

(1997) 03 KL CK 0015

In the High Court Of Kerala

Case No : O.P. No's. 617 and 622 of 1997

Electrical and Hardware Industries

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 19-03-1997

Acts Referred:

Central Excise Rules, 1944 — Rule 206(3), 223, 224, 47, 49
Central Excises and Salt Act, 1944 — Section 2, 23(1), 23(3), 24, 3
Constitution of India, 1950 — Article 14, 226

Citation : (1997) 95 ELT 27

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : C.N. Ramachandran, for the Appellant; John Varghese, for the Respondent

Judgement

P. Shanmugam, J.—Petitioners are small scale undertakings engaged in fabrication of various Line Materials such as cross arms, etc. They have challenged Ext. P3 order of the Assistant Commissioner informing the petitioners [that] they must clear the goods only after observing Central Excise formalities as per the Central Excise Act and Rules and, therefore, goods shall not be cleared on execution of bond.

2. The case of the petitioners is that their factory premises as well as the residence of the partners of the units were inspected on 31-10-1996 by the Central Excise Department staff headed by the Superintendent of Central Excise. The factory once again was inspected on 1-11-1996 and after ascertaining the total quantity of cross arms that were lying in stock, issued a detention orders in respect of the same and directed the petitioners not to remove, part with or otherwise deal with the detained goods without prior permission from the Department. Thereafter, the petitioner approached the respondents and sought for permission to clear the goods provisionally after executing a bond for the alleged duty liability. The said request was turned down and hence the above Original Petitions were filed.

3. According to learned Counsel for the petitioners the demand of the Assistant Commissioner to pay duty is arbitrary and illegal and violative of their fundamental rights of an assessee under Article 14 of the Constitution of India. According to him, the Central Excise Department is not entitled to demand duty without adjudication and in any event they must be allowed to clear the goods on execution of a bond as it had been done in the case of the petitioner in O.P. No. 617 of 1997 as per the directions of this Court in O P. No. 20386 of 1996. Learned Counsel for the petitioners also submitted that the cross arms are not excisable in so far as the fabrication work done in respect of the cross arms cannot be said to be one that tantamounts to manufacture.

4. A counter affidavit has been filed on behalf of the respondents. It is stated that the Original Petitions are premature and the filing of the Original Petitions are abuse of the process of this Court. He stated that there is no provision under the Act and Rules to permit a manufacturer to clear dutiable goods for domestic use without payment of duty on execution of a bond. It is further stated that a search was conducted at the premises of the petitioners at Athani on 31-10-1996 on the belief that excisable goods have been cleared by the unit without observing the Central Excise procedures, even though the ceiling for SSI exemption has been crossed by the petitioners. No documents were maintained at the premises. A simultaneous search at the office premises of the factory at Ernakulam revealed various documents evidencing clearance of excisable good and it was found that the unit had crossed the limit for SSI exemption. Therefore on 1-11-1996 the officers of the Department visited the factory premises of the petitioners and detained the goods lying in the factory and handed over to the petitioner immediately. Subsequently the petitioners were advised by the Department to take the release of the goods provisionally on execution of a bond in proper form with sufficient security by communication dated 5-12-1996. Not being satisfied with the said letter the petitioners moved this Court O.P. Nos. 20386 and 20385 of 1996 and got a direction for the release of the goods on condition of executing a bond with an undertaking that they will be paid duty as may be payable. The petitioners had stated before this Court that items in Ext. P1 are subject to adjudication by the respondents. It is clearly stated that the goods already detained had been released. The respondents stated that the goods that were manufactured in the factory are excisable. As per the Central Excise Rules goods cannot be cleared on execution of a bond and the petitioners cannot claim any exemption from the usual formalities. It is stated that the petitioners are trying to evade payment of duty by clearing excisable goods from the factory. The points raised by the petitioners are premature and can be raised before the adjudicating authority.

