shall be laid before Parliament in session and that the Parliament may make any modification in the rules. Thus it cannot be said that the Parliament completely abdicated its functions as far as collection of excise duties is concerned.

9. I may in this connection refer to the observations of their Lordships of the Supreme Court in the well known Kerala Education Bill case 1959 SCJ 321 : In Re: The Kerala Education Bill, 1957. Reference Under Article 143(1) of The Constitution of India, where the rule-making power conferred by Clause 36 of the Bill was challenged. Their Lordships referred to Clause 37, which required the rules to be placed before the Legislature, and observed that this requirement made it clear that "the rules owe their efficacy to the tacit assent of the Legislative Assembly itself". Their Lordships further observed that the Legislature had not abdicated its function. Again, in *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, their Lordships pointed out that if the statute requires the rules made under it to be placed before the Legislature, the rules become a part of the Act itself. This aspect was also emphasised in Section 38 of the Act in the following terms: "All such rules and notifications shall thereupon have effect as if enacted in this Act". I may also in this connection refer to two English decisions, *Institute of Patent Agents v.*

Joseph Lockwood (1894) AC 347 and to the observations of Lord Thankerton in *Minister of Health v. The King* 1931 AC 494, where the provision in an Act of Parliament requiring the rules made under the Act to be placed before the Parliament was held to be an important circumstance to show that the Legislature had not abdicated its function. For these reasons I reject the contention therefore that the relevant rules should be struck down on the ground of excessive delegation amounting, in effect, to abdication of function by the Legislature.

10. The second contention raised by Mr. Lal Narain Singh is equally untenable. It is true that the rules do not in express term provide for an elaborate inquiry on disputed questions of fact and law before a formal order of assessment could be made. But there is enough indication in the Act and the rules to show that the assessing officer should approach the whole question in a judicial manner and not arbitrarily or capriciously. The conferment of wide powers to summon witnesses to give evidence or produce documents by Section 14, and the provision for appeal and revision against his order, are themselves sufficient to show that he cannot act arbitrarily. While calculating the rate of tax on an ad valorem basis, he must bear in mind the principles laid down in Section 4 of the Act. He may also make provisional assessment under Rule 9B in appropriate cases and he may also allow removal of goods on part-payment of duty or when there is a running current account, where there is provisional assessment, Rule 9B(1) says that before final assessment the officer should give the assessee an opportunity to furnish complete information or proof of the information already furnished.

These provisions undoubtedly show that some sort of quasi-judicial inquiry should be made before any assessment is finalised. But in an overwhelming number of cases the process of assessment becomes somewhat mechanical, based on arithmetical calculation. This seems to be the reason why Rule 52 says that at least twelve hours before the date of intended removal of goods the assessee may apply for assessment in the prescribed form, and the officer may thereupon assess the amount of duty on the goods. It was urged that within such a short period of twelve hours it will not be possible for any assessee to adduce all available evidence in support of his contention, and that, consequently, there is unreasonable restriction on trade. This argument overlooks the significance of the words "at least" occurring in Rule 52. There seems no bar in the rule to the assessee applying several days before the actual day on which he intends to remove the goods.

It is true that Rule 9 permits the storing of goods in a warehouse or other approved places without payment of duty. But this is a provision for the benefit of the assessee and the rules do not say that the assessment should be made only a day or two before the date of intended removal of goods. If the assessee feels that disputed questions regarding assessment arise, there is no bar to his submitting the application in the prescribed form several days before the date of

intended removal, thereby providing adequate opportunities to him to adduce all available evidence in support of his contention. In my opinion, therefore, there is no unreasonable restriction on trade in the procedure laid down in the rules for assessing goods to excise duty. As already pointed out, the provisions relating to provisional assessment, removal of goods on part-payment of duty and removal of goods where there is a current account, or execution of bond, appear to have been deliberately made with a view to prevent undue restrictions on the movement of goods into the market for the purpose of trade.

11. It was then urged that the power to open current account (3rd proviso to Sub-rule (1) of Rule 9), the permission to remove goods on part-payment of duty (Rule 49) and the power to make provisional assessment to duty (Rule 9B) were all made discretely with the appropriate authorities of the Central Excise Department and that the assessee cannot claim those concessions as of right. It was also urged that under Rule 52 it was discretionary with the Collector of Central Excise in a particular case to reject or allow an application for assessment to be made within a specified period as he may think fit. Relying on these discretionary powers it was urged that the free flow of manufactured goods into the market, which is essential for the purpose of safeguarding the freedom of trade, is unreasonably hampered and that the manufacturer is practically at the mercy of the officers of the Central Excise Department. They may, if they choose, refuse to give him any of the concessions, refuse to permit the removal of goods until the payment of duty and, by making an arbitrary assessment just a day before the date of the intended removal of goods from the warehouse, not only deprive the assessee of an opportunity of fair hearing before assessment but impose unreasonable restrictions on the freedom of trade.

