
(1985) 11 DEL CK 0018
In the Delhi High Court
Case No : C.W.P. No. 1804/80

Kolhapur Cane Sugar Works Ltd. and another APPELLANT
Vs
Union of India and others RESPONDENT

Date of Decision : 19-11-1985

Acts Referred:

Citation : (1990) 27 ECR 69 : (1986) 24 ELT 205

Hon'ble Judges : Yogeshwar Dayal, J;S. Ranganathan, J

Bench : Division Bench

Judgement

Yogeshwar Dayal, J.—The Kolhapur Cane Sugar Works Ltd., petitioner No. 1 herein (hereinafter referred to as "petitioners") are challenging the order in revision passed by the Government of India, Ministry of Finance, Department of Revenue, dated 25th September, 1980 rejecting the revision application of the petitioners against an order dated 23rd August, 1979 passed by the Appellate Collector of Central Excise, Bombay. The petition inter alia involves the question of the effect of repeal of Rules 10 and 10-A of the Central Excise Rules 1944 which were repealed vide Notification No. 267/77, dated 6th August, 1977 whereby new Rule 10 was substituted in the Central Excise Rules. The petition also involves, inter alia, another question relating to true scope and construction of Clause 6 of the Notification No. 189/73-C.E., dated 4th October, 1973.

2. The facts of the case which are not in dispute are briefly that M/s. The Kolhapur Sugar Mills Ltd., the Holding Company have been in the business of the production of sugar at Kolhapur since the year 1933-34. The petitioner company was registered as a subsidiary of the aforesaid Holding Company in the year 1972.

The Holding Company bifurcated their activities whereby the activity pertaining to manufacture and sale of sugar was transferred to the petitioner company vide a Resolution passed in their Extra-ordinary General Meeting held on 19th October, 1972.

3. Consequent on this change the petitioners on 9th October, 1973 applied to the Assistant Collector, Central Excise, Kolhapur for L-4 license. In the covering letter dated 9th October, 1973, the petitioners had stated that they had taken over the sugar undertaking from the Holding Company and it was also intimated that Holding Company was having L-4 license during the year 1972-73 and they had manufactured sugar during that season and were having their sugar stocks in the godown now belonging to the petitioners. The petitioners had requested that since the crushing season was to commence from 1st week of November, 1973, they may be granted L-4 license expeditiously. Vide letter dated 13th November, 1973, the Assistant Collector of Central Excise, Kolhapur informed the petitioners that the cane crushing may be started on 15th November, 1973 pending issue of L-4 license to the petitioners and necessary certificate was issued to the petitioner to start business on 15th November, 1973 pending issue of L-4 license for manufacture of sugar and in pursuance of the petitioners' application, they were granted a fresh L-4 license dated 6th December, 1973 authorising the petitioners to manufacture the sugar during the year ending 31st December, 1973.

4. On 19th August, 1974, petitioners sent a letter to the Superintendent, Central Excise, Kolhapur asking him whether the petitioners were entitled for the rebate of excise duty on sugar admissible for the season 1973-74 on the ground that they had commenced manufacture of sugar for the first time during the season 1973-74. They were informed by the Superintendent vide his letter dated 23rd September, 1974 that their factory did not figure in the list of new factories and Therefore they did not come within the scope of Notification No. 189/73 and hence they would not be entitled for the sugar incentive rebate of excise duty for excess production for the year 1973-74 season.

5. On 7th December, 1974, the petitioners applied for rebate on excess production for the year 1974-75 under a Notification No. 146/74, dated 12th October, 1974. This rebate claim was for Rs. 6,53,472 initially on excess production of sugar within two months October and November, 1974. after some correspondence to various Authorities, the Superintendent, Central Excise of Kolhapur by a letter dated 26th May, 1975 informed the petitioners that since a fresh L-4 license was issued to them, their factory will have to be treated as a new unit and Therefore, the rebate claim filed by them as an old unit could not be entertained. Subsequently, the petitioners made an application for grant of incentive rebate on the sugar manufactured by them in terms of Notification No. 189/73, dated 4th October, 1973. The rebate was claimed at the rate specified under Serial No. 6 of the Table appended to the Notification. Serial No. 6 of the Table reads as follows :-

"Sugar produced during the period commencing from the first day of October, 1973 and ending with the 30th day of September, 1974 by a factory which commenced production for the first time on or after the first day of October, 1973 which is in excess of 5000 M.T."

6. This rebate claim was scrutinised and after pre-Audit a sum of Rs. 61,14,930 was sanctioned by the Superintendent of Central Excise vide letter dated 23rd July, 1976. It was stated in the order sanctioning the rebate that the amount sanctioned should be credited in the personal ledger account of the petitioners and utilised for payment of Central Excise duty. Copy of this letter of Superintendent of Central Excise was also forwarded to the Assistant Collector of Central Excise, Kolhapur for information.

7. In the meanwhile, the petitioners had also on 22nd August, 1975 filed an appeal against the order dated 26th May, 1975 rejecting the application for rebate under Notification No. 146/74, dated 12th October, 1974. This appeal was, however, later on withdrawn by the petitioners on or about 29th July, 1976.

