CIVIL WRIT.

Before Bishan Narain, J

THE ADARSH TEXTILE MILLS,—*Petitioner*

versus

THE COLLECTOR OF CENTRAL EXCISE, DELHI,—*Respondent.*

Civil Writ No. 332 of 1957

1958

Feb., 10th

Central Excise and Salt Act (I of 1944)—Sections 35 to 37—Right of Appeal—Whether can be made subject to deposit of the duty levied—Central Excise Rules, 1944—Rule 215—Whether ultra vires *of the Act—Section 38—Effect of.*

Held, that section 35 of the Central Excise and Salt Act, 1944, gives a person aggrieved by any decision or order passed by the Central Excise Officer to file an appeal and the only restriction to this absolute right imposed in the section is that it should be filed within three months from the date of such a decision or order. The right of the Central Government to make rules under section 37 of the Act—however wide—cannot be held to include the right to impose fresh and onerous conditions before this right of appeal is exercised. The liability to deposit the full amount of the duty levied before the appeal is heard in some cases makes it impossible for the aggrieved party to exercise this right of appeal. Rule 215 has been made even though section 37 of the Act does not expressly authorise the Central Government to make rules relating to the right of appeal.

Held, that rule 215 of the Central Excise Rules, 1944, is repugnant to section 35 of the Act and goes beyond the scope of section 37 of the Act. The provisions contained in section 35 of the Act must prevail over those of rule 215 and the conditions laid down in this rule must be ignored inspite of the provisions of section 38 of the Act and should not be given effect to

Held, that the only effect of section 38 of the Act is that the rules framed by the Central Government become

statutory rules and must be so construed. Such rules, provided they have fulfilled all the conditions precedent to their validity, have to be construed as statutes are construed. If it were otherwise, it would be open to the rule making authorities to make rules inconsistent or in conflict with the policy and purpose of the parent Act, and then by virtue of the pharse "as if enacted in the Act" claim that the rules should be construed as part of the Act and should prevail as having been enacted subsequent to the parent Act. Such a conclusion would enable the rule-making authorities to ignore or supersede the legislative intentions expressed in the Act.

Petition under Article 226 of the Constitution of India praying that a writ in the nature of certiorari or mandamus be issued directing the respondent to decide the appeal on merits and not to dismiss it for non-payment of the excise duty.

BHAGIRATH DAS, for Petitioner.

M. R. SHARMA AND MR. CHETAN DASS, for Respondent.

ORDER

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BISHAN NARAIN, J.—The Adarsh Textile Mills of Amritsar have filed this petition under Article 226 of the Constitution in the following circumstances. The 1st Schedule to the Central Excise and Salt Act, 1944, was amended by the Finance Act, 1954 (Act XVII of 1954). Under this amendment an excise duty of six pies per square yard was imposed on the production and manufacture of rayon or artificial silk fabrics. The Superintendent of Central Excise, Circle II, Amritsar, sent a notice under rule 10A of the Central Excise Rules, made under section 37 of the Act, demanding Rs. 26,260-8-0 as excise duty payable by the petitioner for the period 1st March, 1954, to 1st March, 1955, on account of the manufacture of artificial silk cloth. The firm did not accept its liability to pay this amount on various grounds

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and filed an appeal under section 35 of the Central Excise and Salt Act (hereinafter called the Act) on 12th March, 1957, before the Collector of Central Excise, Delhi (hereinafter called the 'respondent'). On 20th March, 1957, the said Collector wrote to the petitioning firm inquiring if it had deposited the amount of duty demanded from it and if not then directed it to deposit the whole amount within ten days. In this letter it was further stated that the appeal was liable to dismissal for non-compliance with this direction and referred to section 189 of the Sea Customs Act, 1878 (Act VIII of 1878), read with rule 215 of the Central Excise Rules, 1944. Thereupon the petitioning firm filed this petition challenging the validity of the respondent's demand on the ground that rule 215 is invalid and is *ultra vires* of the Act under which it has been made.

Now rule 215 reads:—

> "The provisions of sections 168, 189 and 192 of the Sea Customs Act, 1878, shall *mutatis mutandis* be applicable to any decision or order relating to any duty, fine or penalty leviable in respect of any goods under the Act or under these rules."

