
(1980) 02 CAL CK 0031

In the Calcutta High Court

Case No : Appeal from Original Order No. 276 of 1979

Collector of Central Excise and Others

APPELLANT

Vs

Madura Coats Ltd.

RESPONDENT

Date of Decision : 28-02-1980

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1982) 10 ELT 129

Hon'ble Judges : R.K. Sharma, J;M.M. Dutt, J

Bench : Division Bench

Advocate : D.K. Sen and Ramesh Mitra, for the Appellant;P.P. Jinwala and A. Chaudhury, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—In this appeal, the Collector of Central Excise and others have challenged the propriety of the Judgment of a learned single Judge of this Court making the Rule NISI obtained by the respondent company Madura Coats Ltd., absolute.

2. The case of the respondent is that it is required by some of its customers, such as Dunlop India Limited, to arrange nylon or rayon yarns supplied by them in parallel rows loosely held together by cotton varns sun plied by the respondent. Such arrangement of rayon or nylon cards is called a tyre record warpsheet. To make a warpsheet, the respondent first winds the nylon or rayon yarns supplied by its customers into bobbins. The yarns are then twisted in a twisting machine and thereafter used as warps on a loom; the cotton yarns being used at widely spaced intervals as wefts to hold the nylon or rayon yarns in position. A given length of warpsheet will have 99"4% of nylon yarns and 9.8% of cotton yarns. No manufacturing process involved in making warpsheets and no new commodity known to commerce or industry comes into being when yarns are arranged or assembled to form warpsheets. A warpsheet continues to be known as yarns commercially and in industry even after the arrangement

mentioned above. The nylon or rayon yarns in the warpsheets are used by the respondent's customers in the manufacture of motor car tyres, and it is convenient in such manufacture to have the yarns arranged or assembled in the form of a warpsheet. The cotton yarns holding the nylon or rayon together are destroyed in the manufacture of tyres and are not necessary for such manufacture, their only use or function being to hold the arrangement or assemblage of nylon or rayon yarns together.

3. The Collector of Central Excise by his memo dated March 24, 1975 addressed to the respondent had taken the view that a flylon or rayon warpsheet is an item of manufacture by itself and as it does not come under any of the Tariff Entries Nos. 1 to 66 of the First Schedule to the Central Excises and Salt Act, 1944, it will come under the residuary Entry 68 as "goods, not elsewhere specified" and liable to duty at the rate of 1% ad valorem. In that view of the matter, the Central Excise Authorities have been demanding payment of excise duty from the respondent for the nylon and rayon warpsheets. The respondent has since paid such duty under protest for the period between March 24, 1975 and May 7, 1975.

4. On April 30, 1975, the Central Government issued a notification exempting goods mentioned under Entry 68 of the First Schedule manufactured in a factory as a "job work" from so much of the excise duty leviable thereon as was in excess of the duty calculated on the basis of the amount charged for the job work. The Central Excise Authorities also have taken a view that the respondent is not entitled to the exemption of duty on the basis that the job that is done by the respondent amounts to job work. According to them as the warpsheets consist of cotton yarns which are supplied by the respondent's customers their contention was that in any event it was only liable to pay duty on the basis of job work. The refund claimed by the respondent was also rejected by the Assistant Collector of Central Excise. The respondent has filed appeals against the orders of the Assistant Collector of Central Excise rejecting its claim for refund. It is contended that such appeals and applications for refund are not adequate alternative legal remedies inasmuch as the respondent will have to continue to pay excise duty pending the disposal of such appeals or applications and will have to continually file appeals and applications for refund each time the respondent is assessed to duty and compelled to pay the same. Accordingly, the respondent moved this Court under Article 226 of the Constitution praying for the quashing of the said orders dated March 24, 1975 and February 6, 1966. The respondent has also prayed for a Writ in the nature of Prohibition prohibiting the Central Excise Authorities from demanding or collecting any excise duty in respect of such nylon or rayon warpsheets.

5. The learned Judge came to the finding that the nylon or rayon warpsheets did not come within Entry 68 of the First Schedule to the Central Excises and Salt Act, 1944 and that in any event the respondent was entitled to exemption on the basis that such warpsheets were only job works. The Rule was made absolute. Being aggrieved by the judgment of the learned Judge, this appeal has been

preferred by the Central Excise Authorities.

