

(1979) 02 BOM CK 0003

In the Bombay High Court

Case No : O.C.J. Appeal No. 127 of 1975 and Suit No. 238 of 1966

The State of Maharashtra

APPELLANT

Vs

Glaxo Laboratories (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 23-02-1979

Acts Referred:

Central Excises and Salt Act, 1944 — Section 40
Civil Procedure Code, 1908 (CPC) — Section 80, 9
Constitution of India, 1950 — Article 226, 236, 265, 31
Limitation Act, 1963 — Section 15, 29
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 10, 11, 12, 13, 14
Specific Relief Act, 1963 — Section 34

Citation : (1980) 82 BOMLR 46

Hon'ble Judges : B.N. Deshmukh, C.J.;Madon, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Madon, J.—Glaxo Laboratories (India) Pvt. Ltd., who are the respondents No. 1 before us, filed a suit on the .Original Side of this High Court against the State of Maharashtra, the Collector of Bombay, the Director of Prohibition and Excise, Maharashtra, at the time when the orders complained of by the respondents No. 1 were passed, as also the Director of Prohibition and Excise, Maharashtra, at the time of the filing of the suit, and the Union of India for a declaration that the orders dated March 3, 1962, April 10, 1962 and September 20, 1962 passed by the Collector of Bombay and the order dated February 2, 1965 passed by the Director of Prohibition and Excise, Maharashtra, and the notice of demand dated July 1, 1965 issued by the Collector for the recovery of a sum of Rs. 1,64,415.34P. flora the respondents No. 1 by way of excise duty under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, were illegal, invalid and ultra vires and for a decree in the said sum of Rs. 1,64,415.34P. with interest thereon at the rate of 9 per cent. per annum from the date of the suit till payment and for the costs of the suit. The suit was decreed with costs by Mr.

Justice Rege in the terms prayed for by the respondents No. 1 save that he granted them interest on the said sum of Rs. 1,64,415.34P. at the rate of 6 per cent. per annum from the date of the "judgment till payment. The Union of India has not filed any appeal against the said judgment and decree, but the other defendants to the said suit have filed the present appeal and have made the original plaintiffs and the Union of India as the respondents thereto.

2. It will be convenient to refer to the respondents No. 1-Glaxo Laboratories (India) Pvt. Ltd., who were the original plaintiffs, as "the plaintiffs". The plaintiffs inter alia manufacture and deal in pharmaceuticals. Amongst the medicinal preparations manufactured and sold by the plaintiffs is one known as "Codopyrin". Prior to September 25, 1961 Codopyrin was a proprietary medicine, that is to say, it was a medical preparation manufactured from a formula peculiar to the plaintiffs themselves. There is no dispute that Codopyrin manufactured with this formula was excisable to ten per cent. ad valorem duty under item No. 4 of the schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (Act 16 of 1955), (hereinafter referred to as "the Act"). In about April 1961 the plaintiffs desired to revise the formula for Codopyrin so as to make it conform to the formula of compound codeine tablets as specified in the 1958 edn. of the British Pharmacopoeia. As the plaintiffs held a licence under the Drugs Act, 1940, and the Drugs Rules, 1945, made under the said Act, to manufacture pharmaceuticals specified in the licence, they intimated the said fact to the Director, Drugs Control Administration of the State of Maharashtra (hereinafter referred to as "the Drugs Control Director"). According to the plaintiffs, the medicinal preparation, Codopyrin, manufactured from the new formula adopted by them was not liable to any excise duty under the Act by reason of the provisions of item No. 5 in the schedule to the Act. They, therefore, by their letter dated October 13, 1961 wrote to the Director, Prohibition and Excise Department, Maharashtra, to confirm that the new stock starting with batch No. 3215 with strip packs of 300 tablets would not be liable to any excise duty under the Act. By their letter dated October 20, 1961 the plaintiffs intimated to the said Director that all their packs of Codopyrin were being made from the revised formula with effect from batch No. 3215, and once again the plaintiffs requested the Director to confirm that these stocks were not liable to payment of excise duty under the Act. The Director forwarded the said letter of the plaintiffs for disposal to the Collector of Bombay who is the licensing authority under the Act. After two reminders were sent to him, the Collector of Bombay by his letter dated November 17, 1961 asked the plaintiffs to forward to him the old as also the revised formulae and a copy of the letter from the Drugs Control Administration permitting them to manufacture Codopyrin according to the revised formula, as also a letter from him stating that the preparation was a standard pharmacopoeial and not a proprietary one. The two formulae as requested by the Collector were forwarded/ to him by the plaintiffs. Thereafter by his letter dated January 22, 1962 the Prohibition and Excise Inspector, "E" Division, Bombay, wrote to the plaintiffs, in reply to their letters to the Collector,

that since the labels of the packing of Codopyrin did not bear the words "Compound Codeine Tablets B.P. 1958", the product was liable to 10 per cent. ad valorem duty under the Act. By the said letter the plaintiffs were called upon to pay such duty immediately. By his letter dated February 5, 1962 the Collector intimated to the plaintiffs that their preparation Codopyrin as per the revised formula would be deemed to be an official preparation only if the plaintiffs mentioned on the label the words "Compound Codeine Tablets B.P. 1958". Rule 96 of the Drugs Rules, 1945, as amended on June 30, 1961, required, in respect of the drugs included in and in the British Pharmacopoeia, the manufacturers to mention on the label after the name of the drug or its trade name, as the case may be, the name of synonym specified in the same Pharmacopoeia followed by the letters "B.P.". The plaintiffs, therefore, by their letter dated February 8, 1962 wrote to the Drugs Control Director that it would take time for their new labels and packing materials to be printed and that in the meanwhile the Drugs Control Director should allow them to make use of their old packing materials as he had done in the past whenever the Drugs Rules with respect to labels and packing materials had been amended. This permission was granted to the plaintiffs by the Drugs Control Director by his letter dated February 9, 1962. A copy of the said letter was sent by the Drugs Control Director to the Collector of Bombay. By their letter dated February 18, 1962 the plaintiffs pointed out this fact to the Collector and once again requested him to confirm that their stocks of Codopyrin manufactured with the revised formula would be non-excisable. By his reply dated March 3, 1962 the Collector stated,

Your (that is, the plaintiffs') request to treat all packings of Codopyrin from Batch No. 3215 onwards as non-excisable cannot be granted. For purpose of this Department, only those packs of Codopyrin which bear the words "Compound Codeine Tablets B.P. 1958" will be treated as official and no duty will be recovered on them.

