A. V. Venkateswaran, Collector of Customs, Bombay

Vs

Ramchand Sobhraj Wadhwani and Another

Civil Appeal No. 388 of 1956

(P. B. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta, A. K. Sarkar, N. Rajagopala Ayyangar JJ)

04.04.1961

JUDGMENT

AYYANGAR, J. –

This appeal by special leave is against the judgment and order of a Division Bench of the Bombay High Court by which a writ of mandamus or certiorari granted to the respondent was confirmed on appeal preferred by the appellant now before us.

A few facts are necessary to be stated to understand the matters in controversy and the points raised for our decision. The respondent carries on business in Bombay and he was granted on August 18, 1954, a licence under the Imports and Exports (Control) Act, 1947, for the import of fountain-pens at not less than Rs. 25 C.I.F. value each from soft currency area, up to a defined amount. He placed an order for the import of Sheaffer pens from Australia and a consignment of these was received by air in Bombay in October 1954. The fountain-pens thus imported had nibs which were gold plated and also caps and clips of similar composition. The question in controversy relates to the rate of duty to be charged on these imported pens. The Schedule to the Indian Tariff Act, 1934, has an item numbered 45(3) in relation to the article described as "fountain pens complete", the rate of duty being 30 per cent. ad valorem. It was the case of the respondent that the imported goods fell within this item and were liable to be charged with duty at that rate. The Custom authorities, however, considered that the consignment fell within the description "articles plated with gold or silver" being item 61(8) on which duty was payable at 78 3/4 per cent. The Assistant Collector of Customs adjudicated the duty on this latter basis and thereafter the respondent having filed an appeal to the Collector of Customs, the levy was upheld by order dated February 22, 1955.

Section 191 of the Sea Customs Act enables any person aggrieved by an order of the Collector of Customs to file a revision to the Central Government. The respondent, without resorting to this remedy, filed a writ application in the High Court of Bombay to quash the imposition of the duty at the higher rate (certiorari) and to direct the release of the goods on payment of duty at 30 per cent. (mandamus). The application was resisted by the Collector of Customs, who raised substantially two points : (1) that on the merits the goods imported were "gold-plated articles" notwithstanding their being fountain-pens and that the proper rate of duty was that which had been determined by the Assistant Customs Collector, (2) that the respondent had another remedy open to him, viz., to file a revision to the Central Government and that he was, therefore, disentitled to move the High Court under Art. 226 of the Constitution before availing himself of the remedy specially provided by statute. The writ petition came on for hearing before Justice Tendolkar, who by his order dated July 5, 1955, recorded that on any reasonable construction of the items in the Schedule to the Indian Customs Tariff, fountain-pens did not cease to be fountain-pens because they contained parts which

were plated with silver or gold and that so long as they were "fountain-pens complete", subject to any exceptional cases of which this was not one, only duty at 30 per cent. under item 45(3) could be levied. The learned Judge further held that the interpretation that he placed upon item 45(3) in the context of the other entries in the Tariff Schedule can "only be one and it is not reasonably possible for any person to take a contrary view". In other words, the learned Judge was of the opinion that the construction put upon the entry by the Customs authorities was unreasonable or perverse.

The objection to the writ petition based upon the petitioner before him not having exhausted the statutory remedies available to him was repelled by the learned Judge on the ground that on the facts the decision to levy duty at 78 3/4 per cent. was without jurisdiction. The petition was, therefore, allowed and the Customs authorities were, by order of Court, restrained from enforcing payment of any duty higher than 30 per cent.

The Collector of Customs filed an appeal against this order which was disposed of by a judgment delivered on behalf of the Bench, by Chagla, C.J. The learned Chief Justice was equally emphatic that no reasonable person could, on the construction of the relevant items in the Schedule to the Tariff Act, hold that the consignment of fountain-pens could fall under any item other than 45(3) or be charged a duty other than the 30 per cent. provided under that item. Dealing with the other point about the writ petitioner not having exhausted his statutory remedy of Revision to the Government, the learned Chief Justice disagreed with the view of the learned Single Judge that the Customs authorities lacked or exceeded their jurisdiction in assessing duty at a higher figure than was justified by the relevant items of the Schedule to the Tariff Act. The learned Chief Justice, after pointing out that it was the settled practice of the Bombay High Court not to entertain writ petitions by parties who had not exhausted their statutory remedies, however, held that in the case before the Bench the remedy of applying in Revision to the Central Government had become time-barred by the date of the hearing of the appeal and that on that ground he would not interfere with the order of the learned Single Judge. The appeal was, therefore, dismissed. The Collector of Customs having obtained special leave from this Court has brought this appeal before us.

