

(1985) 10 AHC CK 0032

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 802 of 1985

Jay Prestressed Products Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-10-1985

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 4
Constitution of India, 1950 — Article 226

Citation : (1986) 9 ECC 9 : (1986) 26 ELT 913

Hon'ble Judges : V.K. Khanna, J;A. Banerji, J

Bench : Division Bench

Advocate : R.K. Agrawal, for the Appellant; Standing Counsel of the Central Government, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Khanna, J.—Petitioner No. 1 is a company incorporated under the Indian Companies Act, 1956, which is carrying on the business of manufacturing and dealing in R.C.C. poles, sleepers and similar other items. On 15th November, 1976 the petitioner entered into a contract with railways for the manufacture and supply of mono block concrete sleepers. One of the clauses of the said contract was that the petitioner No. 1 will be paid Rs. 135 per piece inclusive of all labour and material excepting for malleable cast iron inserts and fastenings, which were to be supplied free by the said Railway Board. Clause 6.3 of the aforesaid contract specifically stated that any taxes and duties leviable on the said concrete sleepers from time to time was to be, and is to the said Railway Board's Account. In terms of clause 6.4 of the said contract, the malleable inserts were to be supplied free of cost to the petitioner No. 1

2. On 1st August, 1981, the respondent No. 2, Superintendent, Customs and Central Excise, Mathura, besides other things, intimated petitioner No. 1 that no documents have been shown so as to know the value of the inserts supplied by the railways which were most essential for the purposes of assessment of the

duty involved. The petitioner No. 1 was asked to supply the documents so that the duty may be worked out by adding the value of inserts. After receiving the aforesaid communication from the excise department, the petitioner No. 1 asked the Railway Board to furnish the value of inserts consignment-wise and also informed them that any payment of duty on the value of inserts will be to their account as per contract. It was also asked from the Railway Board that their Officers had informed the petitioner that no duty was payable on inserts and the petitioner No. 1, therefore, requested the Railway Board to inform them of the grounds on which they were relying for holding the view that excise duty was not payable on inserts. The petitioner No. 1 informed the excise authorities that they have asked the Railway Board to supply them the value of the inserts supplied by them. On 1st July, 1982 the Chief Executive of the petitioner No. 1 again wrote to the General Manager (Track), Northern Railway informing them that the company is not paying excise duty on the value of the inserts and the excise department is pressing very hard to pay duty on the value of the inserts and the matter is lying pending since long. It was even written that the excise duty may be paid under protest till the dispute is finally settled between the Railways and the excise department. A request was again made for supplying information regarding the value of inserts.

3. From the material which has been filed in this writ petition it appears that throughout the excise department was pressing the petitioner to disclose the value of inserts and the petitioner was taking the plea that the value of inserts could not be disclosed as despite persistent requests the Railways has not supplied the aforesaid information. It was only on 10th October, 1984 that the General Manager of petitioner No. 1 intimated the Superintendent, Central Excise that the General Manager (Engineering), Northern Railways by his letter dated 15th September, 1984 has intimated that the value of inserts being used was Rs. 11.90 paise. However, it appears that before the petitioner No. 1 supplied the information regarding the value of the inserts by their letter dated 15th September, 1984, the Superintendent, Customs and Central Excise issued a demand of excise duty u/s 11-A of the Central Excises and Salt Act (hereinafter described as the "Act"). The petitioner after receiving the aforesaid demand raised u/s 11-A of the Act, submitted a detailed representation in which various pleas were taken and it was requested that an opportunity to produce defence and hearing be provided. The Superintendent, Customs and Central Excise, Mathura issued a show cause notice dated 16th July, 1985 presumably accepting the demand of the petitioner for showing cause and provided him the opportunity of producing defence and hearing. It has been frankly conceded by the petitioner's counsel that the petitioner has not shown cause and did not appear before the authority concerned in pursuance of the aforesaid show cause notice. On the other hand, the present writ petition has been filed challenging the aforesaid show cause notice and the demand raised in letter dated 19th August, 1984 demanding additional excise duty to the tune of Rs. 10,51,328.

4. Learned counsel for the petitioner has urged two points in this writ petition. It

has been firstly urged before us that the excise duty which is being demanded pertains to the years 1979-80 to 1982-83 (up to February, 1983) and from March, 1983 to September, 1983. According to the learned counsel for the petitioner the limitation for issuing such a show cause notice is six months from the relevant date, i.e., the date on which the excise duty was payable u/s 11-A(i) of the Act. We are unable to accept the aforesaid argument as a bare perusal of the show cause notice dated 16th July, 1985 shows that jurisdiction u/s 11-A of the Act has been assumed as according to the excise department the petitioners were being regularly", requested to supply the cost of M.C.I. inserts since July, 1981 to which they have failed and that they have willfully suppressed the value of the inserts so as to evade the payment of duty. A bare perusal of proviso to Section 11-A of the Act makes it clear that in case the duty of excise has not been levied or paid or has been short-levied and short-paid or erroneously refunded by reason of fraud, collusion or any willful misstatement or suppression of fact, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted. There cannot be an iota of doubt that despite the excise department's persistent demand for disclosure of the value of the inserts the petitioner did not supply the value of the inserts and thus the department could rightly take the view that there has been a willful suppression of facts for the purposes of not paying the excise duty. The view taken by the department, in our opinion, cannot be said to be either based on no evidence or perverse so as to require interference in exercise of our extraordinary jurisdiction under Article 226 of the Constitution of India.

