

(2001) 09 BOM CK 0013

In the Bombay High Court

Case No : Writ Petition No. 1454 of 1989

Adhunik Synthetic Limited

APPELLANT

Vs

Municipal Council, Jalgaon and Another

RESPONDENT

Date of Decision : 07-09-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Municipalities (Octroi) Rules, 1968 — Rule 16, 2(28), 24, 25, 26
Maharashtra Municipalities Act, 1965 — Section 169, 2(28)

Citation : (2002) 1 ALLMR 532 : (2002) 1 BomCR 115 : (2002) 1 BOMLR 140 :
(2002) 1 MhLj 27

Hon'ble Judges : N.V. Dabholkar, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : N.K. Kakade, for the Appellant; N.H. Patil, for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—This petition filed under Article 226 of the Constitution, seeks a writ of Mandamus against the Municipal Council, Jalgaon, to grant exemption from payment of octroi under Rule 24(3) (4) of the Maharashtra Municipalities (Octroi) Rules, 1968, in respect of the import of partially oriented yarn which is exported after text rising/processing by the petitioner company, at its factory at Jalgaon.

2. The petitioner is a public limited company, registered under the Companies Act, 1956 with its registered office at Kandivali (West), Mumbai and it established a factory for processing of yarn at plot No. J/49, Additional M.I.D.C. Area, Jalgaon. The said Factory is registered under the Factories Act, 1948, and commenced its production sometimes in January, 1987. There is no dispute that the factory is located within the limits of the Municipal Council, Jalgaon, it paid octroi duty under protest till September 1989 and from October 1989, it stopped payment of the same on the grounds that the partially oriented yarn (commonly known as P.O.Y.) was imported within the municipal limits and exported after its

processing and was thus exempted from payment of octroi. The company claimed exemption for payment of octroi as well as refund of the amount paid under protest from January 1987 to September 1989. This was not conceded to by Municipal council and therefore, the petitioner approached us seeking a writ of Mandamus and for declaration that it was so entitled.

3. The petitioner contends that the P.O.Y. Is procured by its head office from various parties and more particularly from the Reliance Industries, Patalganga, and the said yarn is processed at the factory at Jalgaon and thereafter is exported to the company's godown at Bhiwandi. The yarn imported by the petitioner within the limits of Jalgaon Municipal Council is meant for temporary detention and its eventual export is done after processing and therefore, the petitioner is entitled for exemption on payment of octroi duty as provided under Rule 24(3)(4) of the Octroi Rules. During the processing of the P.O.Y. no new commercial product comes into existence after text rising process and no manufacturing operation is carried out when the process is undertaken. The petitioner further contends that merely processing /text rising as done in the factory at Jalgaon, does not amount to any manufacturing activity and therefore, producing any new product. There is no question of consumption, use or sale of the yam by the petitioner within the limits of Municipal Council, Jalgaon and therefore, it is not liable to pay octroi duty. The Municipal Council, ought to have refunded the amount right from the first day by applying the provisions of Rule 24(3)(4) of the Octroi Rules urges the petitioner. The petitioner has also relied upon a decision of this court in the case of Dimple Silk Mills Pvt. Ltd. and Anr. v. Municipal Council, Amravati and Anr. (W. P. No. 1363 of 1987) handed down by the Division Bench on 4/5-10-1988. In addition, the petitioner has also relied upon the following decisions of the Supreme Court.

1. *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, . *Tata Engineering and Locomotive Company Limited and another Vs. The Municipal Corporation of the City of Thane and others*, , 3. *HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another*, 4. *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, . 5. *Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others*, .

The petitioner also relies upon another decision of this Court in the case of *Khadelwal Traders Vs. The Akola Municipal Council*, .

