

(1988) 03 BOM CK 0052
In the Bombay High Court
Case No : Writ Petition No. 43 of 1988

Ashish Steels Pvt. Ltd.

APPELLANT

Vs

S. Mukhopadhyay and another

RESPONDENT

Date of Decision : 02-03-1988

Acts Referred:

Citation : (1989) 74 STC 293

Hon'ble Judges : G.F. Couto, J;C.D. Parekh, J

Bench : Division Bench

Judgement

Parekh, J.—It is the petitioners' case that the petitioners buy condemned barges and dismantle the same and sell the scrap. That in view of this operation, the excise authorities issued a show cause notice, inter alia, calling upon the petitioners to show cause as to why the petitioners should not pay excise duty on the waste, scrap and other articles derived from such operation. The petitioners have hence come to court challenging the show cause notice.

2. At the hearing of this petition, which has now come up for admission, Mr. Kakodkar, the learned counsel for the petitioners, argued that in breaking up a barge, the petitioners were not engaged in any "manufacture", and that the resulting scrap and waste was only a consequence of the breaking up operation. That since no manufacture of any product was involved, it was not competent for the excise body to issue any show cause notice. That the said show cause notice was clearly without jurisdiction, and the same was liable to be struck down. In support of this contention that the notice was without jurisdiction and the same needed to be struck down, reliance was placed by Mr. Kakodkar on two cases, viz., East India Commercial Co. Ltd., Calcutta v. Collector of Customs, Calcutta AIR 1962 SC 1983 and Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, .

3. Now, the question as to whether dismantling of a barge or a ship can come within the compass of the word "manufacture", it would be necessary to look at the observations made in the case of Commissioner of Sales Tax Vs. Indian Metal

Traders, . In that case a similar question arose, viz., whether the process of breaking up or dismantling a ship would fall within the compass of the word "manufacture" and the court observed as follows :

"This process of dismantling would undoubtedly prima facie, be covered by the definition of the term "manufacture" in clause (17) of section 2 of the said Act. A new commercial commodity, viz., iron and steel scrap, was obtained by applying the process of dismantling on the ship and hence it appears to us that the provisions of section 13(a) of the said Act would be attracted and the respondents would be liable to the payment of purchase tax on the price attributable to the frame or hull or body proper of the ship. In our opinion, it could be said that the iron and steel scrap was produced or manufactured with the use of the said ship. It is not necessary to consider whether iron and steel plates, wooden planks excluding loose ones, rivets and bolts could be said to be new commercial commodities or manufactured with the use of the said ship, as these have admittedly been obtained also from the framework or hull or body proper of the said ship."

If the word "manufacture" is attracted to the operation carried out by the petitioners, then it would only be wholly competent for the excise department to issue a show cause notice. In so far as the two citations are concerned, it may be observed that in the said two cases, it was apparent on the face of the record that the notices were issued in excess of jurisdiction, but in this case, if the word "manufacture" is applicable to the operation carried out by the petitioners, then clearly there is no such patent infirmity which must preclude the authorities from issuing such a notice. Mr. Kakodkar's contention is hence negatived.

4. Mr. Kakodkar next argued that waste and scrap are referred to in two items being item Nos. 72.03 and 72.15. A perusal of these two items goes to show that the waste and scrap that is available from the ships is taxed on a higher footing than the waste and scrap available from other products. That this entails discrimination, and since the petitioners would be affected by such discrimination, they have sought that these tariff items be struck down. That as a matter of fact, in the case of *re : S. S. Jain & Co.* [1986] 25 ELT 17, a single Judge of the Calcutta High Court had in fact struck down tariff item Nos. 72.03 and 72.15. That he (Mr. Kakodkar), however, conceded that this matter had gone before the Division Bench and the said order has been stayed, but be that as it may, since the question of arbitrariness is involved, the petition must be admitted for the determination of the question.

5. In this context, it would be necessary to recall the observations in *Dunlop India Ltd. v. Union of India* AIR 1977 SC 597 wherein the Supreme Court has observed as follows :

"Once an article is classified and put under a distinct entry, the basis of the classification is not open to question."

Nothing whatsoever has, at this stage, been urged to demonstrate that the

classification is not proper. If this be so, the contention canvassed cannot be upheld.

6. These of course are tentative observations based on a prima facie view and nothing herein contained shall be construed to be final and/or binding either on the petitioners and/or the authorities who contemplate to hold an enquiry, and the petitioners will be at liberty to advance such contentions and make such submissions before the enquiry authorities as they desire.

In the result, the petition is dismissed. There will, however, be no order as to costs.

7. Petition dismissed.