The decision contained in this letter dated March 3, 1962 is the first order challenged by the plaintiffs in their suit. By his letter dated March 6, 1962 addressed to the Collector of Bombay the Drugs Control Director intimated to the Collector that Codopyrin marketed by the plaintiffs with the existing labels could be deemed to be an official pharmacopoeial drug and that the plaintiffs had been permitted to use the old stock of labels and cartons and had been asked to incorporate the words "Tablets Codeine Compound B.P." below the proprietary name on the labels and cartons at the time of printing new labels and cartons. By their letter dated March 7, 1962 the plaintiffs requested the Collector to revise his decision in view of what was stated by the Drugs Control Director. They sent a reminder on April 4, 1962. Thereupon by his letter dated April 10, 1962 the Collector intimated to the plaintiffs that he saw no reason to revise his decision communicated to the plaintiffs contained in his said letter dated March 3, 1962. By the said letter he called upon the plaintiffs to pay the excise duty as directed. A copy of this letter was forwarded for necessary action to the Prohibition and Excise Inspector, "E" Division, Bombay, and he was asked to serve a demand

notice in the prescribed form upon the plaintiffs to recover the excise duty and to report compliance with these directions. This is the second order challenged by the plaintiffs in their suit. The plaintiffs thereupon made a detailed representation against the Collector's decision not to revise his earlier decision by their letter dated April 18, 1962 in which they asked for a personal hearing. A personal hearing was given by the Collector to the plaintiffs. Meanwhile, the plaintiffs had started using the new labels and packing materials which they had got printed and which contained on them the words "Tablets Codeine Compound B.P.". By their letter dated June 1, 1962 the plaintiffs intimated to the Collector the dates from which they had started marketing Codopyrin in packing materials with labels containing the words "Tablets Codeine Compound B.P."

3. On September 20, 1962 the Collector passed an order directing the plaintiffs to pay a sum of Rs, 1,64,415.34P, in respect of Codopyrin manufactured and marketed by them under then: old labels. It is an admitted position that the said sum of Rs. 1,64,415.34P. represents the duty on the said preparation Codopyrin for the period September 26, 1961 to April 22, 1962. In Ms said order the Collector held that in the matter of levy of excise duty the formula of a medical preparation was not the criterion and that its classification for the purpose of levy of excise duty under the Act depended exclusively upon the inscriptions indicated on the labels affixed on the containers of the product and that as the plaintiffs had not shown on the labels during the said period the said revised formula, they were liable to excise duty under item No. 4 of the Schedule to the Act. This is the third order which is challenged by the plaintiffs in their suit. Against this order the plaintiffs filed an appeal to the Director of Prohibition and Excise. The plaintiffs also filed a writ petition under Article 226 of the Constitution of India in this High Court challenging the said orders of the Collector. The said writ petition reached hearing on February 5, 1964. At that time counsel for the respondents to the said writ petition stated to the Court that payment of excise duty would not be recovered from the plaintiffs pending the hearing and final disposal of their appeal. Thereupon the learned Judge dismissed the petition on the ground that the plaintiffs should await the determination of the appeal and exhaust their remedy. By his order dated February 2, 1965 the Director of Prohibition and Excise dismissed the plaintiffs' appeal. He held that merely by revising their formula for the preparation of Codopyrin in order to make it conform to the monograph of "Compound Codeine Tablets B.P. 1958", without showing the name of the drug specified in the British Pharmacopoeia as required by Rule 96 of the Drugs Rules, 1945, Codopyrin manufactured from the revised formula did not cease to be a patent or proprietary preparation as defined in Section 3(h) of the Drugs Act, 1940. He further held that marketing the said preparation under the name Codopyrin without showing the name of the drug as specified in the British Pharmacopoeia, 1958 edn., conveyed to the people the sense that it was a patent or proprietary preparation of the plaintiffs and was not an official preparation. In the said appeal the plaintiffs had also contended that Codopyrin did not contain any narcotic drug or narcotic and for that reason also it was not

liable to any excise duty. This contention was also negated by the Collector. This appellate order has also been challenged by the plaintiffs in their suit. Against the said order of the Collector the plaintiffs filed a revision application to the Central Government. They also applied to the Central Government for stay of recovery of excise duty from them pending the hearing of the revision application. A personal hearing was given to the plaintiffs on November 5, 1965, but no decision on this revision application or on the stay application was given by the Central Government and has not been given till today.

4. By his letter dated March 2, 1965 the Collector of Bombay called upon the plaintiffs to pay the said sum of Rs. 1,64,415.34P. adjudicated by the said order dated September 20, 1962. It appears that the plaintiffs through their attorneys requested the Collector to stay his decision until the Central Government decided their stay application. By his letter dated May 15, 1965 the Collector stated that the Government of India had not sent any communication in this regard to the Collector, and by his said letter he requested the plaintiffs' attorneys to advise the plaintiffs to pay the said amount failing which he would take steps against them for recovery of the excise duty as arrears of land revenue in accordance with the provisions of Section 5 of the Act. Thereafter the Collector of Bombay as the Revenue Collector wrote a letter dated July 1, 1965 to the Collector of Bombay in the Prohibition and Excise Department stating that the recovery proceedings under the provisions of the Bombay City Land Revenue Act, 1876, against the plaintiffs had been instituted. By his letter dated September 2, 1965 the Deputy Collector of Bombay turned down the plaintiffs' request to stay the recovery and called upon them to pay the said sum of Rs. 1,64,415,34P. and Rs. 12 as fee of processing and threatened that in the event of non-payment of this amount, the warrant of attachment which he had issued would be executed. Thereupon the plaintiffs, in order to prevent the levy of attachment and subsequent sale of the attached property, paid the amount demanded to the Collector of Bombay. By their attorneys' letter dated March 3, 1966 the plaintiffs gave to the appellants and respondents No. 2 notice u/s 80 of the Code of Civil Procedure, 1908, and filed the suit, from which this appeal arises, on May 6, 1966.

5. In their plaint the plaintiffs have challenged the aforesaid orders, the notice of demand and the recovery of the said sum of Rs. 1,64,415.34P. from them on the ground that the said orders, notice and recovery were in violation of Articles 31(1) and 265 of the Constitution and were arbitrary, capricious perverse and in non-compliance of and contrary to the provisions of the Act. By their written-statement the appellants and the respondents No. 2 raised certain technical defences. They contended that the plaintiffs' suit was barred by Section 20 of the Act. The Union of India in their written-statement took a further preliminary objection that by reason of the pendency of the said revision application before them, the plaintiffs' suit was premature. On the merits it was not denied that the revised formula adopted by the plaintiffs was the one conforming to the formula of Compound Codeine Tablets as specified in the 1958 edn. of the British

Pharmacopoeia. They, however, contended that by reason of the fact that the labels used by the plaintiffs during the period September 26, 1961 to April 22, 1962 did not mention this fact, the plaintiffs were not entitled to any exemption from payment of excise duty.

6. At the hearing of the suit no oral evidence was led but the parties produced documents and correspondence which were exhibited by consent. Mr. Justice Rege who heard the suit negatived all the contentions of the appellants and respondents No. 2 and decreed the plaintiffs' suit. It may, however, be mentioned that no issue was raised by the Union of India with respect to their preliminary objection that the plaintiffs' suit was premature. In their plaint the plaintiffs had also contended that their said preparation Codopyrin was not liable to excise duty because it did not contain any narcotic drug or narcotic. This was denied in the written-statements of the appellants and the respondents No. 2. In view of his finding on the other issue, the learned Judge did not find it necessary to give any answer to this issue.

