
(1983) 08 BOM CK 0021
In the Bombay High Court
Case No : First Appeal No. 514 of 1980

J.K. Vacuum Flasks Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 29-08-1983

Acts Referred:

Central Excise Rules, 1944 — Rule 160, 223A, 47, 9
Central Excises and Salt Act, 1944 — Section 3

Citation : (1984) 1 BomCR 598 : (1984) 2 ECC 303 : (1983) 14 ELT 2095 :
(1982) 135 ITR 727 : (1984) MhLj 674

Hon'ble Judges : V.V. Vaze, J;M.R. Waikar, J

Bench : Division Bench

Judgement

Vaze, J.—Two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. So said Lord Hailsham L.C. in *Re : W. (An Infant)* (1971) A.C. 682. But, in this appeal, we meet two reasonable men who are as different from each other as cheese from chalk. One reasonable manufacturer of vacuum flasks tells revenue that the refills which are made of glass are a fragile commodity and consequently about 5% of his manufactured goods broke in the process. Another equally reasonable officer of Central Excise feels that not a single vacuum flask should be accounted for under the head of "breakages". This thus is the focal point of the controversy.

2. J. K. Vacuum Flasks Limited are engaged in the manufacture of vacuum flasks and refills at Chinchvad, Poona 19, and hold Central Excise L-4 Licence. u/s 3 of the Central Excises and Salt Act, 1944, duties of excise are levied on all excisable goods at the rates set forth in the First Schedule. Item 55 of the First Schedule speaks of vacuum flasks and other vacuum vessels. Under Chapter VII-A of the Central Excise Rules, it is permissible for the manufacturer to remove excisable goods kept in private warehouses, sometimes designated as bonded store-room. Such bonded store-rooms are subject to inspection, and under Rule 9 excisable goods cannot be removed from any place where they are produced, cured or

manufactured or any premises appurtenant thereto, until the excise duty leviable is paid. Under Rule 223-A an account of stock of goods in the warehouse is to be taken and if the owner of the bonded store-room cannot account for the deficiency at the time of its checking, the owner is liable to pay the full amount of duty chargeable on such goods as are found deficient as well as penalty.

3. As a result of an annual stock taking under Rule 223-A a shortfall of 1,74,545 refills came to the notice of the excise authorities for which a show cause notice dated 23-7-1973 was issued under Rule 9, alleging that the manufacturer had disposed of the excisable goods. A reply by the manufacturers on 30-10-1973, resulted in a corrigendum to be issued whereby the notice was deemed to be under Rule 223-A instead of Rule 9 as adumbrated earlier. The manufacturer replied on 16-11-1973 attributing the shortage due to breakage in the storage but the Assistant Collector of Central Excise, Poona, did not accept the plea of breakage and by his order dated 17-12-1973 demanded from the manufacturers a duty of Rs. 58,975.68 and in addition imposed a penalty of Rs. 200/-. An appeal against the order, as well as a revision application which followed, met with no success and the manufacturers, after serving a notice u/s 80 of the Civil Procedure Code, filed a declaratory suit in the Court of the Civil Judge, Senior Division, Poona, challenging the demand. The suit also met with the same fate and the manufacturers are now before this Court in appeal.

4. The key expression occurring in Rule 223-A and repeated elsewhere in various administrative rules is :

"As the proper officer may consider reasonable".

Under Rule 223-A the proper officer has to make :

"such allowance for waste by evaporation, or other natural causes as the proper officer may consider reasonable....."

This phraseology runs through the entire gamut of the catena of Rules. For example, under Rule 47, if any goods lodged in a warehouse are lost or destroyed by unavoidable accident, the Collector may in his discretion remit the duty due thereon. So, also, Rule 160 speaks about the satisfaction of the proper officer with respect to goods which are removed from warehouse without permission. Whenever statute authorises an officer to act in his discretion, it can never be said that the discretion is an unfettered one, because an unfettered discretion and the rule of law go in together and are contradictions in terms. As Griffiths Lord Justice has recently observed in *R. v. Commission for Racial Equality exp. Hillingdon L.B.C.* (1982) Q.B. 276 :

"It goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament."

