

(1974) 12 GUJ CK 0003
In the Gujarat High Court
Case No : Special Civil Application No. 760/72

J.D. Patel and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-12-1974

Acts Referred:

Citation : (1978) 2 ELT 540 : (1975) GLR 1083

Hon'ble Judges : J.B. Mehta, J;B.K. Mehta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.K. Mehta, J.—Petitioner No. 1 is a partner of petitioner No. 2 firm carrying on business of manufacturing Resins and inter-lining material used by tailors and garment makers for collars of shirts and bush-shirts at Udhna in Surat district. The factory of the petitioner-firm went into production in the month of April, 1960. The Excise authorities in the initial stages classified the product of the petitioner firm to be liable to excise duly under sub-item (III) of Item No. 19 in the Schedule to the Central Excises and Salt Act, 1944, which subjected cotton fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial plastic materials to the duty for the time being leviable on the base fabrics, if not already paid. It is the case of the petitioners that the Excise Authorities at Kanpur charge similar product manufactured by M/s. India Coating and Laminating Corporation having its factory at Kanpur as cotton fabrics not otherwise classified under Item No. 19 (II) (f) of the said Schedule which subjects the item to excise duty to be paid according to the quality of cloth and the same varies from 3. 6 paise to 15.5 paise per metre. The grievance of the petitioners is that the action of the Excise Authorities in Gujarat in subjecting their products to duty under sub-item (III) of Item No. 19 would result in the petitioners paying duty at the rate of 25 per cent ad valorem. The petitioners, therefore, made representation to the second respondent who is the Superintendent of Central Excise, Surat, by their letter of March 9, 1927 that the

product of the petitioner-firm should be charged under Item No. 19.(I) (2) (f) and not under Item No. 19(III). The petitioners also pointed out by their another letter of March 13, 1971 the financial impact on account of the action of the Excise Authorities in classifying the petitioner's product as covered by Item No. 19 (III) instead of Item No, 19 (I) (2) (f) of the said Schedule. The 2nd respondent, however, by his letter dated June 9, 1971 intimated the petitioners that the Deputy Chief Chemist was of the opinion that the fabrics which is produced by the petitioner-firm would fail under the term "coated of fabrics" and, therefore, the classification made by the authorities was a valid classification. The petitioners being aggrieved with this decision of the 2nd respondent carried the matter in appeal before the Collector of Central Excise, Baroda-respondent No- 3 herein, the appeal was filed before the 3rd respondent on 14th June, 1971. The petitioners also submitted their observation and explanation regarding the opinion of the Deputy Chief Chemist by a separate letter of July, 1971 addressed to the 3rd respondent. The petitioner also requested the 3rd respondent to decide the appeal as early as possible as the petitioner firm was put to a great financial loss in the market on account of impugned classification. The petitioner-firm particularly pointed out to the Excise Authorities that there was only one other factory manufacturing the products of the kind and in view of the high duty charged by the Excise Authorities at Surat, the petitioner-firm's product would be out of market, as they would not be able to stand in the competition with the product of Kanpur factory. It appears that the 3rd respondent asked the petitioners to appeal in person for hearing of the appeal on October 28, 1971. The petitioners were heard on October 28, 1971 by the 3rd respondent. It is the grievance of the petitioners that they did not hear anything from the 3rd respondent after the hearing was over for a long time. The petitioners, therefore, by their telegram of February 26, 1972 urged respondent No. 3 to give his decision in appeal as early as possible as the petitioner-firm's business had come to a stand still. It is the grievance of the petitioners that respondent No. 3 instead of pronouncing his order in appeal preferred by the petitioners, intimated the petitioners by his letter of March 7, 1972 that the appellate powers of the Collector were transferred to the Appellate Collector, Central Excise, Bombay, and as such the appeal of the petitioners was transferred to the said office. As the petitioners did not get any intimation from the Appellate Collector, Bombay, about the date of hearing of the appeal, they have moved this court by way of this petition filed on April 20, 1972 for appropriate writs, orders and directions, quashing and setting aside the order passed by the 2nd respondent holding that the petitioner-firm should be charged under Item No. 19(III) and restraining the respondents from recovering duty under the said item.

