

(1994) 03 DEL CK 0010
In the Delhi High Court
Case No : C.W.P. No. 1652 of 1982

Indofil Chemicals Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-03-1994

Acts Referred:

Citation : (1994) 73 ELT 9

Hon'ble Judges : K. Shivshankar Bhat, J;G.C. Mittal, J

Bench : Division Bench

Advocate : Shri Ravinder Narain, Mr. Radhey Narain and Ms. Amrita Mitra, for the Appellant; Shri Madan Lokur, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The petitioner has sought several reliefs, mainly challenging the validity of Rule 9 of the Central Excise Rules, 1944 (Rules for short). The petitioner also sought the quashing of certain orders made by the respondents under the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act). The petitioner manufactures a commodity called Plexol-150 which is an oil additive used extensively in the petroleum industry as pour-point represent and also as a de-waxing aid in solvent de-waxing process. In the process of manufacturing this commodity (referred hereafter as the end product), there is an intermediate stage at which a resin type commodity emerges which is the subject-matter of this writ petition. For the sake of convenience this commodity or article may be referred as in-process material, though according to the petitioner this in-process material has no independent identity and it is not marketable and Therefore, it is not "goods" covered by the provisions of the Act. Petitioner has described the entire process as follows :-

"The entire process of manufacturing Plexol-150 takes place in a large kettle. Different monomers are added into the kettle and after regulating the temperature and adding certain catalysts to the kettle and diluting the content of the kettle with dilution oil, the end-product Plexol-150 is obtained. The entire

process from the beginning to the final stage is carried out in the same kettle in a continuous, uninterrupted and integrated process."

2. The petitioner asserts that this is not resin known to the market at all and is never bought and sold. This in-process material, though is a molten liquid, comes into existence as such at an intermediate stage in a continuous and integrated process. In para 5 of the writ petition the petitioner has described the process as follows :-

"The entire process of manufacture of Plexol-150 is carried out in a single unit in a continuous, uninterrupted and integrated process. In the process different monomers are weighed and charged into the kettle. The chain-length control agent is then added to this kettle. At this stage, the kettle is inverter and stirring is started. After about half an hour's heating of the kettle the temperature taken to 122 Degree C using steam in the jacket. Chaser, catalysts are added in four different lots after every half hour. The reaction is allowed to proceed for another 40 minutes at a temperature of 122 Degree C to 124 Degree C. Dilution oil is then added to the kettle to dilute the contents of it. After all the quantity of dilution oil is added, the kettle is kept at a temperature of 115 Degree C to 120 Degree C for one hour. After checking the viscosity and solidity content, the Plexol-150 is ready for packaging."

3. The petitioner also has produced the affidavit of an expert in the field, by name Dr. S. P. Potnis. He was a Professor of Polymer Technology, Head of Plastics and Paints Division and Director of Department of Chemical Technology, University of Bombay. He has visited several renowned foreign Universities for technical discussions and collaborative works as could be seen from para 3 of his affidavit. The process is described by him in paras 7 to 10 of his affidavit as follows :-

"In order to obtain the end product Plexol-150, the starting raw materials are described as monomers. Two types of monomers are taken as the starting raw materials. These monomers are subjected to the process of polymerization. It may be mentioned that the term "monomer" represents a single unit. When several of such single units are linked together, they are described as polymers. The term "polymer" means many units. As such, this process of polymerization results in linking many monomers to form polymers."

In order to carry out the aforesaid process of polymerization, after monomers are added to the Kettle, NDDM (Normal Dodecyl Marcaptam) is added. This acts as a chain length regulator or chain control agent. It ensures that the desired chain length of a polymer is obtained. Certain catalysts are also added which facilitate the process of polymerization. After the catalysts are added, the mixture is heated to attain a temperature of over 120 Degree C to facilitate polymerization. After the initial reaction of polymerization is completed, it is found that the entire quantity of monomers is not polymerized. In order to fully polymerize the entire quantity of monomers, a chaser is added which helps in

polymerizing the un reacted monomers. In this manner the monomers are polymerized. During the entire process of polymerization the process is carried out in an inert atmosphere (by addition of nitrogen). This ensures that no decomposition takes place and this facilitates proper polymerization. This intermediate product so obtained is maintained at a high temperature of over 122 Degree C to ensure that it does not become a solid mass. However, even at this high temperature, it is a very thick liquid mass in molten condition. If the temperature is not so maintained, the product would become a solid mass and become totally unfit for use.