7. At the hearing of this appeal Mr. Desai, learned Counsel for the appellants, has argued four points. They are:

(1) The plaintiffs' suit was not maintainable by reason of the provisions of Section 20(1) of the Act,

(2) The plaintiffs' suit was not maintainable by reason of the provisions of Rule 127 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, (hereinafter referred to as "the Rules").

(3) Assuming neither Section 20(1) of the Act nor Rule 127 of the Rules applied to the plaintiffs' suit, the plaintiffs' suit was barred as having been filed after the expiry of the period of limitation prescribed by Section 20(2) of the Act.

(4) The plaintiffs' preparation Codopyrin, as manufactured and marketed during the period September 26, 1961 to April 22, 1962, was a patent or proprietary medicine and was, therefore, liable to excise duty.

8. We will now examine the appellants' case with respect to the maintainability of the suit u/s 20(1) of the Act. Section 20 of the Act provides as follows:

20. Bar of suits and limitation of suits and other legal proceedings,

(1) No suit or other legal proceeding shall lie against the collecting Government or against any officer in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution or other legal proceeding shall be instituted against the collecting Government or against any officer for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

Under Section 9 of the Code of Civil Procedure, 1908, the Courts have

jurisdiction "to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." Mr. Desai, learned Counsel for the appellants, submitted that Sub-section (1) of Section 20 expressly bars the jurisdiction of the Court in respect of suits of the type mentioned therein, and a reading of the whole section shows that the jurisdiction of the civil Courts with respect to other classes of suits was impliedly barred by the said Section 20. This argument is unsustainable on the bare language of the section itself. This section deals with two subjects: (1) the bar of Courts' jurisdiction in respect of certain suits and legal proceedings, and (2) the providing of a special period of limitation for the institution of other suits, prosecutions and legal proceedings. The suits and legal proceedings which are mentioned in Sub-section CO of Section 20 are against the collecting Government or against any officer in respect of (1) any order passed in good faith under the Act, and (2) any act in good faith done or ordered to be done under the Act. Thus, if a suit relates to an order which has not been passed in good faith, or to any act which has not been done or ordered to be done in good faith, or if it relates to an order or an act not done or ordered to be done under the Act, Sub-section (1) will have no application to it. The argument that Section 20 read as a whole impliedly excludes the jurisdiction of Courts with respect to suits other than those in Sub-section (1) wholly overlooks the fact that Sub-section (2) of Section 20 prescribes a period of limitation. No period of limitation could be prescribed in respect of a suit or a legal proceeding which cannot be instituted. It is only in respect of suits and legal proceedings which can be instituted in civil Courts that a period of limitation can be prescribed. The argument based on Section 20 with respect to the implied exclusion of jurisdiction of Courts in respect of all suits and proceedings would, if it were correct, render Sub-section (2) of that section meaningless and nugatory.

9. It is now necessary to see what the plaintiffs' suit was about in order to determine whether the plaintiffs' suit was of the nature which attracted the provisions of Section 20(1). For this purpose it is necessary to examine first the scheme of the Act. The long title of the Act states that it is

An Act to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium, Indian hemp or other narcotic drug or narcotic.

Section 2 is the definition section. . Clause (b) of that section defines "collecting Government" as meaning

the Central Government or, as the case may be, the State Government which is entitled to collect the duties levied under this Act.

There is no dispute that in the present case the collecting Government is the State of Maharashtra. Clause (c) of Section 2 defines "dutiabale goods" as meaning the medicinal and toilet preparations specified in the Schedule as being subject to the duties of excise levied under this Act.

Clause (g) defines "medicinal preparation". That clause is as follows:

"medicinal preparation" includes all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and, all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals.

Section 3 is the charging section. The relevant provisions of Section 3 are as follows:

3. Duties of excise to be levied and. collected on certain goods.

(1) There shall be levied duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India,

(3) Subject to the other provisions contained in this Act, the duties aforesaid shall be collected in such manner as may be prescribed.

Section 5 provides the machinery for the recovery of sums due to the Government. Under that section excise duty can inter alia be recovered by sale of dutiable goods belonging to the person liable to pay such duty, and if the amount payable is not so recovered, by the excise officer sending a certificate to the Collector of the district in which such person resides or conducts his business, specifying therein the amount due from such person. On receipt of such certificate the Collector is required to proceed to recover from that person the amount specified in the said certificate in the same manner as if such amount were an arrear of land revenue. Section 7 provides for certain offences and the penalties in respect thereof. Under that section if any person inter alia evades the payment of any excise duty payable by him, he commits an offence punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. Further, u/s 8 a Court trying an offence u/s 7 is empowered to order the forfeiture to the collecting Government of any dutiable goods in respect of which the Court is satisfied that an offence under the Act has been committed. Sections 9 to 18 deal with the powers and duties of excise officers. So far as excise officers are concerned, u/s 9(1) they are entitled, if duly empowered by rules made in that behalf, to arrest any person whom they have reason to believe to be liable to be punished under the Act. Further, u/s 10 an excise officer duly empowered by the rules has a power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of the Act. u/s 11 all Customs and Central Excise Officers and other officers of the Central Government as may be specified in that behalf, and all police-officers and Revenue Officers are not only empowered but are enjoined to assist excise officers in the execution of the Act. Further, excise officers are conferred powers of searches and seizure. Section 17 makes it a penal offence for any officer exercising powers under the Act or under the rules made thereunder without reasonable ground of suspicion to search or cause to be searched any place,

conveyance or vessel; or vexatiously and unnecessarily to detain, search or arrest any person; or vexatiously and unnecessarily to seize the movable property of any person on the pretence of seizing or searching for any article liable to confiscation under the Act; or for any such officer to commit any other act to the injury of any person, without having reason to believe that such act is required for the execution of his duty. Any officer committing an offence specified in Section 17 is liable to be punished with fine which may extend to two thousand rupees. Section 19 confers upon the Central Government the power to make rules for carrying out the purposes of the Act.

10. The Schedule to the Act sets out the dutiable goods manufactured in India in respect of which duties of excise are to be levied, and collected on certain goods. The Schedule as originally enacted was substituted by the Amending Act 19 of 1961 with effect from June 1, 1961. We are not concerned with all the amendments made in the Schedule by the Amending Act but only with items Nos. 4 and 5 thereof which were for the first time enacted by the said Amending Act, The said items Nos. 4 and 5 -provide as follows:

No.	Description	of	dutiable	goods	Rate	of	Item duty
							4
	Medicinal preparations, being patent or proprietary				Ten per cent.		
	containing alcohol, but containing opium, ad valorem. Indian hemp, or other						
	narcotic drug or narcotic. 5 Medicinal preparations (not being patent or						
	proprietary Nil. medicines), not containing alcohol but containing opium, Indian						
	hemp, or other narcotic drug or narcotic.						