2. This petition has been resisted by the Union of India- respondent No. 1 herein, contending, inter alia, in the affidavit-in-reply filed on its behalf by one Mr. P.J. Pohowalla, who happens to be Assistant Collector of Central Excise, Surat, that according to the opinion of the Chief Chemist, the product of the petitioner-firm is in the form of a white cotton fabrics on one side of which is an uneven coating

of polythene plastic material, the percentage of which is 37,1 (approximately) and the rest being cotton fabric and the sample thereof did not pass the laboratory test for water proofness, and it was, therefore, validly classified as a product subject to the duty under Item No. 19 (III) of the aforesaid Schedule. It was admitted in the said affidavit-in-reply that the petitioners had preferred an appeal before the 3rd respondent, but since it stood transferred to the Appellate Collector, Bombay, it was necessary for the petitioners to have approached the said authority for his decision instead of preferring this petition. The Union of India has denied that the petitioners' product is known in the market as, fabrics coated with artificial plastic material.

3. Petitioner No. 1 has filed an affidavit-in-rejoinder and contended that since the process of their manufacture which leaves the major part of cotton fabric uncovered by Plastic material could not be said to be a "coating". It was further pointed out in the affidavit-in-rejoinder by the petitioners that Allahabad High Court in Miscellaneous Writ Petition No. 4999 of 1973 filed by M/s. Indian Coating and Laminating Corporation, Kanpur (the only other manufacturer in India of the similar product) has by its order of 7th November, 1973 upheld a similar contention that the product in question was liable to duty under Item No. 19 (I) (2) (f) and not under item No. 19 (III) of the Schedule.

4. At the time of hearing of this petition, Mr. S.N. Shelat, learned advocate, appearing on behalf of the petitioners, urged the following three points-

1. The order of the 2nd respondent holding the product of the petitioners liable to duty under Item No. 19 (III) of the Schedule was clearly beyond his jurisdiction, inasmuch as he has completely overlooked, that the product of the petitioner firm clearly could not be cotton fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial plastic materials.

2. If in any case, respondent No. 2 discriminated against the petitioners in holding that the product of the petitioners was liable to duty under Item No. 19 (III) of the Schedule, inasmuch as, similar products are subjected to duty in Kanpur under Item No. 19 (1) (2) (f) by the Excise Authorities in pursuance of the decision of Allahabad High Court in the aforesaid writ petition.

3. On the established practice and policy of this court that one High Court must accept the view taken by another High Court in the interpretation of a section of a statute which is an all India statute so as avoid discrimination amongst manufacturers of the same product, this Court must accept the view of Allahabad High Court and more particularly since the Allahabad High Court has not granted leave to the Excise Authorities to the Supreme Court against that decision nor the Excise Authorities have sought special leave from the Supreme Court in the matter.

5. Mr. Vakharia, the learned advocate of the Union of India sought to appeal these contentions by urging that the petition is premature inasmuch as the Collector of Central Excise, Bombay, is seized of the appeal which has been

transferred by respondent No. 3 and the petitioners sought not to have rushed to this court and should have exhausted the remedy before the Appellate authority. Mr. Vakharia also contended that as this is a matter of classification of products and the question is about the appropriate Item of the Schedule under which the product in question is liable to duty, it is one, within the jurisdiction of the Excise Authorities and this court on the accepted principles should not interfere with the finding made by the 2nd respondent. In the submission of Mr. Vakharia, the decision of Allahabad High Court cannot be taken as a binding precedent to this court, and the accepted policy of this Court on the principle of comity of judicial decisions, in matters of Income Tax, cannot be extended to the matters falling under Excise and Customs Acts.

6. We are afraid we cannot accept the contention of Mr. Vakharia, that the question urged in this petition is one within the exclusive jurisdiction of the authorities under the Central Excise Act, as it pertains to a question of more classification, because on the plain reading of the two entries, we cannot agree with Mr. Vakharia that the product would fall clearly within the terms of Entry No. 19 (III). Apart from this plain reading of the two entries having regard to the decision of Allahabad High Court, which has applied its mind and decided about this classification, we think that it would not be open to the Excise Authorities to contend that this is a question clearly within the jurisdiction of the Excise Authorities and, therefore, this Court should not, in the matter of classification, or on the question as to which is the appropriate Entry which would subject the product of the petitioners to duty, interfere in this petition.