In order to make this intermediate product marketable, it is necessary to dilute the thick mass with dilution oils (mineral oils). For the purpose of adding dilution oil, the high temperature of molten mass is maintained, otherwise, the dilution process would also not be possible. Only after dilution oil is added, and a solution is obtained, which is called Plexol-150. This end product in solution is known as Plexol-150.

"At the earlier stage, prior to the addition of oil, the intermediate product is not marketable. In that form or condition it is not capable of being brought to the market for sale or purchase. At the intermediate stage, this product is not a marketable commodity."

4. Dr. Potnis has also stated that the molten mass referred as in-process-material by the petitioner cannot be packed and if an attempt is made to pack this material into drums or any containers and is permitted to cool down it would not be possible to again utilise the same and the entire product shall have to be discarded thereafter. Any attempt to heat the cooled mass to the high temperature for further processing will not yield any goods of utility because the product would degrade and decompose. This is what the affidavit states -

"If an attempt is made to pack this molten mass into drums or any containers and is permitted to cool down, it would not be possible to again utilise the same and the product will have to be entirely discarded. Even if an attempt is made to heat the cooled mass to the high temperature required for further processing to add dilution oil, the product would degrade and decompose. On account of local or concentrated heating the polymer mass would degrade and depolymerize. As a result of such heating the links in the chain of polymerization break, making the product totally unfit for use. Such heating would also emit toxic fumes and irritable gases, and may lead to an explosion. It may also be mentioned here, that to make the cool mass reuseable, even after it is heated by some means one would need high pressure to get it out of the drum or container and the normal drums or containers will not stand such high pressure. This is a further indicator to show that this thick molten mass is not a marketable commodity and once it cools down it becomes unfit for use and is not marketable. As stated above, heating the cooled mass would also render the product unfit on account of degradation and depolymerization."

5. Dr. Potnis has categorically asserted that this in-process-material cannot be described as a marketable product and cannot be equated with resins known in the market.

6. In the year 1975, question of classification for the purpose of levy of duty under the Act cropped up, with reference to the end product. Earlier Plexol-150, the end product was approved as non-excisable by the Assistant Collector of Central Excise, Bombay. In September, 1975 the said officer re-classified the same as "acrylic resin" falling under Tariff Item 15A. Petitioner paid the duty under protest as per the petitioner's letter dated 23-4-1976. In August, 1976 the Assistant Collector classified the end product as falling under tariff item No. 68. However, regarding the in-process material he opined that duty shall have to be paid under Tariff Item 15A. Petitioner paid duty under protest accordingly. Petitioner also pointed out that the in-process-material cannot be taxed under the Act. Petitioner pointed out that the material was not known as "resin" in the trade and that material had only a temporary identity at an intermediate stage. The petitioner also contended that Rule 9, as it then stood was not applicable because there was no removal of the alleged goods. This protest was reflected in the letter of the petitioner dated 4-7-1977 (Annexure "D"). However, the petitioner was directed to file the classification list in terms of the opinion formed by the Revenue. The petitioner persisted in its protest. Show cause notices were issued to the petitioner by the Excise Department and there was also a demand levying duty on the in-process-material as well as the end product. Petitioner filed an appeal to the Assistant Collector which was dismissed on 20-7-1978 as per the order marked Annexure "L". Appeal of the petitioner to the Collector also failed, Therefore, the petitioner presented a revision application before the second respondent which was the Revisional Authority during the relevant period. The order of the Appellate Collector was dated 25-2-1980. Thereafter the revision application was filed before the second respondent and the petitioner also sought stay of the recovery. By that time there was a decision of this court in Devi Dayal Electronics and Wires Limited's case given on 16-10-1980 Devi Dayal Electronics and Wires Ltd. and another Vs. Union of India and others, , according to which, the intermediate product cannot be subjected to the duty as the question of removal was not involved, when the process of manufacturing the end product was a continuous process in the same factory. Therefore, the petitioner sought an early hearing of the revision petition pending before the second respondent. On 20-2-1982 Rule 9 was amended with retrospective effect and an Explanation was added to Rule 9, which in fact nullified the effect of the Judgment of this Court. The Explanation which is relevant for the purpose of this case as well as the main Rule 9(1) is quoted below for the sake of easy reference :-

"Rule 9. Time and manner of payment of duty. - (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity

in or outside such place, until the excise duty livable has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form :"

Explanation .- For the purposes of this rule, excisable goods produced, cured or manufactured in any place and consumed or utilised -

(i) as such or after subjection to any process or processes; or

(ii) for the manufacture of any other commodity;

Whether in a continuous process or otherwise, in such place or any premises appurtenant thereto, specified by the Collector under sub-rule (1), shall be deemed to have been removed from such place or premises immediately before such consumption or utilisation.

