
(1983) 01 MAD CK 0020

In the Madras High Court

Case No : W.A. No. 577 to 583 of 1981 in W. P. 11013 etc. of 1981

Indra Match Works Kuruarkulam and Others

APPELLANT

Vs

Superintendent of Central Excise, Sanarankoil

RESPONDENT

Date of Decision : 28-01-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 13, 140, 27, 47

Central Excises and Salt Act, 1944 — Section 11A, 2, 3, 9(2)

Citation : (1983) 13 ELT 931

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

Bench : Division Bench

Advocate : R.S.A. Kareem, for the Appellant; K.N. Balasubramaniam, for the Respondent

Judgement

Mohan, J.—All these writ appeals, which are directed against a common judgment of our learned brother Ramanujam J. rendered in W.P.

Nos. 10868 of 1981 batch, can be dealt with under a common order since they raise identical questions.

2. The appellants are manufacturers of safety matches. On 4-6-1979, a notification No. 201/79-CE was issued, which was later on amended by

notification No. 264/79-CE, dated 29-9-1979. These notifications provided for a set off of duty on all excisable goods to the extent the duty paid

goods falling under item 68 had been used as inputs. In proviso 3 of the said notification it was provided that the notification will not apply to the

goods on which excise duty had been paid through banderols. The appellants challenged the validity of the proviso 3 by preferring writ petitions

contending that the notification allowed set off of excise duty on inputs like Potassium chlorate, glue and phosphorus etc., all of which go into the

manufacture of safety matches, while the proviso however had denied the benefit of the notification to the manufacture of safety matches only on

the ground that they pay excise duty on matches through banderols. On this basis it was urged that there was a clear discrimination. W.P. No.

1554 of 1981 batch were admitted and an interim injunction was granted on 24-3-1981. As a result of the interim injunction the respondent

(Superintendent of Central Excise, Sankarankoil) was restrained from collecting excise duty referable to the value of the imports. It may be stated

at this stage that the Central Excise department did not accept the claim of the appellants. It was urged on its behalf that there was no

discrimination whatever, especially in a matter granting benefits or exemption. It was further urged that the writ petitioners cannot claim exemption

as of right. Those writ petitions were ultimately dismissed on 16-11-1981, by a Division Bench of this court holding that proviso 3 of the

notification No. 201 of 1979-CE, dated 4-6-1979, as amended, was valid. After the disposal of these writ petitions, the Superintendent of Central

Excise, issued similar notices to the appellants in the following terms :-

Sub : Central Excise Matches - Realisation of differential duty involved consequent to dismissal of W.P.

Ref : W.P. 1553 of 1981 W.M.P. 2179 of 1981.

On your filing the aforesaid writ petition the High Court at Madras granted interim injunction restraining the department from collecting the duty on

matches manufactured and cleared from your factory at a rate in excess of Rs. 4.40 while the rate of duty applicable in respect of such matches in

accordance with notification No. 48/81, dated 1-8-1981 as amended by notification No. 88/81, dated 31-3-1981 is Rs. 4.60.

2. Now that the writ petition is dismissed by the High Court, at Madras in their order dated 16-11-1981, the differential duty that was payable by

you but not realised from you in obedience to the said High Court's orders, is liable to be paid by you.

3. You are, therefore, directed to pay the differential duty as per details in the worksheet furnished overleaf within 10 days of the receipt of this

order, failing which action will be taken to recover the said amount in accordance with the law.

3. The appellant challenged these notices before our learned brother Ramanujam

J. The principal contention urged before the learned Judge was that the proceedings in relation to the impugned notices should have been initiated under S. 11A of the Central Excises and Salt Act. Irrespective of the nature of short levy the only available provision for recovery of levy will be S. 11A of the said Act. Without following that procedure, straightway the Superintendent could not by a mere notice call upon the appellants to pay the difference in excise duty. This contention was overruled and the writ petitions were dismissed. Hence the present writ appeals.

