

(1967) 10 DEL CK 0017

In the Delhi High Court

Case No : Civil Writ Appeal No. 1114 of 1967

Technological Institute of Textile

APPELLANT

Vs

The Inspector, Central Excise, Technological Institute of
Textiles, Bhiwani and Others

RESPONDENT

Date of Decision : 20-10-1967

Acts Referred:

Citation : (1968) 4 DLT 206

Hon'ble Judges : T.V.R. Tatachari, J;M.K.M Ismail, J

Bench : Division Bench

Advocate : N.A. Palkhiwala, H.L. Sibbal, B.P. Maheshwari, D.S. Kang, N.N. Goswami, N.C. Chatterjee, B.B. Kishore, for the Appellant;

Judgement

M.M. Ismail and T.V.S. Tatachari. JJ.

(1) In exercise of the powers conferred by Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, the Central Government on 2nd August 1948 made the Cotton Textile (Control) Order, 1948 (hereinafter referred to as the Order). This Order contemplated the appointment of an officer called Textile Commissioner by the Central Government and conferred certain powers on him. Clause 20 of the Order enables the Textile Commissioner to issue directions in writing, from time to time, to any manufacturer or class of manufacturers or the manufacturers generally, regarding the classes or specifications of cloth or yarn and the maximum or the minimum quantities there of, which they shall or shall not produce during such periods as may be specified in the directions, and they shall comply with such directions. Sub-clause (2) of that clause required the Textile Commissioner to have regard to the capacity of the producer to produce cloth and yarn of different descriptions or specifications and to the needs of the general public while exercising the powers conferred by that clause In exercise of the powers conferred by this clause, the Textile Commissioner have been issuing directions from time to time. and one such directions issued by him on 26th August 1965 is as follows :-

"S.O.310 : In exercise of the powers conferred by sub-clause (1) of Clause 20 of the Cotton Textiles (Control) Order, 1948, and in supersession of the Textile Commissioner's Notification No 9 (9)/CT (A)/54 dated the 26th August, 1954, I hereby direct that no producer having a spinning plant shall, without the previous permission, in writing, of the Textile Commissioner, produce any type of grey or bleached cloth of plain weave whether or not mercerized : (i) which has a width of less than 71 cms; but would otherwise be covered by the manufacturing particulars and description of "dhoti" as contained in item (a) of the Explanation below paragraph 3 of the Textile Commissioner's Notification No. S.O. 3656, dated the 13th the October, 1964; (ii) which has a width of less than 94 cms; but would otherwise be covered by the manufacturing particulars and description of "saree" as contained in item (b) of the Explanation below paragraph 3 of the Textile Commissioner's Notification No. S.O. 3656, dated the 13th October, 1964." The reference to the SO. No. 3656 dated 13th October 1964 is a reference to a Notification issued by the Textile Commissioner under clause 22 of the Order. That clause enables the Textile Commissioner to specify; (a) the maximum prices, ex-factory, wholesale and retail at which any class or specification of cloth or yarn may be sold; or (aa) the principles on which and the manner in which such maximum prices may be determined by a manufacturer; and (b) The markings to be, made by a manufacturer or dealer or any class or specification of cloth or yarn manufactured or sold by him and the time and manner of making such markings. It is with reference to this clause 22, the Textile Commissioner issued the Notification No. S. O. 3656 dated 13th October 1964. In that Notification, the Textile Commissioner, stipulated as to how the maximum ex-factory price of five varieties of cloth" dhoti , "saree", "longcloth" shirting and "drill" should be calculated and that the maximum retail price of the aforesaid varieties of cloth shall be 18% over the ex-factory price. For the purpose of this notification," dhoti ""saree" "longcloth "shirting" and "drill" were defined. For this case, it is the definition of "saree" contained in this Notification which is important and that definition is as follows:-

"SAREE" means any type of grey or bleached cloth commonly known by that name, whether or not mercerized ,of plain weave, which: (i) Is manufactured either wholly from cotton or partly from Cotton and partly from any other material; (ii) contains coloured yarn or white yarn on its borders and headings; (iii) has a width ranging between 94 centimeters and 137 centimeters (inclusive); and (iv) has a length ranging from 4.15 metres to 14 metres inclusive); and includes any type of printed mull, printed voll or printed dolia, of any length manufactured in accordance with sub-paragraphs (i) and (iii) above." (2) Under clause 22 itself, the Textile Commissioner had issued another Notification dated 2nd March, 1948, which has been amended from time to time. Under this Notification, each piece of cloth shall be stamped with the manufacturers number. For the purpose of this Notification, a piece of cloth has been defined as any running length of cloth including cloth comprising of uncut dhotis ,towels, sarees or chaddars ordinarily sold by the pair (vide Explanation I

to paragraph 1). This Notification further required that each piece of cloth the ex-factory price of which has been specified under clause 22, shall be stamped with the mill Serial number. Paragraph 2 of this Order required every manufacturer to stamp on each piece of cloth other than embroidered cloth ;