Explanation I to the schedule, as inserted by the Amending Act, provided as follows:

Explanation I.- "Patent or proprietary medicine" has the same meaning as in Clause (h) of Section 3 of the Drugs Act, 1940 (23 of 1940).

Clause (K) of Section 3 of the Drugs Act, 1940, as the Act was called at the relevant time, provided as follows:

Patent or proprietary medicine" means a drug which is a remedy or prescription prepared for internal or external use of human beings or animals and which is hot for the time being recognised by the Permanent Commission on Biological Standardization of the World Health Organisation or in the latest edition of the British Pharmacopoeia or the British Pharmaceutical Codex or any other pharmacopoeia authorised in this behalf by the Central Government after consultation with the Board.

11. As mentioned earlier, we are concerned with the period September 26, 1961 to April 22, 1962. However, it is important for the purposes of this appeal to see the amendment made in the said schedule to the Act by Amending Act 20 of

1962 with effect from April 23, 1962. By that Amending Act Explanation 1 was substituted by a wholly different Explanation. The new Explanation provides as follows:

"Patent or proprietary medicines" means any medicinal preparation which bears either on itself or on its container or both a name which is not specified in a monograph in a Pharmacopoeia, Formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicinal preparation for the purpose of indicating or so as to indicate a connection in the course of trade between the preparation and) some person having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person.

It will be noticed that the concept of patent or proprietary medicine was radically Changed by this new Explanation. While under the old Explanation I, with which we are concerned, the emphasis was upon the remedy or prescription and whether such remedy or prescription was one which was recognized by the permanent Commission on Biological Standardization of the World Health Organization or in the latest edition of the British Pharmacopoeia or the British Pharmaceutical Codex or any other pharmacopoeia authorized in this behalf by the Central Government after consultation with the Board, under the new Explanation the emphasis is placed upon the name which a medicinal preparation bears either on itself or on its container or both. If the name is such as is not specified in a monograph in a Pharmacopoeia, Formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or if it is a brand name, which is a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958, or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicinal preparation for the purpose of indicating or so as to indicate a connection in the course of trade between that medicinal preparation and some person having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person, the medicinal preparation would be a patent or proprietary medicine. Thus, while under the old Explanation what is to be seen is whether the actual remedy or prescription is one recognized as being a standard remedy or medicine or not, under the new Explanation what is required to be seen is not the remedy or the prescription, that is, the formula, but the name which the medicinal preparation bears. The concept of the name a medicinal preparation bears appears to have been introduced because a manufacturer of a medicinal preparation, even while using a standard formula, might sell it under a trade name and thus convey to the public the impression that this was a medicinal preparation made from a special formula which was discovered or invented by the manufacturer alone and thus possessing greater efficacy and curative property. What is pertinent to note for

our purpose is that the test of the name which a medicinal preparation bears had no application and did not exist in the Act prior to the substitution of Explanation 1 in the Schedule by Amending Act 20 of 1962 with effect from April 23, 1962. It is in the context of Explanation I both as inserted by the Amending Act 19 of 1961 with effect from June 1, 1961 and as substituted by Amending Act 20 of 1962 with effect from April 23, 1962 that the impugned orders of the authorities are required to be looked at. We have already set out earlier the grounds given both by the Collector and by the Director of Excise and Prohibition for holding that the plaintiffs' medicinal preparation Codopyrin manufactured with the revised formula, namely, the formula to be found in the British Pharmacopoeia, 1958 edn., was liable to excise duty. The ground in both these orders was that the containers in which Codopyrin was manufactured and sold during the relevant period did not contain the words "Compound Codeine Tablets B.P. 1958". During the relevant period whether these words were shown on the label or not was, however, immaterial because the new Explanation I did not apply. Though in terms neither the Collector nor the Director of Excise and Prohibition have referred to the new Explanation I, it is clear from their orders that they have proceeded to determine the matter as if the new Explanation I applied. It is not disputed that if the new Explanation I did not apply, Codopyrin was not liable to any excise duty by reason of the provisions of item No. 5 in the said Schedule, because it having been manufactured from a formula which was a standard formula found in the British Pharmacopoeia, 1958 edn., it was not a patent or proprietary medicine. An order based on a statutory provision which had no existence during the relevant time cannot be said to be an order passed under the Act. Secondly, an order based on a statutory provision which was enacted later and had no retrospective effect, in the sense of applying it to the relevant period, cannot be said in law to be an order passed "in good faith". Further, both the Collector and the Director of Excise and Prohibition have proceeded upon the basis that the plaintiffs were liable to pay excise duty because they had committed a breach of the provisions of Rule 96 of the Drugs Rules, 1945. Under Rule 96, as amended on January 13, 1965, the plaintiffs were required to give on the labels of the containers, in as conspicuous a manner as the trade name of the drug, the name of that particular drug which was mentioned in the relevant pharmacopoeia. As mentioned earlier, the Drugs Control Director had permitted the plaintiffs to make use of the old labels till such time as the new labels and containers were printed and had intimated this fact to the Collector of Bombay in the Prohibition and Excise Department; but apart from that fact, the taxing authority under the Act was not concerned with any violation of the Drugs Rules. A violation under the Drugs Rules was a matter which concerned authorities under the Drugs Act. For a breach of Rule 96 penalty has been provided in Rule 85 of the Drugs Rules, 1945. That penalty is the cancellation or suspension of the manufacturing licence granted to the offending manufacturer. This penalty is to be imposed by the licensing authority under the Drugs Rules. There is no provision either in the Drugs Act or the Drugs Rules or the Act or the Rules that a manufacturer of a medicinal preparation, if he commits a breach of the Drugs

Rules, the medicinal preparation manufactured by him would be exigible to duty under the Act irrespective of the fact whether by the Act it is exigible to duty or not. What the Collector and the Director of Excise and Prohibition both have done in relying upon this so-called breach of R, 96 of the Drugs Rules is to incorporate into the Act a new item of taxation and have arrogated to themselves the function of authorities under the Drugs Rules and have evolved for a breach of one of these rules a penalty non-existent in the Drugs Act or the rules made there under for this violation. The orders passed on this basis cannot be said to be orders passed under the Act nor can they be said in law to be orders passed in good faith within the meaning of Section 20. Section 20(1) of the Act has thus no application to the case.

