(1957) 03 BOM CK 0022

In the Bombay High Court

Case No : Misc. Application No. 246 of 1956

Hiralal Panachand Shah APPELLANT

Vs

N.L. Mehta and Others RESPONDENT

Date of Decision : 14-03-1957

Acts Referred:

Central Excise Rules, 1944 — Rule 159(2), 213, 8, 8(1)
Central Excises and Salt Act, 1944 — Section 3, 35
Constitution of India, 1950 — Article 14, 226, 245
Legislature Act, 1869 — Section 9

Citation : AIR 1959 Bom 256 : (1958) 60 BOMLR 991

Hon'ble Judges : K.T. Desai, J

Bench : Single Bench

Advocate : Y.B. Rege and R.J. Joshi, for the Appellant; M.J.C. Mistry, for the Respondent

Judgement

1. The Petitioner in this case is a tobacco merchant. He is a member of the Indian Tobacco Merchants He is a member of the Indian Tobacco Merchants Association Limited. He owns a ware-house and holds the requisite licences under the Central Excise and Salt Act, 1944, and the Central Excise Rules. 1944 in connection with the said warehouse. On 9-6-1956, the petitioner submitted to the Range Officer, Central Tobacco Warehouse, an application in Form A.R. 1 for the clearance of one bale of red chopadia whole leaf tobacco from the said warehouse. On 12-6-1956 he made a similar application in respect of another such bale. On 13-6-1956 he submitted a third application in respect of four similar bales. The Range Officer calculated the rate of duty leviable in respect of the goods mentioned in each of the said applications at 6 annas per lb. On 26-6-1956 the petitioner attended the office of the Central Excise, Central Tobacco Warehouse, Bombay, for getting the said applications countersigned for the payment of the duty calculated as aforesaid. In the mean-time, on 16-6-1956, a Notification had been issued by the Collector of Central Excise, Bombay, the effect of which was that the exemption of duty in excess of annas 6

per lb. which was previously available ceased to be available in respect of the said goods and a duty of annas 14 per lb. became payable in respect of the said goods. The Inspector of the Central Excise thereupon made an endorsement on each of the aforesaid applications to the following effect:

"In view of the amendment to the Bombay Central Excise Collectorate Notification No. C.E.R. 8(1)/T25/dated 11-11-55 in force from 21-6-56, the clearance of red chopadia whole leaf tobacco at the rate of 0-6-0 per lb. is not permitted."

The petitioner by his petition challenges the afore-said Notification dated 16-6-1956 issued by the Collector of Central Excise. The Collector of Central Excise, Bombay, is the 1st Respondent to the Petn. The Inspector of Central Excise, Central Tobacco Warehouse, Bombay, is the 2nd Respondent to the petition and the Union of India is the 3rd Respondent to the petition. The petitioner has prayed for a writ of Mandamus or a writ in the nature of Mandamus or other appropriate writ, direction or order under Article 226 of the Constitution of India against the Respondent,

"ordering the Respondents to forbear from enforcing the provision of the said Notification dated 16-6-1956 and further ordering the Respondents to allow the petitioner to clear the said tobacco on payment of the duty at the rate of annas 6 per lb. and to make an order for the clearance of the said tobacco on payment of duty at the rate of annas 6 per lb. and also to forbear from levying, collecting or demanding from the petitioner any duty on the said tobacco in excess of annas 6 per lb."

2. In order to appreciate the contentions of the petitioner it is necessary to refer to some of the provisions of the Central Excises and Salt Act, 1944, and the Central Excise Rules, 1944. Section 3 of the said Act provides as under;

"3(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."

It is not disputed that the tobacco in question constituted excisable goods within the meaning of the said Act. When one turns to the First Schedule to the Act, one finds that the expression "tobacco" has been defined as meaning "any form of tobacco, whether cured or uncured, and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth." Tobacco is item No. 9 in the said Schedule. Item 9 is sub-divided into two parts one relating to unmanufactured tobacco and the other relating to manufactured tobacco. As regards the unmanufactured tobacco, sub-item (5) provides as under:

"(5) if other than flue cured, and not ordinarily used for the manufacture of (a) cigarettes or (b) smoking mixtures for pipes and cigarettes, but capable of being used for the manufacture of biris - Rate of duty fourteen annas."

