REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5297 OF 2008

M/s. The Bombay Dyeing & Mfg. Co. Ltd. .....Appellant(s)

Versus

The Commissioner of Central Excise ....Respondent(s)

J U D G M E N T

A.M. Khanwilkar, J.

1. This appeal is directed against the judgment and order dated 13.9.2007 passed by the High Court of Judicature at Bombay in Central Excise Appeal No. 237 of 2006. Briefly stated, the appellant is engaged in manufacture of cotton and man-made fabrics. According to the appellant, the fabric manufactured by the appellant was not amenable to excise duty since it was for captive consumption and not to be removed for the purposes of sale or for consumption as envisaged under Rule

9 read with Rule 49 of the Central Excise Rules, 1944 (for short, 'the Rules'). On this assertion and relying on the decision of the High Court of Delhi in ***J.K. Cotton Spinning & Weaving Mills Co. Ltd. & Ors. vs. Union of India & Ors.***[1], the appellant filed two writ petitions under Article 226 of the Constitution of India before the High Court of Delhi being Civil Writ Petition Nos. 1234/1981 and 1235/1981. The reliefs claimed in both petitions are identical except that they pertain to separate periods. We may reproduce the reliefs claimed in Writ Petition No. 1235/1981, for the sake of convenience. The same read thus: -

> "(a) Issue a suitable writ, order or direction declaring that duty of excise is not payable in respect of yarn (Cotton and man made) processed further in the petitioner's composite mills in the manufacture of fabrics:
>
> (b) Issue writ of certiorari or any other suitable writ, order or direction in the nature thereof quashing and setting aside the decisions and directives of the Central Board of Excise, respondent No.2, contained in circular letters dated 6.10.1976 (Annexure A), 24.9.1980 (Annexure B) and to quash the notices dated 23.4.1981 (Annexure C) and all similar notices referred to in the statement (Annexure D), dated 7.1.1981 (Annexure G) and dated 9.3.1981 (Annexure H):
>
> (c) Issue a writ of mandamus or any other appropriate writ, order or direction in the nature thereof, restraining the respondents from levying or collecting duty of excise in respect of yarn obtained by the petitioner at an intermediary stage in its composite mill for further processing in the manufacture of fabrics and to direct the

1 1981 (8) ELT 887 (Del.)

Board, respondent No.2, to cancel and/or withdraw the decisions and directives contained in circular letters dated 6.10.76 (Annexure A) and 24.9.80 (Annexure B) and to direct respondent 3 and 4 to cancel and/or withdraw the notice dated 23.4.1981 (Annexure C), 23.2.81 (Annexure G) and all similar notices referred to in the statement (Annexure D), dated 7.1.1981 (Annexure G) and 9.3.1981 (Annexure H) and to restrain defendants 3 and 4 from taking any steps or/proceedings pursuant to and in accordance with the aforesaid directives and notices.

(d) Issue a writ of prohibition or any other appropriate writ, order or direction in the nature therefore, restraining the respondent from collecting duty of excise on yarn obtained by the petitioner in its composite mill which is further processed in the manufacture of fabrics.

(e) Issue appropriate writ, order or direction directing the respondent to refund the amount of duty illegally recovered from the petitioner in respect of yarn obtained in the petitioner's composite mills and further processed in the manufacture of fabrics for the period commencing from 15.7.1977 in respect of cellulosic spun yarn and non-cellulosic spun yarn and from 17.3.1972 and in respect of cotton yarn and from 15.7.77 upto the date of disposal of the present writ petition and in particular the amounts referred to in statement (annexure E) together with interest at the rate of 12% p.a. and in the alternative to direct Respondents No.3 and 4 to grant the refund as per refund claims dated 13.5.1981 (colly.);

(f) In the alternative and without prejudice to the aforesaid prayers, to issue a writ of mandamus or any other writ, order or direction in the nature thereof direction the respondent not to collect duty of excise in respect of yarn upon sizing thereof processed in the manufacture of fabrics.

(g) In the alternative and without prejudice to the aforesaid prayers, issue writ of prohibition or any other writ, order or direction in the nature thereof, restraining the respondents from levying or collecting duty of excise in respect of yarn processed within the petitioner's composite mills on the basis of the weight of yarn after sizing thereof.

(h) To pass such other and further orders as may be deemed just and proper in the facts and circumstances of this case; and

(i) Award costs of the writ petition in favour of the petitioner."

2. During the pendency of the aforementioned writ petitions, the appellant filed Civil Miscellaneous Petition Nos. 1698/1981 and 1699/1981 in the concerned writ petitions, praying for interim reliefs. For the sake of convenience, the reliefs claimed in Civil Miscellaneous Petition No. 1699/1981 filed in Writ Petition No. 1235/1981 are reproduced below: -

"(a) grant order of stay permitting the petitioners forthwith to further process and use cellulose and non-cellulosic spun yarn, man-made filament yarn and cotton yarn in its composite mill in the manufacture of man-made fabric, cotton fabric and woollen fabric at nil rate of duty and to clear cotton fabrics forthwith upon payment of duty in respect of cotton fabric only (without payment of duty on cotton yarn) upon the petitioners undertaking to furnish the requisite bond in Form B-13 Rule 9B supported by a bank guarantee for an amount equivalent to 25% of the differential duty in respect of such yarn within three weeks hereof and to restrain the respondent 3 to 4 from taking any action or proceedings pursuit to the directives of the Board, respondent No.2 (Annexures A and B to the writ petition) and notices dated 23.4.1981 (Annexure C to the writ petition), and all similar notices referred to in the Statement (Annexure D), dated 7.1.1981 (Annexure G to the Writ Petition) and 9.3.1981 (Annexure H to the Writ Petition):

(b) grant exparte ad interim stay in terms of prayer (a) hereinabove : and

(c) pass such other and further orders as may be deemed just and proper."

