(1990) 03 GUJ CK 0008

In the Gujarat High Court

Case No : Special Civil Application No''s. 1376, 1447, 1448, 1449, 1467, 1468 and 1469 of 1980 and 1083 of 1985

Apex Electricals Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 23-03-1990

Acts Referred:
Central Excise Rules, 1944 — Rule 174
Central Excises and Salt Act, 1944 — Section 11A, 2

Citation : (1993) ECR 308 : (1992) 61 ELT 413

Hon'ble Judges : J.U. Mehta, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : P.H. Parekh and R.R. Shah, for the Appellant; J.D. Ajmera, for the Respondent

Judgement

G.T. Nanavati, J.—Special Civil Applications Nos. 1447/80 and 1083/85 are filed by M/s. Apex Electricals Pvt. Ltd., other six petitions are filed by different petitioners but as the question involved in all these petitions is the same, all these petitions have been heard together and are being disposed of by this common judgment.

2. Apex Electrical is a manufacturer of power and distribution transformers. Such transformers are manufactured by assembling high tension and low tension and low tension coils as assembled cores made out of laminations. Laminations are prepared out of cold rolled grain oriented steel sheets. These sheets are not manufactured in India, and therefore, they have to be imported from foreign countries. They come in the form of rolls. They are first slitted into width of required specifications. After sliting is done, the slitted rolls, also known as strips, are further required to be cut into small pieces of required dimensions and designs depending upon requirements of the customers. The pieces which thus come into existence as a result of this process are known as electrical laminations. They were, at the relevant time, chargeable to excise duty under tariff item No. 28A of the First Schedule to the Central Excises and Salt Act, 1944.

3. Apex Electricals were formerly purchasing C.R.G.O. sheets or ready-made laminations from the market. As it did not possess any facility either for slitting or for cutting the said sheets, it used to get both the jobs performed by others on job work basis when it purchased C.R.G.O. sheets from the market. In 1979 it got an import licence and imported C.R.G.O. sheets. In respect of the C.R.G.O. sheets imported by it in the year 1979-80, it had got the slitting work done at Bombay. It had entered into agreements with the following six parties for getting the slitted sheets cut into smaller sizes :

1. M/s. Prolite Engineering Company

2. M/s. Ashish Stampings

3. M/s. Sangma Engineering Works

4. M/s. Mayur Engineering Works

5. M/s. Kaveen Engineering Company, and

6. M/s. Amar Engineering Company.

These parties (hereinafter referred to as "the processors") were either sole proprietary or partnership firms. They had got themselves registered as small scale industries and also made necessary declarations before the excise authorities for claiming exemption under Notifications Nos. 71/78 dated 1-3-1978 and 111/78 dated 9-5-1978. As the turnover of each of those parties did not exceed Rs. 5 lacs in the financial year 1979-80 they were allowed to clear the goods manufactured by them without payment of Excise duty. Since Apex Electricals was not doing the work of manufacturing electrical laminations, it did not pay any duty on the electrical laminations manufactured by those six processors for Apex Electricals. It is the petitioner''s case that all these activities were carried on by the petitioners to the knowledge of the excise authorities. Till April 1989 no objection was raised by the Excise Department with respect to the exemptions claimed by these six processors or non payment of duty by Apex Electricals. However, on April 3, 1980, Apex Electricals was directed by the Superintendent, Central Excise, Range VI, Vadodara, to follow the prescribed procedure under the Central Excises and Salt Act, 1944 and the Central Excise Rules, 1944 in respect of the goods which the said six processors were manufacturing for Apex Electricals. The Superintendent directed Apex Electricals to do so as he was of the opinion that Apex Electricals with respect of those six processors was a loan licensee. By his letter dated 17-4-1980 he informed Apex Electricals to apply for loan licence and follow the prescribed procedure. By that letter those six processors were also informed that as they were working on behalf of Apex Electricals, the declarations filed by them were not acceptable.

4. Apex Electricals feeling aggrieved by the directions given in those letters, has filed Special Civil Application No. 1447 of 1980 challenging the said action of the respondents. As the six processors were also affected by the directions contained in the said letter, they have also filed separate petitions. In all these petitions

Rule has been issued by this Court. So far as Apex Electricals is concerned, it was given a show cause notice by the time the said petition came up for hearing for granting of interim relief and, therefore, while granting the interim relief, this Court permitted the respondent to go on with the adjudication proceedings. No show cause notices were issued to the other six processors. On 27-11-1984, the Collector of Customs and Central Excise, Vadodara, passed an order directing Apex Electricals to pay the duty of Excise at appropriate leviable rate under Tariff Item 28A, on electrical laminations manufactured by the aforesaid six processors for Apex Electricals, on the basis that they had really manufactured those laminations for and on behalf of Apex Electricals and thus Apex Electricals manufactured and illicity removed those goods. He also imposed a penalty of Rs. 15 lacs on Apex Electricals. Aggrieved by that order, Apex Electricals has filed Special Civil Application No. 1083 of 1985.