5. The principle of reasonableness has remained unchanged for at least 400 years. To quote Coke's words from *Rook's Case* (1598) :-

"Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections."

6. Thus, all that remains to be seen is whether the excise authorities exercised their discretion reasonably in the manner intended by Parliament or whether there was a malversation of any kind by which the decision was not according to law, but humour.

7. The first order dated 17th December 1973 of the Assistant Collector, Central Excise, Poona II Division, shows that the Assistant Collector did not accept the plea put forth by the party that 82,814 refills were due to the breakages, on the ground that the Appellant could not account for the remaining quantity of 82,814 refills "without any evidence on the record".

8. Before the Appellate Authority a statistical data was produced showing that the percentage of breakage in processing, testing, bad silvering and storing varies from 0.60% to 5.20% and that the breakages in glass were inevitable. But the Appellate Collector, while dismissing the appeal on 25-4-1975, observed that since goods once deposited in B.S.R. (bonded store-room) are to be accounted for under Central Excise Laws, he did not see any reason to interfere with the order passed by the Assistant Collector. The same refrain continues in the revisional order dated 3rd June 1976 and the burden of maintaining records has been thrown on the manufacturers.

9. It was contended on behalf of the revenue that Mr. Shrotri, who worked as Personnel Manager of the Appellants, has admitted that though there is no provision in the Central Excises and Salt Act and the Rules made thereunder for noting day-to-day breakages, the Company was maintaining certain register in which such breakages were entered. The whole evidence of Mr. Shrotri is full of prevarication on this point, because, though earlier he had mentioned about the breakage register being shown to the Assistant Collector, he retracted and said that he had no personal knowledge about the matter. Reading the evidence as a whole, wherein Mr. Shrotri has asserted that as there are lacs of refills in its stores, it is not practicable to count the stock every day nor is it possible to note the breakages, we do not think that the appellants have failed to produce any evidence which was in their possession. It is understandable that for fixing responsibility and taking appropriate disciplinary action the manufacturers might be keeping some notes of breakages, but failure to produce the same would not vitiate their case. As observed earlier, the standard refrain of the departmental orders is that the appellants should have produced account of breakages but the Respondent department could not pin-point any statutory rule as such which obligated the manufacturers to maintain a record of day-to-day breakages.

10. When Rule 223-A cast a duty on the appropriate officer to take into account receipts and deliveries and make allowance for waste by evaporation, or other natural causes, it would be irrational for the officer to say because the manufacturers have not kept account of day-to-day breakages in their bonded store-room, he would not make an allowance for a single vacuum flask refill. Such a proposition would mean that the repository of the power did not apply his mind at all to the normal and natural course of business of manufacture and storage of a commodity like vacuum flask and acted arbitrarily. Even "the man in the Chapam omnibus," - to borrow the phrase from *Hall v. Brooklands Auto Racing Club* (1933) 1 K.B. 205, would not believe that 15, 38, 194 - glass flasks can be stacked without breaking a single one out of them. Surely, a manufacturer will now allow broken pieces of glass to lie scattered on the floor of the bonded store-room which is trodden over by workers many of whom may be barefooted, nor is it reasonably practicable for a manufacturer to await the arrival of an Inspector of Central Excise every time a flask breaks in the process of manufacture and storage. We find that the Assistant Collector failed in his statutory duty to apply the provisions of Rule 223-A in the matter of giving an allowance for the breakage which was a natural cause within the meaning of Rule 223-A.

11. The upshot of the above suggests that the Appeal falls to be allowed, and it is declared that the orders passed by Defendants 1 to 3 on 3-6-1976, 25-4-1975 and 17-12-1973 respectively, and the consequential demand dated 15-9-1976 made by the Assistant Collector, Central Excise, Poona II, for Rs. 58,975.68 P. together with the demand of penalty of Rs. 200/- are set aside as being not binding on the appellants.

12. The Appeal is allowed with costs throughout.