4. Mr. R. S. Abdul Kareem, learned counsel for the appellants, urges that whenever recovery of excise duty is sought either on account of short levy or because of short payment, it is only S. 11A will apply. That section lays down an elaborate procedure of a show cause notice, representation and determination. Further, a time limit is prescribed under the said section. This procedure and the time limit cannot be circumvented by the Superintendent by merely issuing the demand. In fact, the power under S. 11A can be exercised only by the Assistant Collector.

5. It is well settled law that where excisable goods have been released after the filing of the necessary AR-1 forms, if any short levy is sought to be recovered, it is necessary to establish an element of guilt on the part of the persons who had removed the goods. In support of this contention, reliance is placed on an unreported judgment of this Court rendered in W.P. 3103 of 1976 and also the passage occurring in J.K. Steel Ltd. Vs.

Union of India (UOI), . This case and N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., have held that where the removal of the goods was made after payment of necessary excise duty, there can be no evasion at all. The case on hand is one such.

6. Citing Prakash Cotton Mills Private Ltd. and Others Vs. B.N. Rangwani and Others, , it is urged an enquiry under S. 9(2) is quasi-judicial and a hearing is contemplated, which has been completely set at naught by the impugned notice. Equally in Jamnadas Chhotalal Desai and Others Vs.

C.L. Nangia and Others, , it has been held that the provision under Rule 9(2) is penal in character. Therefore, in this case, it is necessary to establish clandestine removal. It has also been so laid down in Acme Metal

Industries P. Ltd. v. S. S. Pathak, 1980 E.L.T. 156.

7. Even if the court order intervenes, it is only Rule 10 that will apply. Here, the authority concerned does not even state under what power the

notice is issued. To fortify the contention that only rule 10 will apply, reliance is placed on W.P. 4145 of 1967 and W.P. 427 of 1981.

8. The matter is not as simple as the respondent would like to make it. On the contrary, the effect of notification No. 99 of 1980, dated 19-6-

1980 and the subsequent notification No. 2 of 1982, dated 1-1-1982, and the ratio in W.A. 430 of 1981 ought to be considered before recovery.

All these can be done only by proper enquiry and not by issuing a mere notice of demand. Therefore, it is prayed that the notice may be quashed.

9. Mr. K. N. Balasubramaniam, learned counsel for the respondent, in meeting these arguments, submits that this is not a case to which Rule 9(2)

would apply at all, nor again would Section 11A apply. During the prevalence of injunction against the respondent, the Excise department was

unable to recover the proper excise duty. Notwithstanding the appellants failing in the writ petitions, when they unsuccessfully challenged proviso 3

of the said notification, it cannot be contended that either the procedure set out in S. 11A should have been followed or applying rule 9(2)

clandestine removal must be established. This is not a case falling under such a category. Under rule 9, it is categorically stated that no excisable

goods can be removed from the warehouse unless the proper duty thereon is paid. Where, therefore, without payment of the proper duty the

appellants by reason of the injunction were enabled to remove the goods, after the injunction has been vacated, it is certainly open to the

department to demand excise duty, which is legitimately due to it. As a proposition of law there is no demur that Rule 9(2) will apply to clandestine

removal. The case of the appellants is not one of clandestine removal, but removal under an order of Court without payment of the full excise duty.

Looked at from this point of view, not one of the authorities cited on behalf of the appellants would have any application. Hence their applicability

need not be traversed. More or less under similar circumstances, this court in W.P. No. 11318 of 1981 has upheld the right of the department to

collect proper duty. The subsequent notifications, viz., 99 of 1980, dated 19-6-1980 and 2 of 1982 dated 1-1-1982 will also have no application,

since they are for the later period. Hence it is contended that the writ appeals are devoid of merits and have to be dismissed confirming the judgment of the learned single Judge.

