

(1988) 01 KAR CK 0022
In the Karnataka High Court
Case No : Writ Petition No. 31668 of 1981

Deepak Extrusions and Mohanbhai

APPELLANT

Vs

J.T. Chopra, Asstt. Collector of Central Excise and The Union
of India (UOI)

RESPONDENT

Date of Decision : 30-01-1988

Acts Referred:

Central Excise Act, 1944 — Section 2 (f), 2 (f) (v), 2 (f) (vii), 4

Citation : (1988) 17 ECR 83

Hon'ble Judges : S.R. Rajasekhara Murthy, J

Bench : Single Bench

Judgement

S.R. Rajasekhara Murthy, J.—Petitioner No. 1 is a private limited company who is a manufacturer of Aluminum collapsible tubes and rigid cans under a licence granted under the Central Excise and Sales Tax Act (the "Act"). Petitioner No. 2 is the Managing Director and a share--holder of 1st petitioner company.

2. The petitioners have challenged the constitutional validity of the amendment to Section 2(f) and Tariff Item 27 of the First Schedule to the Central Excise Act, effected by Finance Act (2) of 1980. The relevant provisions, viz., Item 27 which stood before its amendment with effect from 17th June, 1980, reads thus:

(a) x x x x x x (b) x x x x x x (c) x x x x x x (d) x x x x x x (e) Extruded shapes and sections including extruded pipes and tubes.

3. The term, "Manufacture" as defined u/s 2(f) of the said Act, before its amendment, read thus:

"manufacture" includes any process incidental or ancillary to the completion of a manufactured product.

The Aluminum collapsible tubes and rigid cans manufactured by the petitioner No. 1 were chargeable to duty under the Central Excises Act under Tariff Item 27 of 1 Schedule to the Act. This item as it stood prior to 17.6.1980 reads as:

27. Aluminum.--

(f) containers made of Aluminum.

Both Section 2(f) and Item 27 underwent change by Finance (No. 2) Act of 1980.

In the definition Section, "manufacture" after Sub-clause (vii), the following sub-clause was inserted, viz.,

(viii) in relation to Aluminum, includes lacquering or printing or both of plain containers".

Corresponding change in Tariff Item 27 in the Ist Schedule to the Act was also substituted and read thus:

27. "Aluminum" and products thereof--

Aluminum" shall include any alloy in which Aluminum predominates by weight over each of the other metals....

(II) Containers, plain, lacquered or printed or lacquered and printed.

4. In the Writ Petition the petitioners have challenged the constitutional validity of the amended Section 2(f) and tariff item No. 27 in the First Schedule referred to above as amended by Finance (No. 2) Act of 1980.

5. An amendment to the petition was sought by I.A.I. to amend the Writ Petition to include the corresponding provisions in the Central Excise Tariff Act, 1985, which substituted the First Schedule to the Central Excises and Salt Act.

The main contest of the petitioners is in relation to the term "manufacture" in relation to Aluminum was understood as "plain extruded Aluminum tubes" and by virtue of amendment to Section 2(f) of the Act and the consequential amendment to the Central Excise Tariff Item 27(11) by Finance (No. 2) Act of 1980, "Aluminum containers plain, lacquered or printed or lacquered and printed" substituted in the Ist Schedule to the Act.

6. Constitutional validity of this provision is the subject-matter of the Writ Petition.

7. On the arguments advanced by Sri Ganesh, learned Counsel for the petitioners and Sri C. Shivappa, learned Senior Standing Counsel for the Department,...the question that arises for determination in this writ petition is:

Whether a new marketable commodity emerges, by lacquering or printing or both on the collapsible tubes and is exigible to duty under the Central Excise Act under the amended provisions of Finance (No. 2) Act of 1980 ?

8. Prior to the amendment, excise duty was levied only on bare Aluminum tubes. The case of the petitioners is that to meet the requirements of certain manufacturers of Pharmaceuticals and cosmetics, petitioners undertake printing and lacquering also. The question is, whether this process of lacquering and

printing can be construed as "manufacture" for the purpose of levy of duty and further whether this process is incidental or ancillary to the manufacture of the dutiable goods. Lacquering, according to the petitioners is nothing but giving an extra coating on the external surface of the plain tubes which are containers, for the purpose of printing as required by the various customers. It is not in dispute that on the facts of the present case no lacquering is done on the internal surface of the tubes and it is also not the case of the Department that lacquering is done on all the tubes manufactured by the petitioners which goods attract the duty under the Act.