3. The High Court of Delhi vide order dated 25.5.1981, while issuing notice on the said miscellaneous petitions, granted interim relief in terms of Prayer clause (a) reproduced above. In furtherance of the said interim relief, the appellant furnished an undertaking dated 2/10.3.1983 in order to secure the payment of differential tax to the Department of Revenue, Ministry of Finance (for short, 'the Department') in the event of dismissal of its writ petitions. The format of that undertaking was in conformity with the prescribed undertaking in Form B-13 referable to Rule 9B of the Rules, submitted by the assessee in the case of provisional assessment. Later on, the High Court modified the interim relief on 14.5.1985. The relevant portion of the modified interim relief reads thus: -

> "…there will be no stay with regard to future payments. During the pendency of the Writ Petition, where will be stay in respect of 50% of the disputed amount of duties claimed by the respondents as arrears on the condition that the applicant furnish Bank Guarantees or renew the Bank Guarantees already furnished and keep it in force till the disposal of the writ petition. With regard to the balance of 50% of the arrears of duty which is disputed, 25% of it shall be paid within 3 months from today. With regard to the remaining 25%, the parties will pay the same in two equal installments of 12½% each in every succeeding quarter. The 25% payment which is the first payment shall be made on or before 14th August, 1985, the second installment shall be made on or before 14th November, 1985 and the third and

> the last installment to complete the 50% will be paid on or before 20th February, 1986.
>
> There arrears of disputed duty which are required to be paid is only in respect of unsized yarn. Any duty claimed on sized yarn will not be paid by virtue of this order.
>
> There will be no duty payable on the sized yarn even for future till disposal of the writ petition.
>
> If any payments have been made through disputed, the same would be adjusted in accordance with what is provided in the order passed by us today……"

4. Pursuant to the modified interim relief, the appellant deposited 50% of its liability towards central excise duty in installments and continued to make future payments. The writ petitions were eventually disposed of on 10/12.3.1993 in the following terms: -

> "Counsel for the parties are agreed that this case is covered by the orders and directions issued by the Supreme Court in Civil Miscellaneous Petitions No.8869 of 1988 and others in Civil Appeals Nos.323 of 1984 and others in Rohit Mills Ltd. v. Union of India, dated 28th April, 1988 and it will be open to the petitioner to raise such other contention available to it before the adjudicating authority in response to the show-cause notices.
>
> Accordingly, we dispose of the writ petition in terms of the aforesaid orders of the Supreme Court, which should be read as part of our order. No order as to costs."

5. Consequent to the disposal of the writ petitions, the Assistant Collector of Central Excise vide letter dated 26.3.1993 addressed to the appellant, informed the appellant that Section

11A of the Central Excise Act, 1944 (for short, 'the Act') was not applicable to the facts of the present case. For, the amount was secured by the bank guarantee furnished by the assessee in terms of the interim order passed by the High Court of Delhi. Yet an opportunity was offered to the appellant to send its response. The said letter of the Assistant Collector reads as follows: -

> "OFFICE OF THE ASSTT. COLLECTOR OF CENTRAL EXCISE: DIVISION F-I 2ND FLOOR, MADHU INDUS ESTATE: P.B. MARG, WORLI, BOMBAY-13
>
> F.No.FI/FI/V(18)-3/81/1735 Bombay, the 26th March, 1993
>
> M/s. Bombay Dyeing & Manufacturing Co. Ltd.,
> (spring Mills),
> G.D. Ambedkar Road,
> Bombay-14.
>
> Gentlemen,
>
> Sub Delhi High Court CW.P. No.1235/81
> M/s. Bombay Dyeing & Mfg. Co. Ltd.
> Versus
> Union of India and OTHERS
>
> Please refer to various correspondences exchanged on the above said state subject.
>
> I have been directed to inform you that the aforesaid case was listed on 12.3.93 before Hon'ble the Chief Justice and Hon'ble Mr. Justice Anil Dev Singh, Delhi High Court, New Delhi.
>
> The aforesaid case is decided in view of the orders passed by the Supreme Court of India in the case of M/s. Rohit Mills Ltd. (copy attached herewith for your information and for further action please).
>
> Before complying the aforesaid orders of the Supreme Court of India in case of M/s. Rohit Mills Ltd., on which

case the Delhi High Court has disposed of the instant writ petition, this office would like to bring to your notice as under:

'As regards applicability of Section 11A and encashment of Bank Guarantee, it is pertinent to refer to the Hon'ble Supreme Court's order in Writ Petition No.848 of 1984 filed by M/s. Bhilwara Processor Ltd. and others, wherein the issue was in dispute i.e., whether department can enforce Bank Guarantees executed in terms of Court's order without issuing Show Cause cum Demand Notice under section 11A. In the above case, also, an interim order was passed on 20.2.84 by the Hon'ble Supreme Court of India restraining the department from levying and recovering the disputed portion of the duty of excise on the condition that petitioners of the case shall furnish the bank guarantee. The Bank guarantee was furnished and the writ petition was dismissed by the Hon'ble Supreme Court of India on 4.11.88. Thereafter the department asked the petitioners to take steps to enforce the Bank guarantee. Aggrieved with this action, they filed a Miscellaneous Writ Petition before Supreme Court of India stating that since no Show Cause cum Demand Notice was issued under Section 11A, no recovery beyond the period of 6 months can be effected. The above petition of M/s. Bhilwara Processors Ltd. was dismissed by Hon'ble Supreme Court of India by its order dated 29.11.88 (reported in Judgment Today Vol. (4) November Part 1988 (83) 330).