Sub-item (6) is as under: "If other than flue cured and not otherwise specified -- Rate of duty six annas." It is common ground that the tobacco in question is other than flue cured. It was at one stage contended that the tobacco in question in the form in which it existed was not capable of being used for the manufacture of bidis, that the case clearly fell within sub-item (6) and that irrespective of all notifications, the only duty that was leviable in respect of the goods in question was 6 annas per lb. under sub-item (6).

3. Mr. M.J.C. Mistry, who appears for the Respondents, contended that if that was the case of the petitioner, then the petitioner had no right to come to Court by way of a petition for a writ if the officers concerned had wrongly considered the tobacco in question as falling under sub-item (5) instead of sub-item (6). He contended that it was a question of fact whether a particular type of tobacco fell under sub-item (5) or sub-item (6), and that the dispute in connection therewith could not be made the subject matter of a petition for a writ. He further stated that if the petitioner was aggrieved by such a decision, then his remedy was by way of an appeal as provided for in Section 35 of the Act. Section 35 is in these terms:

"35(1) Any person deeming himself aggrieved by any decision or order passed by a Central Excise Officer under this Act or the rules made thereunder may, within three months from the date of such decision or order, appeal therefrom to the Central Board of Revenue 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. Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against:

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation or penalty than has been adjudged against him in the original decision or order."

Rule 213 of the aforesaid Rules refers to the persons to whom the appeal lies. Mr. Rege, who appears on behalf of the petitioner, having realised the difficulty in his way has intimated to me that on this petition he does not desire to urge the contention that the case fell within the provisions of sub-item (6) and not of sub-item (5). He has stated after consulting his learned junior, the draftsman of the petition, that when in prayer (a) the petitioner sought relief from the Court by issue of a writ

"ordering the Respondent to allow the petitioner to clear the said tobacco on payment of duty at the rate of annas 6 per lb. and to make an order for the clearance of the said tobacco on payment of duty at the rate of annas 6 per lb. and also to forbear from levying, collecting or demanding from the petitioner any duty on the said tobacco in excess of annas 6 per lb."

he claimed to do so only on the footing that the Notification dated 16-6-1956 was invalid and of no effect and that the relief sought was consequential on the said Notification being considered to be invalid and of no effect. Mr. Rege, however, has stated that he should not be deemed to have given up the contention that his case fell under sub-item (6) and not under sub-item (5) in any other proceedings, which he may hereafter adopt. In view of what Mr.Rege has stated, I am not dealing with that aspect of the matter and it would be open to any party to canvass that point before any other tribunal. In view of what is stated by Mr.Rege the point as regards the petition being barred because there was an alternative remedy by way of an appeal does not survive.

4. For the purpose of this petition I am proceeding on the footing that the tobacco in question was capable of being used for the manufacture of biris.

5. Before I deal with the arguments advanced in connection with the Notification dated 16-6-1956, it would be necessary to set out some of the relevant provisions of the said Act and the Rules as also the Notifications issued thereunder. Section 37 of the Act empowers the Central Government to make rules to carry into effect the purposes of the Act. Sub-clause (xvii)of the said section empowers the Central Government to make rules exempting any goods from the whole or any part of the duty imposed by that Act. The duty imposed by the considered as falling within sub-item (5) of item No. 9 of the First Schedule. In exercise of the powers conferred on the Central Government the Central Government has framed rules. Under Rule 8 of the rules so framed it is provided as under:

"8(1) The Central Government 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."

In exercise of the powers conferred upon the Central Government by rule 8(1), the central Government issued a notification on 10-4-1954 which is Ex. B to the petition. That notification runs as follows:

"In exercise of the powers conferred by rule 8(1) of the Central Excise Rules, 1944, and with effect from the tenth day of April 1954, the Central Government hereby exempts from such of the duty leviable thereon under the Central Excise and Salt Act, 1944 as is in excess of four annas and six pies per lb. varieties of unmanufactured tobacco, whether flue-cured or other than flue-cured, which are capable of being used for the manufacture of biris, but are proved to the satisfaction of, and are notified by, the Collector as varieties which are not in fact utilised, or are utilised only to a negligible extent, within the limits of an area specified by him in the notification, for the manufacture of biris."

