

**(1986) 07 BOM CK 0014**

**In the Bombay High Court**

**Case No : Writ Petition No. 3918 of 1981**

Mahindra Re-rolls Industries and another

APPELLANT

Vs

Union of India and others

RESPONDENT

---

**Date of Decision : 29-07-1986**

**Acts Referred:**

Central Excise Rules, 1944 — Rule 173B, 173B(5), 173CC, 9B

Central Excises and Salt Act, 1944 — Section 11A, 35, 35A, 35A(2), 35A(3)

**Citation :** (1990) 25 ECC 296 : (1988) 33 ELT 684

**Hon'ble Judges :** S.M. Daud, J;M.S. Ratnaparkhi, J

**Bench :** Division Bench

---

## **Judgement**

S.M. Daud, J.—This writ petition, under Article 226 of the Constitution of India, is directed against the show cause notice dated 26-10-1981 - hereinafter referred to as "Exhibit-M" or "the notice."

2. The questions that arise for determination in this petition have to be considered in the following background :-

Petitioners are engaged in the manufacture of iron and steel products at Jalna. The products manufactured by petitioners and others like them, are subject to payment of Excise Duty, which is governed by Tariffs issued under the Central Excises and Salt Act, 1944 - hereinafter referred to as "the Act". One of the products manufactured by the petitioners, is a flat product of iron and steel of less than 3 mm in thickness and less than 125 mm. in width. The process by which this product is manufactured is known as "Hot Rolling". The manufacture is by using six rolling stands of six passes. Rollers of the first four stands have oval types of grooves between the pair of rolls in contact forming the passes, through which the material is not rolled gradually and successively, changing the size and shape of the cross section and length. In relation to the oval groove section, the same is much reduced at the fourth pass vis-a-vis that at the first pass. At the fifth and sixth stands of the rollers, the whole section is rolled through the plain barrel which is horizontal. There is no facility for the cooling of the product or the

shearing of the edges at the end of the rolling process. No vertical plain rolls are fitted to the mills at any of the six stands mentioned above. The products aforementioned was described as falling under Tariff Item No. 26AA, sub-item (ii) and/or (iii). Classification lists were also filed by petitioners to this effect, as required by Rule 173B of the Central Excise Rules, 1944 - hereinafter referred to as the "Rules". In the classification list, the product which was actually a "flat bar" was described as a "Balling Hoop and Strip". According to petitioners, this was a mis-description based upon a mistake of law. At a later stage, the petitioners questioned the correctness of the description and the levy of Excise Duty by an appeal to the appellate Collector, Central Excise and Customs, Bombay. The Appellate Collector, Mr. V.K. Ashtana, delivered his verdict upholding the contention raised by the petitioner on 18-7-1978. A copy of that verdict is at Exhibit-D. As this verdict is of some importance in the determination of the questions that arise for consideration in this petition, we are reproducing the relevant excerpts therefrom :-

"An appeal was filed by the appellants against the order of the Assistant Collector of Central Excise and Customs, Aurangabad, regarding classification of their products, that is bars of less than 3 mm in thickness and less than 125 mm in width..... I have also considered the contentions of the appellants and I find that the classification of cross section of rectangular bars of less than 3 mm thickness and 125 mm width as flats by the Assistant Collector is not correct..... the fact that such product was being classified as bars, as has been claimed by the appellants, cannot be ignored. The classification shall be amended accordingly, with consequential relief to the appellants, if any. The appeal is allowed."

This Order was not subjected to a revision, and, neither was there any change in the wording of the Act, the Rules, inclusive of the Tariff list and the words used therein vis-a-vis the entries that arise for consideration in this writ petition. However, the Excise authorities were not satisfied. On 27-4-1980, they visited the petitioners' factory and from there they attached samples of flat bars of different sizes. In the panchnama pertaining to the seizure, the product attached has been described as "flat bars". A significant recital appearing therein reads thus :-

"..... It appears to us that the cross section of the flat bars is not rectangular....."