The learned Solicitor-General appearing for the appellant argued the appeal on the basis that the view of the learned Judges of the Bombay High Court that on any reasonable interpretation of the items in the Schedule to the Tariff Act the consignment imported by the respondent could have been liable only to a duty of 30 per cent. under item 45(3) was correct. We might add that even apart from this concession for the purpose of argument, we entirely agree with the learned Judges that the tariff items in the Schedule are not reasonably capable of any other construction.

In reaching this conclusion we have taken into account the fact that "fountain-pens complete" were taken out of the general item 45 'Stationery etc.' under which they were originally included, by an amendment effected in 1949 in pursuance of an international agreement and that though the duty on stationery was thereafter increased from 30 to 37 1/2 per cent., under the provisions of the Finance Act, 1949, the duty of 30 per cent. fixed on fountain-pens remained unchanged. This at least showed that they were treated as a specialized class of stationery which required separate treatment. The only question therefore is whether a fountain-pen in which certain of its essential parts are gold or silver-plated falls outside the category of "fountain-pens complete". It cannot be gainsaid that a nib, cap and clip are essential parts of a fountain-pen and not mere accessories, and that without them there would be no question of having a "fountain-pen complete". Next it is a well-known and recognized fact that most fountain-pens in ordinary use have nibs which are gold-plated. In this connection it should not be overlooked that gold, apart from being a store of value, is a metal which has industrial uses by its malleability and its resistance to oxidation on contact with acids and

chemicals which enter into the composition of ink. The use of gold plating for nibs is therefore for increasing the utility of the nib for its primary function of writing and not with a view to enhancing its value by the cost of the metal. In the case before us it would be noticed that the pens permitted to be imported had to be not less than Rs. 25 each C.I.F. value, presumably with a view to protect the market for cheaper pens of indigenous manufacture. Most pens of the value specified in the licence, it need hardly be added, would have gold-plated nibs. It could certainly not be that it was the intention of the authorities that notwithstanding Entry 45(3) reading "fountain-pens complete" there could practically be no import of pens under that item, because with the limit of value prescribed in the licence, the permitted pens would mostly have gold-plated nibs. Different considerations might arise when gold or gold plating is used not for purposes essential for the utility of the pen as such, but merely as an addition to its value. These cases have been excepted by Justice Tendolkar and we endorse his remarks on this point. No such question arises on the pens imported by the respondent and it was obviously because of this, that the learned Solicitor-General did not address us on the correctness of the interpretation placed on relative scope of entries 45(3) and 61(8), by the learned Judges of the High Court.

The only point, therefore, requiring to be considered is whether the High Court should have rejected the writ petition of the respondent in limine because he had not exhausted all the statutory remedies open to him for having his grievance redressed. The contention of the learned Solicitor-General was that the existence of an alternative remedy was a bar to the entertainment of a petition under Art. 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est. In all other cases, he submitted, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners. In the present case, he urged, the High Court in appeal had expressly dissented from the reasoning of the learned Single Judge as regards the lack of jurisdiction of the Customs Officers to adjudicate regarding the item under which the article imported fell and the duty leviable thereon. Nor was there any complaint in this case that the order had been passed without an opportunity to the importer to be heard, so as to be in violation of the principles of natural justice. The learned Solicitor-General questioned the correctness of the reasoning of the learned Chief Justice in condoning the conduct of the respondent in not moving the Government in revision by taking into account the time that had elapsed between the date of the impugned order and that on which the appeal was heard. The submission was that if this were a proper test, the rule as to a petitioner under Art. 226 having to exhaust his remedies before he approached the Court would be practically a dead letter because in most cases by the date the petition comes on for hearing, the time for appealing or for applying in revision to the departmental authorities would have lapsed.