The case of the Department is set out in Paragraph-4 of the statement of objections. It is sought to be made out that the further process of lacquering and printing and printing or lacquering, is also a manufacture for the purpose of levy of excise duty by virtue of the expanded definition of the term, after it was amended in the year 1980. Therefore, it is contended that the value of the final product namely, Aluminum tubes lacquered and printed, which passes out of the gates of the manufacturer, should be taken as the value of excisable goods.

9. Both the learned Counsel for the petitioner as well as the Standing Counsel for the Department are relying upon the decision of the Supreme Court in *Empire Industries Ltd. v. Union of India* : 1986 S.C. 662 : 1985 ECR 1169.

10. Para 36 of the said decision is referred to by the petitioners, and the ratio of the decision on facts, is sought to be applied to the facts of this case, by the Department.

11. It is, therefore, necessary to refer to the facts of the said case and the ratio as applicable to this case.

12. In *Empire Industry's* case, the Supreme Court considered the validity of the definition of "manufacture" as amended by the Central Excises and Salt and Additional duties of excise (Amendment) Act, 1980 (Act 6 of 1980).

13. The amended provisions which were impugned before the Supreme Court in so far as cotton fabrics are concerned, are reproduced in paragraph 13 of the Judgment.

14. Section 2(f)(v) inserted by Act 6 of 1980 effected change in the definition of "manufacture" as inserted by Act 6 of 1980. Relevant Sub-Cl. (v) reads thus:

(v) in relation to goods comprised in Item No. 19(1) of the First Schedule, includes bleaching, mercerising, dyeing, printing, water-proofing, rubberising, shrink-proofing, organdie processing or any other process or any one or more of these processes.

15. item 19-1 of the Ist Schedule refers to Cotton Fabrics and different rates so far as.

(a) cotton fabrics, not subjected to any process--

(b) cotton fabrics, subjected to the process of bleaching, etc., are concerned.

16. A comparative study of these amendments in relation to the definition of "manufacture" and tariff items in relation to the cotton fabrics vis-a-vis the amendments brought about in the Act so far as Aluminum products are concerned would help in appreciating the rival contentions of the parties and having regard to the argument of the department that the reasons given for and the ratio of the decision rendered in Empire Industry's case in relation to processed cotton-fabrics is applicable to the processes Aluminum containers in the present case.

17. The legal consequences that arise out of the amendments, both with regard to the cotton fabric and Aluminum products are analogous and arise out of more or less the similar fact situations and processes which are construed and considered as "manufacture" in relation to both the goods.

18. The facts of the present case in which the Aluminum products are involved are set-out earlier in this order. It would be useful and necessary to deal with the facts involved and which arose for consideration in Empire Industry's case.

19. The petitioner-company in the said case was an independent processing unit carrying on its activities at Bombay and as such was engaged in job activities of dyeing, printing and finishing of man-made cotton fabrics.

20. The petitioner's contention before the Supreme Court was that the processing operations which it carried on its factory, were job-work operations of dyeing, bleaching, etc., of the cotton fabrics, which are known as "grey" fabrics or un-processed man-made fabrics, which had been cleared after payment of excise duty.

21. The further contention of the petitioner was that it received fully manufactured man-made fabrics and cotton fabrics from its customers only for the purpose of carrying out one or more of the aforesaid processes on the cotton fabrics, as per the requirements and instructions of the customers and after the necessary processes were carried out, the same were returned to the customers. The petitioner-company contended that it merely collected from its customers charges only for job work of processing done by it and further it had no proprietary interest in the fabric either before or after the same was processed. The petitioner-company was required to file classification-list for approval of the concerned excise authorities in respect of the processed fabrics referred to above. The demand made by the Central Excise authorities to pay additional excise duty on the processed fabrics under the new tariff Item 19--1(b) was challenged by the petitioner-company before the Supreme Court under Article 32.