At an earlier point in the panchnama, there appears the following recital :-

"..... We have seen the process of manufacture of flat bars. It is seen that the red hot round bars are put through the plane Rollers and flattened so as to form the shape of flat bars of different thickness and width as desired....."

Eventually the matter came up for adjudication before the Assistant Collector, Central Excise & Customs, Aurangabad. This Officer, viz., Mr. D.M. Patil, considered the data and the submissions advanced before him at length and his verdict dated 4-11-1980 is at Exhibit-K. The learned Officer took into

consideration the various test reports, which had a bearing on the subject and also considered different types of mills spoken of in the Central Excise Tariffs. He had also visited the petitioners' factory and witnessed the manufacturing process. His view can be best quoted in his own words from the relevant paragraphs :-

"I have come to the conclusion that the product dealt with in these proceedings i.e. the thickness of which is less than 3 mm and width less than 75 mm is not having rectangular cross section and which is hot rolled through the rolls which have oval grooves in first four passes and then rolled through two plane rolled passes, there is no provision of the facility of coiling the product, and it is produced in irregular shape, size and thickness, is not classifiable under Tariff Item 26AA(ii) as bailing hoops, which has been defined precisely and definitely without any condition of consideration to its understanding in Trade Parlance. .... is classifiable under Tariff Item 26AA(ia)."

Again there was no effort to get this Order revised by recourse to the relevant provisions of the Act. What was done, was, to issue the impugned notice figuring in this petition. The relevant portions from this notice, i.e. Exhibit-M, are as under :-

"I am tentatively of the view that the impugned order (Patil's verdict) is not correct, proper and legal. The product..... should be classified under Tariff Item 26AA(ii). It is on records that the assessee has sold this product as bailing Hoops under various bills/vouchers. From this it is evident that the product in question is commercially known as bailing Hoops and it is being sold and used as such. The excisable product is classifiable as known to the people who are conversant with and deal in such product. On the facts and of this evidence on record, it is evident that the said product is "bailing Hoops" falling under Tariff Item No. 26AA(ii).

I, therefore, in exercise of the powers vested in me u/s 35(A)(2) of the Central Excises & Salt Act, 1944, propose to set aside the order of the Assistant Collector, Central Excise, Aurangabad Division, and pass such order as deemed fit after consideration of submission of the assessee, if any."

Having had enough of the Excise Officers, the petitioners moved this Court under Article 226 of the Constitution of India.

3. It is petitioners case that the product under consideration fell under Tariff Item No. 26AA(ii) - hereinafter referred to as "(ii)" and not under Tariff Item No. 26AA(ia) - hereinafter referred to as "(ia)". To that effect was the decision of Mr. Ashtana, and the same had been reiterated by Mr. Patil. The first decision had not been got reversed by recourse to the higher authorities under the revisionary powers vested by the Act upon different authorities. There had been no statutory changes either. In relation to the order passed by Mr. Patil, assuming that the matter was open for further consideration at a higher stage, the time limit, within which that power could be exercised, was six months. The show cause notice not

having been issued within this period, it was bad in law. Therefore, on merits, as also on the ground of lack of power, the attempted enquiry to get over the adverse verdict, in the guise of the show cause notice, could not be countenanced. The petitioners prayed for a writ to quash Exhibit-K and another writ to restrain the respondents from levying excise on their product in contravention of the verdict of Messers Asthana and Patil.

4. The respondents have filed an affidavit in reply. It is contended that petitioners had submitted a classification list alongwith their letter dated 11-8-1978. In this list, the product was described as "Bailing Hoops" and petitioners cannot go back on the said description. It is further contended that the classification lists issued year-after-year amounted to an admission, which cannot be retracted by the petitioners. As to Mr. Ashtana's verdict, the stand taken in paragraph 5 of the reply, reads thus :-

"..... I say that unless and until the decision of the Appellate Collector, New Delhi, is carefully perused to find out whether the petitioners before the Appellate Collector, New Delhi, had anywhere admitted the approval made by the Excise Officer. That judgment will not be binding on the Excise Department at Aurangabad....."