Section 189 of the Sea Customs Act reads:—

> "Where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs-Collector at the port where the dispute arises the amount demanded by the officer passing such decision or order.

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When delivery of such goods to the owner thereof is with-held merely by reason of such amount not being paid, the Customs-Collector shall, upon such deposit being made, cause such goods to be delivered to such owner.

If upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs-Collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner."

Thus by virtue of this rule the provisions of section 189 have been made applicable to any order relating to any duty, etc., leviable under the Act or under its rules. It is rightly conceded by the petitioner firm that if rule 215 is valid, then the respondent was within his power to demand deposit of the duty before the appeal was heard and decided.

Section 35 of the Act gives a person aggrieved by any decision or order passed by the Central Excise Officer to file an appeal and the only restriction to this absolute right imposed in the section is that it should be filed within three months from the date of such a decision or order. It follows that if rule 215 is invalid, then the respondent's demand is also invalid.

The learned counsel for the respondent has relied on sections 37 and 38 of the Act for the validity of rule 215. The relevant portion of section 37 reads:—

"37(1) The Central Government may make rules to carry into effect the purposes of this Act.

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(2) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;

* * * * * *"

Neither section 37 nor the portion of this section reproduced above deals directly with right of appeal. It is, however, argued that these provisions are wide enough to enable the Central Government to impose restrictions on the right of appeal given by section 35 as these restrictions carry into effect the purposes of the Act, and in any case they relate to collection of excise duty and the manner in which such duties are to be paid. Undoubtedly this Act levies duties of excise on certain goods specified in the Act and provides the procedure for their collection. The liability of a particular person to pay excise duty and the amount payable is determined by the Central Excise Officer appointed under the Act. His decision, however, is subject to appeal to the Central Board of Revenue (section 35) and is revisable by the Central Government under certain circumstances under section 36 of the Act. It cannot be said to be the purpose of this Act to collect this duty even when the decision of the Central Excise Officer is under appeal, particularly when sections 35 and 36 do not lay down that the duty shall be collected before the appeal or revision is entertained. The restriction imposed by section 189 of the Sea Customs Act is of a substantial nature and

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seriously affects the substantive right of a party to file an appeal. The Supreme Court in *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh and others* (1), has described a restriction of this nature to be onerous and burdensome and as not affording adequate alternative remedy available to a party under Article 226 of the Constitution. The legislature never intended to circumscribe this right of appeal with restriction of such an onerous character as has been prescribed under the rules. If that had been the intention of the legislature, then this restriction would have found place in the Act itself. While collecting the duty no purpose of the Act can be said to be served by making the appeal dependent on deposit of the duty levied by the Central Excise Officer when the liability to pay and the amount payable are under dispute and are to be decided by the appellate authority. It is to be noticed that while detailing the matters on which the Central Government can make rules under section 37 the legislature did not mention the matter of appeal. It would be wholly improper to my mind to permit the Executive Government to impose restriction of this character on the ground that section 37 impliedly permits the making of such a rule. The legislature in section 35 has given absolute and unrestricted right to appeal subject to period of limitation from the decision of the Central Excise Officer and the right of the Central Government to make rules—however wide—cannot be held to include the right to impose fresh and onerous conditions before this right of appeal is exercised. Kennedy, J., in *The Queen* v. *Bird and others* (1), when dealing with a similar matter observed—

"I desire to deal only with the general question whether these rules are *ultra*

(1) A.I.R. 1954 S.C. 403
(2) (1898) 2 Q.B.D. 340, 346

> *vires* as being in excess of the powers granted to quarter sessions by statutory enactment. Now, to make an absolute rule which has the effect of debarring a man from the exercise of an absolute statutory right unless he complies with a number of requirements is, in my opinion, clearly *ultra vires.* * * * But that is not like the present case, where an absolute bar has been imposed upon the exercise of a statutory right in the form of a requirement, non-compliance with which will wholly prevent the objector from being heard. * * * *".

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In my opinion, this statement of the legal position fully applies to the present case. The liability to deposit the full amount of the duty levied before the appeal is heard may in some cases make it impossible for the aggrieved party to exercise this right of appeal. I am, therefore, of the opinion that rule 215 is repugnant to section 35 of the Act and goes beyond the scope of section 37 of the Act.