22. The main contentions before the Supreme Court were:

(i) that the processes of bleaching, dyeing, printing, etc., carried out by the petitioner-company as job works, could not properly be described as manufacturing process;

(ii) that the cotton fabrics were subjected to further process only and no different article having distinctive features, character and use, came into existence; and

(iii) that the amendment to the term "manufacture" by including such process in the definition of "manufacture" and the consequential amendment in Tariff Items 19.1 and 22.1 was beyond the scope of Entry 84 of List 1 of the 7th Schedule to the Constitution and as such, ultra vires the power of the Parliament.

23. The Supreme Court, after elaborate consideration of the arguments advanced on behalf of the petitioner-company, referred to its earlier decisions rendered on the interpretation of the term "manufacture" in Central Excise Act. They are:

1. Union of India (UOI) Vs. Delhi Cloth and General Mills,
2. Union of India (UOI) Vs. Hindu Undivided Family Business known as Ramlal Mansukhrai, Rewari and Another, and
3. Allenbury Engineers Pvt. Ltd. Vs. Ramkrishna Dalmia and Others, .

24. The court referred to the decision of Madhya Pradesh High Court in Hiralal Jitmal Vs. Commissioner of Sales Tax, and also the decision of the Punjab and Haryana High Court in East India Cotton Manufacturing Company Pvt. Ltd. v. The Assessing Authority-cum-Excise and Taxation Officer, Gurgaon (1972) 30 STC 489, in which the Courts took the view that, sizing, bleaching or dyeing of raw cloth turns it into a different marketable commodity, and, as such amounted to "manufacture" of a commercially new product.

4. Kores (India) v. Union of India 1982 ELT 253 : 1982 Tax L.R. 2823 : 1982 ECR 40ID;

5. Vijay Textile v. Union of India (1979) ELT (J) 181 : 1980 Tax L.R. 1766), were the other decisions referred to by the Supreme Court.

25. Dealing with the contention of the petitioners, their Lordships tackled the question on first principles, vis-a-vis, the excise law, under which the taxable event is "manufacture". They held, the moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether it is the result of one process or several processes, "manufacture" took place and liability to duty is attracted. After consideration of the several decisions and on the basis of the construction of the term, "manufacture" the Supreme Court came to the conclusion that the process of bleaching, dyeing and printing etymologically also means, "manufacturing process".

26. The argument that it was a tax on the activity, like processing and the charging section did not envisage any levy of duty on such activity, was rejected by the Supreme Court observing that the argument proceeded entirely on a misconception. Charging Section 3 of the Act was then referred to and in view of their finding recorded earlier that the process of bleaching, dyeing, etc., also meant "manufacturing process", the levy was upheld as one falling under the

charging section.

27. The Supreme Court, however, granted relief to the petitioners in so far as the duty that the grey fabrics had already suffered in the hands of its manufacturers. The ratio of the decision and the principle laid down contained in paragraph--52 of the Judgment, (Empire Industry's Ltd.), is reproduced:

When the textile fabrics are subjected to the processes like bleaching, dyeing and printing etc., by independent processes, whether on their own account or on job-charges basis, the value for the purposes of assessment u/s 4 of the Central Excise Act will not be the processing charges alone but the intrinsic value of the processed fabrics which is the price at which such fabrics are sold for the first time in the wholesale market.

28. Now, turning to the facts of the present case, the excisable goods, before the amendment by Finance (No. 2) Act of 1980, was described as "containers made of Aluminum" as specified in Item No. 27F of the 1st Schedule.

29. After amendment, as already stated, the definition of "manufacturing process" included process of lacquering or printing or both of plain containers as a process incidental or ancillary to the manufacture of containers made of Aluminum. A consequential amendment was also made to Item 27, under the heading "Aluminum" and "products" thereof under which Aluminum containers, included plain lacquered or printed or lacquered and printed, and an explanation was also added that "container" means and includes collapsible tubes.