I take it that these words imply only a careful consideration of the judgment of the Appellate Collector in order to find out whether it would be binding upon the Excise Officers at Aurangabad. I mentioned this because a ground slightly different has been taken by Counsel to circumvent Mr. Ashtana's verdict. The efforts made to reopen the issue are not disputed. It is contended that the Officer issuing the show cause notice had the jurisdiction to reopen the matter vis-a-vis Rule 173B(5). It was the power given by this sub-rule which justified the issue of show cause notice impugned in this petition. The show cause notice was also justified because all along the definition of "bailing Hoops", took within its embrace, the product manufactured by the petitioners. In any case, the mere issue of a show cause notice and a desire to enquire further into the matter, could not suffice to warrant this petition. Excise authorities had jurisdiction to ascertain the true position, and, until an adverse verdict had been given, petitioners did not have the right to move this Court. In other words, the petition was pre-mature.

5. Having regard to the submissions made before us, the points for determination would be :-

- (1) Whether the show cause notice at Exhibit-M is ultra vires and unwarranted ?
- (2) What Order,

The findings, for the reasons given below, are :-

- (1) Yes.
- (2) Petition allowed.

## REASONS

The preliminary objection taken to the maintainability of the petition, is that the mere issue of a show cause notice did not warrant the filing of this petition. The petitioner should have replied to the notice, appeared at the enquiry and tried to convince the Collector of justness of their cause. It is well settled that the existence of an alternative remedy is not necessarily a bar to the maintainability of a petition under Article 226 of the Constitution of India. Whether the existence of an alternative and/or a statutory remedy, constitutes a bar to a petition of this nature would depend upon the facts and circumstances of each case. Here, the petition was admitted in the year 1981. The show cause notice was the second attempt to get over Ashtana's verdict. In this background, the suggestion that the petitioners should have faced the enquiry and tried to convince the Collector of their point of view, would be to force them to face an unnecessary ordeal. After all, the Excise Officers have been trying to circumvent the Ashtana verdict by circuitous methods. It would be unfair to the petitioners to compel them to undergo an enquiry, when the Collector's barely concealed opinion is made clear in the affidavit in reply. This, therefore, is one case where the existence of an alternative remedy - statutory or otherwise - would be a poor consolation to the affected persons. Besides, the very attempt to reopen the issue is illegal, as will be shown hereinafter. The preliminary objection is, therefore, overruled.

6. Now taken up for consideration is the petitioners' contentions vis-a-vis Exhibit-M. Briefly, the argument is that having regard to the verdict of Mr. Ashtana, it was not open to the Assistant Collector to issue a show cause notice. If he was purported to exercise the power of revision conferred u/s 35A of the Act, he could do so only in compliance with sub-section (3)(b) thereof. In other words, the power had to be exercised within six months. As a matter of fact, Mr. Ashtana's verdict had not been impugned at all. Even in relation to Mr. Patil's verdict, the show cause notice, not having been issued within six months of the said verdict delivered on 4-11-1980, was bad in law.

7. On merits, the product had been rightly classified as falling under Item No. (ia). The attempt to change the classification to Item No. (ii) was not warranted. It has twice been rebuffed and there could not be repeated enquiries compelling petitioners to face an unending process.

8. Paragraph 3 of the petition, which describes the manufacturing process and the end product, has been accepted as "substantially correct" in the reply filed by the respondents. We emphasise this because of the repeated attempts made by Counsel to circumvent this admission. Also to be emphasised, is the fact, that it is only this product which was the subject of controversy between the petitioners on the one hand and the respondents on the other. That was so right from 1978 upto the end. The third point of significance to be emphasised is that the statutory position all along has remained unchanged. Mr. Godhamgaonkar took the stand that though petitioners may have been manufacturing "flats" or "bars", they had also produced "bailing Hoops". We are not, in the present case,

