Before A. L. Bahri, J.

M/S. RAVI ENGINEERING WORKS, AMRITSAR, AND ANOTHER,—*Appellants.*

versus

THE UNION OF INDIA,—*Respondent.*

Regular Second Appeal No. 1737 of 1978.

6th April, 1990.

Central Excise Rules, 1944—*Rls.* 10 & 10-*A—Manufactured goods removed without payment of Excise duty—Manufacturer claiming that goods manufactured exempt from payment of duty—Notice issued by department—No data submitted for justifying exemption—Relevant rule—Applicability of—No limitation provided for serving such notice—Rules subsequently amended—Limitation provided—Amended rule applicable prospectively.*

Held, that the case in hand is of removing the manufactured goods from the factory of the appellants without payment of any excise duty. Throughout, the stand of the appellants had been that they were not manufacturing any articles on which excise duty was payable and it is on that account that the stand of the department was that no Inspector of the Excise Department was deputed, in the factory of the appellants. In such premises, it cannot be said that the present is a case of nil assessment as no evidence was produced at the time of removal of the manufactured goods from the factory nor necessary documents were got cleared from the Excise Department. To repeat it may be stated that on notice being issued to the appellants to provide data of the articles manufactured out of untested rails produced by the appellants on which exemption could be claimed by the appellants from payment of excise duty, the appellants did not respond to the same and produced any material either before the Authorities or in the case in hand. That being the position, it is Rule 10-A as was existing then which would be applicable to the case in hand. (Para 7)

Held, that the present case is to be governed by the law as it existed when demand notice was issued. Admittedly, at that time, Rule 10-A was in force. S. 11-A had not been introduced. The law then existing is to apply and the case fully falls under the scope of Rule 10-A, which provides no limitation. (Para 9)

Regular Second Appeal from the decree of the Court of Shri Mewa Singh, Additional District Judge, Amritsar, dated the 25th day

of September, 1978 affirming with costs that of the Court of Shri H. S. Bakshi, Senior Sub Judge, Amritsar, dated the 24th January, 1976, dismissing the suit of the plaintiff and leaving the parties to bear their own costs.

Claim: suit for permanent injunction restraining the defendant from recovering the amount of Rs. 1,28,937-45 paise on the basis of demand notice No. 56-A serial No. E/60/283254/61, dated 2nd March, 1986, issued by the Central Excise department M.O.R. Chheharata III MOD, Amritsar on the ground of same being illegal, void and without jurisdiction.

S. C. Sibal Sr. Advocate (R. C. Setia, Advocate with him), *for the Appellants.*

Harphool Singh Brar, Advocate, *for the Respondents.*

JUDGMENT

A. L. Bahri, J.

(1) The plaintiff-appellant is in this Court in Regular Second Appeal against the concurrent decisions of the Courts below. Although on pleadings of the parties eight issues were framed, however, the controversy in appeal centres around only one issue i.e. issue No. 4, which is as under:—

> Whether the demand in question is illegal etc. as alleged in the plaint ?

(2) M/s Ravi Engineering Works, Amritsar and its proprietor partner Kailash Chand Maheshwari filed the suit *inter alia* alleging that they had purchased 2578.749 metric tonnes of steel rails for the purposes of re-rolling in their own mills in the year 1964-65 from M/s Hindustan Steel Ltd., Bhalai. They obtained a licence from the Central Department for manufacture of iron and steel products in their factory. The Inspector of Central Excise issued a notice of demand on March 2, 1966 demanding differential duty at a rate of Rs. 50 per metric tonne. It was alleged that no separate duty was payable on the rails as under Item No. 26-AA (i) of the Tariff, duty had already been paid on the purchase of rails. The said item pertained to semi-finished steel including blooms, billets, slabs, sheet bars, tin bars etc. on which duty at Rs. 75 per metric tonne plus excise duty leviable on steel ingots was payable. According to the

plaintiffs the rails were manufactured from blooms and billets by M/s Hindustan Steel Ltd. The Inspector of the Central Excise Department had been attending the plaintiffs factory and it was never pointed out that any extra duty was payable on the rails or the products manufactured therefrom in the factory of the plaintiffs. Thus, the plaintiffs did not charge any duty from their own customers to whom the manufactured goods were supplied. Rule 10 of the Central Excise Rules, 1944, applied to the case in hand and demand could not be raised for short levy after three months. Thus, in the suit while challenging the demand they prayed for permanent injunction restraining Union of India from recovering the amount of Rs. 1,28,937.45 paise under the said impugned notice.