(I)the word" dhoti , "saree", "longcloth" "shirting" or "drill" as the case may be in respect of varieties of cloth for which the maximum ex-factory price has been specified under clause 22; (ii) the name by which it is commonly known, in the case of varieties other than the varieties of cloth mentioned in (i) above; (iii) the words "ex-factory price" and "retail price" and the amount of ex-factory price and retail price respectively, prescribed by the Textile Commissioner, in his Notification dated 13th October, 1964. (iv) the words "excise duty" and the amount of excise duty paid.

This Notification as amended from time to time contains an Explanation and that Explanation is important and the same is as follows :-

"Dhoti", "saree", longcloth" "shirting and drill" shall have the same meaning as are assigned to them in the Textile Commissioner's Notification No. CER/1/64 dated the October, 13, 1964." (Explanation ii). By another Notification dated 11th May, 1966, the following sentence has been added to that Explanation :-

"ON dhoties or saree lengths packed in singles or in pairs, the amount of ex-factory and retail prices per single or pair, as the case may be, shall be stamped; in all other cases the amount of ex-factory and retail prices per metre shall be stamped " Since both the above-said Notifications, viz. the Notification dated 13th October, 1964 and the Notification dated 2nd August, 1961 have been issued under clause 22 of the Order, for the sake of convenience ,the Notification dated 13th October, 1964 can be referred to as price-notification while the Notification dated 2nd August, 1948 can be referred to as marking notification

(3) We would like to refer to a few more features in relation to the order. In clause 3, sub clause (a) of the order," cloth "has been defined as any fabric made either wholly from cotton or partly from cotton and partly from any other material, and includes, dhotis ,sarees, lungis, chaddars, bedsheets, towels and handkerchiefs and other similar articles made from cloth specified by the Textile Commissioner, from time to time, but not including certain specified types of fabrics. Clause 23(1) of the Order enumerates certain things that should be done in relation to the marking; of cloth or yarn. Sub clause (2) of this clause prohibits a manufacturer from selling or delivering any cloth unless he has previously sent to the Textile Commissioner a sample of such cloth of the dimensions of 6 inches by 6 inches together with true and accurate information in the forms prescribed for the purpose by the Textile Commissioner about the manufacturing particulars thereof and about the manner in which the maximum price was calculated where such maximum price has been fixed under clause 22. The Textile Commissioner, by a Notification dated 17th October, 1964, pursuant to this sub clause, has prescribed a form known as Form "C". In this form, price is required to be shown

as per piece/per pair of finished cloth "and" per pair/per metre.

(4) It is admitted before us by both the sides that the entire production by the mills has not been brought under control and every mill was required to produce about 40% of its production with in the controlled variety.

(5) The price notification will clearly show that its object was to make the common varieties of cloth generally used by the vast majority of the population of this country to be available to them at reasonable price and necessary steps have been taken to ensure that the restrictions imposed in this behalf are complied with and not evaded. When the maximum price of any particular cloth is fixed, it follows that the manufacturer cannot make any profit ho likes with reference to the cloth concerned and his profit is necessarily to be a small one compared to the profit he may make in respect of the cloth not brought under such price control. Consequently, while insisting on the manufacturers to forego a share of the profit which they would have otherwise made, by fixing the maximum price, the Government also had taken steps to make its own contribution towards the end of making such varieties of cloth available to the general public at reasonable prices, by foregoing a part of the excise duty payable in respect thereof. In this connection, on 28th February, 1965 in exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government with effect from 28th February, 1965 made certain amendments to the Notification it had already issued with reference to the Central Excise duty payable in respect of cotton fabrics and the amendment is in the following terms :-

" THE rates of duty prescribed in the Table above both in respect of grey and processed fabric, shall be reduced by 50%. in the case of medium-A medium Band coarse fabrics which answer the description of" dhoti ,"saree", long cloth ,"shirting" or "drill" as defined from time to time by the Textile Commissioner under the Cotton Textiles (Control) Order, 1948 and for which maximum ex factory prices have been specified by the Textila Commissioner under the said Older." In other words, in respect of the five varieties of cloth mentioned above with reference io which the maximum ex-factory price has been fixed by the Textile Commissioner under the Order, only 50% of the excise duty was payable .From this, it will be seen that for eligibility to get the benefit of this concessional rate of excise duty," dhoti ,"saree", longcloth "shilting" or "drill" must answer the definitions of the said terms contained in the Notification issued by the Textile Commissioner, from time to time, fixing maximum ex. factory prices.