concerned with the varieties of goods manufactured by the petitioners. The point before us is the duty leviable on the product figuring in this petition. The product figuring in this case is a concoction of iron and steel of less than 3 mm in thickness and less than 125 mm in width. The process is a comparatively unsophisticated one, for which reason the product is uneven in shape, size and length. In this connection, test reports were obtained from various sources, such as the T.C.R. Engineering Service Private Limited, Bombay, Government Engineering College, Aurangabad, National Test House, Alipur, and Test-House College of Engineering, Pune. The copy of the report of the National Test House, Alipur, was not furnished to the petitioner, even though an attempt has been made to reply upon it. Insofar as the other three reports are concerned, they all converge upon the conclusion that the product falls under Tariff Item No. (ia). The T.C.R. Engineering Service Private Limited, Bombay, is an institution which carries on tests, etc. and has secured the approval of the Indian Standards Institute - hereinafter referred to as the "I.S.I.". The report of this Service is to the effect that the samples examined cannot be described as rectangular. The Government Engineering College, Aurangabad, is of the same view and specifically refers to the unevenness of the width and thickness at the points of the three samples examined by them. The College of Engineering at Pune certifies that the width at the edges were rounded and that there was no uniformity in the width and thickness of the three samples. It is only the report of the National Test House, Alipur, which says that :-

"the cross section at each and under microscope appeared to be rectangular against individual samples..... each sample meets the requirements of I.S. Specification No. 1029-1970 (with amendments).

Now the important point to bear in mind is the use of the expression "appeared". A copy of this report was not furnished to the petitioners and, therefore, they had no opportunity to counter the observations appearing therein. Examination of a stray sample, and, where the date which led to the conclusions is unknown, cannot prevail over the verdicts of the other three Institutions. Moreover, there is no dispute in relation to the manufacturing process. In the very pleadings there is an admission that the product manufactured is uneven in shape, size, thickness, etc. The product that rolls out is not uniform in any sense. It varies from piece to piece. There is no coiling and no shearing of the edges. All these facts fortifies the reports which go in favour of the petitioners. Mr. Patil has considered the question at length, not only with reference to the reports, but also the types of manufacturing processes contemplated by the Central Excise Tariffs. It cannot be said that this consideration is by a novice. The verdict is well-considered one and indicates a careful analysis of every feature of the case.

9. It was contended that in the past petitioners had themselves described the product in question as "bailing hoops". But that this was due to a mistake of law has been amply proved. To that effect is the verdict of Mr. Ashtana. A mere mis-description or error cannot be foisted upon the party committing the same. After

all, excise duty is levied upon the product and not the description chosen by the manufacturer. A reference was made to Section 4(1)(a) of the Act. This provision says :-

"where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale."

We see nothing in these words to support the contention raised by learned Counsel representing the respondents. Even if there was a mis-description as "bailing hoops", this has been satisfactorily explained by the petitioners. The provision referred to by learned Counsel merely establishes the well known principle that duty is leviable upon the price at which the product is sold. That is not of any relevance to the point under consideration. On merits, therefore, we have to sustain the arguments advanced on behalf of the petitioners. The verdicts of Messrs Ashtana and Patil have our admiring concurrence. We hold that the product in question falls under Tariff Item No. (ia).

10. To turn now to the vires of the notice at Exhibit-M vis-a-vis Sections 35A and 11A of the Act. While considering this question it has to be made clear that Mr. Ashtana's verdict was not subjected to a revision. Can the Excise authorities, without taking recourse to the power of revision, undertake a fresh appraisal ? Mr. Godhamgaonkar contended that they could do so for the verdict of Mr. Ashtana was confined to a consideration as to whether the product was a "flat" or a "bar". His submission is that this verdict will not have any bearing vis-a-vis the enquiry proposed to be carried out as contemplated by the impugned notice. The notice indicates the tentative view of the Collector that the product is a "bailing hoop". Now, in the dispute which Mr. Ashtana resolved, the product figuring is the same, as that proposed to be considered by the Collector, who issued the notice at Exhibit-M. That description or what label was attached to it by Mr. Ashtana and by the Collector now, would hardly make any difference. That it would have been considered as a "bailing hoop", and was not so considered, would not permit a fresh appraisal. As said earlier, there has been no change in the wording or the entries of the statutes, the rule or the relevant tariff items. A judgment or verdict given by a competent authority is binding, whether it be wrong, right or incomplete. Therefore, this answer to escape the effects of Mr. Ashtana's verdict cannot be of any help to the respondents. Can it be said that the events, which took place after the verdict of Mr. Ashtana, changed the situation vis-a-vis the application of Sections 35A and 11A of the Act ? To that extent these two Sections are relevant, they read thus :-