8. A notice dated 27th April, 1977 was issued by the Superintendent, Central Excise, A.G. 1 Kolhapur, wherein it was stated that the petitioners who are holder of L-4 No. 2/Sug/93 had presented their claim on 12th July, 1976 for rebate of Central Excise duty on sugar produced in excess during the season 1973-74 by them as a new factory commencing production for the first time after 1st October, 1973 as per provisions of Serial No. 6 of the Table of Notification No. 189/73, dated 4-10-1983 and that they were granted a rebate of Rs. 61,14,930 by the Superintendent, Central Excise, A.G. 1 Kolhapur vide his letter No. Rebate/KCW/73-74/76 dated 23-7-1976 and that they had accordingly taken credit of the said amount in their PLA and whereas now on re-examination of the facts and circumstances connected with the said rebate claim, it appears that the petitioners were merely a subsidiary of the holding company, M/s. The Kolhapur Sugar Mills Ltd., Kolhapur and are owner of the subsidiary, since all the shares issued by the subsidiary company are purchased by them; the petitioners after formation have continued the manufacturing of sugar at and with the existing and running factory of KSM; though the petitioners obtained a new license for the manufacture of sugar, they have not installed and commissioned working the new factory. It was stated in the notice that it appears that only the existing factory has changed hands and that the receiving firm is fully owned by transferring firm, Therefore, the petitioners cannot be considered as a new factory. It was also stated in the notice that the petitioners thus do not appear to be entitled to the rebate sanctioned to it as a new factory, Therefore, the petitioners are hereby required to show cause the Assistant Collector, Central Excise, Kolhapur, why the rebate of Rs. 61,14,930 erroneously sanctioned and allowed to be credited to their PLA by the Superintendent under his letter dated 23rd July, 1973, should not be recovered from them under Rule 10A of the Central Excise Rules, 1944.

9. After considering the submissions of the petitioners in the reply to the show cause notice, the Assistant Collector of Central Excise passed an order dated 15/27th October, 1977 confirming the demand for recruit of the aforesaid amount of Rs. 61,14,930 that was taken into credit by the petitioners in their personal ledger account. The Assistant Collector who adjudicated the matter held

that the rebate under Serial No. 6 of the Table appended to the Notification No. 189/73 was applicable only to a new factory, namely, one which commenced production for the first time on or after the first day of October, 1973 and that it had no applicability whatsoever to the present case where the factory had been in existence long before the issue of Notification No. 189/73.

10. Before this order dated 15/27th October, 1977 could be passed by the Assistant Collector, Central Excise, the existing Rules 10 and 10-A of the Central Excise Rules were substituted by new Rule 10.

11. The petitioners went up in appeal to the Appellate Collector vide their appeal dated 14th November, 1977 and the Appellate Collector dismissed the appeal vide order dated 23rd August, 1979. The petitioners thereafter filed a revision application before the Central Government and the Central Government dismissed the revision vide impugned order dated 25th September, 1980.

12. The submissions made by Mr. Falli Nariman, Sr. Advocate accompanied by Sh. G. E. Vahanvati, Advocate learned counsel for the petitioners were briefly as under :-

(1) Rules 10 and 10-A were repealed from 6th August, 1977 on the substitution of new Rule 10 by the Notification dated 6th August, 1977. The effect of the substitution of the old rule by a new rule is that the old rule ceases to exist.

(2) Upon Rules 10 and 10-A ceasing to exist with effect from 6th August, 1977 and their substitution by new Rule 10, further proceedings were without jurisdiction since the Notification of 6th August, 1977 did not contain any saving clause and Section 6 of the General Clauses Act has no application because it does not apply to the repeal of statutory rules and also because it applies only where there is a repeal by a Central Act (in the present case the repeal is by a Notification).

(3) The effect of a repeal without a saving clause and where Section 6 of the General Clauses Act does not apply is the repealed provision is obliterated as completely from the records as if it had never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was still existing in law.

(4) That there was no question of there being any principle on the lines incorporated in Section 6 of the General Clauses Act in common law or otherwise.

(5) There is no general theory of "Vested rights" apart from Section 6 of the General Clauses Act. Cases like Nathu Ram and Others Vs. Madan Gopal and Others, approved in the case of Charan Dass Vs. Union of India (UOI) and Others, is on the assumption that Section 6 of the General Clauses Act applied.

(6) Alternatively and assuming that there is a theory of vested rights, this has no application here as a mere issue of show cause notice was not enough. Sub-rule (2) of Rules 10 and 10-A clearly shows that even after issue of a show cause

notice proceedings were inchoate; under sub-rule (2) there had to be a reply, consideration of the reply, determination of the amount due and an order calling upon the person to pay the amount. Nothing of this was done in the present case prior to 6th August, 1977. Even the reply had not been filed to the show cause notice before 6th August, 1977.

(7) In this connection it was further submitted that mere right to take advantage of the provision of an Act is not an accrued right. It was submitted that there is a distinction between an investigation in respect of a right and an investigation which is made to decide whether some right should or should not be given.

(7)(a) In any case Rule 10A had no application to the case and show cause notice wrongly invoked Rule 10A. Rule 10A has no application to cases where assessments had been made and to cases of erroneous refund which were squarely covered by Rule 10.

(b) The principle that the mere invoking of a wrong rule is of no consequence does not apply to a case where at the time of passing of the order, Rule 10 to which recourse could otherwise have been made, had ceased to exist.

(c) Therefore, the order passed after 6th August, 1977 could not invoke the old rule 10 which had been repealed.

