
(1999) 07 BOM CK 0127
In the Bombay High Court
Case No : Writ Petition NO. 699 of 1985

Garware Plastics and Polyester Limited and Another	APPELLANT
Vs	
The Municipal Corporation	RESPONDENT

Date of Decision : 19-07-1999

Acts Referred:

Essential Commodities Act, 1955 — Section 3

Citation : AIR 1999 Bom 431 : (1999) 4 ALLMR 266 : (2000) 2 BomCR 698 : (2000) 1 MhLj 8

Hon'ble Judges : V.K. Barde, J;S.B. Mhase, J

Bench : Division Bench

Advocate : R.G. Sheth and V.P. Muley, for the Appellant; K.G. Nawandar, for the Respondent

Judgement

V.K. Barde, J.—Petitioner No. 1 is a Public Limited Company, having its factory at Waluj, about 13 Kms. from Aurangabad. Petitioner No. 2 is the share holder of the company. Petitioner No. 1 manufactures polyester chips. These polyester chips are manufactured from D.N.T. and M.E.G., which are, in turn, petrochemicals derived from the petroleum. The polyester chips manufactured in the factory at Waluj are then imported into petitioner No. 1's factory at Chikalthana within the Aurangabad Municipal Corporation area. In the plant at Chikalthana, the polyester film is manufactured from the polyester chips.

2. Respondent Aurangabad Municipal Corporation has rules for collection of octroi. The octroi is being collected on the goods imported into the Municipal Corporation area for the purpose of consumption, use or sale within the octroi limits of the Corporation area. Schedule O of the said Rules classifies various kinds of goods for the purpose of octroi charges. Entry No. 38(a) of Schedule O reads as follows:

"38(a) Mineral oils of all sorts, diesel oil, petrol, aviation spirits.---All kinds of lubricating oils, white oil, spindle oil, furnace oil, petroleum produce, mava oil, sevassol oil, solvent oil (other than those under entry 48), solutions and

compositions, Turkey red oil and by products of mineral oils, but nothing herein before contained shall include kerosene under this sub-entry, other fuels, oils used as insecticides, natural gasoline pains (sic)."

Entry No. 86 of the said Schedule O reads as under:

"86. Goods not included in any of the above items and not specifically exempted in Schedule-II."

The rate of octroi for the goods mentioned in Entry No. 38(a) is 0.50% on the price of the goods, while such rate for the goods mentioned in Entry No. 86 is 2% on the price of the goods.

3. The petitioners have contended that polyester chips, which is the raw material used for manufacturing polyester films, is a petroleum produce and, therefore, the rate of octroi applicable for the polyester chips imported within the Aurangabad Municipal Corporation area should be as per the rate mentioned in Entry No. 38(a), because the petroleum produce is specifically mentioned as the goods covered under that entry. However, the Municipal Corporation is charging the octroi at the rate of 2% classifying the polyester chips under the residuary Entry No. 86. Thus, the petitioners are required to pay excess octroi at the rate of 1.5%.

4. It is the contention of the petitioners that respondent No. 1 has collected the excess octroi without authority of law. So, the excess amount collected by respondent No. 1 must be refunded by the respondent to the petitioners. The petitioners made representations to the respondent for refund of the excess octroi collected by the respondent. However, the respondent has not refunded the excess octroi collected from the petitioners. Respondent No. 1 is collecting the octroi at the rate of 2% on polyester chips, when it should have been collected at the rate of 0.50%. The petitioners, therefore, have prayed that the respondent be prohibited from collecting the octroi at the rate of 2% on polyester chips. The respondent be directed to classify polyester chips as goods under entry No. 38(a) of Schedule O. The petitioners have also, by effecting amendments, claimed refund of Rs. 70,00,433.50 Ps., which, according to the petitioners, was the excess amount collected by the respondent during August 1985 to July 1988. The petitioners have also prayed that, whatever excess octroi is collected by the Municipal Corporation of Aurangabad, by applying Entry No. 86, after July 1988, also be directed to be refunded to the petitioners.

5. The respondent has filed affidavit in reply through the Deputy Commissioner of Aurangabad Municipal Corporation. The respondent has denied that the polyester chips being manufactured from petrochemicals is a petroleum produce and, therefore, the octroi has to be charged as per the rate prescribed under Entry No. 38(a) of Schedule O. It is the contention of the respondent that the petroleum product or petroleum produce falls under Entry No. 86 of Schedule O and, therefore, the rate chargeable is 2%.

6. The respondent has further contended that if the arguments of the petitioners are accepted that polyester chips is petroleum produce, then, nylon threads; even all the articles, which are obtained from plastic, will be deemed as petroleum produces and, for such articles, Entry No. 38(a) will have to be made applicable. However, Entry No. 53(c) of Schedule O covers the plastics. So, the classification of the articles, "polyester chips", as suggested by the petitioners, cannot be accepted.