10. In order to appreciate the rival contentions it is necessary for us to provide the legal back-drop. The Central Excises and Salt Act of 1944

(hereinafter referred to as the Act) levies excise duty on goods manufactured or produced in certain parts of India. It is well settled law that excise

is an incidence on manufacture. As to what are excisable goods is stated in S. 2(d) of the Act, as follows :-

excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt".

"Manufacture" has been defined u/s 2(f), so as to include any process incidental or ancillary to the completion of a manufacture product. Section 3

is the charging section, which says in sub-section (1) that they 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. The prescription, aforementioned, is found under Rule 9 which is as follows :-

9. Time and manner of payment of duty. -

(1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto,

which may be specified by the Collector in this behalf, whether for consumption, export, or manufacture of any other commodity in or outside such

place, until the excise duty leviable thereon has been paid at such place and in manner as is prescribed in these rules or as the Collector may

require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form :

Provided, that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under

rule 27 or rule 47 or in a warehouse appointed or licenses under rule 140 or may be exported under bond as provided in rule 13;

Provided further that such goods may be removed on part payment of duty leviable thereon if the Central Government by notification in the Official

Gazette, allow the goods to be so removed under rule 49 :

Provided also that the Collector may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods

removed from the place or premises specified in this behalf, or from a store room or warehouse duly approved, appointed or licensed by him keep

with any person dealing in such goods an account-current of the duties payable thereon and such amount shall be settled at interval, not exceeding

one month, and the account holder shall periodically make deposit therein sufficient in the opinion of the Collector to cover the duty due on the

goods intended to be removed from the place of production, curing, manufacture or storage.

(2) If any excisable goods are, in contravention of sub-rule (1) deposited in, or removed from, any place specified therein, the producer or

manufacturer thereof, shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is

delivered personally to him or is left at his dwelling house and shall also be liable to a penalty which may extend to two thousand rupees and (such

goods) shall be liable to confiscation.

By a careful reading of the above, it is clear that no goods which attract excise duty can be removed from the warehouse unless and until the

proper duty is paid. It is not denied before us that the appellants are liable to pay excise duty in accordance with notification No. 42 of 1981 dated

1-3-1981, as amended by notification No. 88 of 1981, dated 31-3-1981. It is common case that in so far as set off was allowed to the extent of

duty under item 68 on inputs like potassium chlorate, glue and phosphorus, which set off was denied where duty was paid through banderols, it

was unsuccessfully challenged in W.P. No. 1554 of 1981. During the pendency of this writ petition No. 1554 of 1981 batch, the respondent was

prevented from collecting the proper duty as per the above notifications, since injunction was operative admittedly between 24-3-1981 and 19-

11-1981. Therefore, after the dismissal of the batch of the writ petitions all that is done by the Superintendent of the Central Excise by the

impugned notice dated 20-11-1981, which has already been extracted, is to call upon the appellants to pay the differential duty. In our considered

view, on removal under rule 9, which, as seen above, prescribes the time and the manner of removal, the charge under S. 3 gets attracted.

Properly speaking, only on the payment of that duty which the appellants are liable as per notification No. 42 of 1981, dated 1-3-1981, as

amended by notification 88 of 1981, dated 31-3-1981, the excisable goods ought to have been removed. But the order of injunction enabled the

appellants to remove the goods without payment of that excise duty. However, on the injunction being dissolved on 19-11-1981, consequent to

the dismissal of W.P. 1554 of 1981 batch, we see no obstruction in the way of the department recovering the full excise duty. To put the matter,

simply - The charge was already there and got attached to the goods on removal. Only the right of recovery by enforcement of the charge got

postponed by reason of the order of the court. This is the position as we see. Under these circumstances, we see no scope for applying S. 11A of

the Act. That section confers power upon the Central Excise Officer for recovery of duty -

- (i) not levied, or
- (ii) levied and not paid, or
- (iii) short levied, or
- (iv) short paid, or
- (v) erroneously refunded.