The learned counsel for the respondent then submitted that under section 38 of the Act all rules made by the Central Government after publication in the official gazette and subject to certain conditions with which we are not concerned in the present case have the effect "as if enacted in this Act". The learned counsel then argued that in view of this provision section 35 and rule 215 should be read together as part and parcel of the same Act, and as there is no repugnancy in these two provisions, effect should be given to both of them. I am unable to accept this contention. The only effect of section 38 is that the rules framed

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by the Central Government become statutory rules and must be so construed. Such rules, provided they have fulfilled all the conditions precedent to their validity, have to be construed as statutes are construed. If it were otherwise, it would be open to the rule-making authorities to make rules inconsistent or in conflict with policy and purpose of the parent Act, and then by virtue of the phrase "as if enacted in the Act" claim that the rules should be construed as part of the Act and should prevail as having been enacted subsequent to the parent Act. Such a conclusion would enable the rule-making authorities to ignore or supersede the legislative intentions expressed in the Act. Halsbury's Laws of England (Hailsham Edition) states the law in these terms:—

> "The Court is not precluded from inquiring into the validity of an order because the statute authorizing the making of the order provides that it shall have effect as if it were enacted in the statute (vide Vol. 31, section 575)."

For this statement of law reliance has been placed on *Minister of Health* v. *The King* (1). In that case the provisions of the Housing Act, 1925, were considered. Under that Act the scheme confirmed by the Minister became as effective as if it had been enacted in the Act. Viscount Dunedin held that if the scheme as confirmed by the Minister conflicts with the provisions of the Act, then it will have to give way to the Act. In that judgment it was also observed that if the scheme *per se* had been embodied in a subsequent Act, then it would prevail as a subsequent legislation. Viscount Dunedin discussed conclusion of Herschell,

(1) 1931 A.C. 494

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L. C., in *Institute of Patent Agents* v. *Lockwood* (1), in which case the Lord Chancellor had held that provisions as to the rule being of like effect as if they had been enacted in the Act, precluded inquiry as to whether the rules were *ultra vires* or not and relied on the following statement of law made by Herschell, L. C., in that case:—

> "No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

It will be noticed that the conclusion in *Institute of Patent Agents* v. *Lockwood* (1), is not precisely the same as in *Minister of Health* v. *The King* (2). This matter has been discussed by Craies on Statute Law at pages 282 to 283, and from this discussion it is clear that the legal position is not free from doubt. Craies at the end of this discussion has summed up the position as under :—

> "It appears then that the effect of the words 'as if enacted in this Act' still remains undecided and awaits an authoritative decision. Sir W. Graham-Harrison has

(1) (1894) A.C. 347
(2) 1931 A.C. 494

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exhaustively reviewed both *Lockwood's* case and the relevant cases in which it has been cited or dealt with judicially. His own opinion is that these words are merely a survival, a common form. which may originally have served a useful purpose, but which, in view of the decisions of the Courts, has long ceased to serve any purpose at all."

I have carefully considered the matter. In my opinion whether rule 215 is taken to be in conflict with section 35 or whether this rule is considered to be subordinate to the governing provisions of section 35, it must give way to that section. It is obvious that the rule is in conflict with the enactment. Section 35 gives unrestricted right of appeal subject to period of limitation to an aggrieved person while under rule 215 this right can be exercised only after onerous and burdensome conditions have been fulfilled and in some cases such conditions may effectively prevent an aggrieved person from exercising this right of appeal altogether. This rule has been made even though section 37 does not expressly authorize the Central Government to make rules relating to the right of appeal. In these circumstances I hold that the provisions contained in section 35 must prevail over those of rule 215 and the conditions laid down in this rule must be ignored in spite of the provisions of section 38 of the Act and should not be given effect to. This contention of the learned counsel for the respondent also fails. It follows, therefore, that the respondent's letter, dated 20th March, 1957, calling upon the petitioner firm to deposit the entire amount of the excise duty levied before the hearing of the appeal contravened section 35 of the Act.

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For these reasons, I accept this petition and direct the respondent to decide the appeal in accordance with law and not to dismiss it for non-payment of the excise duty during the pendency of the appeal. I leave the parties to bear their own costs.

B.R.T.