(6) I be petitioner in Writ Petition No. 1114 of 1967 is maintaining and running a cotton mill and is producing and selling cloth .According to the averments contained in the petition, the petitioner at all material times, manufactured sarees which were manufactured and packed and in the ordinary course sold in pairs. In paragraph 13 of the petition, the petitioner further states :-

" MILL made sarees with woven borders and headings in coarse and medium counts are ordinarily sold in pairs. The length of a saree, forming part of a pair or piece, is ordinarily 5 to 6 metres for use by adults and about 2 to 3 metres for use by children, The maximum length of a wearable portion of a piece of saree in India generally is 7 meters "Paragraph 13 of the petition further avers : "The petitioner at its mills at all material times manufactured and still manufactures, inter alia, saree in pairs having the lengths of 4 5 metres, 6 metres, 6. 5 metres, 7 metres and 8 metres, and such pairs of sarees were, inter alia, manufactured and are still manufactured against the controlled quota of cloth and were always shown and are still shown in several returns filed with the Textile Commissioner. The Central Excise authorities also charged excise duty on such cloth as controlled cloth during the period from 1st March 1905 to 23rd June, 1967. Similar cloth in similar lengths manufactured by several other mills in India, e. g. Aterton Mills, Kanpur, Buthanpur Tapti Mills Ltd., Buthanpur (M. P.), Swadeshi Cotton Mills, Kanpur, Bradburry Mills, Bombay, Orissa Textile Mills, Cuttack, Muir Mills, Kanpur, has been classified as controlled cloth and assessed to excise duty as such." The petition further avers :

" THE Inspector of Central Excise, respondent No. 1 duly inspected, checked and passed A R-1 forms, gate passes and all papers and documents required under the Central Excise and Salt Rules, 1944 (hereinafter referred to as the laid Rules) and assessed the excise duty payable in respect, thereof and the petitioner cleared the said saree upon payment and/or adjustment in the account current of such duty." (7) On about 26th April 1967, the Director, Revenue Intelligence of Central Excise Headquarters ,New Delhi, along with several other officers visited the mill premises of the petitioner and requested the manager of the mill, inter alia, to supply copies of several invoices for the purpose of making certain investigations and/or enquiry. Thereafter, correspondence between the petitioner and the Central Excise authorities ensued under which the petitioner was required to furnish the particulars about the production and clearance of sarees in pairs having length less than 8.3 metres month wise from 13th October 1964 onwards, production and clearance of square meters and duty actually paid in each month on clearance of sarees having lesser lengths than 8,3 meters. The petitioner requested the departmental officers to inform it the purpose for which the said particulars were required so that the necessary statements could be compiled, Except stating that the said particulars were required in connection with an inquiry, no details were furnished to the petitioner. Meanwhile, on 17th June 1967 the Superintendent, C. R. I./C. M. O. R., sent a communication to the Birla Cotton Spinning & Weaving Mills Ltd., Delhi, informing them that controlled varieties of saree whose length is less than 8.3 meters can be cleared after making payment of full excise rate of duty that is to say the said sarees can be cleared under de-controlled items as per necessary clarifications, given by the Textile Commissioner s letter No. CE/ Tax/Pol/4/8568 dated 9th June 1967. The letter dated 9th June 1987 of the Assistant Director of the Office of the Textile Commissioner referred to above is addressed to the Collector of Central Excise,

New Delhi, and is as follows : -

" WITH reference to your above letter, I am directed to inform you that the length range prescribed vide Explanation (b) (iv) under paragraph 3 of the Textile Commissioner's Notification No. S O. 3556 dated the 13th October, 1964, is for a single piece of saree having heaving (width-wise) on either side and not per pair I am further directed to request you to kindly issue suitable instructions to your field staff to bring to the notice of the officer-in charge of the Regional Office of the Textile Commissioner if any mill is found to be packing, under control, sarees measuring less than 4.15 meters per piece without obtaining written permission from this office." This letter purports to be a reply to the query made by the Collector of Central Excise, New Delhi, on 15th May 1967 addressed to the Textile Commissioner, Bombay. That letter stated that a doubt has arisen whether the minimum and maximum length prescribed for a saree under the Notification dated 13th October 1964 is for a single piece or also covers a pair and certain mills were manufacturing sarees whose length per pair is from 6 metres to 8 metres. The Collector, Central Excise, requested the Textile Commissioner, to state clearly as to whether a pair of sarees whose length exceeds 4.15 metres although each piece is less than 4.10 metres can be cleared as controlled cloth .