5. I have heard the Counsel at length. Both the petitioners claim to be small scale industrial undertakings. M/s. General Engineering Industries is a proprietary concern and M/s. Electricals and Hardware Industries is a partnership firm. Both are manufacturing line materials. It cannot be disputed that if the units are manufacturing excisable commodities they will be liable to pay excise

duty before it is being removed from their factory. There is no provision to remove the goods on an undertaking or a bond if the goods are excisable. Petitioners have stated in the Original Petitions that they are engaging in fabrication of various line materials such as cross arms. It is stated that insofar as the fabrication work done in respect of the cross arms is concerned it will not amount to manufacture. On the other hand in the statement filed on behalf of the respondents it is stated as follows :

"Cross Arms can be defined as a product made out of M.S. Angles/Channels for use in the transmission lines for supply of electricity. Duty paid MS Angles are brought into the factory and are subjected to various processes as required. There are various categories of cross arms like 2-line, 4-line, V-Cross Arms, etc. The MS Angles are first cut into the required size and then holes are put as required. In the case of V-Cross arms welding is also done. Once these processes are over, it no longer remains as MS Angles and it has got a separate character and identity as "Cross Arms". Cross Arms once manufactured cannot be used as MS Angles any more".

This statement of the respondents in reference to the manufacturing process of the units of the petitioners had not been repudiated. As per the Act excisable goods means goods specified in the Schedule to the Central Excise Tariff Act, 1985, as being subject to a duty of excise and includes salt. Under the Central Excise Tariff Act MS Angles has been classified under Chapter heading 72.16 and 73.08 as follows :

"72.16 : Angles, Shapes and Sections of Iron or non-alloy steel"

"73.08 : Structures and parts of structures for example...Angles, Shapes, Sections, Tubes and the like, prepared for use in structures, of iron or steel"

73.26 deals with the other articles of iron or steel and 7326.90 deals with the other. As per the Tariff Act the rate of duty is 15%.

6. Section 4 of the Central Excise Tariff Act defines as manufacture including any process incidental or ancillary to the completion of a manufactured product. Therefore, it is clear that the petitioners who have purchased MS Angles have manufactured cross arms which is inter alia a new product coming under the description of other articles of iron or steel under 7326.90. Prima facie I am convinced that MS Angles are first cut into the required size and then holes are put as required. In the case of V-cross arms it cannot be used as MS Angles once again. The process of cutting, drilling and welding are incidental or ancillary to the completion of making of cross arms as a manufactured product. The cross arms is a new product and when it is manufactured, it becomes dutiable under Central Sales Tax Act and the same cannot leave the factory without paying duty.

7. Apart from this factual position of the nature of the goods the goods that were detained on 1-11-1996 were released as per Rule 206(3) of the Central Excise Rules. Adjudication proceedings initiated would be followed to decide whether the

petitioners are liable to pay duty or not. However, the petitioners cannot insist that the same procedure should be followed in every case and that there should not be any amount of duty before adjudication for future manufacture also. Section 3 of the Central Excises and Salt Act provides for levy and collection of excise duty in such a manner as may be prescribed on all excisable goods. The manner of collection is provided under the Rules. Rule 9 of the Rules provides time and manner of payment of duty. As per this Rule no excisable goods shall be removed from any place where they are produced, cured or manufactured or whether for consumption, export or manufacture of any other commodity in outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules. Elaborate provisions have been set out relating to the removal of manufactured goods. Rule 9B provides for provisional assessment to duty. Rule 47 deals with the goods that may be stored without payment of duty. Rule 49 deals with the duty chargeable only on removal of the goods from the factory premises or from an approved place of storage. Rule 50 deals with the requirement of non-excisable product not to be removed without permission. Rule 51 deals with packing and weighment of goods. Rule 51A deals with the removal of goods after payment of duty. Rule 52 deals with the clearance on payment of duty. Rules 53, 54 and 55 deal with the returns to be filed by the manufacturer. Rule 56B deals with the special procedure for removal of finished excisable goods or semi-finished goods for certain purposes. Chapter VILA, deals with the removal of excisable goods on determination of duty by producers, manufacturers or private warehouse licensees. Under Chapter XIV Rule 223 requires stocks of excisable goods to be stored in an orderly manner and Rule 224 deals with restrictions on removal of goods. In the light of these elaborate provisions under the rules regarding the manufacture and removal of excisable goods it is naive to contend that a manufacturer is entitled to remove the goods and before adjudication he cannot be prevented from removing the goods. It could be seen that Rule 9 clearly states that no excisable goods shall be removed until the excise duty has been paid. The petitioners who are manufacturing excisable goods are to follow the various stringent provisions. As a matter of fact Rule 50 states that for the purpose of facilitating the collection of duty on excisable goods, any non-excisable goods produced in such premises, or any intermediate or residual product cannot be removed from the approved premises without a written permission from the Commissioner. Thus if the petitioners want to claim that they are manufacturing goods which are not excisable and they can remove the same without payment of excise duty, it is for them to raise their objection to the levy and proceed with the further appeals before the statutory authorities.