We see considerable force in the argument of the learned Solicitor-General. We must, however, point out that the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted other remedies open to him under the law, is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which Courts have laid down for the exercise of their discretion. The law on this matter has been enunciated in several decisions of this Court but it is sufficient to refer to two cases : In Union of India v. T. R. Varma [[1958] S.C.R. 499, 503, 504.], Venkatarama Ayyar, J., speaking for the Court said :

> "It is well-settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special

> jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this Court in Rashid Ahmed v. Municipal Board, Kairana [[1950] S.C.R. 566.], 'the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs'. Vide also K. S. Rashid and Son v. The Income-tax Investigation Commission [[1954] S.C.R. 738.]. And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Art. 226, unless there are good grounds therefor."

There is no difference between the above and the formulation by Das, C.J., in The State of Uttar Pradesh v. Mohammad Nooh [[1958] S.C.R. 595, 605-607.], where he observed :

> "..... It must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

After referring to a few cases in which the existence of an alternative remedy had been held not to bar the issue of a prerogative writ, the learned Chief Justice added :

> "It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari."

In the result this Court held that the existence of other legal remedies was not per se a bar to the issue of a writ of certiorari and that the Court was not bound to relegate the petitioner to the other legal remedies available to him.

The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor-General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court.

The question that we have now to consider is has the discretion which undoubtedly vested in the Court been so improperly exercised as to call for our interference with that order. We might premise this discussion by expressing our opinion on two matters merely to prevent any misunderstanding. First we entirely agree with Chagla, C.J. that the order of the Assistant Collector of Customs in assessing duty at 78 3/4 per cent. or of the Collector of Customs in confirming the same, was not void for lack of jurisdiction. The interpretation they put on the relevant items in the Tariff Schedule might be erroneous, even grossly erroneous, but this error was one committed in the exercise of their jurisdiction and had not the effect of placing the resulting order beyond their jurisdiction. Secondly, as we have already indicated, we must express our dissent from the reasoning by which the learned Judges of the High Court held that the writ petitioner was absolved from the normal obligation to exhaust his statutory remedies before invoking the jurisdiction of the High Court under Art. 226 of the Constitution. If a petitioner has disabled himself from availing himself of the statutory remedy by his own fault in not doing so within the prescribed time, he cannot certainly be permitted to urge that as a ground for the Court dealing with his petition under Art. 226 to exercise its discretion in his favour. Indeed, the second passage extracted from the judgment of the learned C.J. in Mohammad Nooh's case [[1958] S.C.R. 595, 605-607.] with its reference to the right to appeal being lost "through no fault of his own" emphasizes this aspect of the rule.

The question, however, still remains whether in the circumstances of this a case we should interfere with the decision of the High Court. In considering this, we cannot lose sight of three matters : (1) that the levy of the duty at 78 3/4 per cent. was manifestly erroneous and cannot be supported on any reasonable construction of the items in the Tariff Schedule, (2) it was stated by the Customs authorities in answer to the writ petition, in the grounds of appeal to the High Court under the Letters Patent, as also in the statement of case before us, that the Central Board of Revenue had issued a ruling to the effect that fountain-pens with nibs or caps which were gold-plated fell within item 61(8). This might be some indication that the adjudication by the Assistant Collector of Customs and by the Customs Collector on appeal was in pursuance of a settled policy of the entire heirarchy of the department. Without going so far as to say that a Revision to the Central Government might in the circumstances be a mere futility, we consider that this is not a matter which would be wholly irrelevant for being taken into account in disposing of the appeal before us. After all, the basis of the rule by which Courts insist upon a person exhausting his remedies before making application for the issue of a prerogative writ is that the Court's jurisdiction ought not to be lightly invoked when the subject can have justice done to him by resorting to the remedies prescribed by statutes. (3) Lastly, the learned Solicitor-General does not dispute the correctness of the principle of law as enunciated by Chagla, C.J., his complaint is that the law as laid down by the learned Chief Justice has not been properly applied to the facts of the case before him. If the challenge to the judgment of the High Court were of the former type, this Court might have to interfere to lay down the law correctly lest error creep into the administration of justice. But where the error is only in the application of the law correctly understood to the facts of a particular case, we should be persuaded that there has been a miscarriage of justice in the case before us before being invited to interfere; and this the learned Solicitor-General has not succeeded in doing. It would be remembered that the question is not whether if the respondent's application were before us, we should have directed the writ to issue, but whether the learned Judges of the High Court having in their discretion which they admittedly possessed made an order, there is justification for our interfering with it. The two matters set out earlier should suffice to show that no interference could be called for in this appeal.