(3) The suit was contested and it was clarified that the demand was not on the basis of differential duty. After purchase of the rails, the plaintiffs were required to manufacture goods which were exempt from further excise duty. A notice was issued to the plaintiffs to give complete data of the articles manufactured from those rails. The plaintiffs having failed to reply to the said notice, it was taken that the plaintiffs manufactured exciseable goods and, thus, were liable to pay at the rate of Rs. 50 per metric tonne at the production stage. It was not Rule 10, which was applicable but it was Rule 10-A of the Rule which was applicable and the period of limitation of three months as provided under Rule 10 was not attracted.

(4) The trial Court decided issue No. 4 against the plaintiffs. Other issues were decided in their favour and the suit was dismissed on January 24, 1976. The plaintiffs appeal was dismissed by the Additional District Judge, Amritsar, on September 25, 1978.

(5) While referring to the demand notice Exhibit P. 31 it has been argued by Shri Satish Chander, Senior Advocate, appearing on behalf of the appellants that the claim was made on account of differential duty as mentioned therein and, thus, the case would fall under Rule 10 of the Rules. In order to appreciate this argument it is necessary to refer to the findings of facts recorded by the Courts below. The plaintiffs purchased untested rails on payment of excise duty from M/s Hindustan Steel Ltd., Bhalai. No Inspector of the Excise Department was posted or deputed at the factory premises of the plaintiffs and that the plaintiffs did not submit any forms or documents required before removing manufactured goods

from their factory to the Excise Department or Excise Inspector to get clearance. Even after notice was issued to the plaintiffs, they did not respond to the same and submit data of the articles manufactured from such rails purchased by the plaintiffs.

(6) The case of the Department is that the demand notice did not relate to any short levy of excise duty on the rails. The demand notice relates to excise duty on the articles manufactured by the plaintiffs by using such rails. If the plaintiffs had produced some evidence that from such rails they had manufactured articles which were exempt from excise duty, the plaintiffs could succeed. However, at no stage, i.e., either before the authorities including appellate authorities or in the present suit any evidence was produced regarding articles which were manufactured by the plaintiffs from such rails. Thus, it is a case which would attract Rule 10-A of the Rules, then in force. Rules 10 and 10-A as existed in 1964-65 read as under:—

"10. Recovery of duties or charges short-levied, or erroneously refunded :—

(1) When duties or charges have been short-levied through inadvertence, error, collusion, or misconstruction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty or charges 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 within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, to any particular case, allow.

10-A. Residuary powers for recovery of sums due to Government:—

(1) Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, the proper officer may serve a notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), shall determine the amount of duty, deficiency in duty or sum 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 within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case allow."

(7) Mr. S. C. Sibal, Senior Advocate for the appellants has argued that the present case would fall under Rule 10 as reproduced above. As the department wants to recover the difference of the excise duty payable on the rails, the appellants have already paid excise duty thereon at the time of purchasing the same and the period of three months as provided under Rule 10 having expired, the notice making demand of the excise duty was thus illegal. In support of this contention, reliance has been placed on the decision of the Supreme Court in *N. B. Sanjana Assistant Collector of Central Excise, Bombay and others* v. *The Elphinstone Spinning and Weaving Mills Co. Ltd.* (1). It was held in the above case, that in the case

(1) AIR 1971 S.C. 2039: 1978 ELT (J. 399).

of short levy Rule 10 and not Rule 10-A would be attracted. In that case at the time of removal of manufactured goods from the factory, necessary forms were filled up on which the Inspector of the Excise Department made endorsement of 'Nil assessment' and subsequently notice was issued making demand of differential excise duty. In such circumstances, it was held that Rule 10-A did not contemplate that some amount must have been assessed, and collected to contradict its applicability. In the case of nil assessment, Rule 10 would be attracted as it would also be a case of short levy. On the same point, reliance has been placed on the decision of the Bombay High Court in *Acme Metal Industries Pvt. Ltd.* v. *S. S. Pathak, the Inspector Central Excise and others* (2). In that case also, the necessary papers were produced for getting approval of the Excise Authority at the time of the removal of the manufactured goods and it was held that it was a case of nil assessment. The decision in *N. B. Sanjana's case* (supra) was relied upon. On the facts of the present case, the ratio of the decisions referred to above cannot be applied and it is a case of removing the manufactured goods from the factory of the appellants without payment of any excise duty. Throughout, the stand of the appellants had been that they were not manufacturing any articles on which excise duty was payable and it is on that account that the stand of the department was that no Inspector of the Excise department was deputed in the factory of the appellants. In such premises, it cannot be said that the present is a case of nil assessment as no evidence was produced at the time of removal of the manufactured goods from the factory nor necessary documents were not cleared from the Excise department. To repeat it may be stated that on notice being issued to the appellants to provide data of the articles manufactured out of untested rails produced by the appellants on which exemption could be claimed by the appellants from payment of excise duty, the appellants did not respond to the same, and produced any material either before the Authorities or in the case in hand. That being the position, it is Rule 10-A as was existing then which would be applicable to the case in hand.