5. What is contended on behalf of the petitioners in all these petitions is that the view taken by the respondents that Apex Electricals is really a loan licensee, and that the six processors, who were manufacturing electrical laminations, as ordered by Apex Electricals, were manufacturing the same for and on behalf of Apex Electricals is erroneous as it is based upon misconception of facts and misconception of law. It was urged that the six processors are really independent entities and looking to the nature of the transactions between Apex Electricals and them, it cannot be said that the agreements between them were not on principal to principal basis and that they were manufacturing electrical laminations for and on behalf of Apex Electricals.

6. Prior filing of these petitions what the petitioners were told by the excise authorities was that Apex Electricals was really a loan-license and got the electrical laminations manufactured through the six processors on payment of labour charges. Now we have the adjudication order in the case of Apex Electricals which discloses reasons why the excise authorities have taken the view that the real manufacturer of the said electrical laminations was Apex Electricals, and that the six processors were manufacturing the same for and on behalf of Apex Electricals. They are as under :

1. The six processors addressed letters to Apex Electricals disclosing their willingness to enter into contracts with it for manufacturing electrical laminations. M/s. Amar Engineering Company, M/s. Mayur Engineering Works and M/s. Sangma Engineering Works had addressed their letters on 6-12-1979. M/s. Prolite Engineering Company had addressed such a letter on 20-12-1979 and M/s. Ashish Stampings and M/s. Kaveen Engineering Company had addressed such letters on 12-2-1980.

2. The offers made by the six processors were accepted by Appex Electricals immediately, that is either on the same day on which the offers were received by it or on the next day.

3. All the six processors had filed their declarations with the Range

Superintendent, Vadodara on the same day i.e. 6-12-1979 claiming exemption under Rule 174 of the Rules for the financial year 1979-80.

4. The declarations made by all the six processors contained identical information and did not mention the name of the company whose job work they were to carry out.

5. All the six processors had purchased machinery for doing the cutting work between October, 1979 and January 1980.

6. All of them were supplied C.R.G.O. sheets by Apex Electricals and none had tried to obtain the same from the Steel Authorities of India.

7. All of them were to be paid labour charges, at the rate of 0-50 paise per kg.

Even at the time of hearing of these petitions, no other ground was urged on behalf of the respondents for taking the view which the respondents, including the Collector, have taken in this case. In reply affidavit filed in Special Civil Application No. 1083 of 1983 what was implied in the order passed by the Collector has been specifically stated by saying that the said processors were dummies of Apex Electricals.

7. The question which arises for consideration is whether the view taken by the respondents that Apex Electricals was the real manufacturer of the electrical laminations manufactured by the processors, for Apex Electricals, in the year 1979-80 and thereafter, can be said to be proper and legal. It is now well settled that if, as a result of any process carried out by the processor on job work basis, a new commercial commodity comes into existence, then that process amounts to manufacture under the Act, and in such a case the processor/job worker will become liable to payment of excise duty on the goods manufactured by him. In such cases ownership of the goods is not relevant for deciding who is the real manufacturer. In these cases, it is not in dispute that the process employed by the six processors resulted in manufacture of electrical laminations, a distinct commodity commercially known as such, and separately chargeable to excise duty under Tariff Item 28A. What was, however, contended on behalf of the respondents was that those six processors had manufactured the electricals laminations for and on behalf of Apex Electricals, merely on payment of labour charges and, therefore, the real manufacturer was Apex Electricals. On the other hand, what was contended by the learned counsel for the petitioners was that the said six processors were independent entities, independently managed and even in respect of the process carried out by them they were not subject to any control, direction or supervision from Apex Electricals.