4. The Municipal Council, has opposed the petition and stated that the petitioner was not entitled for exemption from payment of octroi duty as it was subjecting the P.O.Y. to various processes in its factory so as to strengthen the yarn and convert it in its better utility and was thus carrying out a manufacturing activity. The affidavit specifically states that the law laid down by this Court in Writ Petition No. 1363/1987 is not applicable to the petitioner's case. Regarding the nature of activities/processing as undertaken by the petitioner in its factory, the affidavit states thus :--

"I say that the petitioner firm imports gray yarn which is coarse and which is subjected to the process of bleaching and mercerizing. Similarly, there is also a dyeing process by which different colours are given to the yarn and therefore, comes out a new product known as "twisted textures dyed yarn". I respectfully submit that by adopting different processes by the petitioner in the factory, the coarse form or appearance is very much changed and after processing and mercerizing along with dyeing, a new product comes out from the factory. On account of the work, the yarn gets greater strength and much more luster and also different appearance because of dyeing. I further submit that the concept of consumption, use or sale cannot be restricted only to the final act and therefore, use in the continuing process of manufacture of the final product attracts payment of octroi duty. I, therefore, submit that the petitioner is not entitled for any exemption from the payment of octroi duty."

5. The Municipal Council has taken a preliminary objection regarding the maintainability of the petition in view of the provisions of Section 169 of the Maharashtra Municipalities Act, 1965 (Municipalities Act for short). It is in short submitted that there was a statutory remedy of appeal available to the petitioner and therefore, the petition could not have been entertained. While granting Rule, interim relief in terms of prayer Clause (e) was ordered subject to the condition that the petitioner would not be entitled to actual refund, during the pendency of the petition, by order dated 9-8-1989. By order dated 6-12-1991 this Court appointed a textile expert by name Shri M. R. Kaulgud, to undertake the study of the operations of the petitioner's factory and submit a report. This order was challenged in S. L. P. No. 4114/1992 and while disposing of the said S. L. P. by order dated 20-7-1992 the Supreme Court held that the report of the Textile Expert would not be conclusive without any opportunity to either of the parties to challenge its contents or content. We are now informed that the petitioner did not pay the octroi duty pursuant to the interim order passed by this Court and subsequently the operations of the factory at Jalgaon are closed some times in 1997 as stated by the learned counsel for the petitioner.

6. Shri Kaulgud, the textile expert visited the petitioner's factory on 30-1-1992, studied the operations and submitted his report on 11-1-1992. He concluded that the petitioner factory had no bleaching and mercerizing machineries in the factory, in the operations of such machinery bleaching operation of any kind is not feasible in the factory premises, as a fact no bleaching operation is carried or possible to carry out in the petitioner's factory with the existing machineries, mercerizing for polyester filament yarn is not required at all and not possible and the same operation is required only for cotton yarn or cotton fabrics. The findings so submitted have been disputed by the Municipal Council by filing rejoinder and along with the same the Municipal Council has brought on record the opinion of two other Textile experts appointed by it. These two experts namely Shri Madhubhai N. Shah and Shri M. I. Bharambe, visited the petitioner's factory and submitted their report dated 4-1-1992 and concluded as under :--

"(i) The Imported Partially Oriented Yarn - a raw material is first taken to text rising machine where POY is given following treatment:

(a) twisted, (b) stretched resulting in reduction of diameter-receiving luster and more strength, (c) received heat treatment at 190 C. The raw POY thus becomes Fully Oriented Yarn and is known as Polyester textures Yam.

(ii) Thus treated POY was further passed through Twisting Machine where it receives more twist and strength and is ready for further process of Dyeing or to be exported, (iii) it is further taken for Cheese Winding for Dyeing if not sent for Packing. Here different colours as per requirement are fast dyed in high pressure high temperature vertical Chamber and sent for packing for export.

Thus, we came to the conclusion that the Raw POY goes through manufacturing processes -Twisting-Stretching resulting in Diameter Reduction, getting more strength and luster and put text rising, heat treatment and dyeing.

Thus, it is not same POY (which was imported as raw material) and goes out as a totally New Product Known as Polyester textures Yarn."