11. It is not open to the appellants to contend that this a case which will fall under the category of "not paid" or "short paid" because it stands to

reason that in either of these two cases there must have been a levy. In this case, there was no possibility for such a levy because of the order of

injunction by the court. The ratio in W.P. 3103 of 1976 has no application because there was no disability on the part of the excise department

from levying proper excise duty unlike the present case.

12. In J.K. Steel Ltd. Vs. Union of India (UOI), , is was observed thus -

I shall now take up the question of limitation. The written demand made on March 21, 1963, purports to have been made under rule 9(2) of the

rules. Therein the assessing authority demanded steel ingot duty which according to it the assessee had failed to pay. Quite clearly rule 9(2) is

inapplicable to the facts of the case. Admittedly the assessee had cleared the goods from the warehouse after paying the duty demanded and after

obtaining the permission of the concerned authority. Hence there is no question

of any evasion. Despite the fact that the assessee challenged the validity of the demand made on him, both the Assistant Collector as well as the Collector ignored that contention; but when the matter was taken up to the Government it treated the demand in question as a demand under Rule 10. The Government confined the demand to clearance effected after December 21, 1962. The demand so modified is in conformity with rule 10. But, the contention of the assessee is that the demand having been made under rule 9(2) and there being no indication in that demand that it was made under rule 10, the Revenue cannot now change its position and justify the demand under rule 10; at any rate by the time the Government amended the demand, the duty claimed became barred even under rule 10. We are unable to accept this contention as correct. There is no dispute that the officer who made the demand was competent to make demands both under rule 9(2) as well as under rule 10. If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well-settled proposition of law. In this connection reference may usefully be made to the decisions of this court in *P. Balakotaiah Vs. The Union of India (UOI)* and *Others*, and *Afzal Ullah Vs. The State of Uttar Pradesh*, . Further a common form is prescribed for issuing notices both under rule 9(2) and rule 10. The incorrect statements in the written demand could not have prejudiced the assessee. From his reply to the demand, it is clear that he knew as to the nature of the demand. Therefore, I find no substances in the plea of limitation advanced on behalf of the assessee.

This is so in every normal case. But this case has no application to the case on hand, since in that case there was no injunction.

13. In *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*,

it was held thus -

The above reasoning leads to the conclusion that rule 10-A does not apply to the case on hand. There, the question is whether the demands could

be justified under rule 9(2). Even there we find considerable difficulty in sustaining the notice under this rule. Sub-rule (1) of rule 9 provides for the

time and the manner of payment of duty. In this case, there is no controversy

that whenever goods were cleared by the respondent necessary applications had been made to the officer concerned and the later had passed orders of assessment to nil duty. To attract sub-rule (2) to rule 9, the goods should have been removed in contravention of sub-rule (1). It is not the case of the appellants that the respondent have not complied with the provisions of sub-rule (1). We are of the opinion that in order to attract sub-rule (2), the goods should have been removed clandestinely and without assessment. In this case, there is no such clandestine removal without assessment. On the other hand, goods had been removed with the express permission of the excise authorities and after order of assessment was made. No doubt the duty payable under the assessment order was nil. That, in our opinion, will not bring the case under sub-rule (2). That sub-rule (2) is a penal provision is shown from the fact that apart from the duty payable, the party is also made liable to a penalty and he also incurs the risk of the goods being confiscated. That rule 9(2) applies only to cases where there has been an evasion from payment of duty is clear from the decision of this court in J.K. Steel Ltd. Vs. Union of India (UOI), . Though on certain other aspects there was a difference of view amongst the learned Judges, on this aspect the decision is unanimous. There is absolutely no material placed before us by the appellants which would justify the issued of the notice under rule 9(2). In view of what we have stated above, it is clear that there is no possibility of applying the ratio of this ruling because the department was prevented by an order of injunction from levying and recovering the full and proper excise duty. It is true the goods were removed after filing the necessary AR 1 forms. On that score alone, it cannot be contended that the department must have recourse to rule 9(2) and establish clandestine removal, since this is not a case of clandestine removal.