The similar order was passed by Rajasthan High Court vide order dt. 9.12.1988 in C.W.P. No.4441/88. In this case under similar circumstances, M/s. Modern Suitings also made the same grievances before Rajasthan High Court. The Hon'ble Rajasthan High Court placing reliance on the order dt. 29.11.1988 passed by the Hon'ble Supreme Court of India in the case of M/s. Bhilwara Processors Ltd. observed as under:-

> "Be that as it may, we are of the opinion that once orders of a Court, stay order is sought in respect of recovery of Excise Duty or any other duty for that matter and the stay order is conditional, on furnishing Bank Guarantee, if ultimately the writ petition is dismissed and stay order is vacated, the Bank guarantee can become encashable immediately. Therefore, we need not go into this question as to whether Section 11A is or is not attracted, we are of the opinion that because the petitioner furnished the

Bank guarantee, makes secured a stay order which was conditional as a result of which levy and recovery was stayed once writ petition has been dismissed and the stay order has been dismissed ……. The Bank guarantee has become encashable, neither it will be proper nor equitable for this Court to say or make an order that the Bank guarantee should not be encashed……."

With the above observation, we dismiss the writ petition with no order as to cost."

In view of the facts of the case discussed above, the Section 11A is not applicable in the instant case since the amount was secured by the Bank guarantee furnished by the assessee in terms of the stay order of Hon'ble Delhi High Court."

However, complying the orders given by the Supreme Court of India in case of M/s. Rohit Mills Ltd., this office would like to know whether petitioner desires Show Cause cum Demand Notice to be issued by the respondent i.e., Union of India, for the recovery of outstanding dues. If yes, the same may be confirmed by 31.3.93 so as to enable this office to take the action as directed by the Hon'ble Supreme Court of India in case of M/s. Rohit Mills Ltd. However, it will be nothing but the postponement of payment of Central Excise Duty, which is legitimate right of the Union of India, which was deprived by you by filing the instant writ petition, since 1981. If no, the consent letter should be submitted to this office for encashment of Bank guarantees, as early as possible.

Your early reply is awaited in this matter.

Yours faithfully,
Sd/- Illegible
(C.K. NIRBHAVANE)
ASSISTANT COLLECTOR
CENTRAL EXCISE DN. FI
BOMBAY-I"

6. The appellant in its response sent on 11.5.1993, asserted that the Show Cause Notice under Section 11A of the Act was mandatory and moreso in light of the decision of this Court dated

28.4.1988 in ***Rohit Mills Ltd. & Ors. vs. Union of India & Ors.***[2] The said communication reads thus: -

"OUR RE. NO. SM/E-1 11th May, 1993

The Assistant Collector of Central Excise,
Division F-1, IInd Floor,
Madhu Industrial Estate,
P.B. Marg, Worli,
Bombay-400013.

Dear Sir,

Your Ref. F.No.IV/CL-VI/30-84/FI/93/2295
Dated 2nd April, 1993.

Sub: Delhi High Court
Writ Petition No.1235/1981
Bombay Dyeing & Mfg. Co. Ltd.
(Spring Mill Unit) Vs. UOI & Ors.

1. This has reference to your above letter whereby you have intimated the date of hearing for finalizing the classification list in respect of cotton yarn and man made Yarn. Your attention is also drawn to your earlier letter F.No.FI/PI/V(18)-3/81/1705 dated 26.3.1993, whereby you desired us to intimate whether your would like a show cause notice to be issued u/s 11A of the Act.

2. We would draw your kind attention to the order passed by the Hon'ble High Court of Delhi dated 10.3.1993 whereby the above writ petition was disposed of on the basis of the order passed by the Hon'ble Supreme Court in the case of Rohit Mills Ltd. For your ready reference, we enclose herewith a copy of the aforesaid order passed in the case of Rohit Mills.

3. The directions issued by the Hon'ble High Court in the above matter on the basis of the directions issued as in the case of Rohit Mills contemplate that adjudication has now to be done pursuant to a Notice under Section 11A of the Act. It is specifically directed that in cases where such notice has been not issued, the Assistant Collector may issue such notice which should not go beyond 6 months. In

2 1988 (18) ECR 17 SC

the present case, no show cause notice under Section 11A has been issued and as such, as per the direction of the Hon'ble Supreme Court in the case of Rohit Mills Ltd., which direction also forms part of the order of the Hon'ble High Court disposing also forms part of the order of the Hon'ble High Court disposing of the above writ petition, your are now required to issue a Notice under Section 11A of the Act. On receiving such a notice, we shall raise our objections thereto and we reserve our right to do so.

4. You have kindly intimated that the hearing in the above matter is now fixed for 11.5.1993. We may mention here that before any hearing is taken up a show cause notice under Section 11A will have to be first issued and an opportunity be given to us to reply to the Notice. In this connection we may also mention that as per the orders of the Hon'ble High Court dated 10.3.1993, we have been given specific liberty to raise such other contentions as are available, before the adjudicating authority in respect to the show cause notice. We reserve our right to raise such contention as may be advised, in reply to the said show cause notice.