(8) That the foundation of an order for recalling a refund of duty must be that it was erroneous; it must be clear that the duty could never have been refunded under the relevant provisions. And in this behalf it was submitted that the authorities themselves have taken a definite view as expressed in the order dated 26th May, 1975 that the factory was a new factory. This view had become final and cannot be opened. It was held by the Excise Authority that fresh L-4 license had been granted and factory must be treated as a new factory. The refund was granted after consideration at the highest level and Therefore if two views are possible or there is a mere change of opinion, it cannot be said to be an erroneous refund.

(9) That on a true construction of Notification No. 189/73, the words "by a factory" as contrasted with "in a factory" made it clear that the reference in the former is to a manufacturer. The words "Factory" and "Manufacturer" are related terms.

13. We propose to deal with the last point first.

The relevant part of Notification No. 189/73-C.E., dated 4th October, 1973 is as under :-

"Rebate on excess production 1973-74.

189/73-C.E., dated 4-10-1973.

as amended by

78/74-C.E., dated 20-4-1974.

107/74-C.E., dated 20-6-1974.

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts sugar described in column (2) of the table below and falling under sub-item (1) of the Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise livable thereon as is specified in the corresponding entry in column (3) of the said table.

THE TABLE ----- S.					
No.	Description	of	sugar	Duty	of Excise
1.			2.		
3.			4.		
5.		6.	Sugar produced during the period commencing Thirty rupees from the 1st day of October, 1973, and per quintal. ending with the 30th day of September, 1974 by a factory, which commenced production for the first time on or after the 1st day of October, 1973 which is in excess of five thousand metric tonnes.		

14. During arguments, Mr. Nariman, learned counsel for the petitioner submitted that petitioner's factory ought to be considered as a new factory because fresh L-4 license was issued to them by the Department on 6th December, 1973. It was submitted that the petitioner had not suppressed anything from the Department when they initially made their first claim as an old factory in terms of Notification No. 146/74 and yet the Superintendent refused to recognise the factory as a new factory. Thus, their claim for rebate was virtually denied to them. In these circumstances, they were fully entitled to claim rebate as a new factory which is also justified on the merits of the petitioner's case. We are afraid, we are not able to agree with the submission. By the mere fact that the petitioners were granted a fresh L-4 license by the Department, the factory could not be considered to be a new factory. The licensing procedure under the Central Excise Rules is primarily concerned with a manufacturer and his obligations under the Central Excise law. no doubt there is a mention of the premises of the factory apart from the name and situation of the owners of the factory who are licensed as such in the license but the mention of premises is more with a view to identify and connect the persons licensed with the particular factory. The petitioner's factory was in existence for several years before the date of October, 1973 and could not for the purposes of Notification No. 189/73 be called a new factory which went into production for the first time on or after the 1st day of October, 1973. It is not disputed that this factory has been in production business since 1933-34. There was only a re-constitution of the company in the year 1972. The factory remained the same. As the petitioner's factory, as distinguished from the ownership and the license for the factory, was already in existence prior to 1st October, 1973, the mere fact of reconstitution of the

existing ownership of the factory could not be said to bring into existence a new factory for the purpose of applying the benefits available under Notification No. 189/73. The pertinent words used in this connection in Serial No. 6 of the Table below the Notification No. 189/73 are :-

"a factory which commenced production for the first time or after the first day of October, 1973."

Merely because the petitioners had assumed ownership of the factory in 1973 and after their assumption of ownership the particular production to which the dispute relates resulted after the first day of October, 1973, the factory could not be called a new factory which went into production for the first time after 1st October, 1973.

15. In the Notification the reference is to a factory and not to the manufacture. It is well settled that terms "manufacturer" and "factory" used in the Central Excises and Salt Act are neither synonymous nor interchangeable. It is the production of a particular factory that was relevant and the change of ownership was irrelevant and if change of ownership were the test to evade payment of duty the ownership might be changed several times.

16. The submission of Mr. Nariman is that the Department is estopped because earlier they had treated the petitioners as a new factory, Therefore, while granting this rebate same principle will apply. It is well settled that there is no estoppel against the provisions of statute. In fact, the petitioners themselves had first submitted their claim in terms of Notification No. 146/74 but the Superintendent erroneously did not entertain their claim as an old factory which led them to file the present claim as a new factory and it was sanctioned even. The petitioners still thought their claim to be correct and even went up in appeal. Petitioners for reasons known to them withdrew their appeal. There can be no estoppel in such circumstances. The plea of estoppel is a rule of equity and cannot prevail against law. In fact, the Central Government by the impugned order while confirming the orders of the Assistant Collector and the Appellate Collector directed that while the petitioners will pay the amount of Rs. 61,14,930 they may be given interim relief rebate to the extent of Rs. 6,53,572 being their claim as an old factory pending consideration of their application for rebate under Notification No. 146/74 as an old factory.

17. We are in complete agreement with the respondents that the petitioners were not entitled to rebate under Notification No. 189/73.

18. The other submissions may be dealt with together.

19. The rebate as noticed earlier was sanctioned to the petitioners on 23rd July, 1976. The show cause notice for the recovery of the rebate erroneously sanctioned was issued on 27th April, 1977 quoting Rule 10A of the Central Excise Rules. The petitioners have contended that Rules 10 and 10A of the Central Excise Rules were repealed and submitted by the new Rule 10 vide Notification

No. 267/77, dated 6th August, 1977. It was, thus, contended that at the time of passing of the adjudication by which the demand was confirmed the old Rules 10 and 10A were not in existence and hence the demand, even if there was a case for demand, could not be confirmed under the new Rule 10. The contention is that by repeal and substitution of new Rule, old rules ceased to exist.