7. In the meanwhile the petitioner was agitating for the re-classification of the goods during the subsequent period also. But the request of the petitioner was rejected by the Assistant Collector (4th respondent) on 1-5-1982. The Assistant Collector held that a decision has already been given which was confirmed in appeal that the relevant product was falling under Tariff Item 15A(i)(ii). In the order (Annexure R) the Assistant Collector also held that there was no substance in the argument that the product has not been marketable and the fact that the product is useful for further manufacture indicates that the product is marketable and not waste. The Assistant Collector has clearly indicated that according to him the product in question is marketable because the said product is useful for further manufacture. The order nowhere states as to how and where the product in question could be marketed and in fact whether any particular market exists and whether the product in question, which came into existence at the intermediate stage is capable of being marketed.

8. In view of the amendment of Rule 9 the petitioner thought it fit to challenge the validity of the Rule by filing the present writ petition on 27-5-1982. The petitioner also sought the setting aside of the order of the Assistant Collector made on 1-5-1982. In addition to other reliefs the petitioner also has sought a direction to the Revisional Authority to dispose of the revision petition early. We may note here that after the amendment of the Act the revision application of the petitioner stood transferred to CEGAT which has been imp leaded as 7th respondent. In the counter affidavit there is no denial of the process referred by the petitioner, resulting in the manufacture of the end-product. There is also no specific assertion as to how the in-process-material is marketable and whether the said material could be obtained by a manufacturer of the end-product. It is also not stated that the in-process-material has an independent existence. The only relevant assertion reads as follows :-

"In reply to para 4 of the petition it is admitted that a molten liquid comes into existence in the process of manufacture of Plexol-150 by the petitioner but that it

is not looked upon by the consumers, manufacturers and dealers as resin known to the market for buying and selling as such, is not admitted. The fact that the product coming into existence at the intermediate stage is capable of being used in further manufacture indicates that the product coming into existence at the intermediate stage is saleable and marketable."

Therefore, it is clear that the Revenue considered the in-process material as a marketable goods only because it is capable of being used in further manufacture. Nowhere it is stated that this in-process material could exist independently without being used further, like a yarn used in the manufacture of fabric.

9. There is also a contention that this Court cannot entertain this writ petition because the cause of action arose at Bombay.

10. From the respective contentions advanced before us the following questions shall have to be answered :-

(i) Whether this Court has jurisdiction to consider this writ petition ?

(ii) Whether the in-process material referred above falls within the concept of goods manufacture of which could be taxed under the Act ?

(iii) What order should be made by this Court, if for any reason the first two questions are answered in favor of the petitioner ?

11. When the writ petition was filed in the year 1982 the substantial ground of attack against the action of the respondents was based on the challenge to the validity of Rule 9 of the Rules. Further, the second respondent before whom the revision application was pending was situated at New Delhi. After the amendment of the Act the revision application stood transferred to the 7th respondent which is situated at New Delhi. The order of the 5th respondent made in May, 1982, at Bombay was in effect an order following the earlier order which was already the subject-matter of the revision petition before the second respondent. Having regard to these aspects we are of the considered view that this Court had not only jurisdiction to entertain the writ petition but continues to have the jurisdiction to decide the writ petition, even though the challenge to Rule 9 does not survive in view of the decision of the Supreme Court in J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, . The validity of the rule has been upheld by the Supreme Court in the aforesaid decision.

12. Further the learned Counsel for the Central Government also did not seriously question our jurisdiction to entertain the writ petition having regard to the peculiar facts of this case and its history.

13. It is true that the revision application filed by the petitioner is pending before the CEGAT but the subsequent order made in May 1982 is directly under attack in this writ petition and in the circumstances we have to consider whether the

petitioner should be directed to approach the appellate authority nearly 11 years after keeping this writ petition pending. This aspect will be considered after examining to the extent possible, the main plea raised by the petitioner.