12. In this case it is unnecessary to enter into any elaborate discussion as to whether, notwithstanding the language used in the afore said rules, the power conferred on the Central Excise Officers must be held to be mandatory and not discretionary, following the well known principle laid down in *Julius v. Bishop of Oxford* (1880) 5 AC 214, which has been followed in several subsequent decisions, both in Great Britain and in India. I need only refer to pp. 239 to 242 of Maxwell on Interpretation of Statutes Law, 6th edition. There is sufficient authority to show that notwithstanding the use of the permissive expressions, such as, "as he thinks fit", "may at his discretion", etc., a power conferred by a statutory rule may be imperative if it is conferred on public servants for performance of public duties. Even if it is assumed that the exercise of these powers is discretionary, there is no reason to presume that they will be exercised arbitrarily or capriciously with a view to impose undue restraint on movement of manufactured goods. Even if the lower Excise Authorities exercise the discretionary power unreasonably, there is the appellate authority acting u/s 35, or the revisional authority acting u/s 36, to correct the wrong exercise of discretion. It will be noticed that the appellate and revisional power is conferred not only against any "decision" of the lower authority, but also against "any order", which will include not only final orders but even interlocutory orders. In

my opinion, therefore, the argument that the relevant statutory rules impose unreasonable restrictions on the freedom of trade, or they, in substance, deny the assessee a reasonable opportunity of fair hearing where there is a disputed question of fact or law, is not tenable.

13. Some of the observations in *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, were relied upon. In that case it was observed that the Travancore-Cochin Land Tax Act of 1955 was entirely silent as to the machinery and procedure to be followed in making the assessment, leaving it to the Executive to evolve the requisite machinery and procedure. But in the observations in paragraph 9 of that judgment (page 559), if carefully scrutinised, it will be found that the main reason why their Lordships struck down the Act as unconstitutional was that there was no provision in the Act requiring the assessing authority to act judicially in assessment proceedings, nor was there any right of appeal provided to an assessee who may feel aggrieved by the order of assessment. Here, however, these defects are not found. This decision will, therefore, be of no help to the petitioner. On the other hand, in *Chaturbhai M. Patel Vs. Union of India (UOI) and Others*, there are some observations to the effect that the restrictions imposed by the rules were not unreasonable. It is true that in that case the question for consideration was the provision for levy of penalty, but the observations would apply with equal force so far as levy of duty is concerned.

14. The third contention of Mr. Lal Narain Sinha, however, seems to have much force. The Central Government thought that while exercising their powers of revision u/s 36 of the Act they were not bound to give personal hearing to the assessee and that it would suffice if its written submissions, if any, were duly considered. This view seems to be incorrect in view of the observations of their Lordships of the Supreme Court in *Vrajlal Manilal and Co. Vs. Union of India (UOI) and Another*, following the earlier decision of the Supreme Court in *Shivji Nathubhai Vs. Union of India (UOI) and Others*. In these decisions the power of review conferred on the Central Government by Rule 59 of the Mineral Concession Rules was held to be of a quasi-judicial nature and that it was incumbent on the Central Government to give the aggrieved person reasonable opportunity by being heard before passing orders. Though Rule 59 of the Mineral Concession Rules used the expression "review", the content of that rule shows that it was a power of revision & in essence, there is no difference between the power conferred on the Central Government by Rule 59 of the said rules and the power conferred on that Government u/s 36 of the Act.

I have already held that even the assessing officer has to act quasi-judicially, and it necessarily follows that the appellate authority exercising powers u/s 35 and the Central Government exercising powers of revision u/s 36 must also act quasi-judicially and give the petitioner a reasonable opportunity of being heard. The necessity of hearing in this case arises mainly because the question as to when the manufacture of a wireless set is complete is a mixed question of law and fact,

depending on the construction of the expression "manufacture" as given in Section 2(f) of the Act and on what is known to the consumers and the commercial community as "wireless set" (see in this connection paragraph 13 at p. 794 of Union of India (UOI) Vs. Delhi Cloth and General Mills,). The petitioner must be given a reasonable opportunity to prove by affidavits or otherwise (as was done in the aforesaid Supreme Court case) its contention that the disputed 1186 radio sets, or some of them, at any rate, were completely manufactured prior to 1st March, 1961, and that, as such, free from payment of duty. A mere perusal of the written representation filed by the assessee will not be sufficient compliance with the rule regarding giving reasonable opportunity of hearing which every quasi-judicial tribunal is bound to give.

15. It is true that the petitioner has prayed to this Court for quashing the orders of the Superintendent of Excise dated the 13th March, 1961, and 17th March, 1961 (Annexures I and II). But as the dispute was taken up to the Central Government and the revision application was rejected on the 21st December, 1961 (Annexure III), we must quash not only the orders of the Superintendent of Excise but also the appellate order of the Collector of Central Excise, Patna, and the order under revision passed by the Government of India (Annexure III). It does not appear that the appellate authority gave the petitioner an opportunity of being heard before disposing of the appeal.

16. For these reasons, I would quash the orders of the Superintendent of Central Excise dated the 13th March, 1961, and 17th March, 1961 (Annexures I and II), the appellate order of the Collector of Central Excise dated 30th June, 1961 (Annexure II-A) and the order of the Central Government in the Ministry of Finance (Government of Revenue) dated the 21st December, 1961 (Annexure III) and direct the Collector of Central Excise, Patna, to rehear the appeal of the petitioner after giving him a reasonable opportunity of representing his case and dispose of it according to law. There will be no order for costs.

S.N.P. Singh, J.

17. I agree.