The Collector of Central Excise, Bombay, purporting to act under the authority given to him by that notification of the Central Government is used from time to time several notifications. The last of such notifications is dated 11.11.1995. That notification is Ex. C to the petition. That notification provides as under:

"In exercise of the powers conferred by Government of India, Ministry of Finance (Revenue Division) Notification No. 16 dated 10-4-1954 and in suppression of his Notification dated 26-11-1954 and in suppression of his Notification dated 26-11-1954. I hereby notify the varieties of unmanufactured tobacco specified in column No.1 of the sub-joined table as varieties which are not in fact used or are used only to a negligible extent for the manufacture of biris within the limits of the area specified in column No. 2 thereof."

Among the varieties specified are all varieties of non-flue-cured tobacco in whole leaf form tied in judis, or in pendhis or in bundles including lal chopadi and lal chopadia. The area specified in column 2 thereof is the whole of the Bombay Collectorate. The case of the petitioner was based in the petition on the exempting ranted under the Notification of the Central Government dated 10-4-1954. That notification, however, was rescinded by the Central Government by a notification issued on 29-11-1995. That notification dated 29-11-1955 is annexed as Ex. No. 3 to the affidavit of the first Respondent in sub-rejoinder dated 2-3-1957. On the same date the Central Government issued another notification which is annexed as Ex. No. 1 to the said affidavit in sub-rejoinder. That notification of the Central Government inter alia provided as follows:

"In exercise of the powers conferred by rule 8(1) of the Central Excise Rules, 1944, as in force in India XXX the Central Government hereby exempts from so much of the duty leviable thereon as is an excess of annas six per lb. varieties of unmanufactured tobacco whether flue-cured or other than flue-cured, which are capable of being used for the manufacture of biris, but are proved to the satisfaction of, and are notified by, the Collector as varieties which are not in fact utilised, or are utilised only to a negligible extent, within the limits of an area specified by him in the notification, for the manufacture of biris; provided that:

(i)XXXX

(ii) If any such variety is consigned from the premises of assessment to any premises situate out-side such area, it shall not be entitled to the said exemption;

(iii) If any variety so exempted is at subsequent time exported outside such area, the exemption hereby granted shall be deemed to be withdrawn and the wholesale dealer so exporting it, shall, prior to such export, pay in respect of the quantity exported, an amount equivalent to the amount of duty from which such quantity was originally exempted."

On 5-1-1956, the Collector of Central Excise, Bombay, in exercise of the authority conferred upon him by the notification of the Central Government, dated 29-11-1955, issued a notification to the following effect:

"In exercise of the powers conferred by the Government of India, Ministry of Finance (Revenue Division) Notification Central Excise -- No CER 8(7)/55 dated 29-11-1955 issued by me under the Government of India, Ministry of Finance

(Revenue Division) Notification -- Central Excise -- No. CER 8(1)/T/55 dated 11-11-1955 issued by me under the Government of India, Ministry of Finance (Revenue Division) Notification -- Central Excise -- No. 16 dated 10-4-1954 shall be deemed to have been re-issued under the Ministry''s Notification -- Central Excise -- No. CER -- 8(7)/55 dated 29-11-1955 with effect from 1-1-1956."

That notification is Ex. No. 1 in the case. By that notification the Collector reissued his previous notification dated 11-11-1955, with the result that red chopadia in whole leaf form became liable to duty at the rate of annas six per lb. in the whole of the Bombay Collectorate. Thereafter the Collector of Central Excise, Bombay, issued on 16-6-1956 the notification in question being Ex. D to the petition. By that notification the Collector of Central Excise, Bombay, at first excluded from the varieties which were exempt in the whole of the Bombay Collectorate from the payment of duty in excess of six annas per lb. red chopadia tobacco in while leaf form. He, however, added one more item to the list of varieties which were exempted. That added item being item No. 16 runs as follows:

"Lal Chopadia, Lal Chopdi" representing the variety ''Red Chopadia'' is whole leaf tied in judis or bundles. In column 2 relating to the area within which the exemption was to operate, it is mentioned as follows:

"Whole of Bombay Collectorate except Bombay H Circle in the Bombay Division No. II."