14. The nature of enquiry under rule 9(2) came to be laid down in Prakash Cotton Mills Private Ltd. and Others Vs. B.N. Rangwani and Others, , thus -

Having regard to these facts, it is difficult to hold that investigations which must be made before imposing duty under sub-rule (2) cannot be of quasi judicial character and are of administrative character. Now, in this connection, the department may be considered to be one party to the lis

wherein its claim is that the manufacturer has wilfully and fraudulently evades payment of duty, and has for the purpose illegally committed breach

of statutory rules. The other party to that lis would be the offending manufacturer. The result of the findings made in the enquiry under sub-rule (2)

would be levy of (i) heavy excise duty and (ii) penalty and confiscation. It would be difficult to hold that in such an enquiry conclusions can be

made and findings can be arrived at without giving an appropriate opportunity to show cause to the offending manufacturer.

But we see no relevance of this case to the case on hand.

15. In *Jamnadas Chhotalal Desai and Others Vs. C.L. Nangia and Others*, , the scope of rule 9 was considered in the following terms :-

28. (a) Then remains rule 9 for consideration. The first clause of rule 9 provides that no excisable goods shall be removed from any place where

they are produced, cured or manufactured etc. whether for consumption export of manufacture of any other commodity in or outside such place

unless excise duty leviable thereon has been paid at such place or in such manner as is prescribed by the rules or as the Collector may require, and

except on presentation of an application in proper form and on obtaining permission of the proper officer on the form. This clause only means that

no person shall remove the goods from any of the places mentioned in this part of the rule unless an application under rule 52 is made in the form

prescribed thereunder and an assessment under that rule is made and duty so assessed is paid and permission to remove them is granted. The first

clause of the rule, therefore, lays down prohibition against removal without payment of duty and has nothing to do with assessment which, as we

have more than once said, is made under rule 52. There are provisos to the first part of the rule providing for cases where goods can be removed

without payment of duty, but they have nothing to do with the assessment or the question raised by Mr. Sorabji. Clause (2) of rule 9 is the

provision under which the impugned order has been made. Let us, therefore, examine its provisions to see if they suffer from any

unconstitutionality. Clause (2) provides that if any excisable goods, in contravention of clause (1) are deposited in or removed from any place

specified therein, the producer or manufacturer shall pay duty leviable on such goods upon a written demand made by the proper officer and shall

be leviable to a penalty which may extend to two thousand rupees, and such goods shall be liable to confiscation. Clause (2) clearly is a penal

provision, making a producer or a manufacturer liable to duty and confiscation of goods removed in contravention of the ban laid down in the first

clause. It will be observed that the liability to pay duty leviable on the goods under this clause arises from two factors (1) an illegal removal thereof

and (2) consequent thereupon the authority making a demand of duty chargeable thereon. There is no assessment on these goods provided in this

part of the rule and there can be none because the goods are not there to be assessed as they are in fact surreptitiously removed without an

application under rule 52 having been made and without any assessment or payment of such assessment and without the permission to remove

having been obtained. Therefore, the case contemplated under rule 9(2) is one where there can be no assessment. It is a case on the other hand

where the authority, discovering that the goods have been removed without payment of duty, makes a demand of duty leviable thereon from such

information as he might have collected and which empowers him to impose penalty and to order confiscation of the goods.

Even applying this ratio we see no difficulty in holding that the present case does not involve any discovery made by the excise authority about the

removal of matches by the appellants. The excise department could do nothing towards collection of proper duty except to remain as mere

onlookers because of the prevalence of injunction during the relevant period.

16. In *Acme Metal Industries P. Ltd. v. S. S. Pathak*, 1980 E.L.T. 155, the headnote (1) reads as follows -

It is abundantly clear that to attract the provisions of rule 9(2) the goods should be removed in contravention of sub-rule (1) and removal must be

clandestine and without assessment. But if goods were cleared openly and with the knowledge and consent of the department, the provisions of

sub-rule (2) of rule 9 will not be attracted.