(8) On receipt of the letter dated 17th June 1967 of the Superintendent of the Central Excise, the Birla Cotton Spinning and Weaving Mills Limited, on 8th July 1967 wrote to the Textile Commissioner, asking him to let them know whether the sarees referred to in the letter dated 17th June 1967 could be sold as decontrolled goods, and sent a further communication on 19th July 1967. By a letter dated 22nd July 1967, the office of the Textile Commissioner informed the Mills that any cloth answering the definition of controlled variety prescribed vide Notification No. S. O. 3656 dated 15th October 1964 has to be packed under control with necessary price-stamping and sarees answering the definitions prescribed has to be packed only under control and as per policy, sarees produced traditionally but not answering the dimensions prescribed could however be packed under control after obtaining necessary permission from his office and under no circumstances can a mill pack sarees outside control.

(9) Meanwhile, on 29th June 1967, a demand was made under Rule 10A of the Central Excise Rules on the petitioner to pay a sum of Rs. 52,958.66 within ten days from the date of the notice on the ground that short length sarees are not covered by S.O.No. 3658 dated 13th October 1964 of the Textile Commissioner, Bombay, and, Therefore, such sarees were liable to pay excise duty not at the concessional rate, but at the full rate and. consequently, the demand was made for the payment of the difference in duty. The amount mentioned was for the period from 1st March 1965 to 23rd June 1967. The writ petition challenges this notice of demand for the payment of differential excise duty.

(10) The petitioner in Writ Petition No. 1115 of 1967 challenges a similar demand made on the petitioner on 23rd June, 1967 for the payment of Rs. 12,447-15 being the differential duty for the period from 1st March, 1965 to 26th June,

1967. Except for some immaterial details, the case of the petitioner in writ petition No. 1115 of 1967 is the same as that of the petitioner in Writ Petition No. 1114 of 1967. Therefore, both these writ petitions can be disposed of by a common judgment.

(11) The real controversy in these cases is whether the sarees in question produced by the petitioners whose length per pari is admitted to be above 4.15 metres, but the length of each saree is, again admittedly, less than 4.15 metres, fall within the scope of the price notification of the Textile Commissioner dated 13th October 1964. If it falls within the said Notification, it is eligible for the concessional excise duty and if it does not so fall, it is not so eligible. We may mention that it has been admitted on both the sides that the pair of sarees manufactured by the petitioners is a single piece of cloth containing heading in the middle where it has to be cut for the purpose of being used as two separate sarees.

(12) The learned counsel (or the petitioners urged the following four grounds in support of their prayer for the issue of a writ quashing the demand:

(1) The length prescribed for "saree" as defined in the price notification dated 13th October, 1964 is not for a single saree. but for a piece of cloth comprising of one or more sarees and, Therefore, the sarees manufacture by the petitioners were eligible for the concessional rate of excise duty. (2) Even assuming that the sarees in question were not eligible the concessional rate of excise duty and were liable for the full rate of duty, still the demand for the payment of differential duty falls within the scope of Rule 10 of the Central Excise Rules and not under Rule 10A. and, Therefore, the demand has to be made within three months from the date on which the lesser duty was paid or adjusted in the owners' account current and, consequently no demand could have been made for any period earlier than three months from 29th June, 1967. (3) No opportunity whatever was given to the petitioners, before demand in question was raised against them and this constituted a denial of principles of natural justice. (4) The Central Excise authorities are performing their duties under the Central Excise and Salt Act, 1944, and the Central Excise Rules, 1944 and, consequently, the Central Excise authorities will have to apply their mind for the purpose of assessing the correct duty payable by the petitioners and since the Central Excise authorities allowed themselves to be guided by the clarification given by the Textile Commissioner of his Notification dated 13th October, 1964, the demands made by the Central Excise authorities are vitiated and illegal. (13) Before we deal with the above points, we shall dispose of a preliminary objection taken on behalf of the respondents. That preliminary objection is that this Court should not exercise the jurisdiction under Article 226 of the Constitution in view of the existence of an alternative remedy available to the petitioners. The said objection is taken in the following terms in the counter-affidavit filed on behalf of the respondents herein :-