7. The respondent has further contended that the petitioners have paid the octroi on polyester chips and this must have been included in the cost of the final product produced by the petitioners. So, the petitioners have passed on the tax burden to the customers and, therefore, the petitioners cannot claim refund of the octroi. The Corporation has used the amount of octroi for the benefit of the public and, therefore, the petitioners cannot claim the refund.

8. The respondent has also filed additional affidavit and has again contended that the "polyester chips" is not "petroleum produce", but it is a derivative of petroleum obtained through the chemical process of petrochemicals and they cannot be derived from the petroleum product. In support of this contention, the definition of petrochemical and petroleum products given in the Oil Industry and Development Act, 1974; as well as in section 3 of the Essential Commodities Act, 1955, are relied upon by the respondent. Therefore, it is contended that the "polyester chips" will fail under Entry No. 53(c) in the category of plastics, where the octroi rate is 2%.

9. Heard Shri Sheth, learned Advocate for the petitioners; and Shri Nawander, learned Advocate for the respondent.

10. The learned advocate for the petitioners has strongly contended that polyester chips is petroleum produce and in support of this, various reports are produced on record, which are supported by the counter-affidavit of the petitioner No. 1's Deputy General Manager, Research and Development. On going through the data produced on record by both sides, it is very clear that the polyester chips are produced from petroleum. No doubt, the various chemical processes are adopted to obtain polyester chip from the basic material, petroleum. At each stage of such process, various substances are obtained, which, in their turn, by applying further process and by using different chemicals, are converted into different types of petroleum produces.

11. Though the respondent has denied that polyester chips is petroleum produce, the material produced on record by the respondent also indicates that polyester chips is obtained from petroleum. Various processes might have been used and various chemicals might have been used to obtain ultimately the polyester chips; but the basic material is petroleum. It is not necessary to go into the technical data produced on record by both sides, but it gives a hint to draw a conclusion that polyester chips is a petroleum produce.

12. The learned Counsel for the respondent has further argued that even if it is

considered that the polyester chips is petroleum produce, polyester chips is not covered under Entry No. 38(a). Entry No. 38(a) is for the various petroleum produces which are in the form of oils. So, basically, Entry No. 38(a) is for oils. Polyester chips is not an oil and, therefore, it will not be covered under Entry No. 38(a). Rule of interpretation, "ejusdem generis", will have to be made applicable while interpreting the provisions of Entry No. 38(a).

13. The learned Counsel for the respondent has argued that all the articles mentioned in Entry No. 38(a) before the general term, "petroleum produce" are oils, obtained from petroleum. In the same way, all the articles mentioned after the articles "petroleum produce" in Entry No. 38(a) are different types of oils, either obtained from agricultural produce or minerals. So, in this context, the general term "petroleum produce" necessarily refers to other types of oils, which are not specifically mentioned in the earlier portion of Entry No. 38(a). He has further contended that Entry No. 38(b), 38(c) and 38(d) are also with respect to oils obtained from petroleum produce. So, the entire Entry No. 38 is for the oils. He has also pointed out that Entry No. 38(a) specifically mentions that the oils mentioned in Entry No. 48 are excluded from this Entry. So, this also indicates that Entry No. 38(a) is only for oils and not for any other petroleum produces. The general term, "petroleum produces", used in this Entry must be confined to the things of the same kind as specified in the Entry.

14. In this respect, we would like to refer to the ruling of the Apex Court in the matter of Siddeshwari Cotton Mills (P) Ltd. Vs. Union of India (UOI) and Another, , wherein Their Lordships were considering the provisions of the Central Excises and Salt Act; and the principle of ejusdem generis was made applicable to interpret the term "process". Their Lordships observed (para 7):

"The expression ejusdem generis "of the same kind or nature"-- signifies a principle of construction whereby words in a statute which are otherwise wide but are associated in the text with more limited words are by implication, given a restricted operation and are limited to matter of the same class or genus as preceding them. If a list or string or family of genus-describing terms are followed by wider or residuary or sweeping-up words, then the verbal context and the linguistic implications of the preceding words limit the scope of such words."

Their Lordships further observed in paragraph 8.

"The preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members. If there is only one species it cannot supply the idea of a genus."

In the present case also, we find that Entry No. 38(a) is describing various types of oils. The oils are from petrochemicals and from other materials; but all these are oils. Furthermore, a particular type of oil, which is not intended to be included in Entry No. 38(a), is specifically so mentioned. So, Entry No. 38(a), is

describing the categories of different oils. The general term "petroleum produce", which is not akin to oil, cannot be considered to be included in Entry No. 38(a). The principle of ejusdem generis has to be made applicable while interpreting the general term "petroleum produce" found in Entry No. 38(a).

15. We, therefore, find substance in the argument of the learned Counsel for the respondent that the petroleum produce used in Entry No. 38(a) has to be confined to the petroleum produce which are in the nature of oil or akin to oil. Polyester chips cannot be a petroleum produce contemplated to be included in Entry No. 38(a). Polyester chip is not any form of oil obtained from petroleum and, therefore, the polyester chip cannot be an article covered under Entry No. 38(a).