8. The case of the respondents is that the petitioners are manufacturing excisable goods. It is also admitted that the petitioners had registered themselves under the Excise Act and, therefore, before clearing the goods they have to pay the duty as per the provisions.

9. In Collector of Central Excise, Chandigrah Vs. M/s. Steel Strips Ltd., Sangrur,

the Supreme Court held that when it is the case of the Excise Authorities that an article is the result of a process of manufacture and it is commercially distinct and known as such, it is for the Excise Authorities to lay evidence in this behalf before the first adjudicating authority regardless of the fact that he is an officer of the Excise Department. The Supreme Court also found that -

"Too often, as our experience in this Court and in the High Courts, before the Tribunal was established, shows, lack of evidence has led to the failure of the case of the Excise Authorities and, consequently, to the loss of revenue".

In this case the Excise Authorities have stated clearly and the matter being at the adjudication stage, prima facie I am satisfied that the manufactured materials are excisable goods and they have jurisdiction to assess it as such. It is for the petitioners to establish the case before the adjudicating authorities otherwise.

10. In this case the authorities have as a matter of fact set out in clear terms the nature of article that has been manufactured whereas the petitioner has not come forward with the correct nature of manufacture to contradict the stand of the respondents. In such circumstances inference has to be obviously against the petitioner, on his own showing the petitioner is making a new article out of the manufacturing process. In 1988 (18) ECR 291 the Tribunal found that process of sizing and cutting of duty paid MS Angles and sections will not amount to manufacture. They form part of transmission tower as steel angles. In that case they were concerned with transmission towers made up of MS Angles. Transmission towers were formed by assembling these sections whereas this case is concerned with an entirely different commodity created out of steel angles. They are various categories of cross arms like 2-line, 4-line, V-cross arms, etc. It no longer remains as MS Angles and it has got a separate character and identity as cross arms. In *Brakes India Ltd., Madras Vs. Superintendent of Central Excise, Madras and Others*, a Division Bench of the Madras High Court held that the process of drilling, trimming or chamferring is a process incidental or ancillary to the completion of brake lining and amounts to manufacture. The Division Bench held that the nature and extent of processing may vary from one product to another and there could be several stages of processing and different kinds of processing depending upon the utility for which the end product is meant. Any process if it is incidental and ancillary to the completion of manufactured product, it will certainly amount to manufacture within the meaning of Section 2(f) of the Central Excise Act. The Division Bench followed various Supreme Court decisions in this regard especially *Union of India (UOI) Vs. Delhi Cloth and General Mills*, . Therefore, at the threshold itself the petitioners cannot invoke the jurisdiction of Article 226 of the Constitution of India to decide the classification and scope of the manufactured item. It is for the excise authorities to decide and to be contested if opposed before the adjudicating authorities. The issue cannot be decided by this Court at this stage. The Supreme Court in *Metagraphs Pvt. Ltd. Vs. Collector of Central Excise*,

Bombay, held that the issue has to be decided on the basis of nature of product and with reference to the facts of each case. It is well-known settled position that the issue depending upon investigation of facts and appreciation of evidence, even at the stage of show cause notice, extraordinary jurisdiction under Article 226 of the Constitution not to be exercised to obstruct a course prescribed by a statute. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, the Supreme Court held as follows :

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under Sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under Sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court u/s 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of." (emphasis added)

11. For all these reasons I do not find any sustainable grounds to grant the relief sought for and hence the Original Petitions are dismissed.