20. One thing is clear, whether old Rule 10 applies or Rule 10A applies period of limitation was prescribed only by old Rule 10 and not by Rule 10A. That period of limitation is to issue of show cause notice and no time limit is prescribed for confirming the show cause notice and in the present case the show cause notice was issued on 27th April, 1977 within the time limit of one year laid down under rule 10 read with Rule 173J which was the Rule applicable at the time of issue of the show cause notice.

21. The petitioners submitted that the case of erroneous refund was covered by Rule 10 and not by Rule 10A. In this behalf, learned counsel for the petitioners relied upon the decision of the Supreme Court in the case of Geep Flashlight Industries Ltd. v. Union of India and Others, 1983 E.L.T. 1596 (S.C.). Rules 10 and 10A of the Central Excise Rules which were in force prior to 6th August, 1977 read as under :-

"10. Recovery of duties or charges short-levied or erroneously refunded. - When duties or charges have been short-levied through inadvertence, error, collusion or mis-construction on the part of an officer, or through mis-statement 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 person chargeable with the duty or charge, so short-levied or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owners account-current, if any, or from the date of making the refund."

"10-A. Residuary powers for recovery of sums due to Government. - Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

It will be noticed that Rule 10A confers residuary powers for recovery of sums due to the Government. It will come into play only where the Rules do not make any specific provision for the collection of any duty or deficiency in duty which has been short levied but the opening part of Rule 10A shows that it comes into play only where there is no other Rule making specific provision for collection of any duty. If Rule 10 applies then Rule 10A will not come into play. Rule 10

applies in two types of cases, one, where excise duty has been short levied on account of any of the causes specified in that Rule and the other where excise duty "after having been levied has been owing to any such cause erroneously refunded". In the present case the duty was levied. It was refunded. Therefore, Rule 10 by its own force becomes applicable. The duty was erroneously refunded by way of granting rebate by misconstruing Notification No. 189/73, dated 4th October, 1973. Therefore, the correct Rule applicable was Rule 10 and not Rule 10A under which the show cause notice was issued.

22. Supreme Court in the aforesaid case of Geep Flashlight Industries Ltd. (supra) had an occasion to construe the expression "Non-levy", "short-levy" and "erroneous refund" contemplated by Sections 27 and 28 of the Customs Act, 1962. The expression "erroneous refund" was defined in para 19 of the aforesaid case at page 1599 as under :-

"The expression "erroneously refunded" means refunded by means of an order which is erroneously made."

In the present case the rebate was granted by order dated 26th May, 1975 by a letter of Superintendent of Central Excise. It was thus a case of dues erroneously refunded within the meaning of Rule 10 of the old Rules. It was argued that the question whether the petitioner's factory is a "new" factory or not is one on which different views are possible and the Department itself had earlier taken a different view and hence one of them cannot be described as "erroneous". This contention is based on a line of decisions interpreting the words "error apparent on the face of the record" or the like. Here the words are quite clear and the rebate is clearly limited to a factory which starts production for the first time on or after 1-10-1973 and exceeds a certain target. The petitioner's factory does not fulfill this condition and the rebate was erroneously granted. The wide language of Rule 10 clearly covers such a case as the present one.

23. Section 3 of the Central Excises and Salt Act, 1944 is the charging section and creates liability for payment of excise duty. Excise duty was not dependent upon its ascertainment by an order. Section 3(1) of the Act specifically says :-

"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."

The liability to pay duty arose immediately the goods were cleared from the factory by a book entry. In view of the order dated 26th May, 1975, a credit was given to the petitioners which entry is now sought to be reversed by virtue of the show cause notice dated 27th April, 1977. Their right to recover their duty is still subsisting. That right, if we may say so, has not yet been taken away.

24. Section 6 of the General Clauses Act (Act No. 10 of 1897) provides for the effect of repeal. The objects of General Clauses Act, 1897 are several, namely,

(1) to shorten the language of Central Acts, (2) to provide as far as possible, for uniformity of expression in Central Acts by giving definitions of series of terms in common use (3) to state explicitly certain convenient rules for the construction and interpretation of Central Acts, and (4) to guard against slips and over-sights by importing into Factory Act certain common form clauses, which otherwise ought to be inserted expressly in every Central Act. (See : Law Commission of India, Sixtieth Report, Chapter 1, Para 3).

25. Section 6 of the General Clauses Act, 1897 provides as under :-

"6. Effect of repeal. - Where this Act, or any (Central Act) or Regulation made after the Commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

26. Section 6 of the General Clauses Act occurs in group of Sections 5 to 13 and the heading of that group of Sections is, "General rules of construction". In cases where a provision of the Act by its terms does not apply, Courts have applied its principle because of the inconvenience that would otherwise result. [In Re: Swaranath Bhatia, Calcutta High Court in the case of Benoari Lal Sarma and Others Vs. Emperor, , took the view that,

"The rule of interpretation in Section 38 of the Interpretation Act, 1889 is a principle which exists independently of the Interpretation Act and, Therefore, applies as effectually to the Letters Patent as to a statute. It is true that the Letters Patent is not an Act, but it is granted by the Sovereign by virtue of an Act passed by the Parliament and should be construed in the same way as an Act. Further, even if Section 38, Interpretation Act, does not apply in terms to the Letters Patent, the principle underlying Section 38 should be applied in construing clause 44 of the Letters Patent."