16. The learned Counsel for the respondent has argued that polyester chips can be interpreted as plastic and be considered as covered under Entry No. 53(c) or any other article not covered by any Entry; so, under Entry No. 86. In either of the circumstance, the octroi rate is 2%. The learned Counsel for the petitioners was not able to show that the polyester chip otherwise falls in any other entry than Entry No. 38(a). Once, it is held that the polyester chip is not covered under Entry No. 38(a), then, even if it is not accepted that polyester chips is plastic covered under Entry No. 53(c), it could be said that it is an article covered under Entry No. 86, that is, the entry for the residuary items, and, therefore, charge of octroi at the rate of 2% is quite proper.

17. In view of our finding regarding the classification of polyester chips, the next question of refund of octroi does not survive. However, as the petitioners have raised that claim, we would like to deal with the same.

18. The learned Counsel for the petitioners have strongly relied upon the ruling of the Division Bench of this Court in the matter of Solar Pesticides Pvt. Ltd. Vs. Union of India (UOI), . In the said matter, the company was importing copper scrap for manufacture of Copper Oxychloride; and there was the question of imposing customs duty on the copper scrap. So, while considering the provisions of customs duty under the relevant Notifications, the question of refund of the customs duty collected arose and then, by relying on the judgment of the Supreme Court in the matter of HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, ., it was held that the additional duty of customs was levied on raw material, which was being imported. It was not an additional duty on any finished product, which was going to be sold to the consumer and to whom the instance of additional duty of customs could be passed on directly. So, the Division Bench held that, as the additional duty of customs was not directly passed on by the petitioners to any third party by selling the imported goods, the petitioners were entitled to claim the refund.

19. Here, the petitioner have contended that the polyester chips were imported within the Corporation area by the petitioners and were used as raw material for

manufacturing polyester films. So, the polyester chips are not directly sold to any customer by the petitioners and therefore, there is no question of undue enrichment if the refund is ordered.

20. However, we would like to refer to some other rulings of the Supreme Court, which clearly indicate that while claiming such relief, the petitioner must show that the burden of octroi or tax was not passed on to the consumers. Unless that is so pleaded and proved, the petitioners are not entitled to claim any refund. In the present petition, it is nowhere pleaded by the petitioners that the burden of octroi was not passed on; there is also no proof to that effect. The petitioners have simply pleaded that the octroi could not have been collected as per Entry No. 86; but it ought to have been collected as per Entry No. 38(a); and as the octroi was wrongly collected, they are entitled to refund. This much pleading is not at all sufficient to grant the relief of refund.

21. In this respect, first, we would like to refer to the ruling of the Supreme Court in the matter of Indian Aluminium Company Limited Vs. Thane Municipal Corporation, . In the matter before the Apex Court, the company was engaged in business of manufacture of aluminium products in their factory located at Kalwa in Thane District. The company was obtaining aluminium as raw material for consumption from another factory of theirs situated in different State. The question of octroi on such imported aluminium was considered by the Apex Court; and while considering the question of refund, relying on the ruling of the Apex Court in the matter of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, , Their Lordships observed, "In the instant case, the octroi duty paid by the petitioner company would naturally have been passed on to the consumers. Therefore, there is no justification to claim the same at this distance of time and the Court in its discretion can reject the same."

22. In the matter of Entry Tax Officer, Bangalore Vs. Chandanmal Champalal and Co. Etc. Etc., , the Apex Court has observed:

"....In this case also, it is not brought to our notice that the respondents have alleged and/or established that they have not passed on the duty to the purchasers/consumers. The normal presumption is that they have done so. If they say otherwise, it is for them to allege and establish the same. In the absence of any such allegation and proof, the direction of refund is not called for."

23. So, considering these rulings; and the facts on record in this case, the petitioners are not entitled to claim refund.

24. Furthermore, this point of undue enrichment is fully dealt with by the Constitution Bench of Nine-Judges of the Apex Court in the matter of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . Their Lordships, in the Majority View, have observed:

"A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations

contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he established that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that amount is retained by the State i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

In the said judgment, while concurring with the Majority View, Ahmadi, C.J.I., has observed, "As held by me earlier, ordinarily, the presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the duty element also and/or as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an in-depth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge of the taxpayer, the burden of proving that the liability has not been passed on should lie on him.

25. So, this ruling of the Constitution Bench sets at rest the point raised by the learned Counsel for the petitioners. The petitioners have failed to plead that the octroi paid by them to the respondent Corporation was not included in the cost of the final product and was not passed on to the customers; and they have also not established this fact by bringing reliable evidence to that effect. Hence, the petitioners are not entitled to claim any refund.

26. In view of this, writ petition is dismissed. Rule stands discharged. No order as to costs.

27. Petition dismissed.