
(1986) 01 BOM CK 0017

In the Bombay High Court

Case No : Appeal No. 349 of 1980 in Miscellaneous Petition No. 995 of 1974

Ahmed Comerbhoy Mills

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 08-01-1986

Acts Referred:

Citation : (1986) 7 ECC 190 : (1986) 25 ELT 513

Hon'ble Judges : Sujata V. Manohar, J;P.S. Shah, J

Bench : Division Bench

Judgement

Smt. Sujata V. Manohar, J.—The petitioners (who are the appellants herein) inter alia manufacture and process vegetable oils and manufacture other products therefrom. The petitioners have their factory at Ahmed Oomer Street, Two Tanks, Bombay-8. The petitioners, inter alia, manufacture vegetable non-essential oil. They process this oil in order to remove impurities. The processed vegetable non-essential oil is then hydrogenated to produce vegetable tallow which according to the petitioners themselves is a vegetable product. This vegetable tallow is sold and/or used in the manufacture of soap and other products. In respect of vegetable tallow in question the parties have proceeded on the footing that vegetable tallow is used in the manufacture of soap.

2. Central Excise tariff entry 12 deals with vegetable non-essential oil of all sorts. Under tariff entry 12 a notification No. 33/63 dated 1st of March, 1963 has been issued under which, inter alia, vegetable non-essential oil falling under item 12 is exempt from the payment of the whole of the excise duty leviable thereon if "used after it is processed in the manufacture of goods falling under item Nos. 13, 14 and 15 of the First Schedule to the Central Excises and Salt Act, 1944". The second proviso to this notification which was introduced for the first time on 9th October, 1971 provides that "no such exemption shall be allowed in respect of vegetable non-essential oils used in the manufacture of finished excisable goods if such finished excisable goods produced by the manufacturer are exempted from the whole of the duty of excise leviable thereon or are chargeable

to nil rate of duty."

3. The relevant entries in the present case are entries 13 and 15. Entry 13 deals with vegetable products. It says "vegetable product" means any vegetable oil or fat which, whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption." Entry 15 deals with soap.

4. Under entry 13 which deals with vegetable products, a notification has been issued being notification No. CER-8(3)/56 dated 14th January, 1956. Under this notification vegetable product is exempt from the payment of excise duty provided, inter alia, the vegetable product is intended for use in the manufacture of soap.

5. At the material time, the petitioners cleared vegetable tallow manufactured by them by classifying it under tariff entry 13 and claiming the benefit of exemption notification No. CER-8(3)/56 dated 14th January, 1956. The petitioners received a show cause notice dated 28th March, 1973 from the Superintendent of Excise asking them to show cause why excise duty amounting to Rs. 83,123.10 should not be recovered from them in respect of vegetable non-essential oil used by the petitioners between 1st April, 1972 and 31st December, 1972 to manufacture vegetable tallow. They also received a second show cause notice dated 23rd August, 1974 to a similar effect for the period September, 1973 to December, 1973 and February, 1974 to June, 1974. The petitioners replied to the show cause notices pointing out that vegetable non-essential oil was used in the manufacture of vegetable tallow. They submitted that the end product which was cleared from the factory was vegetable tallow and not processed oil. They also submitted that this was an intermediately product which would not attract excise duty. The contentions of the petitioners were rejected and an order was passed directing the petitioners to pay the excise duty in question. It is from these orders passed in the two show cause notices that the petitioners have come to this Court. The petitioners had also filed appeals from these orders. We are told that these appeals have been disposed of in 1975. In the petition which came up for hearing before a learned single Judge of this Court, the learned Judge relying upon a decision of another learned single Judge of this Court in the case of *Indian Vegetable Products Limited v. Union of India and Others* (Misc. Petition No. 922 of 1974 decided on 30th July, 1979, by Pendse, J.) dismissed the petition. The present appeal is from that decision.