At one time there was a dispute what Bombay H Circle in the Bombay Division No. II represented. That disputed has been set at rest by the production of a Circular dated 29-3-1956 issued by the Collector of Central Excise, Bombay Division No. II is the Circle relating to tobacco. The area of Bombay H Circle in the Bombay Division No. II represents the area covered by the territory of Greater Bombay, I am informed that the area of the whole of the Bombay Collectorate includes all the territories of the State of Bombay except Gujrat, Saurashtra and Kutch. The result of this amendment is that within the territories of Bombay H Circle in the Bombay Division II i.e. within the area of Greater Bombay red Chopadia in whole leaf form is not exempt from any duty in excess of six annas per lb. It is this notification which is being challenged on various grounds.

6. It is contended by the petitioner in paragraph 14 of his petition that this notification is void, ultra vires and beyond the powers of the first respondent inasmuch as once an exemption had been granted in respect of red chopadia tobacco within the Bombay H Circle in the Bombay Division No. II, it was not competent or open to the first respondent by means of an amendment to the previous notification issued by him to withdraw that exemption. It is contended that what the first respondent has purported to do was really legislative in character and that he had no power or authority to take away the exemption which had once become operative. It is further contended that even if he had

such power he has exercised the same arbitrarily and that he has without any just cause discriminated between the merchants within the area of Greater Bombay and merchants within the State of Bombay outside the area of Greater Bombay. The petitioner contends that the classification is arbitrary and is made without any rational relation to the object sough to be achieved. He says that the notification violates the petitioner''s fundamental rights guaranteed by Article 14 of the Constitution of India.

7. There are two other grounds mentioned in the petition viz., that the notification violated the principles of natural justice and was issued mala fide. These two grounds, however, have not been pressed by the learned counsel for the petitioner.

8. The principal question in the case is one of construction of the notification issued by the Central Government on 29-11-1955. It is admitted by both the sides that the power to exempt under Rule 8(1) is vested only in the Central Government and that that power can be exercised from time to time by the Central Government by a notification. The power to exempt is not one capable of being exercised by the Collector of Central Excise. The Central Government has the right under Rule 8(1) to empty any excisable goods from the whole or any part of the duty leviable thereon subject to such conditions as may be specified by the Central Government in the notification under which such exemption is being granted. The goods covered by the notification are "varieties of unmanufactured tobacco, whether "flue-cured or other than flue-cured which are capable of being used for than manufacture of biris." The conditions imposed by the Central Government by the notification dated 29-11-1955 are that the goods:

"are proved to the satisfaction of, and are notified by, the Collector as varieties which are not infact utilised, or are utilised only to a negligible extent within the limits of an area specified by him in the notification, for the manufacture of biris."

When the Collector issues a notification of the kind referred to in the notification of the Central Government dated 29-11-1955, he does not in fact exercise any legislative function. He does not exempt anyone thereunder. He only enables the conditions of exemption laid down by the Central Government to be fulfilled, with the result that a person who has unmanufactured tobacco which is capable of being used for the manufacture of biris can obtain an exemption within the limits of the area specified by the Collector. the argument of Mr. Rege is that but for the notification issued by the Collector, an exemption could not be claimed under the notification of the Central Government. That, no doubt, is true. The effect of the issue of a notification by the Collector as required by the notification of the Central Government is to enable a person to claim an exemption by satisfying the necessary conditions laid down by the Central Government, but that does not mean that it is the Collector who exempts a person. In fact he has no powers to exempt any person. It is contended that once an exemption has been granted by the Central Government, it cannot be taken away by the Collector by any act of his, and that the exemption granted by the Central Government can be taken away only by the Central Government. It is urged that the effect of what the Collector has done by issuing the subsequent notification dated 16-6-1956 is to take away the exemption which had previously been granted as a result of the notification issued by the Central Government on 29-11-1955 and the notification issued by the Collector on 6-1-1956. It is no doubt true that the effect of the notification dated 16-6-1956 is that a person cannot claim any exemption within the limits of Greater Bombay in respect of certain varieties of tobacco which he previously could claim. But it is far from saying that the Collector has taken that exemption. The Collector has by the notification disabled persons from fulfilling the conditions required to be fulfilled under the notification of 29-11-1955 issued by the Central Government for claiming an exemption. In doing so, the Collector has not exercised any power to take away any exemption. Such power in fact is not vested in him in law.