7. In the case of Dimple Silk Mills Pvt. Ltd. (supra) similar question arose before this Court (Nagpur Bench). The factory at Amravati was importing raw yarn known as partially oriented yarn (POY) and after processing it was exported to its head office at Mumbai. The plea of the petitioner was that the yarn which was imported was subsequently exported after its process, it did not attract the payment of octroi duty and therefore, it was entitled to the benefit of exemption under Rule 24(4) of the Octroi Rules. In that factory the production had commenced sometimes in January 1987 and the claim for exemption was declined by the Municipal Council/Corporation. The petitioner in that case had described the process work in the following words :

"POY is first passed through vapour faced heater, maintaining a temperature of around 105 degree centigrade, which softens the yarn. The same is thereafter taken to the twin spindles in which the yarn is twisted and thereafter in second set of spindles is again de-twisted. This de-twisted yarn is once again heated to give the yarn its original shape. (POY is called textures yarn after the above processing). Due to the twisting and de-twisting process, the strength of the yarn is improved to enable the yarn to bear the shocks during the weaving of cloth and this process is commonly called as "text rising", the whole object of this process is to strengthen the POY."

This Court accepted the petitioner's plea that as a result of the process carried out by the petitioner, no new commercial product came into existence and the process thus undertaken did not amount to a manufacturing operation, resulting into a new commercial commodity. This Court therefore, held that the petitioner was entitled for claiming exemption from the payment of octroi duty. The remaining two issues decided by this Court in the same petition need not be adverted to, as the views on those issues are no more a good law as at present

in view of the subsequent Supreme Court decision in the case of Tata Engineering and Locomotive Company Ltd. (supra), wherein the Apex Court held :

"In view of the constitutional bar, octroi is not leviable if the goods are not brought into the octroi area for purposes of consumption or use in the area but for export and in fact exported by the importer himself or the sale by him occasions the export. Compliance with the procedure prescribed in the Rules for filing claims of refunds are not conditions precedent for the right or eligibility for refund or the liability to refund but are provisions regarding proof of export of the goods imported and are not meant to be exhaustive either."

In the case of *Burmah Shell Oil Storage and Distributing Co, of India Ltd.* (supra) a constitutional bench of the Apex Court held :--

"that the appellant company was liable to pay octroi tax on goods brought into local area (a) to be consumed by itself or sold by it to consumers direct and (b) for sale to dealers who in their turn sold the goods to consumers within the municipal area irrespective of whether such consumers bought them for use in the area or outside it. The Company was, however, not liable to octroi in respect of goods which it brought into the local area and which were re-exported."

In the subsequent judgment in the case of *M/s. Hiralal Thakorlal Dalai* (supra) another constitutional bench of the Apex Court reaffirmed the above view.

In the case of *H. M. M. Ltd. and Anr.* (supra) the appellant company was importing milkfood powder (Horlicks) in bulk in drums in the city of Bangalore on payment of octroi at the time of its import. The milkfood powder was repacked in small packs and bottles of various sizes and sent to various places outside Bangalore except a small quantity which was sold in Bangalore City proper. The manufacturer claimed refund of octroi for the quantity of milkfood powder which was sent outside Bangalore after repacking and/or rebottling. The claim was negatived. The Apex Court held that manufacturer was entitled to the refund of octroi as repacking the powder in small packs/bottles of various sizes for its export outside the municipal limits would neither amount to use nor consumption of the Horlicks powder attracting the levy of octroi and octroi could be levied or collected in respect of the goods which were used, consumed within the municipal limits, after examining the scheme of Rules 24 to 27 of the Octroi Rules framed by the Bangalore Municipal Corporation.