8. In these cases there was no material before the excise authorities to show the six processors had purchased their machinery for manufacturing electrical laminations with financial help of Apex Electricals. There was no material disclosing that any of the directors of Apex Electricals was a partner of those processors. There was no material pointing out that Apex Electricals or any of its

Directors had any financial interest in any of those processors. There was no evidence to show that Apex Electricals or any of its Directors had any say in management of the business of those six processors. No financial help was given to them by Apex Electricals either for purchasing machinery or towards working capital. The agreements between these processors and Apex Electricals had not revealed that they permitted Apex Electricals to have control or supervision over the process carried on by the processors. Apart from cutting slitted strips, those processors were carrying out other processes also. Two of these processors were doing work of manufacturing electrical laminations for others. M/s. Prolite Engineering Company - petitioner in Special Civil Application No. 1376/80 - has stated in its petition that it was also getting orders for manufacturing electrical laminations from Gujarat Narmada Valley Fertilizers Co. Ltd. Gaskota and Hadiutors Pvt. Ltd., and Johnson Electric Company, Vadodara. These averments made in its petition are not denied by the respondents. Similarly, M/s. Sangma Engineering Works - petitioner in Special Civil Application No. 1469/80 - has stated in its petition that it was doing such job work for Gujarat Tractors Corporation Limited and B.M.P. and Equipments Company. These averments are also not denied by the respondents. There is no finding recorded by the Collector that these six processors were doing the work for Apex Electricals only and for no other party.

9. It is in this context that we have to consider whether for the reasons stated by the Collector in his adjudication order, the six processors can be properly described as dummies and Apex Electricals can be said to be the real manufacturer. The answer to this question can found by looking to the true nature of the transactions between the parties. In order to find out the true nature of the transactions, the circumstances narrated above would be quite relevant and they ought to have been considered by the excise authorities. A perusal of the adjudication order passed by the Collector discloses that these relevant circumstances were not considered by him. As against those relevant and more important circumstances, the Collector relied upon the circumstances which we have stated earlier in this judgment while pointing out what were the reasons for the excise authorities to come to the conclusion that Apex Electricals was the real manufacturer. In our opinion, all those circumstances, even taken cumulatively, cannot be regarded as sufficient for coming to the conclusion that the transactions between the parties were not on principal to principal basis. On the basis thereof no reasonable authority could have come to the conclusion which the Excise authorities have arrived at in this case.

10. The circumstances that all those processors had approached Apex electricals and solicited the work of lamination more or less at about the same time, and that their offers were accepted by Apex Electricals soon after they were received, cannot lead, in these cases, to an inference that they were set up by Apex Electricals. It was quite natural on their part, after coming to know that Apex Electricals was going to import C.R.G.O. sheets and that it did not have the facility of preparing laminations, to have approached it. Because a processor or a

job-worker tries to solicit work from a person who wants a particular job to be done or a particular process to be carried out, it cannot be said that the said job worker or processor is a dummy of the owner of the raw material who wants to get goods manufactured out of them. Filing of declarations for exemption on 6-12-1979 by those processors could not have been used, without anything more for inferring that they had done so at the instance of Apex Electricals and for the inference that they were going to manufacture the goods for and on behalf of Apex Electricals. There was no material to show that they had done so at the instance of Apex Electricals or that Apex Electricals was instrumental in filing those declarations. As pointed out above, three processors had approached Apex Electricals on or after December 27, 1979 and, therefore, it cannot be said to have made their declarations at the instance of Apex Electricals. So also the circumstances that they had given identical information in their declarations and had failed to mention the names of the companies whose job work they were to attend could not have been used for holding that they were dummies of Apex Electricals and not independent manufacturers. The learned counsel for the respondents was unable to point out any provision either in the Rules or in the prescribed form which required those processors to give other information or to disclose the names of the parties for whom they were to do the job. All of them had filed their declarations in the prescribed form and the prescribed form did not require them to give other particulars or to disclose the names of the companies for whom they were to do the job work.

11. The next circumstances relied upon by the respondent, viz, theat those processors had purchased machineries between October, 1979 and January, 1980 would not justify the inference that they had done so for and on behalf of Apex Electricals. As pointed out above, those processors had purchased required machineries independently, without any financial help from Apex Electricals. If on reasonable anticipation that they would be able to obtain orders from Apex Electricals they had purchased the machineries during that period, it cannot be said that they had done so at the instance of or with the held of Apex Electricals. Around an established industry, small units are usually set up to meet with the requirements of the established industry, and for that reason and also for the reason that they cater to the needs of the established industry, it cannot be said that they are not independent entities or manufactures.