12. In this connection, we may refer to the decision of a Division Bench of this High Court in *Union v. Mamingka Industries* (1974) 77 BomLR 663 . That was a case under the Central Excises and Salt Act, 1944. Section 40 of that Act is identical with Section 20 of the Act. In that case the Central Excise authorities charged excise duty to the respondents on the wholesale price of hydrogenated vegetable oil manufactured by them. This price included the cost of the containers and railway freight. The contention of the manufacturers was that these were items of post-manufacturing cost and therefore could not be made subject to excise duty which was the duty on the manufacture of goods. After paying the amounts under protest, the respondents filed a suit for the recovery of the duty so paid by them. The trial Court decreed the respondents' suit. In appeal by the Union of India it was contended that the suit was barred by reason of the provisions of Section 40 of the Central Excises and Salt Act, 1944. The Division Bench held that the imposition of the central excise duty on the containers and on freight was not warranted by the said Act and that the levy of central excise duty on the value of the containers and the cost of freight was wholly outside the law and could not be said to be a mere question of an error in the exercise of jurisdiction. The Division Bench further held that the said Act only provided for the imposition of the duty of excise on excisable goods and that when an attempt was made to levy duty of excise on goods which were not excisable, such a levy fell outside the law and would be illegal. The Division Bench further held, that a plain reading of the said Section 40 showed that it applied only to suits for damages and compensation in respect of acts said to be done under the said Act and the said Section 40 merely enacted an immunity or protection against claims for damages against the Government itself or any of its officers for acts done in good faith under the said Act and that questions of collection of illegal duty and/or its recovery or refund were not questions dealt with by the provisions of the said Section 40. In arriving at this decision the division Bench followed a decision of the Supreme Court in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, . We would have thought that this authority of our High Court would put an end to the matter. This is an authority strictly in point and of a Division Bench of this very High Court. However, without making any attempt to distinguish this authority or any attempt to argue before

us how and in what manner this case was wrongly decided and without any application, after convincing us that the case was wrongly decided, to refer this appeal to a larger Bench, a large number of authorities were cited before us on behalf of the appellants. We find it unnecessary to refer to all these authorities. Several of them were prior to the decision of the Supreme Court in the case of *Dhulabhai v. State of M.P.* in which all the earlier authorities of the Supreme Court on the subject have been referred to and discussed. In that case, after discussing all the earlier authorities, Hidayatullah, C.J., who spoke for the Court, laid down seven propositions deducible from decided cases. These seven propositions are (p. 89): ..

(1) Where the statute gives & finality to the orders of the special tribunals the civil Courts" jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) "Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision, of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express

prohibition in the particular Act, In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred, unless the conditions above set down apply.

(Italics supplied by us).

The case before the Supreme Court as also most of the cases before the Supreme Court were those where jurisdiction of civil Courts was totally excluded either expressly or contended to be so excluded by necessary implication. Even in such cases the Supreme Court has laid down that in spite of such provision in certain circumstances a civil Court would have jurisdiction to entertain the suit and grant to the plaintiff the relief asked for by him. Some of such classes of cases as emerging from the above propositions are where the provisions of the particular statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Yet another class of cases in respect of which the civil Courts would continue to have jurisdiction, as pointed out by the Supreme Court, would be where the-particular Act contains no machinery for refund of tax collected in excess of constitutional limits or which has been illegally collected. We have pointed out earlier that in holding that Codopyrin manufactured by the plaintiffs during the relevant period was exigible to excise duty the taxing authorities have acted in total disregard of item No. 5 of the Schedule to the Act and have proceeded upon the basis of other statutory provisions which either were not on the statute-book during the relevant period or with which the taxing authorities had no concern whatever. This would bring the plaintiffs' suit within proposition (1) enunciated by the Supreme Court and reproduced above.

13. The plaintiffs' suit is really and in substance a suit for the recovery of tax illegally collected from them. A demand was made upon them for the payment of the said sum of Rs. 1,64,415.34P. The plaintiffs' request for stay of the recovery until their revision application was disposed of was turned down by the Collector. The Union of India did not care to decide the plaintiffs' application for stay pending the hearing of their revision application nor did it care to decide the said revision application. We have set out above the coercive machinery of the Act. In fact, a warrant of attachment had already been issued and the plaintiffs were threatened that the warrant would be executed, and as a consequence thereof if the amount demanded was not paid, the property attached would be sold. Under these circumstances, the plaintiffs had no option but, under the threat of the coercive machinery of the Act, to pay up the amount demanded, in spite of their contention that the levy of excise duty was illegal. The Act does not contain any provision for refund of tax illegally collected. So far as the Rules are concerned, the only rule which provides for refund of duties or charges is Rule 13. That Rule is as follows:

13. No refund of duties or charges erroneously paid, unless claimed within six

mouths.-No duties or charges which have been paid or have been adjusted in an account-current maintained with the Excise Commissioner under Rule 9 and of which repayment wholly or in part is claimed, in, consequence of the same having been paid through inadvertence, error or mis-construction, shall be refunded unless a written claim is lodged with the proper officer within six months from the date of such payment or adjustment, as the case may be.

Rule 13 thus applies to a claim for refund of amount of duty paid under very limited circumstances only, that is, when such duty has been paid through "inadvertence, error or mis-construction". The plaintiffs did not act inadvertently in paying the amount. In fact, they adverted full well to the fact that the demand of amount of duty from them was an illegal demand. They were not under any error as to the illegality of the orders levying excise duty upon them nor did they misconstrue any section of the Act in paying the said sum of Rs. 1,64,415.34P. In fact, they correctly understood, the law and raised the correct contention that Codopyrin manufactured by them with the revised formula during the period in question was not exigible to excise duty. They were none the less forced to pay this sum under threat of the coercive machinery of the Act. Their case, therefore, did not and could not Fall under the said Rule 13. If so, under the fifth proposition laid down by the Supreme Court in Dhulabhai's case the plaintiffs were entitled to file this suit for duty illegally collected from them.

14. We will now turn to the appellants' submission that the suit is barred by reason, of the provisions of Rule 127 of the Rules. The said rule provides as follows:

127. Appeals.-(i) An appeal against an order of an officer other than an Excise Commissioner made in exercise of the powers conferred on him by the Act or these rules shall lie to the Excise Commissioner of the State concerned:

Provided that an appeal against an order passed by the Excise Commissioner shall lie to the State Government:

Provided further that if, between the date of the order or decision appealed against and the date of the hearing of the appeal, the officer who passed the order or decision is promoted to be the officer to hear such appeal, such appeal shall be heard by an officer superior in rank to such officer.

(ii) Every appeal under this rule should be filed within three months of the date of the decision or order appealed against. An order passed in appeal under this rule shall, subject to the power of revision conferred by Rule 129, be final.

The word and number "rule 129" in Sub-rule (ii) of Rule 127 appear to be a printing error for "rule 128" because it is Rule 128 which confers revisional jurisdiction upon the Central Government, while Rule 129 deals with how an appeal memo or an application for refund is to be filed.

