Supreme Court of India
J K Cotton Spinning & Weaving Mills ... vs Collector Of Central Excise on 4 March, 1998
Author: Thomas
Bench: Cji, K.T. Thomas, M. Srinivasan

PETITIONER:
J K COTTON SPINNING & WEAVING MILLS COMPANY LTD.

Vs.

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE

DATE OF JUDGMENT: 04/03/1998

BENCH:
CJI, K.T. THOMAS, M. SRINIVASAN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T Thomas, J.

This moot point in this appeal this: Whether the period of six months envisaged in Section 11A of the Central Excise Act, 1944 (for short the Act), for issuing show cause notice, stood extended by further period so as to enable the Revenue to scale over the hurdle of limitation? Respondent (Revenue) advanced two alternative premises in support of the plea that the said period of six months stood extended. First is, there was only a provisional assessment and hence the `relevant date' for issuing the show cause notice could be counted only from final assessment, Second is that an order of stay issued by the High Court of Delhi on 12.8.1981 virtually amounted to a bridle against issuing show cause notice and hence the period stood extended by a entire time when the stay order was in operation.

Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT - the acronym hereafter) held that the assessment was not provisional and hence the first premise was not available to the Revenue. but it held by a majority of 2:1 that the interim order of the Delhi High Court dated 12.8.1991 operated as virtually a stay, though not expressly so, against issuance of show cause notice and hence there was no bar of limitation for recovering the amount of excise duty levied. Thus, the Revenue was permitted by the CEGAT to proceed to recover the duty. The said order of CEGAT is

challenged in this appeal.

The facts which led to the opening of the aforesaid question can be summarised as follows: Appellant has a textile mill consisting of various divisions, among which the division where yarn is made is distinct from other divisions. Yarn is to be used in the manufacture of fabric which is the end product of the textile mill of the appellant. Yarn is obtained at an intermediary stage in the composite textile mill and is further processed in the mill for making fabric. According to the Revenue, there is removal of yarn from one area of the factory and hence that commodity is exigible to excise duty as per Rules 9 and 49 of the Central Excises Rules irrespective of the Excise duty payable on manufacture of fabric. Appellant challenged the aforesaid direction of the Department in a writ petition filed before Delhi High Court and its contention was upheld by judgment dated 16.10.1980. The Department then filed an appeal in this Court by special leave. When the special leave petition was pending the Department issued two notices under Section 11 A of the Act for recovering the excise duty on yarn for the period from 6.11.1980 to 31.3.1981. However, the Department issued a notification on 20.2.1982 as a precautionary step, amending Rules 9 and 49 of the Central Excise Rules Creating a fiction of "deemed removal" of the input goods at the intermediary stage within the factory. That amendment later gained incorporation in a legislative enactment also, vide Section 51 (2)(d) of the Finance Act 1982 by which it was given retrospective effect from 1944. Though the appellant challenged the aforesaid amendments first in the Delhi High Court and later in this Court its validity remained undisturbed vide J.K. Spinning and Weaving Mills Ltd. and Anr. V. Union of India and others, (32) E.L.T1987. 234 - (AIR 1987 SC 191). A three-judge bench of this Court in that decision upheld the validity of the amendments to Rules 9 and 49 besides upholding the retrospectivity granted to the provisions as per Section 51 of the Finance Act 1982.

However, in order to allay the apprehension of the assessees that the judicial imprimatur accorded to the long distant retrospectivity to Rules 9 and 49 of the Central Excise Rules would precipitate them to unbearable financial burden their Lordships put a rider that the retrospective effect "must be subject to the provisions of Section 11A of the Act."

It is advantageous at this stage to read Section 11-A * Act:

> "11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or aid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: Provided that where any duty of excise has not been levied or paid or has been short-levied or short- paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent the provisions of this sub-section shall have effect, as if for the words "six months" the words "five years" were substituted. Explanation - Where the service of

the notice is stayed by the order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be. (2) considering the representation, if any, made by the person on whom notice is served under sub-section (1) determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) for the purposes of this section.

(i) "refund" includes rebate of duty of excise on excisable good exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means"

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid- (A) Where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the data of adjustment of duty after the final assessment thereof,".