14. We have referred to the pleadings as also the affidavit of an expert touching upon this question. The Revenue is not in a position to categorically show that the in-process material has an independent identity. It is not in a position to show that the in-process material obtained at an intermediate stage is not transitory in character. However, the petitioner has been asserting that the in-process material cannot be marketed at all having regard to its transient character and that it has no independent existence. The respondents have inferred that the said material is also covered by the concept of goods because the said material is necessary to produce any product. Only because the in-process material which came into existence at the intermediate stage is capable of being used in further manufacture, it cannot be said that the said material would come within the concept of goods. In-process-material actually is a stage reached before the ultimate product is produced. The learned Counsel for the revenue relied upon the decision of the Supreme Court in *A.P. State Electricity Board Vs. Collector of Central Excise, Hyderabad*,. In the said case the question was whether the pre-stressed cement concrete poles manufactured by the Board are goods within the meaning of Section 3 of the Act. The poles were actually manufactured by the independent contractors under the direct supervision of the Board. They were about 100 types of poles. All the poles manufactured by the Board were utilised for its own purposes and they were not sold in the market. Because of this, the Board contended that the poles were not "goods". The Supreme Court negated this contention with the following observations :

"The fact that the goods are not in fact marketed is of no relevance. So long as the goods were marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country."

The above observations were relied upon to contend that existence of a market for the particular goods is not necessary to hold the article in question as "goods".

15. We are of the view that this is not the correct reading of the above observations of the Supreme Court. The Supreme Court made it clear that so long as articles in question are available for purchasers the articles could be considered as "Goods", and that the fact that there is only one purchaser for the

articles is sufficient to hold that the articles are marketable.

16. In the instant case before us the alleged intermediate product/in-process material is not independently manufactured and it has been shown that it cannot be so marketed at all in that condition. The transient personality of the article is only an incidental stage in the process of manufacturing the end-product. In fact the Supreme Court referred to an earlier decision rendered in *Union Carbide India Limited Vs. Union of India (UOI) and Others*, wherein aluminium cans or torch bodies were produced in the factory of the appellant which was engaged in the manufacture and sale of flash lights. These aluminium cans were sought to be taxed as "goods" under the Act. It was found that the aluminium cans prepared by the appellant were manufactured by the appellant entirely for its own purposes and even the appellant had to process the cans further before using them in the manufacture of torches. The aluminium cans were held to be in an elementary an unfinished form and were not capable of being sold to any consumer and hence not marketable. The affidavit filed on behalf of the appellant in this regard was accepted by the Supreme Court. Ultimately it was held that those aluminium cans were not goods.

17. In *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, the Supreme Court pointed out that to fall within the concept of goods under the Act it is necessary to find out whether the articles in questions are "goods", i.e. to say articles as known in the market as separate, distinct, identifiable commodities. It was further pointed out that simply because a certain article falls within the schedule it would not be dutiable under excise law if the said article is not "goods" known to the market. Marketability is Therefore, an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff, 1985. The articles in question before the Supreme Court were referred as crude PVC film. These articles were produced for the purpose of use in final product such as leather cloth and laminated jute matting's and PVC tapes. The Court held that crude PVC film was not "goods", because it was not marketable.

18. The facts in *Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd.*, have a strong bearing in the present case. The assessed, respondent contended that starch hydrolysis was not being marketed and is not capable of being marketed and Therefore was not dutiable. The contention was accepted and the Supreme Court made the following observations :-

"The case of the respondent had always been that starch hydrolysis was not being marketed and is not capable of being marketed in view of its highly unstable character resulting in fermentation even if kept for a day or two. Shri Ganguly appearing for the revenue sought to urge that the Tribunal was wrong in approaching the problem in that light. The test was not whether the starch hydrolysis was not of a highly unstable character and resulted in fermentation even in a day or two, but whether it was capable of being marketable. He submitted that the test applied was not the true test. He urged that even transient items of articles can be goods, provided that these were known in the

market as distinct and separate articles having distinctive and separate uses, these would still become goods if these were capable of being marketed even during short period. From a conceptual and jurisprudential point of view, Shri Ganguly is right. But we are concerned with the question whether actual goods in question were marketed or, in other words, if not, whether these are marketable or not. It is true that the goods with unstable character can be theoretically marketable if there was a market of such transient type of articles which are goods. But one has to take a practical approach. The assessed produced evidence in the form of affidavit. One Shri Khandor, who filed an affidavit in support of the case of the respondent had stated in his affidavit that completely hydrolysis starch would start fermenting and decomposing and at higher concentration it would start crystallizing out within two or three days. This is evidence indicating propensity of its not being marketed. It is good evidence to come to this conclusion that it would be unlikely to be marketable as it was highly unstable."