6. It is not disputed that the tyre record warpsheets were not chargeable to excise duty. On March 1, 1975 the Tariff Entry 68 was introduced into the First Schedule of the Central Excises and Salt Act, 1944. Under that Entry, all other goods not elsewhere specified in the Schedule, manufactured in a factory, became liable to excise duty at the rate of 1 % ad valorem. The word "goods" has not been defined in the Act. The Supreme Court has interpreted the meaning of the word "goods", and it has been held that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold and is known to the market. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use [See *Union of India and Anr. v. Delhi Cloth and General Mills Co. Ltd.*, - AIR 1953 S.C. 791 and *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*,]. The question, therefore, is whether the tyre record warpsheets are "goods" within the meaning of Entry 68. We have ourselves seen a sample of warpsheet which has been exhibited in the case. Nylon yarns are arranged in parallel rows as warps. In order that the nylon yarns do not get jumbled up they are being held by cotton threads at widely spaced intervals as wefts. Two ends of the warpsheets are bound by two tabbies or closely woven strips for the purpose of holding the warpsheet together. It is apparent from the sample that the nylon yarns have not undergone any change, and it is difficult to say that any new substance has come out as the nylon yarns have been arranged lengthwise in a systematic order. The whole object of a warpsheet seems to be that the nylon yarns should be arranged lengthwise so that the same may be used in the manufacture of tyres.

7. In paragraph 6(4) of their affidavit-in-opposition sworn by the Assistant Collector of Central Excise, it has been alleged by the appellants that the product manufactured by the respondent company is commonly known as nylon/rayon tyre record warpsheet in the trade and industry. The respondent company has, however, denied the said allegation. According to the respondent company the nylon/rayon warpsheets go under the name of nylon or rayon yarns. Even assuming that it is known to the industry or trade as nylon/rayon tyre record warpsheet that will not, in our view, bring it within the term "goods" under Entry 68. In order that an article should be considered as "goods" within the meaning of Entry 68, two conditions should be fulfilled, namely (1) it is a new article obtained through manufacturing process and (2) such article having a distinctive name, character or use can ordinarily come to the market to be bought and sold and is known to the market. In the instant case, as has been discussed by us, the nylon or rayon warpsheets do not appear to be a new article as a result of the nylon or rayon yarns being arranged lengthwise and held together by cotton yarns placed horizontally at widely spaced intervals. A very look at the warpsheet will give one the impression that it is nylon or rayon yarns and nothing else. So even if the warpsheets are bought and sold in the market as nylon or rayon tyre record warpsheets, they do not cease to be nylon or rayon yarns. In other

words, the nylon or rayon yarns are not transformed into a new substance having a distinctive character. They are arranged in the shape of a warpsheet for the convenience of being used in the manufacture of tyre cord. We are, therefore, of the opinion that the nylon or rayon warpsheets are not "goods" within the meaning of Entry 68.

8. There is an alternative contention of the respondent company. It is contended that even assuming that nylon or rayon warpsheets come under Entry 68, the respondent company is entitled to the exemption of excise duty as a "job work" in accordance with the Notification dated April 30, 1975 of the Ministry of Finance, Government of India. Under that Notification goods falling under Entry 68 of the First Schedule to the Central Excises and Salt Act, 1944, manufactured in a factory as a job work are exempted, from so much of the duty of excise leviable thereon as is in excess of the duty calculated on the basis of the amount charged for the job work. "Job work" has been defined in the explanation to the notification as follows :-

"Explanation.- For the purpose of this notification the expression "Job work" shall mean such items of work where an article intended to undergo manufacturing process is supplied to the job worker and that article is returned by the job worker to the supplier, after the article has undergone the intended manufacturing process, on charging only for the job work done by him."