The period of six months envisaged in sub-section (1) thereof can thus be extended only under three eventualities. First is, if the impairment of the levy is attributable of any fraud, collusion or wilful misrepresentation or suppression of facts, the period of six months will stand stretched upto five years. The second eventuality is, if the original assessment was provisional, in which case the period would start running only from the date of final assessment. The third is , if the service of show cause notice on the person chargeable with duty is stayed by a court, in which case the entire period of stay shall be excluded from computing the aforesaid limitation time.

The first eventuality mentioned above has no application to the facts of this case and hence a discussion on that can conveniently be skipped. Regarding the second contingency, though the department pleaded that only a provisional assessment was made, that plea was repelled by CEGAT in reversal of a finding made by the Assistant Collector as well as the Collector (Appeals). It is the third contingency which the Revenue has alternatively relied on which secured approval from

CEGAT.

Before we proceed to consider the merits of the case, we have to deal with a preliminary objection raised by the Revenue regarding maintainability of this appeal. In the appeal petition it is stated that the appeal is filed under Section 35L (b) of the Act which reads as under:

> "35-L. Appeal to supreme Court _An appeal shall lie to the Supreme Court from-
>
> (a) x x x x x x x x x x x
>
> (b) any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment."

We agree with the learned counsel for the Revenue that the question sought to be determined in this appeal has neither any relationship to the rate of duty of excise or to the value of the goods for purpose of assessment. It may be that the appeal could not have been filed under the aforesaid Section on the facts of this case.

Be that as it may, we are no disposed to dismiss this appeal on that technical ground at this stage because the appellant could in that situation have sought for special leave under Article 136 of the Constitution. With all the papers available for deciding the question involved in this appeal, we do not think it proper to drive the appellant to file another special leave petition for that purpose particularly because of the lapse of almost nine years since the filing of this appeal. We, therefore, treat this appeal as one filed by special leave.

We will now come down to the question to be determined. Two vivid period are involved about which appellant raised the contention that the bar under section 11-A of the Act would operate. The first period is between 6.11.1980 and 31.3.1981 and the second period is from 1.4.1981 to 5.12.1981 (there is no dispute regarding the subsequent period as it falls, indubitably, within the span of Section 11-A).

Shri Joseph Vallapalli, learned senior counsel for the appellant fairly submitted that though the appellant raised the contention relating to the aforesaid two periods (first and second), he would confine his argument to the second period only, as a decision of this Court in this appeal need be given with reference to the second period.

According to the Revenue, there was a stay of service of notice (to show cause as envisaged in Section 11-A of the Act) from 12.8.1981. The said contention is made on the strength of an order of stay passed by the Delhi High Court on a Writ Petition filed by the appellant challenging a circular issued by the Central Board of Excise and Customs (for short 'the Board') on 24.9.1980. That circular was issued by the board purportedly in interpretation Rule 9 of the Central Excise Rules. As per the said circular, the Collector of Central Excise was required to specify in addition to the place where excisable goods are produced or cured or manufactured premises appurtenant thereto, if

necessary, and to take immediate steps to ensure approval to the place or production, and to delegate the powers of the Collector under Rule 9(1) to the licensing authorities; and further to demand the assesses to submit fresh ground plans etc. The appellant had moved a petition in the writ application for an order of stay in terms of prayer (a) thereof which consisted of the following limbs:

> (i) Stay permitting the petitioners to process yarn within its factory without payment of duty;
>
> (ii) restraining respondent from giving effect to the contents of the directive of the Board dated 24.9.1980; and
>
> (iii) to stay further proceedings pursuant to notices date 4th and 5th May, 1981 relating to the period 6.11.1980 to 31.3.1981.

The High Court of Delhi has allowed the said petition on 12.8.1981 in terms of the said prayer. The contention which the Revenue pressed into service before CEGAT and which was fond acceptance by them is that as per the second limb, the stay became operative which virtually amounted to stay of service of notice under Section 11-A of the Act.

Exclusion of any period from the time provided for issuing notice which is contemplated in Section 11A of the Act is mentioned in the Explanation which is incorporated as part of that Section. Period of the stay can be excluded if "the service of the notice is stayed by on order of a court." The converse is if there is no stay of service of notice, there is no scope for excluding any time from the period of limitation as per this Explanation.

If a very strict interpretation is given, notice should have been issued before passing the order of stay so that service of the notice could be blocked. But such an extreme view is not necessary for understanding the contours of the Explanation.

