

(1978) 12 KL CK 0005
In the High Court Of Kerala
Case No : W.A. No. 325 of 1977

The Commissioner of Excise

APPELLANT

Vs

Padmanabhan Nair

RESPONDENT

Date of Decision : 07-12-1978

Acts Referred:

Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 11, 12, 40, 81, 9

Citation : (1978) 12 KL CK 0005

Hon'ble Judges : V. Balakrishna Eradi, J;K.K. Narendran, J

Bench : Division Bench

Advocate : M.M. Abdul Khader, General, for the Appellant; V. Bhaskaran Nambiar, C.R. Natarajan, M.K. Ananthakrishnan and R. Bhaskaran, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Eradi, J.—This appeal has been preferred by the Commissioner of Excise, Board of Revenue, Trivandrum and two other officers against the judgment of a learned Single Judge of this Court allowing O.P. No. 3968 of 1976 filed by the Respondent herein and quashing the notice Ext. P-1, dated 17th December 1973 issued by the Commissioner of Excise to the Respondent herein. The impugned notice was issued by the Excise Commissioner in purported exercise of the power conferred by Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (hereinafter referred to as M. and T.P. Rules) informing the Respondent that a detailed investigation conducted by the Board of Revenue into the activities of Messrs. Pratap Industries, Tirur -- a proprietary concern of the Respondent -- had revealed that there was large scale evasion of excise duty by falsification of invoices by showing items of medicine manufactured and released from the factory and its bonded depots as low duty items while, in truth, they were high duty items and that by the said process the Respondent had escaped payment of duty in respect of 852,041 proof litres of spirit used for high duty preparations manufactured during the years 1970-71,

1971-72 and 1972-73. The Respondent was called upon under Ext. P-1 to remit a sum of Rs. 23,43,110 being the duty payable by him in respect of the aforesaid quantity of spirit used in the manufacture of high duty preparations within two weeks of the receipt of the said notice. It was also stated in Ext. P-1 that in case the Respondent had any objection to the payment he may submit his explanation and produce all records, invoices of sale, etc. The Respondent furnished a detailed explanation (sic)ting that there had not been any falsification of invoices nor any evasion of the duty legitimately payable by him in respect of the medicinal preparations manufactured and cleared from his factory. It was further contended that even if it is to be assumed that there was any short collection of duty, the demand should have been made within six months from the date of short payment of duty and removal of the goods since the matter is directly governed by Rule 11 of the M. and T.P. Rules and not by Rule 12 under which the notice was purported to be issued by the Commissioner. Ext. P-2 is a copy of the said explanation dated 27th December 1973 filed by the Respondent. Without passing any further orders in the matter after considering the explanation Ext. P-2 submitted by the Respondent, revenue recovery proceedings were initiated against the Respondent for the realisation of the aforesaid amount of Rs. 23,43,110. The Tahsildar, Tirur (3rd Appellant) is said to have gone to the Respondent's premises on 27th July 1976 and presented the notice of demand under the Revenue Recovery Act with a threat of immediate attachment in the event of failure to comply with the same. The Respondent, thereupon, came to this Court and filed the writ petition seeking to quash Ext. P-1 as well as the revenue recovery proceedings initiated against him pursuant thereto. Before the learned Single Judge it was conceded by the Additional Advocate General appearing on behalf of the Commissioner of Excise that an illegality had been committed in initiating the revenue recovery proceedings without passing final orders in the matter after considering the explanation submitted by the Petitioner in response to the notice Ext. P-1. It was further conceded that there had been a violation of the principles of natural justice in as much as the Petitioner had not been afforded an opportunity to substantiate the case put forward by him in the explanation Ext. P-2. These concessions, however, related only to the legality of the revenue recovery proceedings initiated pursuant to Ext. P-1. The important question still remained as to whether the Commissioner of Excise had acted validly within the scope of the power conferred by Rule 11 of the M. and T.P. Rules in issuing the impugned notice Ext. P-1 or whether, on the other hand, the matter was covered by Rule 12 and the demand made far beyond the period of six months mentioned in the said rule was illegal and without jurisdiction as contended by the Respondent. The learned Judge went into the said question elaborately and came to the conclusion that the case was governed by Rule 11 and not by Rule 12 and since the demand had been made only long after the expiry of the period of six months prescribed under Rule 11, the action initiated under, Ext. P-1 was wholly illegal and without jurisdiction. The original petition was accordingly allowed with costs. Hence this appeal by the department.

2. After hearing both sides we have come to the conclusion that the view taken by the learned Judge that it is Rule 11 and not Rule 12 of the M. and T.P. Rules that governs the present case is absolutely correct.