" THAT the petitioners have invoked the extraordinary jurisdiction of the Hon'ble

Court by way of the present writ petition, without exhausting the departmental remedies of a representation to the Assistant Collector, Central Excise, against the impugned Demand notice dated 27th June, 1967 issued by Respondent No. 1, thereafter an appeal u/s 35 of the Central Excise and Salt Act, 1944, to the Collector of Central Excise, Delhi, and thereafter, a Revision u/s 36 of the Act to the Central Government. The petition, is, Therefore, premature and liable to be dismissed on this short ground." It will be seen that it is not the case of the respondents that under the statutory provisions, a right of appeal is available to the petitioners against the notice of Demand served on them by the Inspector, Central Excise. Section 35 of the Central Excise and Salt Act, 1944, states that any person deeming himself aggrieved by any decision or order passed by a Central Excise Officer under the Act or the Rules may appeal therefore to the Central Board of Revenue or in such cases as the Central Government directs, to any Central Excise Officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Rule 213 of the Central Excise Rules, 1944, provides for an appeal against an order or decision of the Superintendent to the Deputy Collector or to the Collector or Deputy Collector in-charge of a Collectorate, against the order or decision of an Assistant Collector to the Collector or the Deputy Collector in-charge of a Collectorate, and against the order or decision of Deputy Collector to the Collector of Central Board of Revenue. It is not the case of the respondents that an appeal against the notice of Demand issued by the Inspector lies to any higher authority under the Act or the Rules. The preliminary objection referred to already states that the petitioners should have made a representation to the Assistant Collector against the notice of Demand and thereafter against the decision of the said Assistant Collector, should have preferred an appeal to the Collector. No provision in the Act or the Rules for making a representation to the Assistant Collector against the notice of Demand issued by the Inspector was brought to our notice. On this basis, it is argued by Shri Palkhiwala, the learned counsel for the petitioners, in C. W. 1114 of 1967, that the preliminary objection is not tenable. He also took the point that the Assistant Collector himself has filed the affidavit in these writ petitions supporting the notice of demand and on this ground also, the plea of the respondents must fail. Shri Palkhiwala further contended that where the complaint of the petitioners is that the notice of demand issued by the Inspector is without jurisdiction and the same has been issued in violation of principles of natural justice the existence of an alternative remedy, even if one such is available, should not stand in the way of this Court exercising its jurisdiction under Article 226 of the Constitution. The further plea was that the question raised in the writ petition is a recurring one and it is in the interests of both the petitioners as well as the respondents that the question should be decided by the High Court at the earliest opportunity since it affects the petitioners and other mills similarly situate in relation to their day-to-day production of this variety of cloth and clearance of the same. We are of the view the existence of an alternative remedy is merely a circumstance that has to be taken into account by the High Court while exercising its jurisdiction under Article 226 of the

Constitution and it does not really bar the exercise of the jurisdiction. We see considerable force in the submissions of Shri Palkhiwala in this behalf and, Therefore, we overrule the preliminary objection advanced on behalf of the respondents.

(14) With reference to the first point, on merits, Shri Palkhiwala argued that the price-notification and the marking-notification should be read together since they are so intimately connected and the Explanation (ii) to the marking-notification really defines "dhosi", "saree", "longcloth shirting" and "drill" with reference to their definitions in the price-notification and, Therefore, Explanation (i) to paragraph 1 of the marking-notification stating that a piece of cloth means any running length of cloth and includes cloth comprising of uncut dhosis, towels, sarees or chaddars ordinarily sold by the pair, should be taken to apply to the definition of saree etc. in the price notification with the result That the length range prescribed for "saree" in the price-notification should be taken to apply to a single saree as well as a pair of farces. Shri Palkhiwala further argued that Rule 96A of the Central Excise Rules defining "piece of cotton fabrics" as any running length of cotton fabric including a fabric comprising of uncut pair of dhosis, sarees, chaddars, bedsheet, bed spreads, counterpanes, towels, bathmats and table cloth and any other item ordinarily sold by the pair, should be taken into consideration for the purpose of finding out whether the saree in question is eligible for the concessional rate of excise duty. In elaboration of this point, Shri Palkhiwala urged the following considerations :-