This being not a case of clandestine removal, we see no scope for applying this ruling. In view of what we have held above, there is no question of

issuing any show cause notice and following a quasi-judicial procedure, much less the department trying to circumvent all these.

17. The decision rendered in W.P. 4145 of 1967 of this court equally has no

application because in that case the matter was not kept alive by making the demand. After the judgment of this court in W.P. No. 3838 of 1968, which struck down the notification, the Central Excise department did not pursue the demand and allowed the matter to become final. Therefore it was held that in spite of favourable decision by the Supreme Court reversing the above view of the High Court, resort for recovery of escaped levy could not be had excepting under rule 10. Certainly this is not the position here. In W.P. 1554 of 1981 the department took a definite stand that proviso 3 was valid. But for the injunction the department would not have allowed the removal of safety matches by the appellants without payment of proper and full excise duty.

18. W.P. 417 of 1981 dealt with the scope of old rule 10. In that case, the demand was held to be time barred in view of the limitation prescribed under rule 10. The question there was, in the words of the Division Bench, as follows :-

There could be no difficulty in applying this decision to cases where the right of the petitioners who were questioning the validity of the order in the earlier writ petitions, has been upheld. But the more difficult question is whether the decision of the Supreme Court can be treated as one laying down a principle applicable to all cases.

It was held therein -

Learned counsel for the petitioners pointed out that under rule 10 even though the petitioners might not have been made liable to pay the differential duty in view of the judgment of the High Court, there was nothing preventing the revenue from issuing a notice to the effect that they had to issue the notice and keep the matter pending since they have preferred appeals questioning the validity of the High Court judgment. It appears to us that such a procedure could have been adopted as seen from the later portion of rule 10, which was introduced in October 1969 and the matter kept pending. Apart from that, there is no provision in the Act or the rules to keep a liability for excise duty alive either by a protective assessment procedure or some other procedure, the liability could not be kept alive for every person on the basis that the question of liability is pending in the case of some other manufacturer of matches. We have to keep in mind that the excise duty is payable before the goods are removed from the

factory and once the goods are cleared and they go outside the factory, the only way under which the department can recover the short levy or the escaped levy is to resort to rule 10.

In view of the above, the argument that even where a court order intervened it is old rule 10 that would be held to be applicable is not warranted

because, as we have held above repeatedly, but for the injunction there was no possibility of the appellants removing the matches without payment

of full and proper excise duty.

19. We see no scope for the application of the notification No. 99 of 1980, dated 19-6-1980 or No. 2 of 1982, dated 1-1-1982 since they relate to subsequent periods.

20. To our mind the present case is governed by the ratio of the ruling in W.P. No. 11318 of 1981 of this court. Therefore, the learned Judge has

held under identical facts, as follows :-

The liability to pay duty having been already established by the disposal of the writ petition, the authorities are well within their jurisdiction to

recover the amount straightway from the petitioners in each writ petition and there is nothing left for them to decide whether duty is payable or not.

The present attempt made, if entertained, would only result in not only deliberate avoidance to pay duty, but would also amount to abuse of

process of court, which cannot be encouraged.

21. Lastly, we may refer to Herbert Broom's "Legal Maxims, 10th edition page 73", wherein the general principle that no person shall be

prejudiced by an act of court is stated thus -

Actus Curle Neminem Gravabit (Jenk Cent. 118). An act of the court shall prejudice no man. This maxim "is founded upon justice and good

sense; and affords a safe and certain guide for the administration of the law." In virtue of it, where a case stands over for argument on account of

the multiplicity of business in the court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but

should be allowed to enter upon his judgment retrospectively to meet the justice of the case; and, therefore, if one party to an action die during a

curia advisari vult, judgment may be entered nunc pro tunc, for the delay is the act of the court, for which neither party should suffer.

In view of the foregoing discussion we reject the arguments of the appellants and dismiss the writ appeals with costs. Counsel's fee Rs. 500 one set.