5. Although our contentions would be raised after the show cause notice under Section 11A is issued, we may clarify here that, in any event, no duty of excise is payable in respect of yarn after it is sized. In other words, duty of excise is not payable on the basis of the weight of the sized yarn. This has been clearly held in several decisions including the decision of the Hon'ble Supreme Court in the case of J.K. Cotton Spg. & Wvg. Mills Co. Ltd. and another vs. UOI (1987 (32) ELT 234). The attempt earlier made to levy duty of excise at the stage after yarn is sized, is patently illegal in view of the aforesaid decisions. The reference in your letter to provisional assessment is wholly irrelevant. In the first place, as per the directions of the Hon'ble High Court, adjudication has now to be done on the basis of show cause notice under Section 11A of the Act. Secondly for the reason that the provisionally if any, was in relation to dutiablity of yarn at the stage and the condition after sizing and did not relate to unsized yarn. In any event, the assessment has now to be done in terms of the directions of the Hon'ble High Court, after issuing a show cause notice under Section 11A of the Act. The adjudication can only be gone in accordance with the directions of the Hon'ble High Court.

> 6. We may mention here that although our contentions would be raised as and when a show cause notice is received, we may indicate that in any event, no duty of excise is payable in respect of the yarn obtained at the intermediate stage which is further processed within the factory, since it is not obtained at that stage in a marketable condition. We have already paid certain amounts towards duty of excise in respect of such yarn under protest during the pendency of the writ petition and upon decision of this issue, we would be entitled to claim refund thereof.
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> 7. Further contentions would be taken in reply to the show cause notice, which may be issued as per the directions of the Hon'ble Supreme Court. Under these circumstances, we would request you to first issue a show cause notice under Section 11A of the Act and then give us an opportunity to file a reply thereto and a hearing in that respect. The hearing already fixed for 11th May, 1993 may kindly be adjourned since the matter cannot be adjudicated without issuing a show cause notice under Section 11A of the Act as per the directions of the Hon'ble High Court.
>
> Yours faithfully,
> Sd/- Illegible
> [K.R. NAYAK]
> MANAGER"

7. The Assistant Collector of Excise vide order-in-original dated 19.8.1993 noted that the appellant had filed classified lists for its products which had been approved provisionally and the appellant had been directed to pay excise duty. He also noted the objection of the appellant about non-issue of a Show Cause Notice under Section 11A of the Act. However, he proceeded to finalize the classification lists by noting that the classification lists filed earlier by the assessee were treated as provisional.

8. In furtherance of the said order of the Assistant Collector, the Range Superintendent sent a letter dated 27.9.1993 to the appellant stating that all the RT-12 returns for the period of May, 1981 to May, 1985 for the items 18A, 18-III and 18E which had been assessed provisionally by the then Range Superintendent are assessed finally. By the same communication, he called upon the appellant to pay an amount of Rs.35,92,234.67 (Rupees thirty five lakhs ninety two thousand two hundred thirty four and sixty seven paise only) pursuant to the order dated 14.5.1985 passed by the High Court of Delhi. This was followed by a notice dated 7.10.1993 from the Assistant Collector of Central Excise addressed to the appellant reiterating the position that pursuant to the interim order passed by the High Court of Delhi, provisional assessments had been made and necessary endorsements to that effect were made on the classification lists, monthly RT-12 returns, etc. Further, the appellant was obliged to make good the arrears of disputed duty amounting to Rs.35,96,235/- (Rupees thirty five lakhs ninety six thousand two hundred thirty five only) for the period starting from 25.5.1981 to

13.5.1985, which had become payable. The appellant was called upon to pay the said amount within ten days, failing which the Department would take necessary steps to enforce the bank guarantees and recover the dues from the appellant.

9. Subsequent to the above notice, an opportunity of personal hearing was also given to the appellant on 19/20.10.1993 with respect to the recovery of dues. It appears that during the hearing, the appellant reiterated its stand that the Show Cause Notice under Section 11A of the Act was essential, including in terms of the order of the High Court of Delhi, dated 10/12.3.1993. The Assistant Collector of Excise, however, vide order-in-original dated 7/15.12.1993, confirmed the demand of excise duty. He held that in the present case, the duty liability itself was in dispute and the assessment could be made final only when the question of duty liability was decided by the High Court of Delhi, and once that issue was resolved, the question of issuing notice under Section 11A of the Act does not arise, especially when the appellant itself had voluntarily executed B-13 bonds and the assessments were treated as provisional, as

evinced from the endorsements on monthly RT-12 returns in that behalf.

10. The appellant carried the matter in appeal before the Commissioner of Central Excise (Appeals), who in turn, rejected the appeal vide order-in-appeal dated 31.5.2000. The Commissioner of Central Excise (Appeals) also upheld the demand for excise duty and rejected the plea taken by the appellant regarding the necessity to issue a Show Cause Notice under Section 11A of the Act.

11. The appellant then unsuccessfully carried the matter in appeal being Appeal No. E/2747/2000 before the Customs, Excise and Service Tax Appellate Tribunal (for short, 'the CESTAT'). That appeal was dismissed on 22.2.2006. Against that decision, the appellant filed Central Excise Appeal No. 237/2006 before the High Court of Judicature at Bombay under Section 35-G of the Act, which was eventually dismissed on 13.9.2007 following the decision of the Division Bench of the same High Court dated 7.9.2007 in First Appeal No. 2597/2005

titled as ***The Jam Shri Ranjitsinghji Spg. & Wvg. Mills Co. Ltd. & Anr. vs. Union of India & Ors.***[3].