3. Rule 11 deals specifically with the subject of recovery of duties or charges Short-levied. It reads:

When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an excise officer, or through misstatement as to the quantity or description 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 repay the amount paid to him in excess as the case may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

Rule 12, on its very terms, is a residuary provision applicable only in respect of cases of short-levy of duty and other forms of escape from payment of duty in respect of which the rules do not contain any specific provision for collection of such escaped duty or deficiency in duty. That Rule (rule 12) reads:

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 collecting Government under the Act or these rules, such duty, deficiency in duty or sum shall, on written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

There cannot be any doubt that if the instant case is one directly falling within the scope of Rule 11 the provision contained in Rule 12 will have no applicability and it cannot be called in aid by the department. The short question to be considered, therefore, is whether the present case is one falling within the scope of Rule 11. That duties or charges have been short-levied in respect of the medicinal preparations manufactured and cleared from the Petitioner's factory and depot is the very foundation of the action initiated under Ext. P-1. It is also the case of the department that such short-levy had been caused through misstatement of the owner as to the respective quantities of low duty or high duty preparations manufactured by him and through deliberate misdescription by the owner of the goods manufactured and cleared. In the counter-affidavit filed in the original petition of behalf of the department it is also stated that there was grave dereliction of duty on the part of the Excise Officers who were posted in the bonded manufactory of the Petitioner and that one of the Inspectors who had been posted for such duty had been dismissed from service after enquiry. From this it would appear that the case of the department is also that the short-levy of duty had been occasioned on account of collusion on the part of the concerned

Excise Officer. However that may be, there is no doubt that the specific case of the department is that duties had been short-levied through misstatements and misdescription of the goods on the part of the owner. We are not impressed by the contention advanced by the Additional Advocate General that this is not a case of "short-levy" falling under Rule 11 since there had not been any levy or assessment of duty in respect of the goods concerned when they were allowed to be cleared from the Petitioner's manufactory or depot. Rule 40 specifically lays down that issues of alcoholic preparations shall be made from a bonded manufactory on payment of duty. The rule requires that the licensee shall present before the officer-in-charge an application in Form A. R-2 signed by him or by his authorised representative and the officer-in-charge shall after checking the entries and realising the duty payable, allow the required quantities to be removed after issuing a permit. Where the licensee is a person who has been allowed the privilege of having an account-current with the department under Rule 9, the duty payable on the alcoholic preparations issued from the bonded manufactory is to be debited from the account-current before the preparations are removed from the bonded premises. When we look into form A. R-2 mentioned in Rule 40 which is printed at pages 278 to 280 of the Kerala Excise Manual, Volume I, Part II, it is seen that the form contains an assessment memorandum wherein the Excise Officer-in-charge of the bonded manufactory is to enter inter alia the quantity of goods on which duty is assessed, the rate of duty and the total duty payable and affix his signature. Rule 81 which deals with clearance of goods from warehouses by licensee also specifically lays down that when a licensee desires to remove goods on payment of duty he shall make an application in Form A.R-2 in triplicate to the officer-in-charge at least twelve hours before the proposed time of removal of goods and that the officer shall, thereupon, assess the amount of duty leviable on the goods and the goods shall be allowed to be cleared only on production of evidence that the sum has been paid into a Treasury or debited to the account-current. In the face of these provisions contained in the rules it is idle to contend that no levy or assessment of duty is contemplated before the goods are allowed to be cleared from a manufactory or warehouse. The learned Advocate General very fairly produced before us by way of specimen several of the A.R-2 forms filed by the Respondent for obtaining issues of alcoholic preparations and for removal of the goods from the manufactory or depot during the relevant period. The forms were found to contain entries made by the Excise Officers specifying the duty payable in respect of the goods and on the basis of such fixation the amounts were remitted into the Treasury and only on production of the receipted chalangans were the goods allowed to be cleared. Such being the factual position obtaining in this case, we do not find it possible to accept the plea put forward by the Appellants that there had not been any "levy" of duty on the goods in question at any time prior to the issuance of Ext. P-1 and that this is not a case where duty had been "short-levied" so as to attract the applicability of Rule 11. We are in complete agreement with the view taken by the learned Single Judge that the present case is directly governed by the provisions of Rule 11 and that hence the residuary

provision contained in Rule 12 is not at all attracted. The action initiated under Ext. P-1, dated 17th December 1973 is in respect of medicinal preparations manufactured in and cleared from the Respondent's factory during the years 1970-71, 1971-72 and 1972-73. The impugned proceedings having been initiated only long after the expiry of the time-limit of six months specified in Rule 11 they were rightly declared by the learned Judge to be illegal and without jurisdiction.

4. We accordingly confirm the judgment of the learned Single Judge and dismiss this appeal. We direct the parties to bear their respective costs.