We consider, therefore, on the whole and taking into account the peculiar circumstances of this case that the High Court has not exercised its discretion improperly in entertaining the writ application or

granting the relief prayed for by the respondent and that no case for interference by us in an appeal under Art. 136 of the Constitution has been made out. The appeal fails and is dismissed with costs.

SARKAR, J. –

In this case the respondent had imported a certain number of fountain-pens plated with gold. The goods were assessed to import duty by an assessing officer of the Indian Customs under item 61(8) of the first schedule to the Customs Tariff which dealt with "Articles, other than cutlery and surgical instruments, plated with gold or silver" and provided for a duty of 78 3/4 per cent. ad valorem. The respondent appealed from this assessment to the Collector of Customs under s. 188 of the Sea Customs Act, 1878, on the ground that the assessment should have been under item 45(3) of that schedule which dealt with "Fountain-pens, complete" and provided for a duty of 30 per cent. ad valorem. He did not dispute that the fountain-pens imported by him were gold plated. His appeal was dismissed. The respondent then moved the High Court at Bombay for a writ to quash the order of assessment under item 61(8). The application was allowed by Tendolkar, J., who issued a writ of mandamus directing the Collector of Customs to release the goods upon payment of the duty specified in item 45(3). The appeal by the Collector of Customs from the order of Tendolkar, J., to an appellate bench of the High Court was dismissed. The Collector has therefore filed the present appeal.

The first question is, whether the writ should have been refused on the ground that the respondent had another remedy, namely, an application to the Central Government under s. 191 of the Sea Customs Act to revise the order of the Collector. Tendolkar, J., held that the writ could issue though the other remedy had not been pursued, as the order of assessment under item 51(8) was without jurisdiction. This was clearly wrong. The Collector had ample jurisdiction to decide under which item in the schedule the fountain-pens had to be assessed to duty, and if he made a mistake in his decision that did not make his order one without jurisdiction : cp. Gulabdas & Co. v. Assistant Collector of Customs [A.I.R. 1957 S.C. 733.]. The learned Judges of the appellate bench held that the writ was properly issued, not because the assessing authority had no jurisdiction to assess the goods under item 61(8), but because at the date the matter had come before them, the other remedy had become barred. This again is, in my view, plainly erroneous for a party who by his own conduct deprives himself of the remedy available to him, cannot have a better right to a writ than a party who had not so deprived himself. Normally - and the present has not been shown to be other than a normal case - a writ of mandamus is not issued if other remedies are available. There would be stronger reason for following this rule where the obligation sought to be enforced by the writ is created by a statute and that statute itself provides the remedy for its breach. It should be the duty of the courts to see that the statutory provisions are observed and, therefore, that the statutory authorities are given the opportunity to decide the question which the statute requires them to decide.

The fact that the Central Government had on a prior occasion decided, as appears in this case to have happened, that fountain-pens of the kind which the respondent had imported, were liable to duty under item 61(8) cannot furnish any reason justifying a departure from the normal rule or the issue of a writ without that government having been moved under s. 191. This prior decision of the Central Government could be a reason for such departure only on the presumption that it would not change its view even if that view was shown to be incorrect. I cannot imagine that a court can ever make such a presumption. Therefore, it seems to me that it would have been proper to refuse the writ on the ground that the respondent had another remedy available to him which he had not pursued. On the present occasion, however, I do not wish to decide the case on that ground.

Next, I feel the gravest doubt if the case is one for the issue of a writ of mandamus. It is of interest to observe that the respondent had in his petition to the High Court himself asked for a writ of certiorari. A writ of mandamus issues in respect of a ministerial duty imposed by a statute; it cannot issue where the duty to be performed is of a judicial nature, except for the purpose of directing that the judicial duty should be performed, that is, a decision should be given on the question raised. In John Shortt's book on Informations, Mandamus and Prohibition it is stated at p. 256 :

> "If the duty be of a judicial character a mandamus will be granted only where there is a refusal to perform in any way; not where it is done in one way rather than another, erroneously instead of properly. In other words, the Court will only insist that the person who is the judge shall act as such; but it will not dictate in any way what his judgment should be.
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> If, however, the public act to be performed is of a purely ministerial kind, the Court will by mandamus compel the specific act to be done in the manner which to it seems lawful."