"Section 35A(2) :- The Collector of Central Excise may, of his own motion or

otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under this Act or the rules made thereunder by a Central Excise Officer subordinate to him (not being a decision or order passed on appeal u/s 35) for the purpose of satisfying himself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as he thinks fit.

.....

(3)(b). Where the Board or, as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in Section 11A.

(4) No proceedings shall be commenced under this section in respect of any decision or order whether such decision or order has been passed before or after the commencement of the Customs, Central Excise and Salt and Central Boards of Revenue (Amendment) Act, 1978 after the expiration of a period of one year from the date of such decision or order.

Section 11A :-

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

Mr. Loya submitted that it was not open to the Collector, issuing the notice at Exhibit-M ignore the time factor vis-a-vis the verdicts of Messrs Ashtana and Patil. The said Officer had no jurisdiction to override the verdict of Mr. Ashtana. He had the power to reappraise the verdict of Mr. Patil, but that power could be exercised within six months of Mr. Patil's verdict, given on 4-11-1980. Mr. Godhamgaonkar really does not have an answer to the submission founded upon Mr. Ashtana's verdict. In relation to Mr. Patil's verdict, he relies upon Section 35A(4) reproduced above. This submission of learned Counsel cannot be accepted, and, in this connection we can do no better than refer to the Division Bench judgment reported in 1984 (16) ELT 1977 (Bom). Chief Justice Chandurkar speaking for the Bench had this to say on a contention similar to that raised by Mr. Godhamgaonkar before us :-

"According to Mr. Sethna and Mr. Deodhar, the third proviso is not attracted to a case where the order sought to be revised is one made u/s 35 by the Collector of Customs and the third proviso to Section 36(2) provides for cases which do not fall within the scope of Section 35 or 35A. It is, therefore, contended that since

the order sought to be revised was the Appellate order of the Collector of Customs, the proceedings will squarely fall within the second proviso to Section 36(2) and since the proceedings have been commenced within the period of one year as required by the second proviso, there is no infirmity in the proceedings.

Now, we have already pointed out that the third proviso to Section 36(2) is worded similar to clause (b) of Section 35A(3). The normal purpose of a proviso is to carve out something from the main proviso in the section. Unless it is absolutely essential, a proviso cannot be construed to be an independent provision and while construing a proviso, one must normally proceed on the assumption that by enacting the proviso, the legislature was making a provision with a view to carve out something which would otherwise have been included in the main and substantive provision. *Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad*, . Now, admittedly various kinds of orders could be passed by the Excise Officers under the Act..... These orders can be the subject matter of either appeals u/s 35 or be the subject of revisional jurisdiction u/s 35A by the Board or the Collector, as the case may be.

.....

It cannot be disputed that when a special provision was made in clause (b) of Section 35A(3) that the Board or the Collector of Central Excise, as the case may be, would not be entitled to revise the orders of the subordinate officers in respect of these three categories of cases unless a notice to show cause was given within the time-limit prescribed in Section 11A, that is, within the period of six months from the date of the order sought to be revised, it is obvious that the rule of limitation was sought to be laid down by the legislature, which would be applicable only to a limited class of cases referred to in clause (b) of Section 35A(3). By making a similar provision in the third proviso to Section 36(2) it is obvious that the legislature wanted even Central Government's revisional jurisdiction to be controlled by the provision with regard to limitation in respect of the matters relating to non-levy short-levy or erroneous refunds arising out of orders which are made u/s 35 or 35A of the Excise Act. If we accept the contention advanced before us on behalf of the Department, the effect would be that there would be two parallel jurisdiction of a revisional nature in respect of the same orders and possibly the only order which could be subject to such revisional jurisdiction would be the orders of the Assistant Collector which would suffer from the defect of non-levy, short-levy or erroneous refunds. In case of Assistant Collector makes such orders, there was no question of the assessee going in appeal against those parts of the orders and the decision on the construction sought to be placed by department would be that either the Board or the Collector or the Central Government could issue show cause notice against such orders. Vesting of parallel jurisdiction in respect of the same subject-matter could not have been intended by the legislature at all. We must, therefore, construe the third proviso to Section 35(A) of the same line as clause (b) of sub-section (3) of Section 35A.....