12. Next circumstance relied upon by the respondents is that all of them were supplied C.R.G.O. sheets by Apex Electricals and none of them had tried to obtain the same from the Steel Authority of India. Reliance on this circumstance discloses that the respondents did not properly appreciate the true nature of the transactions between the parties. Those processors were really doing the process work and were not engaged in the business of selling electrical laminations. Obviously, therefore, they would not be interested in purchasing C.R.G.O. sheets either from the Steel Authority of India or from any other authority or source. Apex Electricals having obtained an import licence for C.R.G.O. sheets would not have thought it fit to purchase electrical laminations from those six processors as

it would have preferred to get electrical laminations prepared out of C.R.G.O. sheets imported by it. Under these circumstances the only arrangement which the parties would have liked to make between themselves would be that Apex Electricals would supply C.R.G.O. sheets to those processors and those processors would carry out the process of lamination on the sheets supplied by Apex Electricals. It was under these circumstances that they manufactured electrical laminations out of the C.R.G.O. sheets supplied by Apex Electricals and did not try to obtain such sheets or strips from other source. Therefore, this circumstance also could not have been used by the respondents for coming to the conclusion that the said processors were manufacturing electrical laminations for and on behalf of Apex Electricals.

13. The last circumstance relied upon by the respondents is that all the processors were paid Rs. 0.50 paise per kg as labour charges. The said processors were to do the job work. Obviously, therefore, they were required to be paid for the work done by them. It is, therefore, difficult to appreciate how payment of charges for the work done in these cases can lead to an inference that those processors were mere hired labourers and the charges paid to them were only labour charges in that sense. The circumstance that they were all paid the charges at the same rate also would not prove that fact as looking to the nature of the work required to be done by them, if will have to be said that more or less it was the same type of work. If for the same type of work they were paid charges at the same rate, it would be difficult to appreciate how that circumstance would have been utilised against the petitioners. The Collector''s order does not make it clear as to whether it was the smallness of the rate which induced him to come to the conclusion that that circumstance also indicated that the six processors really manufactured electrical laminations for and on behalf of Apex Electricals or the circumstances that the rate was the same had induced him to take that view. There was no material with the respondents to show that for doing such job other manufacturers were paid higher rates.

14. Therefore, it will have to be held that all the circumstances which have been relied upon by the respondents are neither individually nor collectively sufficient to come to the conclusion that the said six processors were dummies of Apex Electricals and in reality they were manufacturing electrical laminations for and on its behalf. If there had been any material to show that Apex Electricals was connected financially or otherwise with any of those six processors, or that it had a say in the management of those processors, or that it was rendering financial or technical help to those processors for doing the job work entrusted to them, then that would have been a different thing. In these cases, the processors appear to have come into existence on their own, were managed independently and were carrying on the job work entrusted to them also independently, i.e., without the control and supervision of Apex Electricals. Under the circumstances between Apex Electricals and the processors, it is not possible to say that they were not on principal to principal basis and that the processors in reality were dummies set up by Apex Electricals. For these reasons, these petitions will have

to be allowed.

15. The learned counsel for the petitioners also pointed out that the Collector in support of his conclusion has relied upon the decision of this Court in Jamnadas Chhotalal Desai and Others Vs. C.L. Nangia and Others, which has been reversed by the Supreme Court Hansraj Gordhandas Vs. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and Others, . While construing the expression, "cotton fabrics produced on power-looms" occurring in an exemption notification, this Court had taken the view that the exemption of excise duty given under the notification applied to cotton fabrics manufactured or produced by the society through its members on looms either owned by the society or its members or those allotted to such members and not in the case of cotton looms by an outsider by supplying yarn to the society. The Supreme Court disagreeing with the view taken by this Court, held that it was not necessary that cotton fabrics should have been produced by the co-operative society for itself. It further held that a dealer who, under an agreement, got the cotton fabrics manufactured through a society was covered by the language of the notification and as such was entitled to exemption from excise duty for those goods. The decision of the Supreme Court, though not on the point with which we are concerned in these petitions, is helpful inasmuch as it lays down that ownership of raw material is not relevant for the purpose of deciding who is the manufacturer under the Act.