In the case of *Chowgule and Company Pvt. Ltd. and Anr.* (supra) the Supreme Court referred to its earlier decision in the case of *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers*, , regarding the definition of the term "manufacture" and held that blending of different qualities of ore possessing different chemical and physical ? composition so as to produce ore of the contractual specifications cannot be said to involve the process of manufacture, since the ore that is produced cannot be regarded as a commercially new and distinct commodity from the ore of different specifications blended together and what was produced as a result of blending

was commercially the same article, namely, ore, though with different specifications i.e. ore blended and hence it could not be said that any process of manufacture was involved in blending of ore. This was a finding recorded in the case regarding payment of sales tax under the Central Sales Tax Act, 1956.

8. One of the main issues before us is whether the decision of this Court in the case of Dimple Silk Mills Pvt. Ltd., should be followed and applied to the petitioner's case at hand and our answer is in the negative, for the reasons elaborated hereinafter.

9. In the case of Dimple Silk Mills Pvt. Ltd., (supra) the decision of the Supreme Court in the case of Empire Industries Limited and Others Vs. Union of India and Others, was not referred to. On referring to its earlier decisions including that of Chougule and Company Ltd., (supra) it was held in Empire Industries's case that :--

"(a) Whatever may be the operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes such a process which will be part of "manufacture". Any process or processes creating something else having a distinctive name, character and use would be manufacture,

(b) the process of bleaching, dyeing and printing etymologically also means manufacturing process.

(c) etymologically the word "manufacture" properly construed would doubtless cover the transformation."

The decision also referred to the observations made in the case of King v. Caledonian Collieries Ltd., 1928 AC 358, where the Judicial Committee observed :--

"If that aspect of the matter is kept in mind then expenditure of human skill and material have been used in the processing and it may not be that the raw material was first transformed but over the transformed material, further transformation was done by the human labour and skill making this fit for human consumption."

In the case of Ujagar Prints Vs. Union of India (UOI), , the earlier decision in the case of Empire Industries Ltd., was considered by the Constitutional Bench of the Supreme Court and it was affirmed. We quote the observations made in para 42 :

"The prevalent and generally accepted test to ascertain that there is "manufacture" is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes. The principles are clear. But difficulties arise in their application in individual cases. There might be borderline cases where either conclusion with

equal justification be reached. Insistence on any sharp or intrinsic distinction between processing and manufacture, we are afraid, results in an oversimplification of both and tends to blur their interdependence in cases such as the present one."

The Supreme Court further agreed with the view taken by it in the Empire Industries case that :

"gray-fabric after they undergo the various processes of bleaching, dyeing, sizing, printing, finishing etc. emerges as a commercially different commodity with its own price structure custom and other commercial incidents and that there was in that sense a manufacture within the meaning of Section 2(f), even as unamended, is an eminently plausible view and is not shown to suffer from any fallacy."

10. We have one more subsequent decision of another Division Bench of this Court in the case of Deccan Embroidery Manufacturing Co. and Anr. v. Municipal Corporation of City of Poona 1989 MLR 875, wherein a similar issue as in the instant petition fell for consideration regarding the process of bleaching and mercerizing the gray yarn. The petitioner company in that case had taken a plea that it was eligible for 90% exemption from payment of octroi duty on the gray yarn which was imported within the octroi limits and was exported after it underwent the process of bleaching. This High Court considered the provisions of Rule 16(e) of the Octroi Rules framed by the respondent Municipal Corporation. The said rule reads thus :-

"16. Refund of octroi on export of goods imported for consumption, use or sale.
-- Refund of 90 per cent, of the octroi paid on goods imported for consumption, use or sale shall be admissible on their export subject to all the conditions mentioned in Clauses (a) to (h).....

(e) The goods have not since their import changed in any manner whatsoever their original form, conditions, state or appearance by any process of manufacture or otherwise.

Provided that goods shall not be deemed to have changed their form within the meaning of this rule merely by reasons that they are wood, which since its import has been cut and made into beams, planks and rafter; or grain or tur ground and converted into pulses; or tobacco converted into snuff or bidis; or rice parched and made into murmurās; or wheat or other grain made into flour....."