30. The petitioners in the present case are the manufacturers of Aluminum collapsible tubes and rigid cans, which, after the process of extrusion, are subjected to further process of printing and lacquering or both. This further process is done by the petitioner on specific orders placed by its customers and supplied in bulk. It is, however, the case of the petitioner that so far as its Bangalore Unit is concerned, after the extrusion, lacquering and coating is done on the surface only and printing is done in order to satisfy the requirements of some of its customers, who are manufacturers of pharmaceuticals and cosmetics. The main thrust of the argument of Sri Ganesh, learned Counsel for the petitioner is, that the process of printing and/lacquering is not incidental or ancillary to the completion of the manufacture of the plain Aluminum, collapsible tubes or rigid cans, which are the goods excisable to duty under the Act.

31. The further contention is that the said processes have no relation to the manufacture of excisable goods and the process of printing and lacquering do not bring forth a new marketable commodity.

32. The argument that follows from the above submissions is that the cost of the process of printing of lacquering or both, should not be included in the value of the plain tubes for the purpose of levy of Central Excise Duty.

The learned Counsel for the petitioner has also relied upon the Division Bench decision of the Gujarat High Court in *Extrusion Process Pvt. Ltd. v. N.R. Jadhav*,

Superintendent of Central Excise [79 ELT (J) 380, and the three decisions of the three learned Single Judges of the Bombay High Court in:

(i) Metal Box Company's case--(Misc. Petition No. 511/73--disposed of on 24th July, 1979);

(ii) Metal Box India Ltd. v. Union of India and Ors.--(W. P. No 998/81--disposed of on 1.7.1987), and

(iii) Extrusions Pvt. Ltd. v. M.C. Thakur and Union of India--(W.P. No. 1539/81--disposed of on 23.7.1987).

33. Reliance is also placed on paragraph-36 in Empire Industry's case, in which a reference is made to the decision of the Gujarat High Court in Extrusions Pvt. Ltd. v. N.R. Jadhav, and it is submitted that, by implication, the said decision is approved by the Supreme Court.

Before advertng to the contentions of the petitioner, it would be necessary to deal with each one of the cases cited by the learned Counsel.

34. In Metal Box Company's case--(Misc. Petition No. 511/73)--an attempt made by the Department to include the cost of printing and lacquering, etc., in the value of the excisable goods, namely, the extruded plain Aluminum tubes, was foiled by the Bombay High Court in the said decision. It was held, that the process of printing, coating, etc., were post-manufacturing processes and were, therefore, not covered by Sub-item (e) of Item 27.

35. This decision is said to be pending in appeal before the Supreme Court at the instance of the Department. It should be noted herein that the provisions of the definition section and the schedule that were considered by the High Court, were the provisions of the Act before their amendment in 1980.

36. In the second case--W.P. No. 998/81, the subject-matter was enforceability of the provisions of Section 3 of the Provisional-Collection of Taxes Act, 1931, with reference to the levy made under Item-27(e), after amendment by Finance (No. 2) Act of 1980. The Court did not go into the validity of the provisions of the amended item in relation to lacquering or printing or both.

37. In the last of the cases referred to above--Extrusions Pvt. Ltd. (W.P. No. 1539/81), his Lordship Justice Suresh, struck down the provisions of Finance (No. 2) Act of 1980 in so far as it relates to the tariff Item 8312.11 and Note II to Chapter 83 of the Central Excise Tariff Act, 1985, as ultravires Entry 84 of List 1 of Schedule VII of the Constitution.

38. His Lordship relied upon the decision of Gujarat High Court in Extrusions Pvt. Ltd. and the decision of the Bombay High Court in Metal Box Co. case, for his conclusion that the process of printing and lacquering did not bring about a new marketable commodity and such a process cannot be considered as process of manufacture.

39. This is the only decision directly on the point rendered in relation to the amended provisions.

40. As already stated, the Central Excises Tariff Act substituted the First Schedule to the Central Excises Act with effect from 28.2.1986. Item 27(11) in the First Schedule and the amended definitions of Section 2(f)(vii) correspond to the provisions of the Tariff Act struck down by the Bombay High Court in the said decision.

41. I beg to differ from the view taken by his Lordship in the said case, and upheld the levy in this case for more than one reason.