9. If Mr. Rege''s contention is right that the Collector has taken away the exemption which previously existed by his notification dated 16-6-1956, it would equally be right to say that it is the Collector who has granted the exemption by his previous notification dated 5-1-1956. In that event if Mr. Rege is right in his contention that the Collector has exercised legislative functions in taking away the exemption by the notification dated 16-6-1956 which he had no power to do, it would be equally right to say that the Collector has exercised legislative functions in granting the exemption by the notification dated 5-1-1956 which he had no power to do. In that even, the very foundation of Mr. Rege''s case about the existence of an exemption would disappear. The true position is that by issuing a notification the Collector neither grants nor takes away any exemption. This is borne out by a decision of the Privy Council cited by Mr. Rege at a later stage of his argument for a different purpose. It is the case of Her Majesty the Queen v. Burah reported in 5 Ind. App. 178. In that case their Lordships were dealing with the provisions of Act XXII of 1869 of the Indian Legislative. By Section 9 of that Act the Lieutenant Governor of Bengal was empowered by notification to extend mutatis mutuandis the provisions of the said Act of to certain areas therein specified. The majority of the Judges of the Calcutta High Court held that the 9th section was not legislation but was a delegation of legislative power. In negativing that contention their Lordship of the Privy Council observed at p 191 as follows:

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant Governor (large as they undoubtedly are) as if, when exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor General in Council. The whole operation is, directly and immediately, under and by virtue of this Act (XXII of 1869) itself. The proper legislature has exercised its judgment as to place, persons, laws, powers and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled the legislation is now absolute." The exemption granted by the Central Government by its notification dated 29-11-1955 was a conditional exemption. The question as regards the area within which it was to operate and the question as regards the varieties of tobacco in connection where with it was to operate dependent upon the use of such tobacco in the area concerned were left to be determined by the Collector in the manner therein provided. When the Collector acts in the exercise of these powers, he cannot be said to legislate in connection therewith or to exercise any power of exemption.

10. Mr. Rege next argues that the authority that was granted to the Collector under the notification of 29-11-1955 was an authority which could be exercised only once by him. He says that once that authority was exercised by the Collector, the exemption became absolute and the became functus officio. he says that on a true construction of that notification the Collector does not have any authority to amend any notification previously issued by him. Mr. Rege says that the words "but are proved to the satisfaction of, and are notified by the Collector as varieties which are not in fact utilised, or are utilised only to a negligible extent within the limits of an area specified by him in the notification for the manufacture of biries: mean that the Collector can issue only one notification. I am unable to agree with this contention. The intent and purpose of the notification of the Central Government is to exempt certain varieties of unmanufactured tobacco which are capable of being used for the manufacture of biris, only when such varieties are not in fact utilised in a particular area for the manufacture of biris or are utilised only to a negligible extent for the manufacture of biris in that particular area. The use of unmanufactured tobacco for the manufacture of biris may vary not merely from area to area, but many vary from time to time. It may be that in a particular area a factory for the manufacture of biris may be started and unmanufactured tobacco which was not previously used or was used to a negligible extent in the manufacture of biris may be used thereafter to a large extent for the manufacture of biris. In my view, it was not the intention of the Central Government is issuing that notification that the Collector should once and for all determine whether a particular variety of unmanufactured tobacco was or was not utilised or was utilised to a negligible extent in any particular area for the manufacture of biris. As the exemption was intended to be granted having regard to the use to which the tobacco in question was put in any particular area, it would be placing a reasonable construction on the language used to hold that the Collector would have power from time to time to notify what varieties of unmanufactured tobacco were not utilised or were utilised to a negligible extent in the manufacture of biris as the circumstances may warrant. If the intention of the Central Government had been that the Collector should once and for all issue the notification, the Central Government would in all probability have provided the time limit within which such notification was to be issued by the Collector. There is no such time limit provided for in the notification. In my view, the Central Government has left it open to the Collector to exercise the authority conferred upon him from time to time as the circumstances or the situation may require and that the had authority to issue the notification dated 16-6-1956.