12. To complete the narration of facts, it is relevant to mention that the relied upon decision was assailed before this Court in Civil Appeal No. 1551/2008 by the assessee therein, which was summarily dismissed on 7.3.2008, presumably at the admission stage.

13. The sum and substance of the view taken in the relied upon judgment, which involved similar facts, is that in a case such as this where B-13 bonds have been executed by the assessee and clear endorsement is made on the monthly RT-12 returns that it is a case of provisional assessment, the question of issuing a Show Cause Notice under Section 11A of the Act does not arise. The assessee in that case had relied on the decisions of this Court, which have been distinguished as inapplicable to the fact situation of the case under consideration. We shall advert to the detailed reasons noted in this decision a little later.

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3 2007 (109) Bom LR 2167

14. We may now advert to the issues raised by the appellant in the present appeal. According to the appellant, primarily two questions arise for consideration, which are as follows: -

> "1) Whether the demand for Central Excise for the period 25.05.1981 to 14.05.1985, as raised by the department, is barred by limitation?
>
> This question in turn is dependent upon the issue whether the assessment in this case could be said to be provisional assessment.
>
> 2) Could the respondent authorities have ignored the binding directions of the Hon'ble High Court of Delhi vide its Order dated 12.03.1993 to hold that no Show Cause Notice (SCN) was required in the present case as the assessments in question were provisional?"

15. It is urged that the purport of the order dated 10/12.3.1993 passed by the High Court of Delhi, while disposing of the writ petitions filed by the appellant clearly obliged the Department to issue a Show Cause Notice under Section 11A of the Act and to proceed against the appellant only in the manner permissible under the said provision in light of the dictum of this Court in ***Rohit Mills Ltd. (supra).*** It is urged that the dictum in ***Rohit Mills Ltd. (supra)*** formed part of the subject order of the High Court of Delhi and for which reason, it was not open to the Department to take a contrary stand. The approach of the authorities in not complying with the said obligation cannot

stand the test of judicial scrutiny. On the other hand, if the authorities were to follow the direction given by the High Court of Delhi, the demand for central excise duty for the period starting from 25.5.1981 to 13/14.5.1985 would be clearly barred by limitation. It is then urged that had the authorities adopted the route of provisional assessment, they were obliged to expressly state that position by passing an order. In the present case, no such order has been passed by the authorities. To buttress the argument that it is incumbent upon the authorities to pass formal specific order directing provisional assessment, reliance is placed on the circular issued by the Ministry of Finance (Department of Revenue) bearing number 26/1989 dated 24.4.1989. It is urged that the fact that the appellant had executed B-13 bonds or the monthly RT-12 returns purportedly treated as provisional assessment, can never be held against the appellant especially in light of the observation of the High Court of Delhi that a formal notice be issued to the appellant, which was the basis for disposing of the writ petitions. In support of the above arguments, the appellant would rely on decisions of this Court in ***Rohit Mills Ltd. (supra)***; ***The Bhopal Sugar***

Industries Ltd. vs. The Income Tax Officer, Bhopal[4]; ***R.B.F. Rig Corporation, Mumbai vs. Commissioner of Customs (Imports), Mumbai***[5]; ***Metal Forgings & Anr. vs. Union of India & Ors.***[6]; ***J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. Collector of Central Excise***[7]; ***Commissioner of Central Excise, Calcutta vs. Hindustan National Glass & Industries Ltd.***[8]; ***Kalabharati Advertising vs. Hemant Vimalnath Narichania & Ors.***[9]; ***Jagmittar Sain Bhagat & Ors. vs. Director, Health Services, Haryana & Ors.***[10]; and ***Coastal Gases and Chemicals Pvt. Ltd. vs. Assistant Collector of Central Excise, Visakhapatnam & Ors.***[11]***.***

16. The respondent, on the other hand, supported the reasons recorded by the authorities/Tribunal and would contend that being a case of provisional assessment, the question of issuing a

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4 1961 (1) SCR 474
5 (2011) 3 SCC 573
6 (2003) 2 SCC 36
7 (1998) 3 SCC 540
8 (2005) 3 SCC 489
9 (2010) 9 SCC 437
10 (2013) 10 SCC 136
11 (1997) 7 SCC 223

Show Cause Notice to the appellant under Section 11A of the Act does not arise. Whereas, the authorities acted as per the mandate of law and proceeded to pass final assessment orders after the disposal of writ petitions by the High Court of Delhi, and before passing such orders, opportunity of hearing was given to the appellant. According to the respondent, the order dated 10/12.3.1993 of the High Court of Delhi did not create any impediment for the authorities to proceed against the appellant in accordance with law. At best, the tenor of the order would suggest that if a Show Cause Notice is required to be issued and has not been so issued, authorities were free to issue such a notice and take decision thereon, after giving opportunity of hearing to the assessee. No more and no less. The High Court of Delhi could not have issued any other direction against the respondent, which would be in the nature of prohibiting the statutory functionary from discharging its statutory functions and obligations nor to absolve the appellant of its statutory obligation to pay excise duty, which otherwise was payable by the appellant but for filing of the writ petitions. Admittedly, the interim protection given to the appellant was conditional and the

appellant, acting upon the same, had submitted B-13 bonds, which pre-supposes that it was a case of provisional assessment and could be proceeded further as per law, after the disposal of the writ petitions. In that, it was not a case referable to Section 11A of the Act. The respondent is placing heavy reliance on the decision of the Division Bench of the High Court of Judicature at Bombay in the case of ***The Jam Shri Ranjitsinghji (supra)***, which has been upheld by this Court by dismissing Civil Appeal No. 1551/2008 on 7.3.2008. It is urged that the facts of the relied upon case and the present case are almost similar, if not identical. According to the respondent, the appeal is devoid of merits and the same be dismissed.