6. The decision of the learned single Judge in *Indian Vegetable Products Limited v. Union of India and Others* also came up in appeal before a Division Bench of this court (to which one of us was a party). By its decision in that case which is reported in *Indian Vegetable Products Limited Vs. Union of India and others*, the Division Bench has upheld the decision of the learned single Judge in that case and has dismissed the appeal. In that decision the same entries 12, 13 and 15 as well as the two exemption notifications were interpreted by this Court. The court interpreted the exemption notification No. 33 of 1963 dated 1st of March, 1963

under tariff entry 12 to mean that vegetable non-essential oil, in order to claim exemption, should be used after it is processed in the manufacture of goods falling under tariff entries 13, 14 and 15. It also interpreted the proviso to this exemption notification to mean that if goods so produced and falling under items 13, 14 or 15 are themselves exempt from the whole of the duty of excise leviable thereon, the benefit of the exemption notification 33/63 dated 1st of March, 1963 would not be available to the vegetable non-essential oil which was used in the manufacture of such goods.

7. In the course of that appeal the appellants therein sought to contend for the first time that vegetable tallow should not be considered as a vegetable product falling under tariff item 13 but it should be considered as vegetable non-essential oil falling under tariff item 12. The court held that this contention had not been raised by the appellants at any stage prior to the appeal. The appellants had throughout proceeded on the footing that vegetable tallow manufactured by them fell under tariff item 13. They could not therefore be permitted to raise a new contention at the appellate stage to the effect that vegetable tallow was vegetable non-essential oil.

8. The facts of the present case are similar to the facts in the case of Indian Vegetable Products Limited Vs. Union of India and others, It is contended by Mr. Bharucha, learned advocate for the petitioners (appellants), that there is no admission made by the petitioners in the petition that vegetable tallow is vegetable product falling under tariff item 13. We have, however, gone through the petition. In the petition the petitioners have stated in terms that they produce vegetable tallow which is a vegetable product. We do not find any contention in the petition to the effect that vegetable tallow should be classified under tariff item 12. Even in the proceedings before the respondents the petitioners, at no stage, contended that vegetable tallow was not vegetable product falling under tariff item 13 but was vegetable non-essential oil falling under tariff item 12. At the stage of the appeal the petitioners cannot be allowed to raise this contention for the first time especially when there is no material on record to decide this classification dispute. It was, therefore, submitted by Mr. Bharucha that the matter should be remanded by us before the learned single Judge in order to determine this question. We, however, fail to see on what basis the learned single Judge can also decide this question since there is no material on record to determine whether the product manufactured by the petitioners falls under tariff item 12 or 13.

9. The petitioners sought to rely upon a decision of a learned single Judge of this Court in the case of Tata Oil Mills Co. Ltd. v. Union of India and Others reported in 1981 ELT 189. The petitioners in that case had converted vegetable non-essential oil into tallow. The tallow had been used in the manufacture of soap. The petitioners in that case had originally represented to the excise authorities that this tallow fell under tariff item 13 of the Central excise tariff and by reason of notification No. CER-8(3)/56 dated 14th January, 1956 it was exempt from

duty. In that case, however, in reply to the show cause notice issued by the respondents, the petitioners had contended that they had wrongly classified tallow under tariff item 13. They had contended that tallow was not fit for human consumption and hence it could not be classified under tariff item 13. The contention of the petitioners was negated by the excise authorities. Before the learned single Judge the question was whether the tallow in question was a vegetable product falling under item 13 of the Central excise tariff. It was also contended before the learned single Judge that vegetable tallow in question did not attract the second proviso to the exemption notification under tariff item 12. The learned Judge came to a conclusion that vegetable tallow was not a vegetable product falling under item 13. In that case the question of classification was directly in issue between the parties, both in the proceedings before the Collectorate of Central Excise as well as in this Court. In the present case, however, this question has not been raised either in the proceedings before the Collectorate of Central Excise or in the petition in this Court. In our view it would not be proper to permit the petitioners to raise this issue at the appellate stage when there is no material on record on the basis of which this question can be raised or decided.

10. In the premises contentions in the present appeal are directly covered by a decision of this court in the case of Indian Vegetable Products Limited Vs. Union of India and others, referred to earlier. The appeal is therefore dismissed. In the circumstances of the case there will be no order as to costs.