(i) the plain grammatical meaning of the definition of "saree" contained in notification dated 13th October, 1964 makes it clear that the length referred to therein is the length of a saree or a pair of sarees since the notification refers to a type of cloth only; (ii) such a conception harmonizes with the definition contained in Rule 96A of the Central Excise Rules and the marking notification dated 2nd August, 1948; (iii) the interpretation of the respondents will lead to an absurdity as there cannot be a single saree of 14 meters long; (iv) the interpretation put by the respondents will defeat the object of the notification itself since a saree of the length of less than 1.15 metres will go out of the scope of the notification even though such a saree is widely used by the people of this country; and (v) Such a construction will be unreal and opposed to the actual practice prevailing among several mills in this country of producing sarees in pairs where the length of the pair is more than 4.15 metres and the length of each saree is less than 4.15 metres and the petitioners have given by way of sample the names of several mills which are producing such sarees, in the rejoinder filed by the petitioners. (15) As against this submission of Shri Palkhiwala, Shri N. C. Chatterji, appearing for the respondents, contended that the price-notification and the marking-notification should not be taken together since the definition of "saree" contained in each notification is for the purpose of that notification only and, Therefore, the petitioners cannot derive any assistance from or rely upon, the definition contained in the other notifications. Whether the two notifications and the definition contained in rule 96-A of the Central Excise Rules, 1944,

should be taken together or not ,we are of the opinion that the length range given in the price-notification for saree is not confined to a single saree alone. Such a length range will apply to a single saree as well as to a running length of cloth comprising more than one uncut sarees. It is to be noticed that the definition of the term "saree" commences by referring to a type of cloth commonly known by that name and having a length ranging from 4.10 metres to 14 metres. Therefore, the definition primarily refer to a type of cloth of the particular length range and the other requirement is that it should be commonly known by the name saree. A single saree as well as a running length of cloth comprising more than one uncut sarees will be known only as saree. Consequently, there is nothing in the definition itself to compel us to come to the conclusion that the length range referred to therein inevitably qualifies only a single saree and not a pair of sarees or a running length of cloth comprising more than a pair of uncut sarees. The notification was issued with the object of making certain common varieties of cloth largely used by the vast majority of the people of this country available at cheap prices and, consequently, any definition of the expression "saree"," dhoti ,etc. used in the notification will have to be understood in the context of the conditions available and prevalent among the mills producing such cloth and the people using such cloth .If the length range contained as part of the definition of "saree" is to be confined only to a single saree, it will necessarily mean that the definition contemplates a saree of a length of 14 metres or 15.4 yards. In no part of the country, a saree of such length is produced or used by the people of this country. Even if it is assumed that it is possible to have a saree of such a length specially made for certain type of people or for certain circumstances, still the very nature of the notification and the object for which the notification was issued, will clearly show that such a saree was not intended to be covered by the notification since it was intended to cover the popular varieties of cloth largely used by the vast majority of the people of this country. The definition contained in the notification of such a nature will have to be understood consistent with commonsense, prevailing practice and common understanding of the people, unless there is anything in the language of the definition itself compelling a contrary conclusion. When Shri Chatterjee contended that the length range, contained in the notification, of "saree" was meant to apply only to a single saree, we repeatedly asked him how such a contention is tenable in view of the fact that there can be no single saree of a length of 14 metres or 15.4 yards. Shri Chatterjee was not able to offer any acceptable Explanation except to report that what was defined in the said notification was only "saree" and not "sarees" and for the purpose of these cases, we are concerned only with the minimum length of 4.15 meters and not with the maximum length of 14 metres. Under these circumstances, we consider that the contention of the petitioner is is well founded, So long as a piece of cloth satisfies all the requirements contained in the four clause of the definition of "saree" given in the price-notification, it will be a "saree" for the purpose of the notification whether it comprise of only one saree or is a running length comprising more than one uncut sarees. We are fortified in this conclusion by the

inclusive part of the definition as well. That refers to any type of print dmuil, printed voile or printed doila of any length manufactured in accordance with subparagraphs(i) and (iii) of the definition. The idea here seems to be that whatever be the length of the cloth a piece of cloth will be "saree" if it is capable of being used as a saree either by itself or by cutting it to required lengths. Shri Palkbiwala further contended that the looms of the Indian Mills are such that a single saree of 2" metres or 3 metres cannot be produced and that is why the notification prescribed the minimum length of 4.15 metres and if a very large quantity of sarees of small length worn by children, or young persons are not to go out of the scope of the notification, the minimum length of 4.15 metres should not be confined to a single saree. In view of these considerations, we hold that the length range mentioned in the definition of saree contained in the price-notification is not confined only to a single saree and will cover a single saree as well as a running length of cloth comprising more than one uncut sarees.