19. Therefore, the theoretical possibility of an article being marketable will not make it goods and a practical approach shall have to be adopted while considering the question. As already noted by us, the fact that the in-process material is necessary and it is used in the manufacture of the end-product by itself is not a ground to hold it as "goods".

20. It was then contended by the learned Counsel for the revenue that in view of the Explanation to Rule 9 inserted in the year 1982, whatever comes into existence at an intermediate stage of production of another product is deemed to be "goods" because it is deemed to be removable from one place to another. According to the learned Counsel for the revenue the purpose of this Explanation is to create a legal fiction and to treat all kinds of intermediate products or materials or articles as "goods".

21. It is impossible to accept this submission. The purpose of the Explanation is to create a legal fiction that the goods which had come into existence at an intermediate stage of production shall be deemed to have been removed from such place or premises, when the said intermediate product is consumed or utilised in the manufacture of any end-product. The purpose of this Explanation is to get over certain judicial pronouncements which held that intermediate product which comes into existence and immediately thereafter consumed in the manufacture of end-product is not "removed" from the place of manufacture and if there is no such removal levy under the Act cannot be imposed on the said intermediate product.

22. It is a well known rule of construction that the deeming provision shall have to be confined to the purpose for which it is enacted. Explanation nowhere deems every kind of transient intermediate product as goods. If that is the intention the proper step would have been to add an appropriate Explanation to the definition of the "goods" under the Act.

23. In J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, the Supreme Court had an occasion to make the following observations as to the scope of Rule 9. In para 39 of the Judgment the Supreme Court observed as follows :-

"It is well settled that a deeming provision is an admission of the non-existence of the fact deemed. Therefore, in view of the deeming provisions under Explanations to Rules 9 and 49, although the goods which are produced or manufactured at an intermediate stage and, thereafter, consumed or utilised in the integrated process for the manufacture of another commodity is not actually removed, shall be construed and regarded as removed."

The above observation is a complete answer to the contention advanced by the Revenue.

24. From the above it is quite clear that there is no substance in the stand taken by the Revenue regarding the marketability of the in-process material involved in the instant case as also the contention of the revenue based on Explanation to Rule 9.

25. Mr. Lokur contended that the question whether the article in question is "goods" or not is a question of fact and the statutory authorities should decide the said question and, Therefore, we should relegate the petitioner to the statutory remedies.

26. As a simple proposition of law there can be no two opinions about the correctness of this proposition.

27. However, in the instant case the Revenue has taken a specific, categorical stand as to why the in-process material should be considered as "goods" under the Act and we have already found that the stand taken by the Revenue is not proper and the Revenue has mis-directed itself in its approach on the relevant question. Therefore, we do not think, we should dismiss the writ petition only on the ground that the petitioner has effective alternative remedies.

28. The next question pertains to the relief to be given to the petitioner. We have expressed our opinion as to the nature of the in-process material and we have found that the said material cannot be brought within the term "goods" under the Act. If so, what should happen to the revision petition filed by the petitioner, which is pending before the CEGAT, is a matter for the said Tribunal to consider. Similarly it is open to the petitioner to seek a review of the order made by the Assistant Collector of Central Excise, Bombay, with a request to re-classify the goods or articles in question. It is not possible for us to make an order of assessment in any manner. The same shall have to be done by the Statutory Authorities according to law and in the light of the observations made in this order.

29. The revision application filed by the petitioner before the second respondent which has been transferred to the 7th respondent/CEGAT has to be disposed of

early. We direct the 7th respondent to dispose of the said matter within six weeks from the receipt of this order. It is open to the petitioner to file a certified copy of this order before the 7th respondent with an application for disposal of the said matter. Similarly it is open to the petitioner to seek review of the order dated 1-5-1985 (ANNEXURE "R") made by the Assistant Collector of Central Excise, Bombay, Division IV. The writ petition is allowed accordingly. Rule is made absolute.