In considering whether the extension of time permitted in Section 11-A of the Act can be liberally construed or that it should be a strict construction, we think it useful to recall how this Court approached the challenge made against Section 51 of the Finance Act, 1982 which afforded retrospective operation to the amended Rules 9 and 49 of the Central Excise Rules. Those provision were assailed in the case of J.K. Spinning and Weaving Mills Ltd. & Anr. (Supra) attributing arbitrariness and unreasonableness to them besides being violative of Article 19(1) (g) or the constitution.

It was contended in that case that excessive retrospective operation prescribed by a taxing statute would amount to contravention of fundamental rights, and in support of that contention, those appellants made reliance on the decisions of this Court in Raj Ramakrishna & Others v. The State of Rajasthan of Others, 1966 (1) SCR 890. In the former decision, this Court has pointed out that if the retrospective feature of a law is arbitrary and burdensome, the statute will not be sustained and reasonableness of the extent of retrospective operation of a statute will depend upon he

circumstances of each case. The apprehension of the appellants in J.K. Spinning and Weaving Mill (supra) that the long retrospectivity attached to the legislative amendments would result in mulcting the taxpayer with whopping financial burden has gained serious consideration of this Court and an effort was made to find a way out to salvage those provisions by minimising the gravity of the hardship on the assessees. That endeavour resulted in the judicial pronouncement in J.K. Spinning and Weaving Mills (supra) by placing those provisions subject to the time limit fixed under Section 11-A.

If the said rider was not imposed by this Court as per the decision in J.K. Cotton spinning and Weaving Co, case (supra), what would have been the fate of Rules 9 and 49 (as amended in the wake of the challenge to its vires cannot now be reexamined. Whatever it be, the fact remains, that Rules 9 and 49 survived the challenge when this Court nailed their sweep to the limitation specified in Section 11-A. Hence that limitation period should not be stretched more than the elasticity supplied in the Section itself. So, in our opinion, the eventuality envisaged in Section 11-A for the further lengthening of the limitation period must be strictly construed.

The notice envisaged in Sub-section (1) of Section 11-A of the Act can be issued under any one of the four conditions:

(1) when duty of excise has not been levied on the commodity;

(ii) when such duty has been short- levied; or

(iii) when such duty, though levied, has not been paid; or

(iv) when such duty levied was only short-paid.

If any one of the above condition exists, the notice contemplated therein can be issued. It is an extremely difficult proposition for acceptance that Collector of Central Excise was prevented from issuing a notice to the appellant in this case as the Delhi High Court has restrained the department from "giving effect to the contents of the directives of the board dated 24.9.1980". The said directive of the Board was mainly intended to be observed by the Collector of Central Excise as well as other officials under him to carry out certain steps while exercising powers under Rule 9(1) of the Act and also for making delegation of such powers to the licensing authorities. here the test is, if the said circular (or directive) had not been issued at all, could the Collector of Central Excise have issued a notice under sub-section (1) to Section 11-A of the Act. The answer is, that the Collector could still have issued a notice. If so, the suspension of the circular by the order of the court would not have prevented the Collector from issuing the notice. The effect of the court order dated 12.8.1981 was only to keep the circular in suspended animation so far as the appellant is concerned and nothing more.

That apart, the mere fact that department issued three notices during the time when the aforesaid order was in force itself is sturdy proof that even according to the Department, there was no stay of service of notice by a court order. Nobody has advanced a contention, nor could any such contention

have been advanced, that the Collector of Central Excise has flouted the stay order of the Delhi High Court by issuing such notices.

Shri Gauri Shankar Murthi, learned counsel for the Revenue adopted an alternative contention that the period of limitation can be saved by holding that the assessment which preceded the action was only a provisional one. Of course, Section 11-A A permits the said six months time to go further if the preceding assessment was only provisional as could be noted from sub-section 3(ii) (b) of Section 11A. The same contention was urged before the CEGAT but after a detailed discussion, it was repelled. Undaunted by such adverse finding, Shri Gauri Shankar Murthi pleaded that the Revenue must be allowed to canvass for reversal of the said finding in this appeal in on the footing of the principle adumbrated in Order 41 Rule 22 of Civil Procedure Code, 1908. Shri Joseph Vallapalli, learned senior counsel opposed reopening the said finding on the premise that in this appeal, even after it is treated as one by special leave under Article 136 of the Constitution, the points raised by the appellant alone can be canvassed.

A three-judge bench of this Court in Vashit Narain Sharma v. Dev Chandra and Others, 1955 (1) SCR 509 did not permit a respondent, in an appeal filed by special leave under Article 136 to support the decision challenged in the appeal on a ground which had been found against him. The court held that the corresponding provision in the Civil Procedure Code has no application to an appeal filed by special leave under Article 136.