The Division Bench referred to the judgment of the Supreme Court in the case of Empire Industries Ltd., (supra) decisions of this Court and observed in para 7 as under :--

"7, it appears in the light of the several decisions and on the construction of the expression that the process of bleaching, dyeing and printing etymologically, also means manufacturing process. The ratio in these observations indicate that to

express the term manufacture it is not as if that all these processes must be combined together and it is then only that there is the process of manufacture, but either of these processes which includes bleaching, would amount to manufacture, because it would answer the test laid down that it can go in the market in that distinguishable changed form. This is apparent because there is obvious difference between a coarse or a gray yarn and a bleached one, and any consumer going to the market would by even a naked look would distinguish between the two commodities. However, in the instant case, something more has happened, because, after bleaching, the yarn has also undergone the process of mercerizing, and as stated, this process imparts not only more strength to the yarn but very valuable luster which obviously would enhance its utility as also appearance in the view of the customer who can easily distinguish it from gray yarn which would also be capable of being sold in an acceptable form to satisfy the desire or fancy or taste of the customer in preference to the gray or coarse yarn. Obviously the process involves human skill and industry and that requirement is satisfied. Further, that it can be sold in a distinguishable term from the gray yarn in the market by bringing about this change by these two important processes is also fully satisfied. The Supreme Court has negated a similar contention raised on behalf of the petitioner that the original commodity remains the same as in that case cotton fabric remains the same before and after the processing, and thus further that this state of remaining the commodity to be the same wipes out the concept of manufacture, has also been negated by the Supreme Court. This answers Shri Apte's contention that the yarn remains basically the same yarn before and after process and therefore, there is no manufacture. It is also well accepted that it is not the requirement in every case that an entirely new article must emerge out of the processing so as to constitute manufacture, but even some process which may not alter the foundation of the commodity would still constitute the process of manufacture."

This Court also referred to the decision of another Division Bench in the case of *New Shakti v. Mahalaxmi v. Union of India and Ors.* 1983 (14) ELT 1786, wherein it was observed :--

"cotton fabrics is merely a general description but there may be various types of cotton fabrics and that even if both printed material and gray cloth could generally be described as cotton fabric as printed yet, the unbleached gray cloth is not the same cotton fabric as printed cotton fabric, and therefore, it cannot be said that dyed and printed cotton fabric must be treated on the same footing as gray cloth as the use to which the bleached, dyed, printed and finished product could be put to is entirely different or in addition to the use to which the gray cloth could be put to."

The Division Bench therefore, held that the petitioner company who was claiming a similar benefit as is claimed in the instant petition and on the same pleas, was not entitled for 90% exemption as claimed. The process of bleaching and mercerizing resulted into either use of the material imported or a new article

distinguishable from the article originally imported resulting into a change as prescribed in Rule 16(e). The view taken by the Division Bench in Deccan Embroidery Manufacturing Co. and Anr. (supra) is squarely applicable to the case at hand and therefore, the decision of the earlier Division Bench in the case of Dimple Silk Mitts Pvt. Ltd. (supra) can not be held to be a good law any more, in view of the judgment of the Supreme Court in the case of Empire Industries Ltd, (supra) which was reaffirmed by a Constitutional Bench in the case of Ujagar Prints and Ors. (supra).

11. Section 2(28) of the Municipalities Act, defines the term octroi and it means a tax on the entry of goods into a municipal area for consumption, use or sale therein. List II of the Seventh Schedule to the Constitution pertains to the State list and at serial No. 52 the entry of taxes on entry of goods into a local area for consumption, use or sale therein has been incorporated. This octroi duty is payable on entry of goods into a municipal area, if these goods are brought within the municipal limits for the purpose of consumption, use or sale either inside the municipal area or outside. However, if the goods are brought within the municipal area for its re-export simpliciter the charging of octroi would be unconstitutional. The petitioner contends that the POY imported by it from its head office and processed at its factory at Jalgaon is re-exported and therefore, the Municipal Council has no authority to levy octroi duty in view of the Constitutional bar.