17. We have heard Mr. Kavin Gulati, learned senior counsel for the appellant and Mr. A.K. Sanghi, learned senior counsel for the respondent.

18. After cogitating over the rival submissions, the core issue that requires to be immediately addressed is about the purport of the order passed by the High Court of Delhi dated 10/12.3.1993, while disposing of the writ petitions filed by the appellant. The said order will have to be understood in the context of the stand

taken by the appellant before the High Court. In the said writ petitions, the appellant had asserted that the fabric manufactured by the appellant was not amenable to excise duty as it was not removed from the premises within the meaning of Rules 9 and 49 of the Rules. Indisputably, the purport of the stated Rules has been finally answered by this Court in ***M/s. J.K. Cotton Spinning and Weaving Mills Ltd. & Anr. vs. Union of India & Ors.***[12] after resolving the conflicting opinions of different High Courts including of the High Court of Delhi. The stand taken by the appellant in the writ petition has been negatived by this Court, in the said decision. Thus, the question relating to liability to pay excise duty was not and could not have been disputed by the appellant at least after this decision. Concededly, the appellant had filed writ petitions taking clue from the exposition of the High Court of Delhi in ***J.K. Cotton Spinning & Weaving Mills Co. Ltd. & Ors. (supra @ F.N.1)***. That view has been finally dealt with by this Court in ***M/s. J.K. Cotton Spinning and Weaving Mills Ltd. (supra @ F.N.12)***, fastening liability on the assessee to pay excise duty.

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12 1987 (Supp) SCC 350

19. Additionally, it may be apposite to underscore the purport of the interim conditional stay granted by the High Court of Delhi whilst entertaining the writ petitions filed by the appellant. Initially, vide order dated 25.5.1981, interim relief was granted in terms of the Prayer clause (a) of Civil Miscellaneous Petition No. 1699/1981, reproduced hitherto. By this Prayer clause, the appellant had expressed its willingness to file undertaking/bond in Form B-13 referable to Rule 9B supported by bank guarantee for an amount equivalent to specified differential duty in respect of the yarn in question. The said interim relief was then modified on 14.5.1985. The fact remains that the appellant voluntarily furnished requisite bonds in Form B-13 referable to Rule 9B supported by bank guarantee for equivalent amount of the differential duty. It is not an undertaking filed pursuant to the order of the Court. Concededly, the order disposing of the writ petitions does not absolve the appellant from the said bonds; nor the endorsements made thereon and on the monthly RT-12 returns, indicating that it was a provisional assessment have been ordered to be effaced. Suffice it to observe that the order dated 10/12.3.1993 passed by the High Court of Delhi, disposing

of the writ petitions filed by the appellant in no way extricate the appellant from the process to which the appellant had voluntarily submitted itself at its own volition, namely, under Rule 9B of the Rules. Thus, it was not a case of duty not levied or not paid or short-levied or short-paid. The understanding of the parties was absolutely clear that the appellant was liable to pay excise duty, but for the exposition of the High Court of Delhi in ***J.K. Cotton Spinning & Weaving Mills Co. Ltd. & Ors. (supra @ F.N.1)***. Understood thus, the appellant is obliged to fulfill its statutory obligations including those arising from the undertaking/bonds in Form B-13 and cannot resile from the process to which it had submitted itself without any demur, namely under Rule 9B of the Rules.

20. Indeed, the High Court of Delhi while disposing of the writ petitions vide order dated 10/12.3.1993, had adverted to the decision of this Court in ***Rohit Mills Ltd. (supra)***. On a fair reading of that decision, it is obvious that the Court dealt with two situations referred to therein. First, where Show Cause Notices under Section 11A of the Act have been served and the claim does not cover any period beyond six months from the date

of receipt of the notices. Second, where there is dispute as to whether the notice under Section 11A had been issued or not. In the present case, none of the above is attracted; and for the same reason the exposition in paragraphs 30 to 33 of ***M/s. J.K. Cotton Spinning and Weaving Mills Ltd. (supra @ F.N.12)***, on which reliance has been placed by the appellant, would be of no avail to the appellant.

21. Section 11A of the Act as applicable at the relevant time, would apply to cases of recovery of duties not levied or not paid or short-levied or short-paid etc. The Section, as applicable at the relevant time, read thus: -

> "11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. -
>
> (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid 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 this 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 one year, the words “five years” were substituted:
Explanation .—Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

(1A) When 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 misstatement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 11AB and penalty equal to twenty-five per cent. of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.

(2) Central Excise Officer shall, after 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:

Provided that if such person has paid the duty in full together with, interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice is served under sub-section (1) shall, without prejudice to the provisions of sections 9, 9A and 9AA, be deemed to be conclusive as to the matters stated therein:

Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the Central Excise Officer, shall determine the amount of duty or interest not being in excess of the amount partly due from such person.

(2A) Where any notice has been served on a person under sub-section (1), the Central Excise Officer,—

(a) in case 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 misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, where it is possible to do so, shall determine the amount of such duty, within a period of one year; and

(b) in any other case, where it is possible to do so, shall determine the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1).

