

(1987) 07 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 1655 of 1981

Asha Pavro Electronics Pvt. Ltd. and Shri Ajit Prabhakar
Deshpande

APPELLANT

Vs

The Union of India (UOI), B.N. Phatarpekar, Asstt. Collr. and
Peico Electronics and Electricals Ltd.

RESPONDENT

Date of Decision : 31-07-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(f)

Citation : (1988) 14 ECR 405

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

H. Suresh, J.—The first petitioner-company is a small scale industrial sector having a factory at Thane. The company has been registered as a small scale industries with the State Government. The company manufactures small transistor radios since April, 1979. It has been manufacturing radios against the orders placed by the third respondent viz., M/s. Peico Electronics and Electricals Limited. The said orders are placed by way of the third respondents' purchase orders, on the basis of the specifications supplied by the third respondents to the first petitioners. In accordance with the requirements of their purchaser, the first petitioner labelled the said radios with brand name of the third respondents viz. "Philips". On and from April 27, 1979, the first petitioner manufactured and sold to the third respondent two-band transistor radios (Model AL. 252). Thereafter it was discontinued in March 1981. Thereafter from time to time the models have been changed. The petitioners say that they started manufacturing the aforesaid two-band transistor radios for the third respondent and the latter used to supply to the first petitioner certain components on consignment basis for the manufacture of the said transistor radios ordered by them from time to time. The quantity and value of these components supplied by the third respondent to the first petitioner diminished and as on the date of the petition, only a few

components of approximately Rs. 14/- per radio in value were being sent by the third respondent to the first petitioner for the manufacture of the said two-band transistor radios. In the case of the single-band transistor radios, no components whatsoever were received from the third respondent.

2. The petitioners further say that the said factory at Thane is owned entirely by the first petitioner company and the workmen employed by them are the servants of the first petitioner company. They further say that the land and factory and the entire plant and machinery belongs to the first petitioner company. The manufacturing activity in the said factory is controlled and supervised entirely by the first petitioner and not by any outside party. The said transistor radios are manufactured by the first petitioner for sale to the third respondent. After being manufactured in the said factory, the said transistor radios are sold by the first petitioner to the third respondent on a principal to principal basis at arm's length with the price of the said radios being the sole consideration for the sale between the first petitioner and the third respondent. The first petitioner company pays sales tax on such sales and are independently assessed to income tax on the income earned by them. All the goods remain at the risk of the first petitioner till they are sold and property therein does not pass to the third respondent till then. They, therefore, submit that the first petitioner is an independent manufacturer of transistor radios and the third respondent is an independent buyer of such transistor radios from the first petitioner. The petitioners also assert and say that the third respondents are entitled to reject any of the said transistor radios sold to them by the first petitioner in the event of the quality thereof not being acceptable to the third respondent.

3. The first petitioner further says that the third respondent has no control or supervision over either the first petitioner's factory or the manufacturing process therein or over the labour employed by the first petitioner. No technical know-how is imparted by the third respondent to the first petitioner. The third respondents have no inter-relation with the business of the first petitioner inasmuch as neither are there any common directors between the two companies, nor do the third respondents have any direct or indirect shareholding in the first petitioner company.

4. Apart from the aforesaid two-band transistor radios manufactured and sold to the third respondent by the first petitioner, the latter also produces single-band radios which they sell directly to their own dealers and customers. In addition, the company also manufactures electronic digital clocks which they market under their own brand names directly to dealers and customers. There are number of other things which the company manufactures and the third respondent has nothing to do with the same.

5. The petitioners state that for the purpose of Central Excise, the said transistor radios manufactured by the first petitioner fall for classification and assessment of excise duty under Item No. 33-A (2) of the first schedule to the said Act. In exercise of its powers under Rule 8 (1) of the Central Excise Rules, 1944, the

first respondent issued notification No. 208/77-CE dated July 2, 1977 exempting radios, including transistor sets, falling under Item No. 33-A (2) of the first schedule to the said Act of a value of not exceeding Rs. 165/- per set from the whole of the duty of excise leviable thereon, provided that the sets are manufactured in an industrial unit in respect of which a Central Excise Officer is satisfied that the sum total of the value of the capital investment made from time to time on plant and machinery is not more than Rs. 10 lakhs.

6. The petitioners say that the said transistor radios manufactured by them were being sold to the third respondent at Rs. 28.80 per set. As stated above, some of the components were supplied by the third respondent. However, the value of each set always remained well below Rs. 165/-. Further, the capital investment of the first petitioner on plant and machinery was under Rs. 10 lakhs. The petitioners, therefore, submit that the said transistor radios manufactured by the first petitioner were thus eligible for the exemption from duty under the aforesaid notification. It appears that on the date of the filing of this petition, the said radios were sold for Rupees 115.16/- per set.