15. Mr. Desai, learned Counsel for the appellants, submitted that since Sub-rule (ii) of Rule 127 clothed the order of an appellate authority with finality subject to

the power of revision conferred under Rule 128 upon the Central Government, the jurisdiction of civil Courts to entertain any suit challenging the legality of an order passed under the Act was impliedly barred. There are two complete answers to this argument. The Rules are made by the Central Government in exercise of the powers conferred upon it by Sections 9, 10 and 19 of the Act. Sections 9 and 10 authorize the Central Government to empower, by rules, excise officers to arrest persons as also vest in them the power to summon persons to give evidence and produce documents in inquiries conducted under the Act. Section 19 confers upon the Central Government a general rule-making power, but by the express language of Section 19(1) the rules which the Central Government is authorized to make are rules "to carry out the purposes of this Act". Sub-section (2) confers upon the Central Government specific rule-making powers in respect of particular topics without prejudice to the generality of the powers conferred by Sub-section (1). Thus, the Rules made by the Central Government must be in conformity with the parent statute and cannot travel beyond its scope. Section 20 of the Act has already provided in which particular matters the jurisdiction of the Court would be barred. It would not be open to the Central Government under its rule-making power to enlarge the scope and ambit of Section 20. Even Sub-section (2) of Section 19, which prescribes certain specific matters with respect to which the Central Government may make rules, does not clothe the Central Government with power to oust the jurisdiction of civil Courts. Courts always lean in favour of the validity of a statutory provision. We must, therefore, so construe Rule 127 as not to make it ultra vires the Act. If the construction canvassed for by Mr. Desai, learned Counsel for the appellants, were placed upon Rule 127, that rule would be beyond the scope of the rule-making power of the Central Government and would be ultra vires the Act. A Court, however, would not lightly place a construction upon a statutory provision, whether enacted by the Legislature or contained in a piece of delegated legislation, which has the effect of rendering that provision unconstitutional or ultra vires where two constructions are possible according to one of which it would be valid. Bearing this principle in mind we must place upon Rule 127 a construction which safeguards its validity by holding that it does not oust the jurisdiction of civil Courts except with respect to suits, and other legal proceedings falling under Sub-section (1) of Section 20.

16. Even assuming for the sake of argument that Rule 127 has the effect of impliedly ousting the jurisdiction of civil Courts, what must be borne in mind is that even in cases where such provision were enacted in statutes the Supreme Court has held that suits could be filed in civil Courts for certain reliefs and in certain circumstances. That aspect of the case we have already dealt with earlier and the circumstances in which suits, in spite of such provisions, can be filed in civil Courts have been set out by the Supreme Court in Dhulabhed's case. In this connection, we may usefully refer to another decision of the Supreme Court, namely, Union of India (UOI) Vs. Tarachand Gupta and Bros, . That was a case under the old Sea Customs Act, 1878. Section 188 of the said Act provided for an

appeal from orders passed by customs officers. The last paragraph of that section provided,

Every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final.

It is pertinent to bear in mind that this is the exact phraseology of the last sentence in Sub-rule (ii) of Rule 127 of the Rules. The facts in Tarachand Gupta's case were that Tarachand Gupta and Bros, imported certain goods under "their import licence granted to them to import parts and accessories of motor cycles and scooters. The goods imported by them were motor cycle parts. These goods arrived in two consignments. The customs authorities on examining the goods held that these goods when put together constituted fifty-one sets of "Rixe Mopeds complete in a knocked down condition" and were not parts and accessories of motor cycles and scooters, and ordered confiscation of the goods. The plaintiffs thereupon filed a suit to set aside that order. The Supreme Court held that what the Collector of Customs had to ascertain was whether the goods were parts and accessories and not whether the goods, though parts and accessories, were so comprehensive that if put together would constitute motor cycles and scooters in a knocked down condition. In adopting the latter approach the Collector was acting contrary to and beyond the relevant entry under which he had to find out whether the goods were of the description given in that entry. The Supreme Court further held that such an approach would be in non-compliance of the entry which was applicable. So far as the position with respect to the exclusion of jurisdiction of civil Courts is concerned, the Supreme Court observed (p. 1566):

The principle thus is that exclusion of the jurisdiction of the civil Courts is not to be readily inferred. Such exclusion, however, is inferred where the statute gives finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the Courts would normally do in such a proceeding before it. Even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. The word "jurisdiction" has both a narrow and a wider meaning. In the sense of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction.

17. Bearing in mind what has been laid down by the Supreme Court in Tarachand Gupta's case, let us see what we have in the case before us. We have here orders of statutory authorities, which authorities have decided the case not by applying the test laid down in the relevant item which they had to consider, namely, item No. 5 of the Schedule to the Act read with Explanation I as it was

on the statute-book during the period in question but instead by applying a statutory provision which came into existence after the period in question and which did not apply to the period in question, namely, the new Explanation I as substituted with effect from April 23, 1962. Further, they proceeded to determine the case before them on the provisions of rules made under a different Act and which had no application to the case and which did not provide for the penalty by way of payment of excise duty on non-excisable goods, namely, the provisions of the Drugs Rules. Such an approach adopted by the authorities can only be described as an approach which would be a non-compliance of the statute, and on this basis in view what has been laid down by the Supreme Court the plaintiffs' suit would be maintainable in spite of Rule 127, assuming it were to be construed as canvassed for by the appellants.

18. The point of limitation now falls to be decided. The appellants' submission on this point is that the plaintiffs' suit has been filed after the expiry of the special period of limitation prescribed by Sub-section (2) of Section 20 of the Act. This submission is on the basis that the Court's jurisdiction to entertain the suit is not barred under Sub-section (1) of Section 20. As pointed out earlier, there is a difference in the language used in Sub-section (1) and that used in Sub-section (2). When we contrast these two sub-sections, we find that there are three cardinal differences, namely, (1) while Sub-section (1) applies to suits or other legal proceedings, Sub-section (2) applies to suits,, prosecutions or other legal proceedings; (2) while Sub-section (1) applies to suits or other legal proceedings in respect of any order passed in good faith or any act in good faith done or ordered to be done under the Act, Sub-section (2) applies to suits, prosecutions or other legal proceedings in respect of anything done or ordered to be done under the Act; and (3) the qualification with respect to good faith in Sub-section (1) is not to be found in Sub-section (2). The one common factor to be found in both Sub-sections (1) and (2) is the qualification that order or the act, as the case may be, must be one which is passed or done or ordered to be done under the Act. The omission of any reference to prosecutions in Sub-section (1) and the omission of any reference to any order in Sub-section (2) as also the omission of the qualification with respect to good faith in Sub-section (2) are significant. It is these different phraseologies used in these two sub-sections that give us the clue to what Sub-section (1) is intended to apply to. The word "prosecution" is not mentioned in Sub-section (1) because a prosecution in respect of any act done or ordered to be done can only be with reference to special offences created by the Act by a public servant. The offences which can be committed under the Act by officers exercising powers under the Act are provided for in Sections 17 and 18. If we look at these sections, we find that mens rea is an essential ingredient of the offences created by these sections. Thus there can be no prosecution in respect of any act done in good faith or ordered to be done in good faith under the Act nor can there be any prosecution, from the nature of things, with respect to any order passed under the Act, and it is for this reason that the word "prosecution" is not to be found in Sub-section (1). The phrase "in good faith" is