It is the case of the respondent company that they prepare warpsheets with nylon or rayon yarns which are supplied to it by its customers, and that after the warpsheets are prepared they return the same to the customers on payment by them of the charges for the job work. It is not disputed by the appellants that nylon or rayon yarns are supplied by the customers of the respondent company and are returned to them by the respondent company after the warpsheets are prepared. But the case of the appellants is that the respondent company not only returns the nylon or rayon yarns, but also they supply the cotton yarns used as weft in the warpsheets and, accordingly it cannot be said that the warpsheets are manufacture as a "Job work". It has been already noticed that the respondent company supplied cotton yarns and those are placed at widely spaced intervals for the purpose of holding the nylon or rayon yarns together, so that they are not dislodged from their position. According to the appellants, if any additional article is supplied by the job worker along with the article intended to undergo manufacturing process, it will cease to be a job work. Though the proposition is correct to some extent, it is very wide. The job worker has to return the article supplied to him and he will only be entitled to charge for the job work. He cannot sell any additional article along with the article supplied by the customers and which have undergone a manufacturing process subject, however, to this that any article which is required for the job work incidentally may be supplied. For instance, when cloths are delivered to a tailor, he makes the garment. He has to use some incidental articles, namely, threads, buttons etc. After the garment is prepared, he returns the same to his customers along with the incidental articles.

The work he does will not cease to be a job work within the meaning of the explanation to the notification simply because he supplied some additional articles. But if the additional article has to be used in substantial proportion and constitute an important element in the manufacturing process and is sold and supplied by the job worker, the work will not be a job work, for under the explanation the job worker will only be entitled to charge for the job work which necessarily means that he will not be entitled to any other consideration. If a manufacturing process involves job work as also sale of certain article, or in other words, if the contract is one of labour and sale, it will not be a job work. But the article supplied and sold by the job worker must constitute a substantial part of the manufacturing process and not merely used incidentally.

9. In paragraph 2 of the Writ Petition, it has been categorically stated that a given length of warpsheet will have 99.4% of nylon or rayon and 0.6% of cotton. There was some dispute as to the percentage of cotton threads in the warpsheet. Samples of nylon and rayon warpsheets given by the respondent company to the appellants for chemical examination. The report of the Chemical Examiner is that the samples are in the form of loosely woven white materials in which weft threads are just sufficient to hold the warp ends. The same of nylon warpsheets contain 83.7% by weight of Polyamide and the sample of rayon warpsheet 83.6% by weight of viscose. The report of the Chemical Examiner has been explained by the respondent company in paragraph 6 of the affidavit-in-reply. It has been stated therein that normally a roll of rayon warpsheets is 1170 metre long and a roll of nylon warpsheet is 880 metre long. In the body of the warpsheet itself there are 2.25 strands of 23 cotton with yarn per inch of warp. However, at each end of the roll there are tabbies or closely woven strips for the purpose of holding the warpsheets together. These tabbies which are about 4% are 6" in width have twelve strands of 10 S or 12 S cotton weft yarn per inch or warp. Further, for the purpose of providing a sample, whenever a sample is required for testing other records at one end of the roll there is a metre long warpsheet similarly, bounded by two tabbies to hold it together. In the Chemical Examiner's reports, the percentages by weight of Polyamide in the nylon sample and viscose in the rayon sample have been calculated as percentages of the weight of the whole piece including the tabbies, thus giving the percentage as 83.7% and 86.6% respectively. It is stated that the tabbies are not a part of the warpsheet at all, but merely a sort of binding for the purpose of holding the yarns together, and that if the tabbies are treated as part of the warpsheet, the sample is not a representative sample since it has two tabbies for a length of one metre whereas the roll has two tabbies for a length of 880 or 1170 metres as the case may be.

10. There is no reason why the above explanation should not be accepted. The percentage of the cotton yarn used in the warpsheet has gone up as the Chemical Examiner took into his consideration the presence of cotton yarn in the tabbies which do not form part of the warpsheet, only a metre in length. It is obvious that in a roll of 880 or 1170 metres, the percentage of cotton yarn will

be very small. In the circumstances, we accept the case of the respondent company that the percentage of cotton yarn in a given length of warpsheet is only 0.6%. The use of 0.6% of cotton yarn in the warpsheet cannot but be held to be an incidental requirement. Such incidental requirement will not prevent the work being considered as "job work" within the meaning of the definition of the term as given in the explanation to the said notification. Apart from what has been stated above, the respondent company has produced a number of invoices which show that it has not charged for the cotton weft supplied by it to its customers, but it has only charged for the works done by it in preparing the warpsheets. After considering the above facts, we are of the view that even assuming that the nylon or rayon warpsheets come within Entry 68 as "goods not elsewhere specified" in the First Schedule it will be a "job work" and the respondent company will be entitled to the exemption as granted by the said notification- We have, however, held that the nylon or rayon warpsheets do not come under Entry 68. The appellants are, therefore, not entitled to impose excise duty on the respondent company for the warpsheets.

