
(1993) 06 MAD CK 0020

In the Madras High Court

Case No : Writ Petition No. 1239 of 1985

Ashok Leyland Ltd.

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 14-06-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 35, 4
Constitution of India, 1950 — Article 226

Citation : (1993) 44 ECC 88 : (1993) 68 ELT 65

Hon'ble Judges : Venkataswami, J

Bench : Single Bench

Judgement

1. The petitioner challenges an Order of the first respondent passed in CW/52/13/4/82-CX ADJ. I dated 11-9-1984.

2. The petitioner is a Company incorporated under the Companies Act and engaged in the business of manufacture of heavy duty motor vehicles

and industrial and marine engines. In the course of its business, the petitioner utilises manufacturing capacities of automobile ancillary industries in

accordance with recognised practice of the trade and in accordance with the policy of the Government of India to encourage such small scale

industries. In that way, the petitioner had entrusted to the second respondent certain job works by supplying raw materials to the second

respondent. After receiving the finished/semi finished articles from the second respondent, the petitioner used the same in the course of manufacture

of its excisable goods which it then clears after payment of appropriate excise duty. The controversy is, whether the petitioner is to be treated as

`manufacturer' u/s 2(f) of the Central Excise Act regarding the goods received from the second respondent or the second respondent is to be

treated as "manufacturer" of those goods. The second respondent is an independent legal entity and it does similar job works for other industries

like Brakes India, Sundaram Clayton, etc. It is stated in the affidavit filed in support of the writ petition that an identical issue arose in the year

1981, and after the petitioner explained the position, the Excise Department treated only the second respondent or similar job worker as

"manufacturer" and not the petitioner. However, the petitioner received a show-cause notice dated 1-6-1983, calling upon it to show cause why it

(petitioner) should not be treated as manufacturer of ancillary goods such as studs, locking bolts, plugs, special pins, etc. on the basis that the

petitioners supplied raw materials to the second respondent for the manufacture of the abovesaid ancillary goods. According to the Revenue, in

view of the inclusive definition of "manufacture" u/s 2(f) of the Central Excises and Salt Act, (hereinafter referred to as "the Act"), the petitioner is

the "manufacturer" of those ancillary goods. The show cause notice further accused the petitioner for not taking out a Central Excise licence for

manufacture of those items, etc. The petitioner sent a detailed reply on 15-7-1983 bringing to the notice of the first respondent about the earlier

stand taken by the Department and also several judgments of various High Courts on this aspect. A supplementary reply was also sent on 28-11-

1983. The first respondent, overruling the objections raised in the reply to the show cause notice, by order dated 11-9-1984, received by the

petitioner on 28-11-1984, held that the petitioner was the "manufacturer" and accordingly liable to pay a duty of Rs. 5,54,841.86. P.

3. The petitioner has further stated that though it has got an alternative remedy by way of appeal u/s 35 of the Act, it has moved this Court under

Article 226 of the Constitution of India, in view of the apparent error committed by the first respondent and also in view of the blatant stand taken

by the first respondent in spite of earlier precedents.

4. A counter affidavit has been filed on behalf of the first respondent. While admitting that the second respondent is a separate legal entity, the first

respondent, however, has taken the stand that in view of the inclusive definition contained in Section 2(f) of the Act. persons like the petitioner are

considered as "manufacturers" since they supply raw materials and get back the finished excisable goods. According to the first respondent, it does

not make any difference whether the second respondent undertakes similar job for others. The first respondent also states that for the reasons

stated in the impugned Order, the reliance placed by the petitioner on the judgment of this Court and earlier precedents will be of no avail to the

petitioner. In short, the stand taken in the counter affidavit filed on behalf of the first respondent is that in view of the inclusive definition contained in

Section 2(f) of the Act, the petitioner must be treated as 'manufacturer' as it has supplied the raw materials to the second respondent and got back

the finished excisable goods from the second respondent.

5. Mr. N. Venkataraman, learned Counsel appearing for the petitioner, after narrating the facts relating to the transactions between the petitioner

and the second respondent, and placing reliance heavily on the judgments of the Supreme Court, this Court and other High Courts, submitted that

the stand taken by the first respondent on the facts and in the circumstances of the case, that the petitioner is to be considered as 'manufacturer'

for the purpose of Section 2(f) of the Act is totally unwarranted and, therefore, the impugned Orders are to be quashed by issuing a writ of

certiorari as prayed for. He also submitted that the reliance placed by the first respondent on the judgment of the Supreme Court in M/s. Shree

Agency v. S. K. Bhattacharjee and Others reported in A. I. R. 1872 S. C. 780 = 1977 (1) E. L. T. 168, divorced from the facts of that case, is

again not warranted. According to the learned Counsel, the said decision of the Supreme Court has to be confined only to the peculiar facts of that

case and the Supreme Court has not laid down any ratio in that case which is applicable generally. He also submitted that the first respondent has

distinguished the cases relied on by the petitioner without appreciating the similarity of facts between the petitioner's case and those cases. The

cases cited by the learned Counsel for the petitioner in support of this writ petition are the following : Ujagar Prints Vs. Union of India (UOI), ,

P.M. Abdul Latif and Others Vs. Assistant Collector of Central Excise, Trichirapalli and Others, , Andhra Re-Rolling Works and Others, , Ganga

Dhar Ram Chandra Vs. Collector, Central Excise and Others, , Ashok Transformers Pvt. Ltd. v. Superintendent of Central Excise, Baroda

reported in 1992 (42) ECR 128, Prolite Engineering Co. v. Union of India reported in 1991 (37) ECR 528, and Apex Electricals Pvt. Ltd. Vs.