(8) The learned counsel for the appellants has argued that Rule 10-A as reproduced above, was declared *ultra vires* by the Madras High Court in 1977, the effect of which would be as if Rule 10-A never existed on the statute. In such circumstances, the department could fall back only on Rule 10, which provided a limitation of

(2) 1980 E.L.T. 156 (Bom.).

three months for taking action for demanding excise duty. In support of this contention, reliance has been placed in *Murugan and Company, Pudukotai* v. *Deputy Collector of Central Excise, Tiruchirapalli and others,* (3). It was held that Rule 10-A of the Central Rules is *ultra vires* in so far as there was no specific rule making power conferred under section 37 of the Act, for the recovery of excise duty which had escaped levy at the time of clearance. On the same lines there is another decision of the Madras High Court, which has been relied upon *Government of India and others* v. *Prabhakar Match Industries, Dharampuri* (4). The appellants cannot take any benefit from the two decisions referred to above, as subsequently the matter was considered by the Supreme Court and rule 10-A was held to be *intra vires* in *Assistant Collector of Central Excise* v. *Ramakrishnan Kulwant Rai,* 1989 (41) *E.L.T.* 3 (SC). It was observed as under:

> "Section 37(1) of the Central Excise and Salt Act, 1944 enables the Central Government to make rules 'to carry into effect the purposes of this Act'. Sub-section (2) of said Section 37, enumerated the matters the rules might provide for 'in particular' and without prejudice to the generality of the foregoing powers'. Thus this section did not require that the enumerated rules would be exhaustive. Any rule if it could be shown to have been made 'to carry into effect the purposes of the Act', would be within the rule making power. Chapter II of the Excise Act provides for the levy and collection of excise duty in such manner as may be prescribed. It could not, therefore, be said that Rule 10-A was not covered by the above provision. Scrutinising the provisions of Rule 10-A there is no doubt that the said Rule 10-A, as it existed at the relevant time, was valid and not *ultra vires* the rule making power.

Almost similar provision existed in Rule 12 of the Medicinal Toilet Preparations (Excise Duties) Rules, 1956. The said rule was held to be *intra vires* by the Supreme Court in *Government of India* v. *Citedal Fine Pharmaceuticals* (5). In view of the decision of the Apex Court holding Rule 10-A to be not *ultra vires*, the provisions

(3) 1977 E.L.T. (J. 193).
(4) 1984 (15) E.L.T. 316 (Mad.).
(5) 1989 (42) E.L.T. 515 (S.C.).

of Section 37 of the Act, the contention of the learned counsel for the appellants cannot be accepted and is repelled.

(9) The learned counsel for the appellants has next argued that Rule 10-A was repealed subsequently and such a provision was made in the Act by adding Section 11-A in the Act and this amended section provided a period of 5 years during which action could be taken for the recovery of excise duty which had escaped notice. Since the demand notice in the present case related to more than five years before the commencement of Section 11-A, the same requires to be quashed. In support of this contention, reliance has been placed on the decision of the Supreme Court in *M/s Mysore Rolling Mills (P) Ltd.* v. *Collector of Central Excise, Belgaum* (6). The ratio of this decision cannot be applied to the case in hand, as in that case a notice issued was within 5 years of the introduction of Section 11-A. The present case is to be governed by the law as it existed when demand notice was issued. Admittedly, at that time, Rule 10-A was in force. Section 11-A had not been introduced. The law then existing is to apply and the case fully falls under the scope of Rule 10-A, which provides no limitation. Neither the notice nor the order calling upon the appellants to pay the excise duty could be quashed on that score. The findings of the Courts below on this point, are, therefore, affirmed.

(10) For the reasons recorded above, finding no merit in the appeal, the same is dismissed with costs.

S.C.K.

Before N. C. Jain, J.

NACHHATTAR SINGH AND OTHERS,—*Petitioners.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Civil Revision No. 2615 *of* 1989.

12th April, 1990.

Code of Civil Procedure, 1908 (*Act V of* 1908)—*S.* 115, *O.* 21 *rl.* 15—*Indian Succession Act*, 1925—*S.* 214—*Award providing enhanced compensation—Death of joint decree holder during execution proceedings—Legal representatives—Whether under an obligation to obtain succession certificate.*

(6) (1987) I.S.C. cases 695.