(2B) Where any duty or excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of “one year” referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. —Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

Explanation 2. —For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

Explanation 3 .—For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of duty under this sub-section and interest thereon.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

(3) For the purposes of this section—

(i) "refund" includes rebate of duty of excise on excisable goods 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 periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical 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 date of adjustment of duty after the final assessment thereof;
>
> (c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund."

22. The case at hand, however, would come within the dispensation predicated by Rule 9B of the Rules, which deals with provisional assessment to duty. The same reads thus:-

> **"Rule 9B. Provisional assessment to duty.-** (1) Notwithstanding anything contained in these rules,-
>
> (a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or
>
> (b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or
>
> (c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further inquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal) for assessing the duty;
>
> the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in

such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed.

(2) xxx xxx xxx

(3) The Collector may permit the assessee to enter into a general bond in the proper form with such surety or sufficient security in such amount or under such conditions as the Collector approves for assessment of any goods provisionally from time to time:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Collector may in his discretion demand a fresh bond and may, if the security furnished for a bond is not adequate, demand additional security.

(4) The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee, shall pay the deficiency or be entitled to a refund as the case may be."

23. Indisputably, the appellant voluntarily executed bonds in Form B-13 referable to Rule 9B of the Rules and also furnished bank guarantee for an amount equivalent to the differential amount of duty in respect of the fabric in question. The authorities have made endorsements on the bonds and on the monthly RT-12 returns filed by the assessee, indicating that it was a case of provisional assessment. Having submitted to that

process, it is not open to the appellant to urge that an express order of provisional assessment has not been passed by the authorities.

24. Be that as it may, the stand taken by the parties as recorded in the order dated 10/12.3.1993, is limited to accepting the fact that if notice is required to be given, the same will be given and in that case it will be open to the appellant to file response thereto and further, the authorities would take decision after giving opportunity to the assessee. Nothing more can be read into the order dated 10/12.3.1993 passed by the High Court of Delhi. It is certainly not an order to undo the obligation accepted by the assessee by voluntarily executing the bonds in the prescribed format, namely, Form B-13 referable to Rule 9B of the Rules - to treat the process as provisional assessment until the disposal of the writ petitions. It is also noticed that the authorities have later on passed the final order after the disposal of the writ petitions.

25. A priori, the authorities have not violated any stipulation or direction contained in the order dated 10/12.3.1993 passed by

the High Court of Delhi and for having proceeded in accordance with law for the period between 25.5.1981 to 13/14.5.1985.

26. Reverting to the decision of the Division Bench of the High Court of Judicature at Bombay in ***The Jam Shri Ranjitsinghji (supra)***, similar argument was considered and the High Court, after detailed analysis, concluded that in a case such as the present one, it is not open to the assessee to insist for a notice under Section 11A of the Act, which has no bearing in cases of provisional assessment. The High Court of Judicature at Bombay, while dealing with similar arguments, observed thus:-

> "33. The question, therefore, to be considered is, firstly, whether circumstances for making provisional assessment existed in the present case and secondly, whether a provisional assessment order was made before clearance of the yarn for captive consumption?
>
> 34. With reference to the first contention, the argument of the appellant is that none of the circumstances for making provisional assessment set out in Rule 9B existed in the present case. Moreover, classification list and the price list were already approved, and therefore, there was no scope for making provisional assessment. There is no merit in this contention because under Rule 9-B(1)(c) of the 1944 Rules, even after the assessee has produced all the necessary documents and furnished full information for the assessment of duty it was open to the assessing officer to make provisional assessment either on a written request made by the assessee or if the proper officer deemed it necessary to make further inquiry. In the present case, admittedly there was a dispute pending before the Delhi High Court regarding the excisability of the yarn cleared for

captive consumption. Pending final decision of the Delhi High Court, it was open to the appellant to seek and to the proper officer to allow clearance of yarn for captive consumption on provisional assessment basis. In fact, in the B-13 Bond it is recorded that the appellant had sought provisional assessment. Even if the contention of the appellant that the B-13 Bond was executed at the instance of the excise authorities, is accepted, in view of the fact that a dispute was pending before the Delhi High Court, it was open to the proper officer to insist on clearing the yarn for captive consumption on provisional assessment basis.

35. The next question to be considered is, whether a provisional assessment order was in fact made before clearance of yarn for captive consumption on provisional assessment basis? It is not in dispute that during the period from May, 1981 to May, 1984 the appellant had cleared the yarn for captive consumption by executing B-13 Bond which is applicable to provisionally assessed goods. It is pertinent to note that the Delhi High Court by its interim order had not directed the appellant to execute B-13 Bond. Apart from B-13 Bond, there are various types of Bonds specified in Appendix I to the 1944 Rules, which could be executed by the appellant. The fact that the appellant claims to have executed the B-13 Bond at the instance of the revenue clearly shows that as per the directions given by the proper officer, the clearances have been effected on provisional assessment basis by executing B-13 Bond.

36. It is not the case of the appellant that B-13 bond was executed inadvertently or by mistake. Therefore, having consciously cleared the yarn for captive consumption on provisional assessment basis by executing B-13 Bond as directed by the excise authorities, it is not open to the appellant to contend that there was no order/directions to clear the yarn on provisional assessment basis."