42. Firstly, his Lordship relied upon two Judgments, one of Gujarat High Court in--*Extrusions Process (P) Ltd. v. N.R. Jadhav* 1979 ELT (J) 380, and *Anr. of the Bombay High Court in Metal Box Co. of India v. Union of India and Ors.* (Misc. Petition No. 511/73) in support of his conclusion taken, to allow the writ petition and strike down the relevant provisions impugned in the writ petition.

43. The important point to be noted to distinguish those two decisions is, that in both the cases the provisions of the Central Excise Act before it was amended by Finance (No. 2) Act of 1980 had been challenged and therefore, they have no relevance in view of the amended provisions.

44. It is significant to note that under the amended Section 2(f), the expression, "manufacture" underwent a marked change which means and includes, any process incidental or ancillary to the completion of a manufactured product, and, Item (v) of Section 2(f) refers to goods comprised in Item No. 19-1 of First Schedule viz, cotton fabrics includes, cotton fabrics, bleaching, printing and dyeing, and Item (viii) in relation to Aluminum, includes, lacquering and printing or both, of plain containers.

45. It is also stated by Sri Shivappa for the Department that the said Judgment of Justice Suresh has since been stayed in a Writ Appeal filed by the Department before the High Court of Bombay.

46. The observations made and the principles laid down and the conclusions drawn by their Lordships of the Supreme Court in *Empire Industry's* case are applicable on all fours, in my view, to the facts of this case, and in view of the amendments made to Section 2(f) widening its scope and ambit. It is, therefore, necessary to deal with the facts, the discussion and the ratio in the *Empire Industry's* case.

47. The Supreme Court held that the intrinsic value of the cotton-fabric, as enhanced by the process it undergoes, should be the value for purposes of levy of excise duty and the price of such processed fabric sold, for the first time, in the open market, and therefore should be the basis for the levy.

48. The process of printing and lacquering which the plain Aluminum tubes undergo in this case, correspond to and is governed by the same principle which

was applied in Empire Industry's case, to include the process of dyeing, bleaching, etc., in the extended definition of manufacture. Therefore, the extruded tubes supplied by the petitioners' customers, after giving them the necessary coating, which is technically known as lacquering and also printing on the tubes as required by its customers, are the finished goods which are sold, for the first time, in wholesale by the petitioners in the open market and are therefore exigible to charge under the Central Excise Act, as noticed by the Supreme Court in Empire Industry's case.

49. The important test is, whether the plain Aluminum tubes have undergone transformation by the process of lacquering and printing, thus bringing forth a commodity distinct and separate from the plain extruded tubes? The argument of the petitioners, that the process of lacquering and printing do not constitute manufacture and are not incidental or ancillary to the manufacture of dutiable goods, namely--extruded plain tubes and that the said processes are independent of the manufacture of excisable goods, and the value of the tubes for the purposes of levy of excise-duty should not include the cost of lacquering and printing is, therefore, rejected.

50. After careful consideration of the arguments advanced, I am not persuaded to hold why the ratio of the Supreme Court decision in Empire Industry's case, should not be made applicable to the facts of this case.

51. If the value of the processed fabric, can form the basis for the charge, as upheld by the Supreme Court, the question is, why not the value of lacquered and printed tubes be adopted for purposes of levy on the fabrics in this case ?

52. The object of the extended definition of the term, "manufacture" is to include lacquering or printing, or both. Petitioners are the manufacturers of Aluminum collapsible tubes and supply in bulk quantities, lacquered and printed tubes to their customers, depending upon and to meet the requirements of the various manufacturers of products like, pharmaceuticals, cosmetics, etc. To quote from the very wordings used by their Lordships in the said case-(See : Para 44), the process of lacquering and printing which is incorporated in the impugned provisions, are not alien or foreign to the concept of "manufacture". The process of lacquering and printing has nexus with the manufacture of the item, particularly as the process was intended to give a finishing-touch rendering the product marketable and as a new and distinct article.

53. I am, therefore, of the view that the excisable goods on the facts of this case, should be the lacquered and printed tubes, and not plain collapsible tubes and the intrinsic value of the goods should be the increased value of the plain tubes, including the cost of lacquering and printing for purpose of excise duty.