7. By a letter dated April 12, 1979, addressed to the Superintendent of Central Excise, the petitioners claimed the benefit of the said exemption and, therefore, they wanted a confirmation that it was not necessary for the petitioners to obtain a manufacturing licence from the department. To this letter the Superintendent of Central Excise replied by his letter dated April 17, 1979 that the investment of the plant and machineries of M/s. Philips India Ltd. is to be taken into consideration since according to the department the products are manufactured by the petitioners on behalf of M/s. Philips India Ltd. (i.e. the third respondent as then known). The department, therefore, pointed out that the petitioners were not entitled to the benefit of the said exemption, and, therefore, called upon the petitioners to apply for Central Excise Licence under Tariff Item No. 33A. The petitioners by their letter dated April 18, 1979 pointed out that M/s. Philips India Ltd. were not related to the petitioners in any way and have no direct or indirect interest in their business and, therefore, they reiterated the position that they were entitled to the benefit of the exemption notification. However, in the meanwhile, with a view to maintain production, the petitioners pointed out that they had no alternative but to pay the excise duty as demanded by the department under protest.

8. By a letter dated July 12, 1979 the Superintendent of Central Excise called upon the petitioners to show cause as to why the remark "under protest" by the petitioners should not be deleted immediately. A reply was given on August 9, 1979 by the petitioners setting out the relevant facts and also requesting the Assistant Collector to grant a personal hearing in the matter. By a letter dated September 12, 1979 the Assistant Collector of Central Excise, Thane, informed the first petitioner that they were exempted from payment of Central Excise under the said notification as the price of the radio, per set, did not exceed Rs. 165/-. However, in the said order he stated that the transistor radios were

"manufactured by you on behalf of M/s. Peico Electronics & Electricals Ltd.". The petitioners immediately by a letter dated Sept. 23, 1979, with a view to avoid misunderstanding and with a view to clarify, informed the Asstt. Collr. of Central Excise that it is not quite correct to say that the petitioners manufacture on behalf of M/s. Peico Electronics and Electricals Ltd. They also stated that they themselves are the manufacturers of those items some of which are sold to M/s. Peico Electronics and Electricals Ltd. and that they only affix their brand name thereon. Thereupon a show cause notice dated October 8, 1980 was issued to the petitioners. The said notice pointed out that the petitioners have contravened the provisions of Rule 9 (1) (a) and 9 (1) (c) of the Central Excise Rules, 1944 inasmuch as the petitioners have availed of exemption in terms of notification No. 208/77-CE dated July 2, 1977 by filing wrong declaration and furnishing false information in respect of Philips two-band radio model No. 15 RL 254 and two-band radio model No. 15 AL 262. The notice further stated that the petitioners "undertake the job work of manufacturing" of the said two-band transistor radios under the brand name of Philips. Then they issued a show cause notice which relies on the definition given in Section 2 (f) of the Central Excises and Salt Act, 1944, and according to the said notice, on verification of all invoices of M/s. Peico Electronics and Electricals Ltd. the selling price of the product manufactured by them on behalf of M/s. Peico Electronics and Electricals Ltd. was more than Rs. 165/- per set at the time when the exemption was asked for by the petitioner-company, and that the value of capital investment made from time to time on plant and machineries was much more than Rs. 10 lakhs since the investment on plant and machineries was required to be taken into consideration in respect of M/s. Peico Electronics and Electricals Ltd., and that they were not eligible for exemption in terms of the notification No. 208/77-CE dated July 2, 1977. The notice is, of course, addressed to both, the petitioners as also the third respondent. The petitioners by their reply dated November 12, 1980 again pointed out in detail as to how they are totally independent manufacturers. M/s. Peico Electronics and Electricals Ltd. also by their reply dated November 3, 1980 again pointed out that they are not the manufacturers of the said wireless sets which are supplied to them by the petitioners and they are not in any way connected with the first petitioners and, therefore, the notice should not have been issued. The Assistant Collector, thereafter by his order passed in October, 1981 held against the petitioners and the relevant portion of this order is as follows:

In the present case, radio sets of two band model No. 15RL 252 and Model No. 15AL 262 under the brand name of "PHILIPS" which is registered in the name of M/s. Peico Electronics and Electricals Ltd. are manufactured by M/s. Asha Pavro Electronics Pvt. Ltd. and exclusively supplied to M/s. Peico Electronics only. Further it has been admitted by the representative of the Co. i.e. M/s. Peico Electronics and Electricals Ltd. during the course of personal hearing that some of the inputs for the radio sets manufactured by M/s. Asha Pavro Electronics Pvt. Ltd. are supplied by M/s. Peico Electronics and Electricals Ltd. and the sets are

manufactured as per specifications and drawing of M/s. Peico Electronics and Electricals Ltd. establish following facts:

- (1) The two band radio Model No. 15 R.L. 252 and No. 15 AL 262 manufactured by M/s. Asha Pavro Electronics Pvt. Ltd. bear "PHILIPS" trade mark which is registered in the name of M/s. Peico Electronics.
- (2) The product comes into market as if it is manufactured by M/s. Peico Electronics and Electricals Ltd.
- (3) The entire production of two band radio models are exclusively supplied to M/s. Peico Electronics and Electricals Ltd.
- (4) M/s. Asha Pavro have no interest in the commercial sale of the products in question.

The above facts necessarily lead to the inescapable inference that M/s. Peico Electronics and Electricals Ltd. have engaged in the production of two band radio models through M/s. Asha Pavro Electronics Pvt. on their own account.

It is this order which is under challenge in this petition, under Article 226 of the Constitution of India.

9. Mr. Setalvad, appearing for the petitioners has submitted that the reasons given by the Assistant Collector when he passed the said order are all patently wrong and contrary to well established principles. He submitted that the order indicates five reasons as to how the department holds that the petitioner-company and the third respondent are one and the same and he submits that each of these reasons is not maintainable. In this connection he has drawn my attention to the case of Union of India (UOI) and Others Vs. Cibatul Limited, . In this case, the Assistant Collector proceeded on the footing that the buyer was a manufacturer of the goods and not the seller and in that connection the Supreme Court observed as follows:

The entire question before us is whether the goods are manufactured by the seller or are manufactured by the seller on behalf of the buyer. The relevant provisions of the agreements and the other material on record show that the manufacturing programme is drawn up jointly by the buyer and the seller and not merely by the buyer, and that the buyer is obliged to purchase the manufactured product from the seller only if it conforms to the buyer's standard. For this purpose the buyer is entitled to test a sample of each batch of the manufactured product and it is only on approval by him that the product is released for sale by the seller to the buyer. In other words, the buyer has the right to reject the goods if he does not approve of them. If the manufactured goods are not in accordance with the buyer's standard, they are either reprocessed to bring them up to the requisite quality, or if that is not possible the goods are sold to the buyer for a different purpose if they are compatible with the specifications of some other product, or the goods are sold to others in the market as substandard goods at a lower price or the goods are destroyed. It is

significant to note that the buyer is not obliged to purchase the goods manufactured by the seller regardless of their quality, and that in the event of rejection by the buyer the alternatives present before the seller extend to the sale of the manufactured goods to others or even to the very destruction of the goods. It is apparent that the seller cannot be said to manufacture the goods on behalf of the buyer.

The appellant relies also on the circumstance that under the agreements the seller is required to affix the trade marks of the buyer on the manufactured goods and, it is said, that indicates that the goods belong to the buyer. It seems to us clear from the record that the trade marks of the buyer are to be affixed on those goods only which are found to conform to the specifications or standard stipulated by the buyer.

All goods not approved by the buyer cannot bear those trade marks and are disposed of by the sellers without the advantage of those trade marks. The trade marks are affixed only after the goods have been approved by the buyer for sale by the seller to the buyer. The seller owns the plant and machinery, the raw material and the labour and manufactures the goods and under the agreements, affixes the trade marks on the goods. The goods are manufactured by the seller on its own account and the seller sells the goods with the trade marks affixed on them to the buyer.

10. Mr. Setalvad also drew my attention to another case of the Supreme Court being the case of Joint Secretary to the Government of India and Others Vs. Food Specialities Ltd., considering a contention that the goods were manufactured by the respondents therein according to the specifications supplied by another concern M/s. Nestles and trade mark was affixed on the goods so supplied and the Supreme Court said as follows:

What are sold and supplied by the respondent are goods manufactured by it with the trade marks affixed to them and it is the wholesale price of such goods that must determine the value for the purpose of assessment of excise duty. It is immaterial that the trade marks belong to Nestle's. What is material is that Nestle's have authorised the respondent to affix the trade mark on the goods manufactured by it and it is the goods with the trade marks affixed to them that are sold by the respondents to Nestle's. There can therefore be no doubt that the wholesale price at which the goods with the trade marks affixed to them are sold by the respondent to Nestle's as stipulated under the agreements would be the value of the goods for the purpose of excise duty.