27. Supreme Court in the case of National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), observed,

"The Canon of construction of statutes enunciated in Section 38, Interpretation Act, and reiterated with some modifications in Section 8, General Clauses Act, is one of general application where statutes or Acts have to be construed and there is no reasonable ground for holding that that rule of construction should not be applied in construing the charters of the different High Courts. These charters were granted under statutory powers and are subject to the legislative power of the Indian Legislature. Assuming however, but not conceding, that strictly speaking the provisions of the Interpretation Act and the General Clauses Act do not for any reason apply, there is no justification for holding that the principles of construction enunciated in those provisions have no application for construing these charters."

Applying this, it was held in State v. Fateh Chand, AIR 1955 M.B. 82 that, if for some reason or other, the General Clauses Act cannot be applied in terms, its principles (and, in particular, the principle of Section 6 can be extended to construe the law.

28. Madhya Pradesh High Court in the case of Bhupendra Kumar Jain Vs. Y.S. Dharmadhikari and Others, observed,

"No doubt. Section 13 of the Act is applicable to Central Acts and Regulations only; but unless the context otherwise requires, the same rule of construction should be applied to the State Bar Council Election Rules framed under the Advocates Act, 1961, which is a Central Act."

29. Govinda Menon, J. in the case of In Re: Swaranath Bhatia, observed,

"The defense of India Rules should be interpreted in accordance with the principles laid down in the General Clauses Act."

30. Even when there is no express saving, the principles of Section 6 of the General Clauses Act have been applied and it has been held that Section 6 applies to repeal and this principle applies to amendment of prior enactments.

31. Heading of the group of Sections 5 to 13 of the General Clauses Act shows that these are merely General Rules of construction which have been codified but they are not rules of construction which were for the first time created by the General Clauses Act. These rules were there under Common Law. General Clauses Act applies to Central Acts and Regulations but that does not mean that Courts cannot take advantage of the settled principles of construction of Central Acts being applied to the Subordinate Legislation as well.

32. What is the effect of repeal and what should be the line of approach of Court in case of repeal has been succinctly brought out in the case of State of Punjab v. Mohar Singh Pratap Singh AIR 1955 S.C. 84. In para 6 learned Judge noticed the Law of England as it stood prior to the Interpretation Act of 1889 and also

noticed the consequences of the Interpretation Act, 1889. Learned Judge observed as under :

"Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law : Vide Craies on Statute Law : 5th edn. page 323. A repeal Therefore without any saving Clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right; Vide Crawford on Statutory Constitution pp. 599-600. To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment.

Later on, to dispense with the necessity of having to insert a saving clause on each occasion, Section 38(2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or "suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act has not been passed. Section Section 38(2) of the General Clauses Act, as is well known, is on the same lines as Section 38(2) of the Interpretation Act of England.

Under Section 30 of the General Clauses Act, which corresponds to Section 27 of the Punjab Act, the provisions of the Act are applicable to Ordinances as well. Of course, the consequences laid down in Section 6 of the Act will apply only when a statute or regulation having the force of a statute is actually repealed. It has no application when a statute, which is of a temporary nature, automatically expires by efflux of time. The Ordinance in the present case was undoubtedly a temporary statute but it is admitted that the period during which it was to continue had not expired when the Repealing Act was passed. The repeal Therefore was an effective one which would normally attract the operation of Section 6 of the General Clauses Act. The controversy thus narrows down to the short point as to whether the fact of the repeal of the Ordinance being followed by re-enactment would make the provision of Section 6 of the General Clauses Act inapplicable to the present case."

33. Again in para 8, learned Judge observed,

"Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh "legislation on the same subject we would undoubtedly have to look to the

provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot Therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

34. In the present case a new Rule 10 shows no different intention than what the law was prior to its substitution. In new Rule 10, for certain types of recoveries, limitation period has been extended.

35. For the submission that the effect of substitution of old rule by new rule is that old rule ceases to exist, Mr. Nariman relied upon the following cases :-

- (1) Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, .
- (2) Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co., .
- (3) State of Punjab v. Mohar Singh Pratap Singh, AIR 1955 S.C. 84.
- (4) State of Orissa Vs. M.A. Tulloch and Co., , and
- (5) Qudrat Ullah Vs. Municipal Board, Bareilly, .

Para 20 of the judgment in the case of Firm A.T.B. Mehtab Majid and Co. (supra) on which reliance has been placed is as under :-

"It has been urged for the respondent that if the impugned rule be held to be invalid, old Rule 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid."

36. We are afraid that no help can be derived by learned counsel of the petitioners from these observations of Raghubar Dayal, J. In that case Rule 16(2) framed under the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 was challenged as being violative of Article 304(a) of the Constitution. This rule was brought in by way of substitution of an old rule which had been repealed by the new Rule 16 which was challenged as discriminatory. The Supreme Court held that the provisions of new Rule 16(2) were violative of Article 304(a) of the Constitution and were, Therefore, void. In that situation counsel for the State of Madras wanted to rely upon the repealed Rule 16 to justify the assessment. It was in these circumstances that the aforesaid observations have been made in

paragraph 20 quoted above. It will be noticed that it has got no application for the facts of the present case. In the present case action has been taken under the old rule before its repeal.