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7. It is no doubt true that the Assistant Collector of the Central Excise, Mr. P.J. Pohowalla who has filed affidavit in reply on behalf of the respondents has tried to support and justify the decision of respondent No. 2 on ground that the opinion of the Chief Chemist clearly established that it was a cotton fabric impregnated or coated with preparation of cellulose derivatives or of other artificial plastic materials. The Union of India has also in the said affidavit-in-reply relied on the process adopted by the Manufacturers for manufacturing cotton fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial, plastic materials from the Encyclopaedia of Chemical Technology (2nd Edition) Volume 5, page, 585 by Kirk and others. The observations on which reliance has been placed reads as under :-

"...use of powdered resin directly on fabrics is a relatively new process for the manufacture of coated fabrics. Application of resin powder may be by the "flour-sifter" techniques involving a rotating brush ropl operating against the screen surface. From the powder-coating station the fabric may pass under an infrared heating zone to freeze the resin without disturbance from air convention ourvents. Moreover, heading 59.08 of S.T.N. also covers textile Fabrics spattorern, e.g. by spraying, with visible particles of artificial teremo-plastic material, capable of providing a bond to other fabrics or materials on the

application of heat and pressure."

It appears that before the Allahabad High Court, the facts were similar. The Deputy Chemist in Kanpur case gave his opinion in favour of the Manufacturer. The Board of Central Excise being not satisfied with, the opinion referred the matter to the Chief Chemist who also relied on the same observations from the aforesaid Encyclopaedia of Chemical Technology, Vol. 5 and opined in favour of the Revenue. It is on the basis of this opinion that the Excise Authorities raised a demand for differential duty as in their opinion the product of Kanpur Manufacturers which was classified hitherto by the Excise Authorities as cotton fabrics material in any other manner under Item No. 19(1) (2) (f) was not correct. The Kanpur Manufacturers being aggrieved with the order in appeal preferred by them against the additional demand, moved Allahabad High Court under Article 226 of the Constitution of India for appropriate writs, orders and directions. The Excise Authorities in Allahabad High Court also resisted the petition on similar grounds which have been raised in this petition. A Division Bench of Allahabad High Court which heard the petition observed as under :

"According to this report only 27 per cent Of the cotton fabrics is covered by plastic material. The process of manufacture which leaves a major part of the cotton fabrics uncovered by plastic coating. In coating the intention would be to cover virtually the entire surface of the material sought to be coated. The process which leaves a considerable area uncovered would not in our opinion be called coating. It may be some other kind of processing. As mentioned by the Chemist the plastic material is not impregnated in the inter space of the cloth and thus the process cannot be called one of impregnation: Prima facie the Chemical Examiner's conclusion appears to be justified in law."

The said Division Bench of Allahabad High Court also considered the opinion of the Chief Chemist which the Board of Central Excise had obtained and after consideration of the process, the Division Bench came to the following conclusion:-

"The process adopted by the petitioner could not, in our opinion, be called not calender coating process. The decision circulated by the Board was, in our opinion, not applicable to the material manufactured by the petitioner so as to make it includible within the term "cotton fabrics impregnated or coated". It was cotton material processed in any other manner. The demand of excess excise duty raised by the Department on the footing that the material was coated or impregnated one was manifestly erroneous in law.

In the result, the Allahabad High Court allowed the said petition and the notice requiring the petitioner in that case to make payment of duty was quashed.

8. In this petition before us, even according to the chemist's report on which the Union of India has placed reliance, coating is only to the extent of 37.1 and, therefore, it cannot be said that the entire Fabric was coated and, therefore, within the mischief of Item No. 19(III). The opinion of the Chemist on which

reliance has been placed by the Union of India and which has been set out in the affidavit-in-reply of Assistant Collector, clearly points out as under.