54. The test, as laid down by the Supreme Court, should be the intrinsic value of the lacquered and printed tubes which are sold, for the first time, in the wholesale market, though on the facts of this and other cases relied upon by the petitioner, they were done at the request of the various customers to suit their

convenience and needs.

55. The petitioner has also contended that the Supreme Court has approved by implication, the decision of the Gujarat High Court in *Extrusion Pvt. Ltd. v. N.R. Jadhav* [79 ELT (J) 380] in Paragraph-36 of its Judgment. On a careful perusal of the observations, this argument of the learned Counsel for the petitioner has to be rejected, since in my view, the Supreme Court has not, in clear terms and categorically approved the view of the Gujarat High Court, but have observed with a note of caution, that the question whether a particular process is process of manufacture or not, has to be determined naturally having regard to the well-known tests laid* down by the Supreme Court.

56. The Supreme Court in *Union of India (UOI) Vs. Delhi Cloth and General Mills*, , dealing with the connotation of the term, "manufacture", observed at Para-14 thus:

"Manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

57. In the light of the principles enunciated and the law as to, "what is manufacture", it is difficult to agree with the contention of the petitioners that the lacquered and printed tubes are not a new and distinct commercial product.

That the extruded plain tubes undergo a further transformation by lacquering, coating and printing and is different from the plain tubes, cannot be disputed. Does not a new and different commodity having distinct features, name, use and character emerge as a result of the lacquering and the printing ? The answer should be in the affirmative applying the ratio of the Supreme Court decision in *Empire Industry's* case.

58. But, the Supreme Court has in a later decision made in a batch of cases in *Ujagar Prints Vs. Union of India (UOI)*, differed from the view taken in *Empire Industry's* case and referred the said case to a larger--Bench. While doing so, their Lordships expressed that it would be open to the larger--Bench to consider not only the question of determination of the assessable value, but also the principal question, whether processing of grey fabrics by a processor on job-work basis, constitute "manufacture" decided in favour of the Revenue in *Empire Industry's* case was also left open to be decided by the larger--Bench.

59. The petitioners in *Empire Industry's* case had independent processing units and some difficulty was felt by the later--Bench in evolving the correct method of determining the assessable value of the processed fabric in the hands of the processor, who does the job-work on the grey cloth supplied by the manufacturer or trader.

60. Re : the constitutionality of the provisions of Section 2(f) and Tariff Item 27 in the I Schedule to the Central Excises and Salt Act, 1944, as amended by

Finance (No. 2) Act of 1980, and also Note No. 2 of Chapter 83 (amended by) and Tariff Item 8312.11 (Now Chapter 76 and Heading 76.12) in the Schedule to the Central Excise Tariff Act, 1985, considerable argument was advanced by Sri Ganesh, the learned Counsel for the petitioner.

61. The Supreme Court has upheld the constitutionality of the expression "manufacture" as amended by Act 6/80 and the competency of the Parliament to define the expression so as to include any process incidental or ancillary to the completion of the manufacture of the product and with reference to manufacture of cotton fabrics, to include the process of bleaching, etc. carried out on cotton fabrics, in *Empire Industry's* case. (See : Paragraphs 42 and 46).

62. For the same reasons given by the Supreme Court to uphold the constitutionality of the amended provisions of Section 2(f) in relation to Item (v), the argument as to the constitutionality of Item (viii) of Section 2(f) advanced in this case, in relation to the process of lacquering and the printing or both, has to be rejected.

63. Consequently, the amended definition of Section 2(f)(viii) and Tariff Item-27 of the I Schedule to the Central Excises and Salt Tax Act, 1944, as also the corresponding provisions of Item No. 2 in Chapter 83 of the Central Excise Tariff Act, 1985 and Tariff Item 8312.11 in the Schedule, as applicable to the process of lacquering and printing of Aluminum containers are concerned, which are impugned in this writ-petition, are upheld as valid and within the competence of the Parliament, both under Entry 84 and 97 of List I of Schedule VII.

64. But, on the facts of the present case, the manufacturer of plain tubes and processor of lacquering and printing being the same, the Department may continue to levy and collect the duty on the price at which the processed tubes are sold, for the first time. It is, however, made clear that any decision of the larger--Bench of the Supreme Court on the principal question, should ultimately govern this case also.