37. In the case of Koteswar Vittal Kamath (supra) also reliance was placed on a passage where the Supreme Court analysed its earlier decision in the case of Mehtab Majid and Co. (supra) as noticed earlier. The Supreme Court in relation to the aforesaid case of Mehtab Majid and Co. (supra) noticed,

"In that case, rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 was impugned. A new Rule 16 was substituted for the old Rule 16 by publication on September 7, 1955, and this new rule was to be effective from 1st April, 1955. The Court held that the new Rule 16(2) was invalid because the provisions of that rule contravened the provisions of Article 304(a) of the Constitution. Thereupon, it was urged before the Court that, if the impugned rule be held to be invalid, the old Rule 16 gets revived, so that the tax assessed on the basis of that rule will be good. The Court rejected this submission by holding that :

"Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid."

On that analogy, it was argued that, if we hold that the Prohibition Order of 1950 was invalid, the previous Prohibition Order of 1119 cannot be held to be revived. This argument ignores the distinction between super session of a rule, and substitution of a rule. In the case of Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, , the new Rule 16 was substituted for the old Rule 16.

* * * * * The process of substitution consists of two steps. First the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist come into effect and it was for this reason that the Court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived."

38. We have already noticed how the case of Mehtab Majid and Co. (supra) has no relevancy to the dispute before us.

39. Coming to the decision of B. K. Mukherjee, J. in the case of State of Punjab v. Mohar Singh Partap Singh (supra) reliance was placed on paragraph 6 which was reproduced earlier. We have already reproduced portions of the judgment in paragraphs 6, 7 and 8. We are of the opinion that the discussion in that case was in an entirely different context and do not override the principle stated in National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), . In fact, the decision in the case of State of Orissa and Another v. M/s. M.A. Tulloch and Co. (supra) cited by him does not also support the submissions advanced by Mr. Nariman. It will be noticed that this case raised the question regarding the continued operation of Orissa Mining Areas

Development Fund Act (27 of 1952) and the continued exigibility of the fees livable from mine owners under the said enactment. In this case the respondents had filed writ petition in Orissa High Court praying for writ if mandamus restraining the State of Orissa from applying the provisions of Orissa Mining Areas Development Fund Act and to direct the appellants to cancel the notices of demand which were served on the petitioners to pay the fees assessed under the said Act. The fees with which the respondents were concerned were fees for the period from July, 1957 to March, 1958. The contention before the Orissa High Court was that the Orissa Mining Areas Development Fund Act had been rendered in-effective or superseded by Central Act - Mines and Minerals (Regulation and Development) Act, 1957, hereinafter called the Central Act, which was brought into force as and from June 1, 1958. The Orissa Act had been enacted by virtue of the State legislative power. The learned Judges of the Orissa High Court had taken the view,

"that on coming into force of the Central Act, Orissa Act had ceased to be operative reasons of the withdrawal of legislative competence by force of the entry in the State List being subject to the parliamentary declaration and the law enacted by Parliament."

Orissa High Court held that,

"for this reason the Orissa Act should be deemed to be non-existent as and from June 1, 1958 for every purpose, with the consequence that there was lack of power to enforce and realise the demands for the payment of the fee at the time when the demands were issued and were sought to be enforced."

40. The Supreme Court was pleased to reverse the decision of the Orissa High Court, Supreme Court noticed Section 6 of the General Clauses Act and also noticed that Section 6 on its terms applied only to express repeals and the case before the Supreme Court was not the case of express repeal but of the super session of the enactment by a law having by the Constitution superior efficacy. In this connection, the Supreme Court in para 20 observed as under :-

"Before proceeding further it will be convenient to clear the ground by adverting to two matters : (1) the effect of a Central Act under its exclusive legislative power which covers the field or an earlier State Act which was competent and valid when enacted is not open to doubt. The parliamentary enactment supersedes the State law and thus it virtually effects a repeal, (2) the effect in law of a repeal, if it is not subject to a saving as is found in Section 6 of the General Clauses Act is also not a matter of controversy.

Tindal, C.J., stated this in *Kay v. Goodwin* (1830) 6 Bing 576 at p. 582.

"I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

41. It was the same idea that was expressed by Lord Tenterden in *Surtees V. Ellison*, (1829) 9 & C 750

"It has long been established that, when an Act of Parliament is repealed, it must be considered (except as to transactions Past and closed) as if it had never existed."

This laid down the law as it was prior to the U. K. Interpretation Act, 1890 which by Section 38(2) made provision for a saving of the type we now have in Section 6 of the Indian General Clauses Act, 1897 which we have extracted earlier. The submission of Mr. Setalvad, learned counsel for the respondent was very simple. He said that S. 6 on its terms applied only to express repeals. Here we have a case not of an express repeal but of the "super session of a State enactment by a law having by the Constitution superior efficacy. It would, Therefore, be a mere disappearance or super session of the State enactment or at the best a case of an implied repeal. In this connection he invited our attention to some observations to be found in the decision of this Court in *Keshavan Madhava Menon Vs. The State of Bombay*, already referred to. The Court was there concerned with the legality of the prosecution of the appellant for contravention of the Indian Press (Emergency Powers) Act, 1931. The offence had been committed before the Constitution came into force and a prosecution launched earlier was pending after January 26, 1950. The enactment which created the offence was held to be void under Art. 19(1)(a) read with Art. 13 as being inconsistent with one of the Fundamental rights guaranteed by Part III of the Constitution. In the circumstances, the point that was debated before this Court was whether the prosecution could be continued after the enactment became void. The majority of the Court held that the Constitution was prospective in its operation and that Art. 13(1) would not affect the validity of proceedings commenced under pre-Constitution laws which were valid up to the date of the Constitution coming into force, for to hold that the validity of these proceedings were affected would in effect be treating the Constitution as retrospective. They Therefore considered that there was no legal objection to the prosecution continuing. Fazal Ali, J. Who dissented from the majority, after discussing the legal effect of a repealing statute in the absence of a saving clause and the history of the provision in regard to the matter in the successive General Clauses Acts in India observed :