It does not seem to me that the duty which the Sea Customs Act created and the performance of which was sought to be enforced by a writ in the present case, can properly be said to be a ministerial duty. That duty was to decide which item in the Customs Tariff was applicable to the respondent's goods and to realise the customs duty specified in that item. In so far as the statute required the officer to realise the Customs levy, I find it difficult to see how it can be said to be a public duty to the performance of which the respondent had a legal right and without this right he was not entitled to the mandamus : see Ex parte Napier [(1852) 18 Q.B. 692.]. In so far again, as the Act required the Customs Officer to choose the proper item in the Customs Tariff for assessment of the customs levy on goods, it in my view involves performance of work of a quasi-judicial nature. The observation of Das, J., in Province of Bombay v. K. S. Advani [[1950] S.C.R. 621, 725.], which I am about to read, fully fits this case : "If a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially." Now the Sea Customs Act empowers the Customs authorities to impose a certain duty on goods imported and this no doubt prejudicially affects the importer. The Act further clearly requires the authorities to proceed judicially in imposing that duty when a dispute arises, that is, after giving a hearing to the party affected : see ss. 29, 31 and 32 of the Act. In this case a hearing was in fact given to the respondent. This taken with the provisions as to a right of appeal from the decision of the first assessing officer and as to the right to move the government in revision from the decision in the appeal, would clearly indicate that the authorities have to act judicially. In Gulabdas & Co. v. Assistant Collector [A.I.R. 1957 S.C. 733.] this Court proceeded on the basis that the duty of assessing the customs levy was of a judicial nature. Therefore I feel the gravest doubt, if the present is a case where a mandamus could at all issue.

No doubt if a mandamus could not issue because the act which the statute required to be performed was not a ministerial one but judicial in its character, the case might be a fit one for the issue of a writ of certiorari. But that writ cannot, in any event, issue unless the proceedings disclosed an error apparent on their face. In issuing a certiorari again, the Court does not examine the judicial act questioned as if it was hearing an appeal in respect of it : see Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale [[1960] 1 S.C.R. 890, 901.]. I do not propose to discuss this question further in the present case, for it was not considered by the High Court nor raised at out

bar. I proceed on the basis that it was a case where an application for a mandamus lay.

The respondent, in substance, asked for and obtained a writ directing the Customs authorities to release the goods on payment of duty at the rate of 30 per cent. ad valorem as prescribed by item 45(3). This was on the basis that the duty should have been levied under that item and not under item 61(8) as the Customs authorities had done.

The question then is, was there a clear duty on the assessing authorities to assess the goods under item 45(3) dealing with "Fountain-pens, complete" and not to do so under item 61(8) dealing with "Articles, other than cutlery and surgical instruments, plated with gold". All the learned Judges of the High Court agreed that this clear duty had to be established before the respondent could be held entitled to a mandamus and they found that the Act created such a duty. They said that item 45(3) was a specific provision and therefore it had to be applied in preference to item 61(8) which was a general provision. I am unable to agree with this view.

What, apparently, the learned Judges had in mind and applied, was the rule of construction of statutes that when two provisions in an Act are inconsistent with each other, if one is specific and the other general, the specific provision prevails over the general. Now, this rule like all other rules of construction, derives its justification from the fact that it assists in ascertaining the intention of the legislature. The reason why it so assists is this. When two provisions enacted by the legislature, are inconsistent and one cannot operate at all if the other is given full effect, a question arises as to what the legislature intended. Clearly, it could not have intended that a provision that it enacted should have no operation at all. Therefore it is to be presumed that the legislature intended that both the provisions would at least have some effect, if they could not have their full effect. The rule under discussion gives effect to this presumed intention of the legislature. In order to give effect to this intention, the rule provides that the provision with a narrower scope of operation should have effect so far as it goes, in preference to the provision with the larger scope of operation so as to restrict the operation of the latter which, without such restriction, would have wiped the narrower provision out of the statute book altogether. This rule permits both the provisions to have effect; it reduces the scope of one and prevents the other from becoming a dead letter. This aspect of the rule would, I believe, appear clearly from a statement of it by Sir John Romilly in Pretty v. Solly [(1859) 26 Beav. 606; 53 E.R. 1032.] which I now set out :