11. Mr. Setalvad then drew my attention to the affidavit in-reply, particularly to para 5 wherein the respondents have referred to certain facts which are subsequent to the impugned order. He submitted that those facts cannot be taken into account while deciding this petition inasmuch as if the respondents wanted to justify their order that must be on the basis of the material that was before the officer concerned and not on the basis of any subsequent material or

on the basis of a material which was thought of as relevant subsequent to passing of the order. Assuming these facts can be considered as relevant Mr. Setalvad submitted that these facts did not show that the petitioners were merely the agents of the third respondent. In this connection the respondents have referred to certain bank guarantees executed by the petitioner-company in pursuance of the interim order dated Nov. 20, 1981 in the present petition and the respondents say that the bank guarantees have been revalidated by the very same bank at the instance of and against the account of M/s. Peico Electronics and Electricals Ltd. (Respondent No. 3). I do not understand as to what the respondents wanted to convey by this contention. Assuming the bank has revalidated the bank guarantees at the instance of M/s. Peico Electronics and Electricals Ltd., how does this fact lead to the conclusion that the petitioners are not the manufacturers. Any excise duty that may be charged on those products would ultimately be passed on to M/s. Peico Electronics and Electricals when they buy the same. Therefore, if they have shown interest in assisting the petitioners in any manner that cannot be construed otherwise.

12. From the facts placed before this Court it is clear that the petitioners are an independent concern and they sell the material to the third respondents and if that is so, the entire basis of the order must necessarily be held to be bad in law.

13. Mr. R.V. Desai, appearing for the respondents, drew my attention to the case of Shree Agency v. S.K. Bhattadnaree, reported in 1977 E.L.T. (168) 1976 Cen Cus. 94, to contend that if the raw material was supplied by the third respondent that should be considered as a criterion for the purpose of holding that the petitioners were manufacturing for and on behalf Of the third respondent. In the case referred to above and relied on by Mr. Desai, the Court had clearly come to the conclusion that there was no actual sale of cloth at all by the weavers to the appellant and the cloth was woven by the weavers at the instance of the appellant. The Court as also the excise department came to the conclusion that the yarns were issued to the power-loom weavers not on credit, but for getting the same back duly woven by them into cloth and weekly payments were made by the appellants. I do not understand as to how the respondents can rely on this authority which is totally different from the facts of this case.

14. It is true that one of the criteria could be supply of raw material. Mr. Desai submitted that in the present case raw material was supplied by the third respondent and he suggested that the petitioners were only manufacturing the transistor radios out of the raw material supplied by the respondent. The statement is not factually correct. In fact in the order itself the Assistant Collector has said that some of the components were supplied by the third respondent. In fact in the petition, the petitioners have stated that in course of time the supply of components has been reduced to the value of Rs. 14/- per set and if that is so certainly that by itself cannot be considered as a material to hold against the petitioners.

15. However, Mr. Desai submitted that in any event no relief should be given to the petitioners in the present case as according to him, the petitioners had other remedies available to them. He submitted that the petitioners have come to this Court against the order passed by the Asstt. Collector and there is no justification as to why the petitioners could not have preferred an appeal as against the said order, and after exhausting all remedies open to them, they could have come to this Court if necessary. He also submitted that in the present case the challenge is not to any want of authority on the part of the excise department for demanding excise. If there is any challenge for want of authority or jurisdiction, perhaps, one could say, writ petition can be maintained against any initial order, without exhausting all remedies. But not otherwise. He relied on the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . This case has been referred to and expressly followed in a subsequent case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , wherein the Court has observed that Article 226 of the Constitution is not meant to short circuit or circumvent statutory procedure. Mr. Desai, relying on these two authorities submitted that more often the petitioners rush to this Court without exhausting all statutory remedies only for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. He submitted further that this practice has been strongly discouraged by the Supreme Court. I have no quarrel with any of these propositions at all. But I wish this contention had been raised by the respondents at the time of the admission of this petition which was in the year 1981. I presume that the respondents had raised such a contention and yet the learned Judge entertained this petition. If that is so, it is neither fair nor proper for me after a period of six years to say that the petitioners must go back to the Collector of Customs and exhaust all statutory remedies and perhaps come back to this Court after another five or six years. It is high time such technical objections are not resorted to particularly after a number of years during which time the petition remains in this Court and even interim orders by consent are obtained. In the present case, I find a certain minutes of the order at the interim stage which obviously must have been passed after hearing both the advocates and the respondents found no fault with the order at any stage.

16. I may also mention that in the present case, the petitioners have pleaded that *ex facie*, the impugned order is without jurisdiction and *ultra vires* and, therefore, they are entitled to approach this Court at the present stage.

17. In the result, the petitioners must succeed and I, therefore, pass the following order:

The rule is made absolute in terms of prayers (a) and (b).

The bank guarantees furnished by the petitioners to the Prothonotary and Senior Master do stand discharged and they are to be cancelled and handed over to the petitioners within a period of six weeks from today.

In the circumstances of the case, there will be no order as to costs.