12. The petitioner itself admits that the POY first passes through the vapour heater maintaining a temperature of 185 Centigrade which softens the yarn and the same is thereafter taken to the spindles in which the yarn is twisted. In the second set, the yarn is re-twisted and it is once again twisted to give the yarn its original shape, whereupon POY is called textures yarn. It is further admitted that due to the twisting and re-twisting process, the strength of the yarn is improved to enable the yarn to bear the shocks during the weaving of cloth and this process is commonly called as text rising and the whole object of this project is to strengthen the POY. The original form of the POY is thus changed due to the process that it is subjected to and it does not retain its original status of partially oriented yarn. The process certainly upgrades the POY, not only by adding strength but adding in its structure due to the processes it is subjected to and thus it is converted into a commodity fit for further export for different applications, for which POY in the original form would not be suitable and would not infact used. The process thus adds qualitative changes to the POY and converts the same to a distinct article as compared to the original imported one and the processed article which is exported does not remain to be the same article which was imported in its form, substance and quality as well as application/utility. If an article is imported within the municipal limits and is exported without undergoing any change by any process, would be certainly eligible for exemption from payment of octroi duty if the same is re-exported outside the municipal limits. This benefit shall not be available to the petitioner company in the instant case. It has set up a factory for carrying out certain

operations which operations do satisfy the definition of manufacturing process as defined under the Factories Act, 1948. These operations are carried out with the help of machinery with a purpose to upgrade the imported article for an application for which it could not have been utilized in its original form. The petitioner has incurred not only additional costs in the said processing operation but that additional cost is invested for a specific purpose namely to change the utility of the product thereby its utility as well as value goes up. The process is, therefore a device for bringing about a value added distinct yarn as compared to the POY imported at the first place.

13. In the case of Kores (India) Limited v. Union of India and Ors., 1982 E.L.T. 253, this Court held that the process of cutting large rolls of paper into specific sizes and dimensions and to roll them into teleprinter rolls with the aid of power driven machines amounted to manufacture u/s 2(0) of the Central Excises Act. This view was confirmed by the Supreme Court. The case at hand is much more than just repacking or reconvertng the POY and the value added is much formidable than the operation which was at issue in the case of Kores (India) Ltd. The petitioner admittedly set up a factory by installing certain machinery for carrying out the process to change the form of the original article namely POY so as to upgrade it converting into a different commodity in substance and in strength as well as for utility/applications. It is for these reasons we hold that the petitioner's contentions are not sustainable as the petitioner was not re-exporting the same commodity which was imported within the municipal limits. The petitioner's contentions that such articles which are imported are not liable for payment of octroi duty, even if they undergo the mechanical process cannot be accepted. The petitioner further goes to take a plea that even if the process is carried out, octroi duty is not attracted and the said process did not amount to manufacturing. This plea is no more sustainable in view of the decisions of the Supreme Court in the case of Empire Industries Ltd., as well as Ujagar Prints and Ors. (II) and the decision of this Court in the case of Deccan Embroidery Manufacturing Co, and Anr.. In the case of Deccan Embroidery (supra) this Court held that the gray yam which was subjected to the process of bleaching and mercerizing could not be held to have been re-exported without use and in fact, the process carried out was itself a usage. This Court "therefore, held that even otherwise, the process of bleaching and mercerizing would also satisfy the requirement of "use" in the municipal limits and thereby satisfying the definition of the term octroi within the meaning of Section 2(28) of the Municipalities Act. The same observation is also applicable in the instant case and in fact, the POY which is processed must be held to be a raw material for the factory operations of the petitioner's company at Jalgaon and the factory was certainly using the POY for carrying out its manufacturing activities. On this count also the petitioner would be liable to pay octroi duty.

14. In the result, the petition is dismissed. Interim order stands vacated. Rule discharged but with no order as to costs.

15. At this stage Shri Kakade, learned counsel for the petitioner submitted an oral application for stay. We have considered the same and we hereby reject the application.

16. Petition dismissed.