5. The learned counsel for the petitioner has lastly urged that on merits no excise duty was chargeable on the inserts as the petitioner No. 1 had never become the owner of those inserts and thus there could not be a sale of those inserts requiring the payment of excise duty at the time of sale of sleepers containing those inserts" to the Railways. Reliance has been placed on an reported decision of Andhra Pradesh High Court in Civil Misc. Writ No. 1 66% of 1980 Mysore Structural Limited v. Asstt Collector of Central Excise, Hyderabad and Anr. decided on 26th October 1984-1985. [1985] 4 ECC 165 . Having heard the learned counsel for the petitioner on this question at some length and after perusing the decision given by the Andhra Pradesh High Court in the case of Mysore Structural Limited (supra). We are of the opinion that the contention raised by the learned counsel for the petitioner has no force and we respectfully differ from the view taken by the Andhra Pradesh High Court in the case of Mysore Structurals Limited (supra).

6. There is no dispute that what is being sold to the railways is mono block concrete sleepers. These concrete sleepers have necessarily to contain malleable cast iron inserts and fastenings as without them these sleepers cannot hold the rails. The undisputed description of the item which is being supplied by the petitioner to the railways is mono block concrete sleeper in which at the time of

manufacture are embedded malleable cast iron inserts and fastenings which are Integra gifts of the commodity manufactured by the petitioner. It has not been, disputed that such a mono block concrete sleeper will attract excise duty. The real question which falls for determination is as to what is the value of this excisable commodity in question for the purposes of charging of duty of excise. Section 4 of the Act provides that the value of such excisable goods will be deemed to be the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale. The mere fact that the railways had supplied the inserts and fasteners to the petitioner No. 1, in our opinion, would not make any difference in determining the price of the sleepers as in case the railways would have supplied the inserts and the fasteners to the petitioners for manufacturing the sleepers after charging price, the petitioner would in return while selling the sleepers with inserts and fasteners would have included the price of those inserts and fasteners while selling the goods to the railways. The effect would be to set-off the price which the petitioner would have paid for obtaining the inserts and fasteners. At best it could be said to be an arrangement between the manufacturer and the supplier that in case the purchaser supplies some material essential for the finished goods without charging any price on the assurance that the same will be utilised in the finished product and supplied to the purchaser, in such a case the manufacturer will not be entitled to include the price of that item which has been supplied free of cost on the undertaking that the same would be utilised in finished products which were being purchased by the purchaser. In any arrangement purchaser may insist on the manufacturer that the latter will have to utilise certain items which were supplied by him at a certain price which may either be included by the manufacturer at the time of calculating the total price of the finished goods or the purchaser may indicate the price of the item supplied and allow the manufacturer to give a rebate to the purchaser in the "price of the finished commodity. We are in complete agreement with the view expressed by the Calcutta High Court in the case of Union of India and Ors. v. Free India Dry Accumulators Limited 1983 ELT 733 CalOn the parity of reasons as expressed in the aforesaid decision we are, of the opinion that the valuation for the purposes of charging of duty of excise u/s 4 of the Act cannot be conceived of without taking into consideration the cost of the inserts and the fasteners. In the present case also under the contract the petitioner was not to supply any parts of the mono block sleepers but was to supply the finished mono block sleepers in which inserts and fasteners were to be embedded at the time of manufacturing of these sleepers. In fact, the plain concrete slab without containing the inserts and fasteners could hardly be used as a railway sleeper as it would not hold the rails on it. In our opinion, therefore, the excise authorities were quite justified in adding the cost of inserts and fasteners while determining the valuation of mono block sleepers for the purposes of charging the duty of excise. The argument raised, therefore, in our opinion has no force.

7. Before parting, it may be observed that we are not expressing any opinion on the question as to whether the value of the inserts and fasteners which have been taken into account by the excise authorities is correct or not. The petitioners before us have placed material that the railways have informed them that the cost of fasteners is Rs. 11.90 while the excise authorities have taken the cost to be Rs. 40 per insert. Admittedly, the petitioners have a statutory right of appeal, and in case the petitioner wants to challenge the aforesaid part of the order relating to the valuation of the inserts and fasteners, the proper remedy is to file an appeal before the appropriate authority under the Act.

8. For the reasons stated above, in our opinion, this is not a fit case for interference under Article 226 of the Constitution. The writ petition is accordingly dismissed. However, looking to the facts and circumstances of the case the parties shall bear their own costs.