16. The learned counsel for the petitioners also relied upon the decision of Allahabad High Court in Ganga Dhar Ram Chandra Vs. Collector, Central Excise and Others, . In that case, the petitioner was a firm carrying on business of manufacturing and selling vegetable non-essential oils. It was manufacturing non-essential oils in its own factory and in addition thereto used to take oil-seeds belonging to it to certain other oil mills and get oil manufactured there on payment of manufacturing charges. Those other oil mills were quite independent of the petitioner oil mills. The vegetable oil manufactured by those other oil mills out of the oil-seeds supplied by it was allowed to be removed by the excise authority without payment of any excise duty since the total quantity of oil produced by each oil mill was within the exemption limit. Subsequently, the excise authorities took the view that the vegetable non-essential oil manufactured by the petitioner was also liable to excise duty in respect of the oil manufactured by those oil mills out of the oil-seeds supplied by the petitioner. The petitioner had, therefore, after pursuing his alternative remedy filed the petition in Allahabad High Court. After referring to the definition of word "manufacture" as contained in Section 2(f) of the Act, the Allahabad High Court observed as under :

"Two things have to be noticed in this definition. The first is that a person who manufactures excisable goods through hired labour is the manufacturer of those goods. The second is that a person who manufactures excisable goods on his own account is also a manufacturer if the goods are intended for sale. The petitioner does not fall in any of these categories. It does not, so far as the oil in dispute is concerned, manufacture it with hired labour. Further it does not itself manufacture this oil.......... All these provisions lead to the conclusion that it is the owner or occupier of the factory or oil mill where the vegetable non-essential oil is manufactured who is the manufacturer of such oil and a person who merely brings his oilseeds for being manufactured into oil upon payment of crushing charges is not the manufacturer of the oil for the purposes of the Act ......"

These observations support the contentions raised by the learned counsel for the petitioners and the view we have taken. The learned counsel for the petitioners also relied upon the decision of Allahabad High Court in Philips India Limited and Others Vs. Union of India (UOI) and Others, .

17. On the other hand, learned counsel appearing for the respondents relied upon the decision of the Supreme Court in Shree Agency v. S.K. Bhattacharjee AIR 1972 S.C. 780. In that case the question which had arisen was whether Shree Agency was the real manufacturer of cotton fabrics which were manufactured by 16 weavers to whom Shree Agency used to supply yarn. The facts found in that case were that Shree Agency was issuing yarn to the powerloom weavers on credit and getting the same duly woven by them. The powerloom weavers were paid weekly payments and were supplied yarn worth several thousand rupees on credit. Shree Agency was not in a position to know what amount was recoverable from the powerloom weavers to whom they had supplied yarn on credit and advanced money every week. It was under these circumstances that looking to the nature of the transaction between Shree Agency and those powerloom weavers the authorities had come to the conclusion that Shree Agency was the real manufacturer of the cotton fabrics. The Supreme Court did not think it fit to interfere with that finding and, therefore, the view taken by the authority was confirmed and the appeal filed by Shree Agency was dismissed. The facts of this case are quite different from the facts of the case of Shree Agency and, therefore, this decision does not support the contention raised on behalf of the respondents.

18. It was also urged by the learned counsel for the petitioners that the show cause notice dated 20-1-1982 issued to Apex Electricals was time-barred and without jurisdiction. According to him, the six processors had disclosed all the relevant facts to the Excise authorities in their applications made for seeking exemption. In March 1980 statements of the partners or owners of those processors were recorded by the Excise authorities. On 17-3-1980 statements of the Managing Director of Apex Electricals was also recorded. After gathering all the relevant facts, the concerned officer had granted exemption on 7-3-1980. Therefore, the show cause notice issued to Apex Electricals and the action taken pursuant thereto on the basis that relevant and material facts were suppressed by Apex Electricals and those six processors cannot be said to be legal. As pointed out above, the only fact which was not disclosed by those six processors was that they were going to manufacture lamination for Apex Electricals. They

were neither required to disclose the same nor questioned about it before their statements were actually recorded by the Excise authorities. Therefore, the Department was not justified in proceeding on the basis that there was suppression or concealment of true facts and therefore, the show cause notice could be issued within the large period of five years. As we have found that there was no justification for taking that view, the show cause notice issued to Apex Electricals and the order passed thereon by the Collector deserve to be quashed and set aside. So also the prosecution which has been launched against Apex Electricals will have to be quashed on the ground that it did not commit the offence alleged against it.

19. In the result, all these petitions are allowed. It is declared that the action of the Excise authorities directing. Apex Electricals to apply for loan licence and follow the prescribed procedure and treating the declarations filed by the other petitioners as not acceptable was illegal. The show cause notice issued to Apex Electricals and the order dated 27-11-1984 passed thereon by the Collector of Customs and Central Excise, Vadodara are quashed and set aside. We also quash the prosecution launched against Apex Electricals on the basis of the said order of the Collector. Rule in each of these petitions is made absolute accordingly with no order as to costs.