not used in Sub-section (2) because Sub-section (2) refers to suits, prosecutions and other legal proceedings in respect of anything done or ordered to be done under the Act otherwise than in good faith, because for an act done or ordered to be done in good faith a complete immunity is provided for by Sub-section (1). Thus, there are two distinct categories of suits and legal proceedings provided for by these two sub-sections. The first is with respect to orders passed and acts done or ordered to be done in good faith, and the second is with respect to suits, prosecutions and legal proceedings in respect of acts done or ordered to be done otherwise than in good faith. The important qualification with respect to both these categories is that the order must be passed or act done or ordered to be done under the Act. Sub-section (2) will apply to suits for damages or compensation against the collecting Government or an officer for an act done or ordered to be done under the Act otherwise than in good faith. To give an illustration of this, if an officer clothed with the power of search, seizure and arrest vexatiously and unnecessarily exercises any of these powers, apart from the fact that he is liable to a prosecution u/s 17, he will also be liable in tort, because false arrest, false imprisonment or wrongful detention of goods are well-recognized, heads of torts, and it is for this reason that various statutes which confer such or similar powers upon officers grant them a complete immunity or, as in the present case, a partial immunity in respect of the exercise of such powers. In placing this construction upon Sub-section (2) of Section 20, we are fortified by the decision of the Division Bench of our High Court in *Union v. Mamingka Industries*, already referred to earlier. As pointed out by us, the section which the Division Bench had to construe is identical with the section which falls to be construed by us, and this authority is, therefore, binding upon us. If an act, which is not an act under the Act, is done or ordered to be done by merely ostensibly purporting to do it under the Act, neither Sub-section (1) nor Sub-section (2) will apply. Similarly, if an order is passed otherwise than in good faith, Sub-section (2) will not in terms apply. Thirdly, if an order is passed, which is not in law an order under the Act though it may ostensibly state that it is an order under the Act, Sub-section (1) also will not apply. Thus, there arises a third category of suits and legal proceedings which are not covered either by Sub-section (1) or (2), and in respect of these suits the civil Courts will continue to have jurisdiction, and as Sub-section (2) will not apply the period of limitation for filing such suits will be the, ordinary period of limitation prescribed by the Limitation Act, 1963. We have already seen in the Supreme Go to cases referred to above the types of suits which do not fall under such sections even in the case of statutes where the section provides for a complete bar to Court's jurisdiction. We have also pointed out that the plaintiffs' suit is one which falls hi the class of suits which constitute an exception to such sections. We, therefore, hold that the plaintiffs' suit was not governed by Sub-section (2) of Section 20 but was governed by the ordinary period of limitation of three years under the Limitation Act, 1963. In this, connection, we may refer to a recent decision of the Supreme Court in *Firm Surajmal Banshidhar and Others Vs. Municipal Board, Ganganagar*, . The facts of that case were that under the Rajasthan Town

Municipalities Act, 1951, the municipality had no power to levy a terminal tax. Under the earlier Municipal Acts it had such power. The terminal tax levied under the earlier statutes was, however, continued by the municipality even after the coming into force of the Rajasthan Town Municipalities Act. Several persons from whom this tax was collected filed suits to recover the amounts of tax paid by them. The Supreme Court held that the imposition of this tax after the coming into force of the Rajasthan Town Municipalities Act was beyond the taxing power of the municipality. Section 179 of that Act provided for a special period of limitation of six months and the giving of a notice of two months for any suit in respect of anything "done or purporting to be done under the said Act. Disposing of the defence that the suits were barred u/s 179 of the said Act, the Supreme Court held that the suits were outside the purview of the said Act. It further held, ... we have no hesitation in holding, in the circumstances of the present cases, ... that the suits did not fall within the purview of Section 179 of the Act (that is, the Rajasthan Town Municipalities Act, 1951) and were not barred by limitation. (p. 247).

This authority is, therefore, a direct binding authority for the proposition that where a suit is in respect of an act which is not done or purported to be done under the statute, the period of limitation prescribed by the statute does not apply to the suit.

19. Even on the alternative footing that Sub-section (2) of Section 20 of the Act applies to the plaintiffs' suit, we find that the plaintiffs' suit is not barred by limitation. The (submission of the appellants was that the plaintiffs' suit was one to set aside the impugned orders and notice. In support of this submission reliance was placed upon prayer (a) of the plaint in which the plaintiffs have asked for a declaration that the said orders of the Collector dated March 3, 1962, April 10, 1962 and September 20, 1962 and the order of the Director of Prohibition and Excise dated February 2, 1965 and the said notice of demand dated July 1, 1965 and the recovery of the said sum of Rs. 1,64,415.34 P. were illegal, invalid and ultra vires. We are unable to accept this submission. The reading of the whole plaint shows that the plaintiffs' suit was "really in substance a suit to recover the amount of duty illegally recovered from them by the authorities. The cause of action for this suit accrued to the plaintiffs when under the threats of setting into action against them the coercive provisions of the Act the plaintiffs paid the said sum of duty on September 6, 1965. Had the plaintiffs' suit been only to set aside the aforesaid orders and not for the recovery of the sum paid by them, it may well be argued that there was some force in the contention that the plaintiffs' suit was premature because they had filed a revision application to the Central Government which was still pending. According to the plaintiffs, the aforesaid orders and the aforesaid demand were void as being wholly outside the Act. Whether these orders were passed under the Act or in non-compliance of the Act or whether the issue of the notice of demand was an act done or ordered as to be done under the Act or in non-

compliance of the Act were issues which fell to be determined in the suit. In *Abdullamiyan Abdulrehman Vs. The Government of Bombay*, a Full Bench of this High Court), in a suit where Section 11 of the Bombay Revenue Jurisdiction Act, 1876, was set up as a defence to the suit, has held that where a revenue officer purported to do an act or pass an order which was invalid, his action did not operate to raise a bar under that section. It further held that where an authority which purported to pass an order was acting without jurisdiction, the purported order was a mere nullity, and it was not necessary for anybody who objected to that order to apply to set it aside, and he could rely upon the invalidity of the order when it was set up against him, although he had not taken steps to set it aside, and that such an order did not give rise to any right whatever, not even to a right of appeal. The said Section 11 barred a civil Court from entertaining any suit against the Crown on account of any act or omission of the revenue officer unless the plaintiff first proved that previously to bringing his suit he had presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present. In that case, without filing an appeal to the Government against the order of the Revenue Commissioner, the plaintiff sued the Government of Bombay for a declaration that a lease granted to his father was valid and binding on the Government and for an injunction restraining the Government and its officers from interfering with the plaintiff's possession and enjoyment of the suit property. The said lease had been purported to be cancelled "by the revenue authorities on the ground that the grant of the lease was beyond the powers of the Collector. On the ratio laid down in the above case, it was not necessary for the plaintiffs to sue to set aside the orders complained of. In fact, the plaintiffs have not asked for these orders and notice to be set aside. They only asked for a declaration that these orders and notice were invalid. Such a declaration does not make the suit a suit for a declaratory decree as provided by Section 34 of the Specific Relief Act, 1963. We have had occasion to consider the nature of suits for declaratory decrees which fall under the said Section 34 of the Specific Relief Act in *Nagin Mansukhlal Dagli v. Haribhal Monibhai Patel* (1979) O.C.J. Short Cause Suit No. 890 of 1978, decided by Deshmukh C.J. and Madon J., on February 7/8, 1979 (Unrep.). In that case we have held that a suit for a declaratory decree can only be a suit of the type specified in the said Section 34, and merely because a plaintiff chooses in his plaint to ask for declarations which are really answers in his favour to issues which arise in the suit does not make that suit a declaratory suit or a suit for a declaratory decree. The real relief which the plaintiffs have claimed in this suit is a money-decree in the Sum of Rs. 1,64,415.34 P. Before such a decree could be granted to the plaintiffs the Court would have to determine the question of validity or invalidity of the orders and the notice complained of. That is an issue which arises in the suit, but that is not the relief for which the suit is filed. The plaintiffs' cause of action arose only on September 6, 1965 when they paid the amount of duty. u/s 80 of the Code of Civil Procedure, 1908, the plaintiffs were required to give a notice to the Union of India, the State of Maharashtra and the Government officers. That notice was