...the petitioner firm sprinkles polythene powder on the cotton fabrics by hand screen. Thereafter, the fabrics passes through the heating chamber, where the powder, i.e. small particles stick in an uneven position. These powder granules stick to the cloth without either penetration or going through the body of the cotton fabric. Thereafter, the said fabric is used by the garment manufacturers on collars of shirts and bush shirts."

On the above clear admission of the Chemist in his report it also cannot be urged successfully that it is an impregnated fabric. It has been also pointed out by the petitioners in paragraph 10 of the petition that in the process of manufacturing of their product there is no lamination, no coating, no impregnation. The petitioners have asserted that for purposes of coating or impregnating any cotton fabric what is required is the adoption of one of the following three methods :

1. Extrusion and roller pressing,
2. The use of Doctor Knife.
3. Calendering process.

As a result of either of those three processes, the cellulose derivatives or plastic material completely inter-mixes with the base material by which this impregnated or coated material is never separable from the base material. The petitioners have also produced a sample of their product and pointed out that the small coating which has been applied on the fabrics can be easily separated from the base material. Petitioners have further averred that there is only sprinkling of the powder on cotton fabric by screen and no motive power is used while doing the same, while in case of impregnation or coating the plastic has to be dissolved with alcohol or other solvents, or it is to be liquified so that there is complete saturation of the base material with the resin or plastic. In reply to what the petitioners have averred in paragraph 10 of the petition as to their process, the respondents in the affidavit-in-reply in paragraph 13 have stated that the process of coating is not defined under the Central Excise Act, but since the process which is being carried out by the petitioners on the fabric would certainly attract the duty as leviable under Tariff Item No. 19(III), they denied the averments made in paragraph 10 by the petitioners. In our opinion this is hardly a method of denying specific averments made by the petitioners as to the process which they adopt for manufacturing their product. As stated by us above, on the plain reading of Item No. 19(III), we do not think that the stand of the respondents is justified that the product in question can be classified legally as coated or impregnated cotton fabric, and more particularly in view of the clear opinion of the chemist which has been set out in the affidavit-in-reply of the Assistant Collector of Central Excise filed on behalf of the respondent where it has been clearly admitted that the percentage of polythene plastic material is only 37.1 and that it is not penetrated through the body of the cotton fabric. We

are, therefore, in respectful agreement with the view which the Allahabad High Court has taken in the matter of similar product manufactured by Kanpur Manufacturers.

9. We have been told by Mr. Shelat, the learned advocate of the petitioners that the Excise authorities have not sought special leave to appeal against the said decision of Allahabad High Court from the Supreme Court. The Allahabad High Court also refused to grant leave for going to the Supreme Court. Mr. Vakharia the learned advocate of the respondents was not in a position to assert one way or the other, whether special leave has been sought by the Excise Authorities from the Supreme Court. We, therefore, think that on the salutary principle which the Bombay High Court has followed since long and which has been affirmed in number of tax matters that it is a practice and policy that in case where there is only one interpretation enunciated by a High Court in respect of provision of a taxing statute, another High Court must ordinarily accept that view of the interpretation of a section or a provision of taxing statute which is an all India statute (see *Maneklal Chunilal and Sons Ltd. Vs. Commissioner of Income Tax (Central), Bombay*, : *Commissioner of Income Tax, Bombay City I Vs. Chimanlal J. Dalal and Co.*, and *Commissioner of Income Tax Vs. Tata Sons Private Ltd.*,) .

10. In *C.I.T. v. Chimanlal J. Dalal and Co.* (Supra) the Division Bench of the Bombay High Court was concerned with the question of a carry forward loss in speculation suffered by it in earlier year and set it off against speculative profits of the subsequent year. There was already a decision of the Gujarat High Court on the point with which the Bombay High Court was not in agreement. The Gujarat High court has held that registered firm was entitled to carry forward the speculative loss suffered by it in earlier year and set it off against speculative profits of the subsequent year. The Division Bench of the Bombay High Court, though it did not agree with any of the reasons of the Gujarat High Court, in support of its decision, however, in conformity with the general practice of the Bombay High Court that in Income Tax on High Court must ordinarily accept the view of another High Court on the interpretation of a section or a provision of a statute which is an all India Statute, did not think fit to depart from that salutary principle, and therefore, followed the decision of the Gujarat High Court of the point. The said Division Bench of the High Court of Bombay actually followed the earlier decision of the Division Bench of the Bombay High Court in *Maneklal Chunilal and Sons Ltd. v. Commissioner of Income Tax* (Supra) where, Chagla C.J. (as he then was) speaking for the court observed:

"A special Bench of the Madras High Court has taken the view favourable to the Commissioner and contrary to the view suggested by Mr. Palkhiwala and in conformity with the uniform policy which we have laid down in income tax-matters; whatever our own view may be, we must accept the view taken by another High Court on the interpretation of the section of a statute which is an all India Statute."

The same salutary principle is reiterated and followed in Commissioner of Income Tax v. Tata Sons Pvt. Ltd. Supra where Mr. Justice K.K. Desai, speaking for the court observed as under :

"The attempt of Mr. Hajarnavis, was to re-argue all the questions decided in the above decision before us and to persuade us to make findings contrary to and inconsistent with the findings made therein. We have informed Mr. Hajarnavis that having regard to Uniform Policy laid down in Income Tax matters we did not propose to give him a long hearing as he desired. The practice and the policy established is that in these matters whatever our own view may be we must accept the view taken by another High Court on the interpretation of the section of a statute which is an all India statute."

As a matter of law the earliest decision of the Division Bench of the Bombay High Court in Maneklal Chunilal and Sons v. Commissioner of Income Tax, is binding on us. Apart from it, we are in respectful agreement with the salutary practice and the policy that in taxation matters where a High Court is concerned with the interpretation of on all India statute, it should be a practice and policy that if one High Court has interpreted a provision on section of a taxing statute, which is all India statute and there is no other view in the field, another High Court must ordinarily accept that view in the interest of Uniformity and consistency in matters of application of taxing statute, so as to avoid the challenge of discrimination in application and administration of tax matters. Mr. Shelat's third contention, therefore, must clearly prevail

11. The contention of Mr. Vakharia that the petition is premature is not at all well founded for the simple reason that though the petitioners have tried to exhaust this alternative remedy by filing appeal on 14th June, 1971 before respondent No. 3 and which as a matter of fact was heard on 28th October, 1971 before respondent No. 3, he did not think it fit to decide that appeal and pronounce his order till as late as 28th April, 1972 when the petitioner's moved this court on being informed, when petitioner No. 1 inquired as to the result of the appeal, that the same was transferred to the Appellate Collector, Bombay. It is really surprising how respondent No. 3 thought fit after lapse of considerable period of as much as six months to transfer this appeal to the Appellate Collector, Central Excise, Bombay. We think it our duty to draw the attention of the taxing authorities that delay in Administration of justice always results in denial of justice. It is actually the grievance of the petitioners that on account of competition with Kanpur firm the petitioners business came to a stand still and their production was thrown out of market. It is not desirable at all to keep the determination of tax liability in doldrums for a long time as it would affect the financial workings of industrial units resulting in ultimate closure of the units which have serious repercussion on production of goods and materials. It is also not desirable that taxing authorities in different States should take different views. In any case they must try to settle the matter of conflicting interpretations between different Collectors at the highest level at the earliest

opportunity. In that view of the matter, it cannot be said that the petitioners have not exhausted alternative remedy. It is on the contrary on account of the appellate authority not deciding the appeal after it was once heard by him and on the contrary transferring the same to another Collector that the petitioners were forced to move this Court. In that view of the matter, therefore, we cannot agree with the learned advocate of the respondents that the petitioners have not exhausted the alternative remedy. In the result, this petition succeeds and is allowed. We, therefore, issue appropriate writ quashing and setting aside the order passed by the 2nd respondent holding that the petitioner-firm should be charged under Item No (III) of the aforesaid Schedule, and it is directed that the product of the Petitioner-firm shall not be subjected to duty under Item No. 19 (III) but should be charged duty under Item No 19(1) (2) of the Schedule to the Act, and the consequent refund of the excess amount of duty collected from the petitioners shall be made within a period of two months from today. Rule is made absolute accordingly with costs.