"The position Therefore now in India as well as in England is that a repeal has not the drastic effect which it used to have before the enactment of the Interpretation Act in England "or the General Clauses Act in this country. But this is due entirely to the fact that an express provision has been made in those enactments to counteract that effect. Hence in those cases which are not covered by the language of the General Clauses Act, the principle already enunciated (1830) 6 Bin 576 and (1829) 9 B & C 750 will continue to operate. The learned Attorney General had to concede that it was doubtful whether Section 6 of that Act is applicable where there is a repeal by implication, and there can be no

doubt that the law as to the effect of the expiry of a temporary statute still remains as stated in the books, because section 6 of the General Clauses Act and section 38(2) of the Interpretation Act have no application except where an Act is repealed."

42. Mr. Setalvad submitted that this was an express decision on the point in his favor. We are, however, not disposed to agree with the submission apart from its being the basis of a dissenting judgment. We might add that this point as to the effect of an implied repeal has arisen in a few other cases before this Court but it has been left open (see for instance, the judgment in *Trust Mai Lachmi Sialkoti Bradri Vs. The Chairman, Amritsar Improvement Trust*, . The question is rest integra and has to be decided on principle.

43. Again in paragraph 21, the Supreme Court observed as under :-

"We must at the outset point out that there is a difference in principle between the effect of an expiry of a temporary statute and a repeal by a later enactment and the discussion now is confined to cases of the repeal of a statute "which until the date of the repeal continues in force. The first question to be considered is the meaning of the expression "repeal" in Section 6 of the General Clauses Act whether it is confined to cases of express repeal or whether the expression is of sufficient amplitude to cover cases of implied repeals. In this connection there is a passage in *Craies on Statute Law*, Fifth Edition at pages 323 and 324 which appears to suggest that provisions of the corresponding Section 38 of the English Interpretation Act were confined to express repeals. On page 323 occurs the following :

"In Acts passed in or since 1890 certain savings are implied by statute in all cases of express repeal, unless a contrary intention appears in repealing Act."

and on the next page :

"It had been usual before 1889 to insert provisions to the effect above stated in all Acts by which express repeals were effected. The result of this enactment is to make into a general rule what had been a Common statutory form, and to substitute a general statutory presumption as to the effect of an express repeal for the can one of construction hitherto adopted."

There is, however, no express decision either in England or, so far as we have been able to ascertain, in the United States on this point. Untrammelled, as we are, by authority, we have to inquire the principle on which the saving clause in Section 6 is based. It is manifest that the principle underlying it is that every later enactment which supersedes an earlier one or puts an end to an earlier state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under the superseded enactment unless there were sufficient "indications express or implied in the later enactment designed to completely obliterate the earlier state of the law. The next question is whether the application of that principle could or ought to be limited to cases where a

particular form of words is used to indicate that the earlier law has been repealed. The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or forms of drafting but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such super session, then there is in law a repeal notwithstanding the absence of the word "repeal" in the later statute. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word "repeal" is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is fostered, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about it appears to "us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving of sound, is Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted. If this were the true position about the effect of the Central Act 67 of 1957 as the liability to pay the fee which was the subject of the notices of the demand had accrued prior to June 1, 1958 it would follow that these notices were valid and the accounts due there under could be recovered notwithstanding the disappearance of the Orissa Act by virtue of the superior legislation by the Union Parliament."

It will, thus, be noticed that though Section 6 of the General Clauses Act was not applicable yet the Supreme Court applied the general principles enacted in Section 6 of the General Clauses Act as to the effect of repeal. The ratio of the decision in this case is against the submission of Mr. Nariman.

44. The case of Qudrat Ullah (supra) is not at all of any help to the petitioners.

45. As another instance where the Full Bench of the Punjab and Haryana High Court applied the principles of Section 6 of the General Clauses Act to repeal of Central Rules framed, under the Central Act, reference may usefully be made to the decision of the Punjab and Haryana High Court in the case of Nathu Ram and Others Vs. Madan Gopal and Others, , which was approved by the Supreme Court in the case of Charan Dass Vs. Union of India (UOI) and Others, . It is true

that there was no discussion as to the applicability of Section 6 of the General Clauses Act but surely five learned Judges of the Punjab and Haryana High Court and the learned Judges of the Supreme Court could not have been unaware that Section 6 of the General Clauses Act was not expressly applicable. Yet the five learned Judges of the Punjab and Haryana High Court and the learned Judges of the Supreme Court gave relief to the parties on the basis of the applicability of the General principles enunciated in Section 6 of the General Clauses Act to the rules framed under Displaced Persons (Compensation and Rehabilitation) Act.

46. We are thus of the considered view that the principles of construction enunciated in Section 6 of the General Clauses Act are applicable when Rules 10 and 10A of the Central Excise Rules were substituted by new Rule 10. In fact, there is no change intended as is clear from the provisions of new Rule 10 with the context in which we are dealing with these Rules.

47. Provisions of Section 6 of the General Clauses Act do not talk of any vested rights. They merely talk of rights, duties, privileges, obligation or liability or talk of investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability.