11. Before we part with this appeal, we have to dispose of some technical points raised by Mr. Sen, learned Counsel for the appellants. It is contended by him that the Writ petition is premature inasmuch as the respondent company has only been asked to show cause why it should not pay excise duty on the warpsheets, under Entry 68. It is for the excise authorities to consider the cause that may be shown by the respondent company and not this Court at this stage. It is also submitted by him that the Writ petition is not maintainable as there is no question of jurisdiction involved in the Case. The excise authorities have jurisdiction to issue such a show cause notice and they cannot be prevented from deciding the question whether excise duty should be imposed on the warpsheets or not under Entry No. 68. Moreover, it is contended that the decision on the question of imposition of excise duty involved adjudication of facts and the High Court does not embark on such adjudication under Article 226 of the Constitution. Much reliance has been placed on behalf of the appellants on the decision of the Supreme Court in *Delhi Cloth and General Mills Co. Ltd. and Others Vs. R.R. Gupta, Commercial Tax Officer, Jaipur and Another*, .

12. The above contentions do not commend to us. It is not correct to say that there is no question of jurisdiction involved in this matter. The excise authorities have no jurisdiction to proceed to impose excise duty on an article which is an exempted article. There can be no doubt that, if in considering whether excise duty is leviable or not facts are to be decided on evidence this Court will not surely interfere in the matter. However, as noticed above, there is no serious dispute on questions of fact, the only dispute being the percentage of cotton yarn in a warpsheet. That, in our opinion, can be decided on affidavits. Even assuming that what the Chemical Examiner has reported about the percentage of cotton yarn in a warpsheet is correct, still, in our opinion, it is very small compared to the percentage of nylon or rayon yarn present in the warpsheet. In that case also the supply of cotton yarn by the respondent company will be quite incidental. In

Delhi Cloth Mills Case (supra), the question was whether "rayon tyre cord fabric" manufactured by the appellant company in its mills was "textile fabric" within the meaning of Entry 22A of the First Schedule of the Central Excises and Salt Act, 1944, so that sales tax might be charged for the sale of rayon tyre cord fabric as "Textile fabric" under Entry 18 of the Rajasthan Sales Tax Act, 1954. It was, inter alia, held by the Supreme Court that the High Court was right in not interfering with the decision of the taxing authorities as the question appertained to the knowledge of technical aspects of textile weaving and production to determine at what stage threads or cords forming warps and wefts really amounted to "textile fabric". In the circumstances, the contention of the appellant cannot be accepted.

13. Another point has been urged on behalf of the appellants against the maintainability of the Writ petition on the ground of alternative remedy. It is pointed out that the respondent company made an application for refund of the excise duty paid by it under protest. That application was rejected and thereafter an appeal was preferred by the respondent company and during the pendency of the said appeal, the Writ petition was filed in this Court. It is contended that the respondent Company having availed itself of an alternative remedy is debarred from moving this Court under Article 226 of the Constitution. Mr. Jinwalla, learned Counsel for the respondent Company, submits that every year the respondent company has to pay the duty on warpsheets under protest and also to make an application for refund. After the application is rejected, the respondent Company has to file an appeal. Even if the appeal succeeds, that will not prevent the excise authorities from charging excise duty on warpsheets and so there will be no final determination of the matter. The relief that the Respondent Company may get in respect of a particular year, is not an effective and adequate relief, for in the next year the respondent company has to again ask for refund and prefer an appeal if the application for refund is rejected. In our opinion, the contention of Mr. Jinwalla has considerable substance. There can be no dispute that unless an alternative remedy can give full and effective relief to the aggrieved party, it will not stand in the way of his moving this Court under Article 226 of the Constitution. In our opinion, the provision for refund cannot be regarded as an alternative remedy. In these circumstances, the Writ petition was quite maintainable. No other point has been argued in this appeal on behalf of either party.

14. For the reasons aforesaid, we dismiss the appeal but there will be no order for costs.