(16) The second point urged on behalf of- the petitioners is based on the language of Rules 10 and 10-A. of the Central Excise Rules, 1914 and the said Rules are as follows : -

"10.Recovery of duties or charges short-levied or erroneously refunded: When duties or charges have been short levied through inadvertence, error, collusion or misconstruction 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 is obvious that Rule 10-A is a residuary rule and so long as a case is covered by any specific provision contained in any part of the other rules, Rule 10 A cannot apply. The contention of Shri Palkhiwala was that even assuming that the sarees in question were not eligible for the concessional rate of excise duty and were liable to full duty, still the case will fall under rule 10 since that will be a case of short levy through misconstruction inadvertence, en or or misconstruction on the part of an officer of the Central Excise department It is not the case of the respondents that there was a collusion between the petitioners and the departmental officers or there was any mis-statement as to the quantity, description or value of the goods on the part of the petitioners.

Therefore, the only question that remains to be considered is whether it is a case of short-levy through inadvertence, error or mis-construction on the part of an officer or not. It is admitted that at the time of the clearance of the sarees in question, as required by Rule 52 of the Central Excise Rules, the excise duty was paid but it was paid only at the concessional rate of 50%. The facts narrated already will also indicate that the Central Excise officials collected the duty on their understanding, of the price notification of the Textile Commissioner to the effect that the length range contained in the definition of "saree" mentioned therein would cover not only a single saree but also a pair of sarees. It is only afterwards when a doubt arose and a clarification was given by the Textile Commissioner, the Central Excise officials came to the conclusion, that the sarees in question were not eligible for the concessional rate of duty and the full rate of duty should have been recovered. Therefore, the present is a clear case falling within the scope of Rule 10. Shri Chatterjee referred to the following departmental Instructions contained in the C.B.R. Bulletin and contended that it was no part of the Central Excise Officials to verify the particulars of the declaration :-

" IT may be noted that the function of the Central Excise Officers posted to composite mills is to ensure that there is marking of a price and other items on a fabric described by them as one of the four varieties of controlled cloth, as is required vide para 2(i). Our officers must not enter into controversy whether a fabric is shirting or longcloth or dhoti or saree. It is not the function of the Central Excise Officer to check whether all "controlled cloth "produced by a manufacturer has been declared as such or whether the price intended to be stamped on the "controlled cloth "is in accordance with the provisions of the above cited notifications or such orders other that may be issued by the Textile Commissioner on the subject. In other words, the only check required to be exercised is that such fabrics as are declared by the manufactures to be "controlled cloth "bear requisite markings in red ink. If any Central Excise officer has any information of any malpractice prevailing with regard to price control, he has to pass on the information to the Textile Commissioner." For one thing, the above Instruction is merely a departmental Instruction issued by the Higher authorities to their subordinates and cannot have the force of law and cannot exonerate the Central Excise officials from discharging their statutory functions. Secondly, even the said Instruction does not say that the Central Excise officers should not as the proper duty of Central excise payable in respect of the cloth in question. Thirdly, while the Central Excise officials are assessing and collecting the excise duty, they are exercising their statutory functions under the provisions contained in the Central Excise and Salt Act, 1944. and the Central Excise Rules, 1944, and consequently, they have to act within the four corners of the law. For these considerations, we are of the view that the present are cases of short-levy based upon a particular interpretation by the Central Excise officials of the price notification of the Textile Commissioner, which interpretation was clarified subsequently by the Textile Commissioner not to be correct and, Therefore, the

cases fall squarely within the scope of Rule 10 and, Therefore, Rule 10-A cannot apply. In this connection, Shri Palkbiwala drew our attention to an unreported judgment dated 1st/2nd July 1965 of the Bombay High Court in N. B. Sanjana, Assistant Collector of Central Excise, Bombay I, Integrated Division v. The Elphinstone Spinning and Weaving Company Limited, (Appeal No. 69 of 1963) holding that the short-levy contemplated by Rule 10 includes non-levy as well and in such a case the deficiency in the duty will mean the whole of the duty payable. On the other hand, Shri Chatterjee drew our attention to a decision of the Rajasthan High Court in Mewar Textile Mills Ltd. v. Union of India and others. In that case an argument was advanced that according to the scheme of the Central Excise and Salt Act, 1944 and the Rules made there under, excise duty cannot be recovered after the goods have been lawfully removed from the place where they are produced, cured or manufactured or any premises appertaining there to such as may be authorised for the purpose and Therefore, the demand subsequently made was illegal. In repelling that argument, the learned Judges of the High Court referred to Rule 10-A of the Central Excise Rules and concluded that the demand made in that case for the payment of the additional excise duty even though it was made after the goods were removed from the usual premises, can be recovered, according to law. In our opinion, this decision has no bearing on question before us and did not deal with the relative scope of Rules and 10-A of the Central Excise Rules,