given by the plaintiffs on March 3, 1966 before the period of six months from the date of the accrual of the cause of action expired. The period of two months of this notice is required to be excluded in computing the period of limitation by reason of the provisions of Section 15(2) read with Section 29(2) of the Limitation Act, 1963. The period of limitation for filing this suit would thus expire on May 6, 1966. The plaintiffs have filed their suit on that day and the suit is, therefore, in time.

20. So far as the last point urged before us, namely, that the plaintiffs' medicinal preparation Codopyrin was during the period in question a patent or proprietary medicine, we have already dealt with this aspect of the case while dealing with the question, of maintainability of the suit, and we have already held that it was not a patent or proprietary medicine which attracted the application of item No. 4 in the Schedule to the Act. We may mention that on this aspect of the case no arguments whatsoever were advanced to us to show why the wordings on the label were the criterion to be applied, and as the judgment under appeal shows, almost same was the position at the time of the trial of the suit.

21. Thus, we negative all the points raised by appellants. The result is that this appeal must fail.

22. Before parting with this appeal we would like to express our distress at this wasteful and futile litigation. There was almost nothing to be said by the appellants and the Union of India so far as the merits of the case were concerned. As we have mentioned earlier, no arguments have been attempted to be advanced to justify the order's of the authorities, The arguments in this Court as also in the trial Court mostly centred around the technical defence of maintainability of the suit. We may well ask, "To what purpose, assuming for the sake of argument that the Court were to hold that the suit was not maintainable, was this waste of public time and money? Had the plaintiffs failed in the suit on this point, they could have immediately filed a writ petition under Article 226 of the Constitution for the same relief. There being no answer on the merits, they would have been granted the relief prayed for. From our experience of litigation of this type, we, of course, can contemplate some technical defences which would have been raised in that writ petition. One of them would have been that of delay, but the answer to that defence would have been furnished by the period taken up by the pendency of this case. Another technical defence very likely would have been that the respondents' proper remedy was to file a suit. We are not saying this in a facetious vein, because in the very suit from which this appeal arises, in the written-statement filed by the Union of India a defence has been taken that the suit is barred by limitation, and immediately thereafter another defence is taken that the suit is premature. This we may well expect from a private litigant who seeks to postpone the evil day, but these are certainly not pleas which we expect from the Government and its officers. For the filing of a suit the CPC requires a notice u/s 80 to be given to the Government; and its officers. The object of that notice is to bring to the attention of the proper

department of the Government the injustice which the plaintiff claims he has suffered, and if his claim is true, to give an opportunity to the Government to make redress or to settle his claim. Unfortunately, this salutary object underlying Section 80 seems today to have been perverted, and we find that nowadays a notice u/s 80 is only taken in hand when a suit is filed in order to find out from it whether any defence as to non-compliance or want of proper compliance with the provisions of Section 80 can be raised in the suit. Thus, there was no real object in raising these technical defences because, as we have pointed out above, if not by way of a suit, by way of a writ petition the plaintiffs would have succeeded. The only object, therefore, could have been to drive the plaintiffs from pillar to post. In this connection, we would like to refer to the decision of the Supreme Court in Union of India (UOI) Vs. A.V. Narasimhalu, . In that case the respondent who had imported certain goods applied for refund of the duty paid by him. His application was dismissed as also his appeals to the authorities. The respondent then filed a suit against the Union of India. The defence raised was that the suit was not maintainable. This defence was negatived by the High Court, but in appeal by the Union of India this defence was upheld and the appeal allowed and the suit dismissed. While allowing this appeal the Supreme Court observed as follows (p. 662):

The jurisdiction of the Civil Court to entertain a suit challenging the validity of the imposition of the duty of customs being excluded, the plaintiff's suit must fail. But it must be observed that the present is a fair illustration, of the administration not making a serious attempt to avoid futile litigation for small claims. There was a judgement of the High Court of Madras on the identical" question which fell to be determined. If the plaintiffs had moved the High Court in exercise of its jurisdiction under Article 236 the Union had practically no defence. The Union could without loss of face accede to the request of the plaintiff to refund the amount collected. The learned Attorney-General stated that the Union desired to obtain a decision of this Court on the extent of the jurisdiction of the Civil Court to entertain a suit challenging the decision of the Customs Authorities, because in the view of the Law Advisers the High Court had fallen into error in enunciating the principles. But the High Court recorded the judgment under appeal after the claim was resisted by the Union. We are glad to record the assurance given by the Attorney-General that whatever may be the decision in the appeal, the Union of India will refund the amount of tax unauthorisedly recovered by the Assistant Collector of Customs. This was essentially a case in which when notice was served the Central Government should instead of relying upon technicalities have refunded the amount collected. We trust that the Administrative authorities will act in a manner consistent not with technicalities, but with a broader concept of justice if a feeling is to be nurtured in the minds of the citizens that the Government is by and for the people.

No such statement as was made by the Attorney-General in that case was at any time made before the trial Court or before us. Here the only object was to

deprive the plaintiffs of their just claim. Today the Government, both the Central and the State Government, are expressing great concern for what is termed arrears in Courts. We are constrained to observe that a considerable part of such arrears is due to litigations of this type in which the State or the Union is a party and is the result of the attitude which the Government adopts towards legal proceedings which are filed against it. We express a hope that hereafter in legal proceedings against the Government the Government will adopt an approach consistent with and befitting its role as a social welfare State. With these words and with the expectation that these words will not fall on deaf ears, we dismiss this appeal.

23. The appellants will pay to the respondents No. 1 (the original plaintiffs) the costs of this appeal fixed, under Rule 569-D of the Rules and Forms of the Bombay High Court (on the Original Side), 1957, on the basis of two advocates, at Rs. 10,500. The respondents No. 2, the Union of India, will bear and pay their costs of the appeal.

24. The respondents No. 1 will be at liberty to withdraw the amount of security for costs given by the appellants.