11. The next argument advanced to Mr. Rege is that the action of the Collector is discriminatory and that no reasonable differentia is provided. It is urged that the Collector in issuing the notification dated 16-6-1956 has acted in an arbitrary manner. The authority conferred upon the Collector by the notification dated 29-11-1955 is an authority to be exercised by him within well defined limits. It is an authority to be exercised in connection with an area having regard to the use of unmanufactured tobacco in the manufacture of biris. If it was found that such tobacco was not utilised at all or was utilised only to a negligible extent within a particular area for the manufacture of biris, then that fact had to be notified so that an exemption may accrue in respect of that variety of goods within that area. The discrimination based on the use of particular goods in a particular area cannot be said to be without a reasonable basis. In fact Rule 159(2) of the Rules envisages the rate of duty leviable upon any goods being determined by the use to which the goods re put. In my view, there is no substance in the contention that there is no reasonable differentia and that there is discrimination between one class of citizens and another. Reliance was placed in support of his argument by Mr. Rege on a notification issued by the Collector of Baroda being Ex. A to the affidavit of the petitioner in rejoinder, dated 11-1-1957. Strong reliance was placed upon some of the words appearing in that notification. it is stated in that notification as under: "It may please be noted that the varieties shown in Appendix A in their respective identifiable form can be transported anywhere in India on payment of duty at annas 6 per lb. in the Baroda Collectorate." The varieties mentioned in Appendix A include tobacco other than flue-cured in whole leaf form and include therein red chopadia. Mr. Rege states that having regard to that notification it was open to a person to pay a duty of annas six only per lb. within the territory under the control of the Collector of Central Excise, Baroda, and remove the goods without payment of any further duty to any place anywhere in India, and that here is clear discrimination between person who bring the goods from Baroda and those who do not. He says that by the process of taking the goods to Baroda and taking them out of the territory of the Baroda Collectorate on payment of six annas per lb. a person can avoid payment of further duty. This argument of Mr. Rege might have had some merit if the statement of the Collector of Central Excise, Baroda, was correct. It has been urged on behalf of the respondents that that statement in the notification of the Collector of Central Excise, Baroda, does not represent a correct exposition of the legal position on the subject. It is pointed out that the statement is contrary to the very notification of the Central Government issued on 29-11-1955. When one turns to that notification, it is expressly provided by proviso (ii) and proviso (iii) of that notification as under:

(ii) If any such variety is consigned from the premises of assessment to any premises situate out side such area, it shall not be entitled to the said exemption."

(iii) If any variety to exempted is at subsequent time exported outside such area, the exemption hereby granted shall be deemed to be withdrawn and the wholesale dealer so exporting it, shall, prior to such export, pay in respect of the quantity exported, an amount equivalent to the amount of duty from which such quantity was originally exempted. My attention has further been drawn to Rule 159(2) of the Central Excise Rule, 1944, which provides as under:

"Where the rate of duty leviable upon any goods is determined by the use to which the goods are to be put after clearance from the warehouse, the goods shall be reassessed to duty at such rate, if such rate is different from the rate at which the goods were assessed to duty when they were received in the warehouse."

Having regard to the notification of the Central Government and the rule quoted above, there is no merit in the contention advanced, based on the statement appearing in the notification of the Collector of Central Excise, Baroda.

12. I do not think that any of the fundamental rights of the petitioner is violated in this case.

13. In the result, the petition fails and is dismissed with costs. Costs fixed at Rs. 1000/-.

14. Petition dismissed.