48. Therefore, on the principles of Section 6 of the General Clauses Act, the rights and obligations of the parties will have to be decided on the basis of continued, application of Rules 10 and 10A.

49. Mr. Nariman also referred to the decision of the Supreme Court in the case of *Zohrabi Vs. Arjuna and Others*, and *Narhari Shivram Shet Narvekar Vs. Pannalal Umediram*, and submitted that the Supreme Court has taken the view that right to take advantage of provisions of an Act is not accrued right. We fail to understand this submission. If we look at the fact of *Zohrabi's* case (supra), we will notice that the landlord in that case applied for possession of certain premises on 30th October, 1961. The ejectment was claimed under the provisions of Hyderabad Tenancy and Agricultural Lands Act. The only question for consideration was whether the proviso to sub-section (1) of Section 28 of the Act as amended in 1960 would apply to this case. Section 28(1) of the Act reads :

"Where a tenancy of any land held by a tenant is terminated for nonpayment of rent and the landholder files any proceeding to eject the tenant, the Tahsildar shall call upon the tenant to tender to the landholder the rent in arrears together with the cost of proceeding within ninety days from the date of the order, and if the tenant complies with such order, the Tahsildar shall, in lieu of making an order of ejectment, pass an order directing that the tenancy has not been terminated, and thereupon the tenant shall hold the land as if the tenancy had not been terminated."

50. There was a proviso to this sub-section as follows :

"Provided that nothing in this Section shall apply to any tenant whose tenancy is terminated "for non-payment of rent if he has failed for three years to pay rent

within the period specified in sub-clause (i) of clause (a) of sub-section (2) of section 19."

This proviso was amended by Section 7 of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1960. The Amendment Act added the following words at the end of the existing proviso :

"and the landholder has given intimation to the tenant of the default within a period of six months of each default."

The Amendment Act received the assent of the President on December 18, 1960 and was published in the Maharashtra Government Gazette Extra-ordinary, on December 29, 1960.

51. Since the landlord had not given intimation to tenant of the default of period six months of each default, the Supreme Court non-suited the landlord. The argument on behalf of the landlord before the Supreme Court was that the amended Section 28 requiring the landholder to give notice to the tenant within a period of six months of each default was not applicable to the case because the tenant having defaulted in payment of rent for three years before the amended proviso to Section 28(1) came into force on December 29, 1960, the landlord had acquired a right to institute a proceeding for the eviction of the tenants that could not be taken away by the amendment which was not given a retrospective operation either by express words or by necessary implication. The Supreme Court took the view that the application for possession was made long after the amendment came into force and even the right to institute the proceeding does not appear to have accrued before the amendment because the notice terminating the tenancy was also issued after the proviso was amended.

52. This case has got no applicability whatsoever to the facts of the present case for the simple reason that here the proceedings had been initiated when old Rule 10 and 10A were subsisting.

53. The case of Narvekar (supra) is again of no help to the learned counsel for the petitioners. Here the Supreme Court took the view that the law relating to execution is a procedural law and it was the duty of the trial court to take note of the change in law. The observations of the Supreme Court were made in the light of the facts that a money decree had been passed by Bombay High Court in 1960. The decree was transferred for execution to the Court at Goa after it became a Union Territory of India. Execution application was dismissed by Goa Court on the ground of non-executability of the decree. Pending appeal to the Additional Judicial Commissioner against that order, Indian CPC was made applicable to Goa and it was held that, "it was duty of the appellate Court to take note of the change in law and that the decree was on transfer executable in the Court in Goa."

54. Reliance was also placed by learned counsel for the petitioners on the case of Director of Public Works and another And Ho Po Sang and others, 1961 Appeal

Cases 901 at 921.

55. We find that the facts of this case also give no assistance to the submissions of Mr. Nariman. Mr. Nariman relied upon the following observations of the Judicial Committee,

"But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act."

We are afraid, these observations do not help the petitioners on the facts of the present case. Here the rights, obligations and liability have already been created for the petitioners. namely, to pay the excise duty. That obligation has not been taken away. In fact, the wording of substituted rules do not manifest any intention that the remedy which are pending for realisation of excise duties have come to an end.

56. A bare reading of the Notification No. 189/73 shows that under Serial No. 6, no rebate whatsoever could have been given in a case like the case of the petitioners. The rebate on the face of it was erroneous. We have thus no doubt that the proceedings could continue even after the repeal.

57. It is well-known that merely invoking a wrong rule is of no consequence. It makes no difference that the authority invoked Rule 10A or was under the impression that Rule 10 did not apply.

58. In the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., , the Supreme Court held,

"Fact that notice of demand refers to wrong provisions does not per se render it invalid if authorities have power to issue such notice under other provision. If the exercise of 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 proportion of law."

59. Reference in this connection may usefully be made to the decision of the Supreme Court in the case of P. Balakotaiah Vs. The Union of India (UOI) and Others, and Afzal Ullah Vs. The State of Uttar Pradesh, .

60. Mr. Nariman vehemently contended that Rule 10 should have been available to the Excise authorities when it passed the order and since by repeal that rule ceased to exist the Authority could not take advantage of Rule 10. We are afraid, this contention is again of no effect in view of principles of construction contained in Section 6 of the General Clauses Act being applicable to Rules framed under the Central Excises and Salt Act, 1944.

61. On the date on which rebate in excise was erroneously given, cause of action arose for claiming this refund and certainly Rule 10 was there when the notice was issued to the petitioners to refund the same. The result is that the petition

fails and is dismissed.