.....

It must be held that the third proviso has been effect of restricting the revisional jurisdiction of the Central Government in matters which arise out of the orders u/s 35 and 35A relating to non-levy, short-levy or erroneous refund. This restriction is in the form of an express provision that the notice to show cause in respect of these matters must be given within the time limit specified in Section 11A, that is, within a period of six months....."

In the instant case, according to the show cause notice itself, there had been a non-levy. The product manufactured by the petitioners fell under Tariff Item No. (ii). It had been earlier treated as falling under Tariff Item No. (ia). For that reason, there had been a non-levy. It was proposed to revise the classification so as to convert it into one falling under Tariff Item No. (ii). Therefore, the matter fell squarely within Section 35A(3)(b) of the Act. Once that conclusion is reached, the time limit of six months, as specified in Section 11A of the Act, cannot be avoided. Mr. Patil delivered his verdict on 4-11-1980 and the show cause notice is dated 24/26 October, 1981, i.e., clearly beyond six months.

11. To somehow save the show cause notice, Mr. Godhamgaonkar relied upon the powers said to have been conferred vide Rule 173B(5) of the Rules. This sub-rule is worded as follows :-

"When the dispute about the rate of duty has been finalised or for any other reasons affecting the rate or rates of duty, a modification of the rate or rates of duty is necessitated, the proper Officer shall make such modification and inform the assessee accordingly."

Sub-rule (5) cannot be read in isolation. It has to be read in the context of several sub-rules that precede it. Briefly, sub-rule (1) requires every assessee to file with the proper Officer for approval a list in such form as the Collector may direct, giving full description of all excisable goods produced or manufactured by him or them, all other goods produced or manufactured by him or them and intended to be removed from his or their factory, and all the excisable goods already deposited or likely to be deposited from time to time without payment of duty in his or their warehouse, and such other particulars as the Collector may direct. Sub-rule (2) requires the proper Officer to make such inquiry as he deems fit, and thereafter approve the list with such modifications as are considered necessary and return one copy of the approved list to the assessee. Sub-rule (2A) speaks of the clearances being subject to the provisions of Rule 173CC, to be made only after the approval of the list by the proper Officer. If there is likely to be any delay in the inquiry, the proper Officer may allow the assessee to avail himself of the procedure prescribed under Rule 9B for provisional assessment of the goods. Sub-rule (3) entitled the assessee, disputing rates of duty, to pay the duty under protest, after intimating his protest to the concerned Officer. Sub-rule 4 specifies three categories permitting an alteration of the list approved by the proper Officer. None of these categories comes to the rescue of the respondents

in the instant case. It is after this, that sub-rule (5) comes. Sub-rule (5) has to be read as restricted to the assessment beginning with the filing of the list contemplated by sub-rule (1). That is not the position here. What the respondents are seeking to get over, are the effect of an adverse adjudication in the form of the Ashtana and Patil verdicts. To such an attempt, sub-rule (5) cannot confer any protection. The notice issued by the Collector is beyond the six months limit prescribed by the statute, and one to which sub-rule (5) of Rule 173B of the Rules, does not apply. The result of the foregoing discussion is that the petition will have to be allowed. Hence the Order :-

#### ORDER

Petition allowed. Rule, quashing the notice and the inquiry proposed to be taken thereunder, is hereby made absolute. Petitioners shall get their costs from the respondents, who shall, in addition, bear their own.