Union of India, .

6. Mr. K Jayachandran, learned Additional Central Government Standing Counsel, contending contra, submitted that the ratio laid down by the

Supreme Court in the Shree Agency case AIR 1972 S. C. 780 = 1977 (1) E. L. T. 168 (supra) squarely applies to the facts of this case and the

contention to the contrary put forward by the learned Counsel for the petitioner is not sustainable. He invited my attention to the definition of

`manufacture' u/s 2(f) of the Act, and, placing reliance on a judgment of the Supreme Court in Bajrang Gopilal Gajabi Vs. M.N. Balkundri and

Others, , submitted that on the facts of this case, the petitioner alone can be treated as `manufacturer'. He also placed reliance on an unreported

judgment of this Court in Writ Petition No. 11764 of 1990, etc. Batch [Structo Fab Industries v. The Assistant Collector of Central Excise -

Order dated 13-12-1990].

7. I have considered the rival submissions.

8. Let me first consider whether the Revenue is right in placing reliance on the judgment of the Supreme Court in Shree Agency case (referred to

supra). In this context, with respect, I would like to quote a Division Bench judgment of the Gujarat High Court reported in 1991 (37) ECR 528,

distinguishing the judgment of the Supreme Court in Shree Agency case. The learned Judges, in paragraph 17 of the said judgment, have observed

as follows :-

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 SC 780 = 1977 (1) E. L. T. 168 = 1977 ECR C 381 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 those 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 fabric. 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.

With respect, I agree with the above view expressed by the learned Judges. Therefore, I hold that the reliance placed on Shree Agency case

(supra) is of no avail to the first respondent, particularly, when it is a fact that the second respondent is an independent concern, and there is

nothing to suggest that the arrangement entered into between the petitioner and the second respondent was not a genuine one or a camouflage. The

other judgment of the Supreme Court on which heavy reliance was placed by the learned Counsel for the first respondent is, 1986 (8) ECR 690.

Again I am to point out that from a reading of paragraphs 3 and 4 of that judgment, it is clear that their Lordships of the Supreme Court have

decided the issue before them on the facts of that case. Paragraphs 3 and 4 of the said judgment read as follows :-

The High Court after a detailed consideration of all the aspects of the case found that the books of accounts produced by the appellant before the

Excise Authorities contained clear evidence of the fact that the appellant himself was the owner of the yarn alleged to have been sold by Tejpal to

the powerloom owners and that the appellant got back that very yarn in the shape of cloth after it was woven into cloth. After referring to the

details of the evidence, the High Court observed :-

These particulars and details go to show that there was clear and cogent evidence on the record of the department to enable to assessing

authorities to make inferential findings that the transactions of alleged sale of yarn by Tejpal to the powerloom owners and the transactions of

alleged purchase of cloth by the petitioner from the powerloom owners were camouflage for the petitioner to get powerloom cloth manufactured

by himself by employing powerlooms of the powerloom owners.

We see no scope at all for interference with the aforesaid conclusion of fact

reached by the High Court. The consequential position that emerges is that the appellant himself was the manufacturer of the cloth in question and he must be held to have been rightly assessed to excise duty in respect of the cloth so got manufactured on the powerlooms. Therefore, this decision will not be of any help to the first respondent. Again the judgment cited by the learned Counsel for the first respondent, namely, A. P. No. 11764 of 1990, etc. Batch (supra) is not opposite to the facts of this case as it related to a trade notice and the effect of a subsequent trade notice clarifying the earlier one.

9. Let me now consider the decisions cited by the learned counsel for the petitioner.

10. In 1988 (38) E. L. T. 535 (supra), a Constitutional Bench of the Supreme Court has observed in para 37 as follows :-

One more aspect will have to be reiterated. Computation of the assessable value is one question and as to who should be liable for the same is

another. Duties of excise are imposed on production or on manufacture of goods and are levied upon the manufacturer or the producer in

accordance with the relevant rules. This is quite independent of the ownership of goods. It is, therefore, necessary to reiterate that the value for the

assessment u/s 4 of the Act will not be the processing charge alone but the intrinsic value of the processed fabrics which is the price at which the

fabrics are sold for the first time in the wholesale market. The rules are clear on the computation of that value. If the valuation is made according to

the rules as adumbrated in Empire Industries (supra) and as clarified by my learned brother in this judgment no difficulty should arise.