27. The decisions of this Court, to which our attention has been invited by the learned counsel for the appellant, have been considered by the High Court of Judicature at Bombay. The High Court rightly observed that the said decisions have no

application to case of provisional assessment followed by a final assessment. While dealing with those decisions, the Court observed thus:-

> "39. At the outset, it may be noted that the observations made by the Apex Court in all the above cases regarding the issuance of notice under Section 11-A of the 1944 Act was in the context of the excise duty that became payable on account of the Apex Court upholding the validity of the amendment to Rule 9 and 49 of the 1944 Rules with retrospective effect from 28.2.1944. Obviously, the said observations were meant to apply to cases where the final assessments were already made and not in respect of cases where the assessments were provisional, because duty liability is determined only at the time of final assessment. In other words, what is held in all the above cases is that, in spite of the retrospective amendment to Rule 9 and 49 is upheld, where the assessments are already finalised the duty under the amended Rule 9 and 49 can be recovered only by issuing notice under Section 11A of the 1944 Act.
>
> 40. This is evident from the fact that in the case of J.K. Cotton Mills (supra) in respect of the clearances effected during the pendency of the dispute, there was no direction to clear the goods on provisional assessment basis. In that case, neither the goods were cleared by executing B-13 Bond nor there were any endorsements made on the RT-12 returns to the effect that the assessments were provisional. Moreover, in the show cause notice issued by the revenue it was not even averred that the goods were cleared on provisional assessment basis. In fact, Assistant Collector in that case treated the assessments as provisional solely on the premise that the matter was subjudice and the basic argument of the revenue was that the stay granted by the Delhi High Court virtually amounted to stay of service of notice under Section 11-A of the Excise Act. In the facts of that case, where the assessments had attained finality and where there was no evidence whatsoever to establish that the clearances were effected on provisional assessment basis, the Apex Court held that in the absence of an express order of provisional assessment made under Rule 9B, the assessments cannot be treated as provisional."

28. As noticed earlier, this decision of the High Court of Judicature at Bombay was assailed by the assessee before this Court by way of Civil Appeal No. 1551/2008, which came to be summarily dismissed on 7.3.2008. We are conscious of the fact that this Court had summarily dismissed the said appeal. Nevertheless, the view expressed by the High Court of Judicature at Bombay, as reproduced above, commends to us.

29. The appellant had placed emphasis on the decision in **The *Bhopal Sugar Industries Ltd. (supra)*** and ***R.B.F. Rig Corporation, Mumbai (supra)*** to contend that the Department cannot be permitted to take contrary position than the direction given by the High Court of Delhi. For the reasons indicated hitherto, in our opinion, the basis of this submission is ill-founded. The authorities have not been nor could be prohibited by the High Court of Delhi from proceeding with the matter in accordance with law. In the present case, all that the authorities have done is to follow the procedure consequent to provisional assessment, by passing a final order and raising demand on the

basis of that order. The appellant, as a matter of fact, in terms of the conditional interim order is obliged to discharge its obligation in terms of the bonds executed in Form B-13 and the monthly RT-12 returns filed from time to time for the relevant period.

30. It is not necessary for this Court to dilate on the other observations in the decision of the High Court of Judicature at Bombay in ***The Jam Shri Ranjitsinghji (supra)***. For the same reason, it is not necessary for us to deal with the exposition in ***Metal Forgings (supra)***. That decision has been pressed into service to assail the finding of the Commissioner of Central Excise (Appeals), who had observed that the order passed to finalize the assessment based on the RT-12 returns itself be treated as Show Cause Notice. It is not necessary to dilate further on this aspect.

31. Similarly, the exposition of this Court in ***Metal Forgings (supra)*** and ***Hindustan National Glass & Industries Ltd. (supra)*** to urge that specific order was required to be passed before an assessment is treated as a provisional assessment, will be of no avail considering the execution of bonds in Form B-13 by the appellant-assessee at its own volition, which is referable to

provisional assessment procedure under Rule 9B of the Rules. Once the appellant submitted itself to that procedure without any demur pending disposal of the writ petitions, it is not open to later on resile therefrom. Permitting the assessee to do so, would inevitably result in giving undue advantage and favour to the assessee, who had invoked the remedy under Article 226 of the Constitution of India and sought interim protection on offering to execute bonds in Form B-13 as is noted in the Prayer clause (a) of the civil miscellaneous petition(s). For the same reason, the circular issued by the Government of India pressed into service will be of no avail to the appellant. Further, the decisions in ***Kalabharati Advertising (supra)*** and ***Jagmittar Sain Bhagat (supra)*** will also be of no avail to the appellant. For, the appellant had voluntarily executed the bonds and also filed monthly RT-12 returns, on which endorsement had been made indicative of being a provisional assessment.

32. Taking overall view of the matter, we are of the considered opinion that the appellant cannot be allowed to approbate and reprobate - for inviting the High Court of Delhi to pass interim order stipulating that the appellant would execute bonds in Form

B-13 referable to Rule 9B of the Rules and continue to file monthly RT-12 returns from time to time, on which endorsements have been made indicating that it is a case of provisional assessment. The appellant cannot now be permitted to urge that it had not submitted to the process of provisional assessment as such for lack of a specific order of the concerned authority in that behalf. The order passed by the High Court of Delhi on 10/12.3.1993, will have to be understood in proper perspective and not to give undue advantage to or bestow favour on the appellant and thereby deprive the legitimate State exchequer.

33. Resultantly, this appeal deserves to be dismissed and the same is accordingly dismissed with no order as to costs. Pending interlocutory applications, if any, shall stand disposed of.

.....J
(A.M. Khanwilkar)

.....J
(Dinesh Maheshwari)

New Delhi;
December 9, 2019.