(17) In our view the third contention of Shri Palkbiwala also is well- founded. The contention is that before raising the demand for the payment of the duty, the petitioners ought to have been given an opportunity to put forward their case. It is admitted that no such opportunity is given by the Central Excise officials before the Inspector issued the demand notices dated 27th June 1967. However, Shri Chatterjee contend that a notice issued on 12th January 1967 is sufficient for this purpose. the said notice is as follows;-

"IT is observed from the inspection report that you have a deviation Older in so far as the width of saree is concerned You have produced sarees in lengths outside the range prescribed in the definition. Your contention that the length range is per pair is incorrect as the plod-action is irregular. You are, Therefore, requested to explain why action should not be pursued against you under the provisions of the Cotton Textile (Control) Order, 1948. You are also requested to furnish the construction particulars of the above sarees." It is clear that notice was issued by an Assistant Director in the Office of the Textile Commissioner and the petitioners were requested to explain why action should not be pursued against them under the provisions of the Cotton Textile (Control) Order. 1948. Certainly, this notice cannot be a substitute or a notice by the Central Excise officials discharging their functions under the Central Excise and Salt Act, 1944 and the rules made there under, and calling upon the petitioners to explain why the difference in duty should not be recovered from the petitioners.

(18) Shri Palkhiwala's fourth point supplemented by Shri Sibal, the learned

counsel for the petitioner in writ petition No, 1115 of 1987, is that the Central Excise officials when assessing the excisable goods to duty have to apply their mind to the relevant provisions of law and should come to their own conclusion and should not allow themselves to be guided or influenced by opinions or clarifications of other officials or authorities. From the facts stated already, it is clear that the Central Excise officials considered the sarees in question, falling within the definition of "saree" contained in the price-notification of the Textile Commissioner and Therefore eligible for concessional rate of duty under the notification issued by the Government of India on 28th February 1965, referred to already. Thereafter, only because of a clarification said to have been given by the Textile Commissioner as to the definition of the term "saree" contained in the price-notification of the Textile Commissioner, as conveyed in his communication dated 9th June, 1967 already extracted, the Central Excise officials changed their view and made the present demand for the payment of the differential duty. In our opinion, the action of the Central Excise officials in this behalf is illegal. The Central Excise officials were discharging their functions under the Central Excise and Salt Act, 1944, and the rules made there under and while assessing the sarees in question to duty, they were applying the notification of the Government of India dated 28th February 1965. Therefore, it was their duty to apply their mind to the said notification read with the price notification of the Textile Commissioner and to come to a conclusion of their own. If any particular official wrongly construed the said notification, it may be open to the higher authorities to have the error corrected in accordance with the procedure prescribed by law and it is not open to the Textile Commissioner himself to come forward and tell the Central Excise officials as to what he meant when he issued the price-notification. If there was anything vague or indefinite in the said price-notification, it was for the Textile Commissioner to issue necessary corrections to the said notifications and thereafter, it will be for the Central Excise officials to apply the corrected notification in assessing the sarees in question to duty. As far as the present cases are concerned, it is clear from the communication dated 17th June 1967 of the Superintendent C.R.I./C. M. O. R that the Central Excise Officials took the view that the sarees in question did not fall within the definition contained in the price notification only because of the Textile Commissioner letter dated 9th June, 1967 already extracted. Therefore the conclusion is inescapable that instead of applying their own mind and coming to their own conclusion as to whether the sarees in question come within the scope of the price-notification of the Textile Commissioner and, Therefore, the notification of the Central Government dated 28th February 1965 made under Rule 8.11 of the Central Excise Rules, 1944, or not, in making the demands in question, they simply acted on the letter of the Textile Commissioner dated 9th, June, 1967, though originally they had taken a different view. Such an action on the part of the Central Excise officials cannot be supported in law.

(19) For these reasons, we allow both these writ petitions and quash the demand for payment of differential duty made on the petitioners. However, there will be

no order as to costs to either of these writ petitions.