The aforesaid decision was cited before another three- judge bench in the case of Sri Baru Ram v. Shrimati Prasanni and Others 1959 SCR 1403 where it was not dissented from. But in the light of the decision of the Constitution bench of this Court in Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji and Others, 1965 (1) SCR 712, the ratio adopted in the earlier mentioned two decisions is no more in vogue. The Constitution Bench held that this Court has power to decide all points arising from the impugned judgment and even in the absence of an express provision like Order 41, Rule 22, CPC, this Court can devise appropriate procedure to be adopted at the hearing. The observations of the bench which are relevant now are the following:

> "There could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it. Consideration of justice, therefore, require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even favour even upon grounds which were negatived in that judgement. We are therefore, of the opinion that in Vashisht Narain Sharma's Case, too narrow a view was taken regarding the powers of this Court".

We, therefore, concede that respondents cannot be precluded in this appeal from canvassing for reversal of a finding contained in the impugned judgment despite its end result being in their favour.

However, on a consideration of the arguments raised on the merits of that point, we find it is difficult to hold that there was provisional assessment. CEGAT has adverted to certain reasons for arriving at such a finding. Rule 9-B of the Central Excise Rules has been quoted in the impugned judgment. The title of the rule is "Provisional Assessment", in which situations are detailed when provisional assessment could be made. CEGAT pointed out in the judgment certain admissions made by the Department such as the absence of any express order of provisional assessment as required under Rule 9-B, absence of any circumstance for making a provisional assessment, and that it was not stated in the show cause notice that the assessment made during the relevant period was provisional. The Assistant collector had treated the assessment as provisional solely on the premise that the matter was subjudice, and hence "all the assessments for the period April 1981 to 15.3.1983 were, therefore, made provisional". CEGAT has rightly found that the said yardstick was hardly sufficient to make an assessment provisional.

Shri Gauri Shankar Murthi, in order to surmount a difficult situation confronted by the aforesaid Rule 9-B of the Central Excise Rules adopted a new contention as under:

Rule 9-B was incorporated in the Central Excise Rules with effect from 1-8-1059 whereas the `Self Removal Procedure" by manufacturers themselves has been introduced in the Rules with effect from 14.7.1969 which provides for a self assessment, the finalization of which could be made as indicated in Rule 173-F. Learned counsel contended that with the introduction of the said procedure a self removal by itself would amount to provisional assessment. In support of the contention, learned counsel cited the decision of this Court in Seraikella Glass Works vs. Collector of Central Excise, Patna [1997 (91) ELT 497] wherein implication of a self assessment has been considered and held it to be nothing but a provisional assessment which is subject to final assessment.

Shri Joseph Vallapalli, learned senior counsel for the appellant pointed out, in reply to the said contention, that the concept of provisional assessment adverted to in Section 11-A has a connotation which can be traced in rule 9-B which requires a specific order to the made for provisional assessment and it should be followed by compliance with certain statutory requirements, In the absence of any such order there was no provisional assessment as envisaged in Section 11-A of the Act, according to the learned counsel. he further contended that respondent cannot be permitted to advance a new ground for supporting his theory of provisional assessment. On the factual side also, learned counsel submitted that pursuant to the judgment of the High Court dated 16.10.1980, the appellant has totally excluded captively consumed yarn from assessment and hence there was no self assessment at all on yarn because it was a case of non-levy of a particular commodity and not one of short levy. The corollary according to the counsel, is that there was no provisional assessment at all.

It is a fact that Revenue has never adopted a stand based on self Removal procedure envisaged in Chapter VII-A of the Rules for establishing that there was a provisional assessment. It is one thing to say that respondent can, in an appeal filed by the opposite party, re-canvass for reversal of a finding reached against him in the judgment, (the operative part of which the respondent is now supporting), and it a different thing to permit the respondent to put forth absolutely new grounds for it. hence it is not necessary to further consider whether there was any self-assessment. We are,

therefore, not persuaded to disturb the finding reached by the CEGAT regarding the plea of provisional assessment.

In the result, we allow this appeal and set aside the impugned judgement. We hold that recovery of excise duty for yarn from the appellant for the period between 1.4.1981 and 5.12.1981 is barred by the period of limitation prescribed in section 11-A of the Act. The appeal is thus allowed without any order as to costs.