"The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

The test of the applicability of the rule, therefore, is that one enactment must overrule the other. The one overruled is called specific only in comparison with the other which is in the same way only, called general. There need be nothing inherent in the nature of the enactments which, apart from a consideration of their comparative scopes, mark one out as specific and the other as general. When one overrules the other, it must include within its scope that other and so becomes general in comparison with the other. If two provisions were merely in conflict with each other, each affecting the other and none overruling the other and itself remaining in force, no question of calling one general and the other specific would arise.

I should suppose, when Sir John Romilly talked of one enactment overruling the other, he meant completely overruling. That would make the rule sensible for, then it would clearly be a guide to the

intention of the legislature which is that, all the provisions are intended to have effect. This reason to support the rule would not exist if it was applied to a case where the provisions only partially affected each other for, then, both the provisions would have at least some operation. It would further be impossible to say from a comparison of the degrees of the effect of each on the other, if such comparison was possible, what the intention of the legislature was. I am not aware that it has ever been said that when two provisions partially affect each other, without one completely overruling the other, the legislature intended the one less affected should yield to the other or even the other way about. To such a case the rule would, in my view, have no application.

The present is a case of that kind. I now confine myself only to items 45(3) and 61(8) for, no question as to any other item in the Tariff arises for applying the rule. If gold plated fountain-pens were assessed under item 61(8), there would still be plenty of scope left for item 45(3) to operate upon, for, there would be many kinds of complete fountain-pens without gold plating. Likewise also if gold plated fountain-pens were assessed under item 45(3), there might be many other gold plated articles for being assessed under item 61(8). Item 61(8) cannot be said to overrule item 45(3) completely. Item 61(8) cannot be said to be a general provision and item 45(3) a specific one. There is no scope here of applying the rule giving effect to a specific enactment in preference to the general.

What then should be done ? Under which item should the gold plated fountain-pens then be assessed to duty ? In my view, they were properly assessed under item 61(8). The item is clearly intended to apply to all gold plated articles other than the two expressly excepted, namely, cutlery and surgical instruments. There is no reason why this intention should not be given effect to. The Customs Tariff Schedule no doubt makes separate provisions for various individual articles. A fountain-pen is one of such articles. If a gold plated fountain-pen is for the reason that fountain-pens are separately provided for, to be taken out of item 61(8), all other articles separately dealt with in the schedule would have for the same reason, to be taken out of that item even though they happen to be plated with gold. The result of that would be that item 61(8) would apply to those articles which are not separately provided, and as Customs Tariff Schedules are made as exhaustive as they can be, there would be very few articles, if any, left to which item 61(8) might be applied. It does not seem to me that this could have been intended.

Item 61(8), as already stated, is intended to take in all gold plated articles except cutlery and surgical instruments. A proper construction of this item must give effect to this intention. Item 45(3) applies to fountain-pens. Now it is not necessary for a fountain-pen to be gold plated at all. Indeed the large majority of them are not gold plated. It is true that a fountain pen does not cease to be a fountain pen because it is plated with gold. It is, however, equally true that a gold plated fountain-pen is an article plated with gold. A fountain-pen may or may not be gold plated but a gold plated article can only be a gold plated article. Therefore, it seems to me that item 45(3) was intended to apply to fountain-pens simpliciter, that is, without gold plating or other embellishments which might properly bring them under another item in the schedule. This, in my view, would best harmonise the different items in the Tariff schedule and carry out the intention of the legislature. This can be illustrated by an example. Suppose a fountain-pen was studded with diamonds. Could it then be said that the legislature intended to impose on them a duty of 30 per cent. ad valorem under item 45(3) and the diamonds were not intended to be assessed under item 61(10) which deals with jewels and provides for a higher duty. I do not think that a possible view to take.

I think, therefore, that the assessment in the present case under item 61(8) was proper. I would hence allow the appeal.

BY COURT :

In accordance with the opinion of the majority, this appeal is dismissed with costs.

Appeal dismissed.

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