11. In 1985 (22) E. L. T. 758, a Division Bench of this Court had occasion to consider whether a job worker like the second respondent herein is

a manufacturer or not. On the facts of that case which are more or less identical with the facts of the case on hand, the learned Judges held that the

job worker will be the "manufacturer" u/s 2(f) of the Act. Of course, it is to be stated that the Revenue in that case conceded the position.

12. In 1979 (4) E. L. T. 600, a Division Bench of the Andhra Pradesh High Court had occasion to consider the scope of Section 2(f) of the Act.

That was a case filed by the job worker, claiming that he is not a manufacturer. The learned judges rejected that contention and held that the job

worker in that case was the manufacturer u/s 2(f) of the Act. The facts relating to that case are as follows :-

The petitioner is a firm carrying on business of re-rolling having its factory at Moosapet near Sanatnagar, Hyderabad. On 16-6-1964, the 5th

respondent (Surana Trade and Finance Corporation, Secunderabad) entered into a written agreement with the petitioner and during the period

from 29-4-64 to 23-2-1966 entrusted about 3,000 metric tonnes of second class untested rails having purchased the same from Hindustan Steel

Limited, Bhilai Division for the purpose of re-rolling it into M. S. rounds of different specifications. The rolling charges varied according to the size

of the finished product. In accordance with the terms of the said agreement, the rails were supplied by the 5th respondent to the petitioner and the

petitioner re-rolled the said second class untested rails into M. S. rounds and delivered the same to the 5th respondent for which the petitioner

received the requisite re-rolling charges. The contention of the petitioner is that under the provisions of the Central Excises and Salt Act, 1944

(hereinafter called the Act) rails are exempt from duty. The petitioner and the 5th respondent are under the impression M. S. round rolled out of

the duty free rails are also exempt from duty. But after the last petitioner demand notices dated 17-10-66 for Rs. 98,191-95 and Rs. 37,707-90

respectively demanding payment as excise duty on the rounds re-rolled by the petitioner under Tariff Item No. 26AA in Schedule 1 of the fact.

The demand notices were purported to have been issued under Rule 10A of the Central Excise Rules, 1944. Thereupon the petitioner, made a

written representation to the Assistant Collector, Central Excise that the demands were not valid and enforceable in law. But the Assistant collector

by his order dated 17-1-1967 rejected the contention of petitioner. He, however, gave direction to revise the demands in accordance with the

rates of duty current for the different periods. Pursuant to it three demand notices dated 18-3-1967 for various amounts were issued. The

petitioners filed an appeal to the Collector, Central Excise but the appeal was rejected and the demand were confirmed. A revision petition filed to

the Central Government also met with the same fate. The petitioner was, therefore, obliged to file the writ petition.

In that case, the learned Judges held as follows :-

The last contention on behalf of the petitioner is that he does not come within the definition of manufacturer and as such cannot be held liable for

the excise duty. The definition of `manufacture" in the Section is to the following effect.

2(f) manufacture includes any process incidental or ancillary to the completion of manufactured product..... and the word `manufacturer" shall be

construed accordingly and shall include not only a person who employ hired labour in production or manufacture of excisable goods, but also any

person who engages in their production or manufacture on his own account.

The definition is comprehensive enough to include the petitioner within its ambit. It cannot be denied that the petitioner was engaged in the

production of M. S. rounds and as such cannot accept the liability sought to be imposed on him. We are not concerned here with the contractual

relation between the petitioner and the 5th respondent nor it is necessary to express any opinion on that aspect.

13. In 1979 (4) E. L. T. 597, a learned Judge of the Allahabad High Court, while construing the scope of Section 2(f) of the Act, held as follows :-

The real question that arise for determination in this case is whether the petitioner is the manufacturer in respect of the oil manufactured by other oil

mills out of oil seeds supplied by the petitioner. To determine this question it is necessary to consider some of the provisions of the Act and of the

rules made thereunder. Section 2(e) defines ""factory"" to mean any premises, including the precincts thereof, wherein or in any part of which

excisable goods other than salt are manufactured or wherein or an any part of which manufacturing process connected with the production of these

goods is being carried on or is ordinarily carried on Section 2(f) define the word ""manufacture"" in relation to tobacco and salt and them provides as

follows :-

the word `manufacturer" shall be construed accordingly and shall in clude not only a person who employs hired labour in the

production/manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those are

intended for sale.

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 of 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. Therefore, the positive provisions in the definition of the word 'manufacturer' do not assist the respondents.....

The learned Judges of the Gujarat High Court in 1991 (37) ECR 528, 1992 (42) ECR 128 and 1992 (61) E. L. T. 413 have consistently held under identical circumstances that job worker will be the 'manufacturer' u/s 2(f) of the Act.

14. On an appreciation of the decisions of the various High Courts and also the law laid down by their Lordships of the Supreme Court (as extracted above) and having regard to the facts narrated above, I have no hesitation in coming to the conclusion that on the facts and in the circumstances of this case, the petitioner cannot be considered as 'manufacturer' u/s 2(f) of the Act, to attract the levy of duty on the goods manufactured by the second respondent, though the raw materials were supplied by the petitioner.

15. In the result, the writ petition is allowed, and the impugned Order of the first respondent is quashed. However, there will be no order as to costs.