

(1994) 12 MAD CK 0012

In the Madras High Court

Case No : Writ Petition No. 8825-8832 and 9864 to 9868 of 1994

Kali Aerated Water Works

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-12-1994

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 5, 5A, 9
Constitution of India, 1950 — Article 14, 19

Citation : (1995) 76 ELT 265

Hon'ble Judges : Raju, J

Bench : Single Bench

Advocate : Shri C. Natarajan, for the Appellant; Shri K. Jayachandran, for the Respondent

Judgement

1. These writ petitions involve for consideration identical issue on similar factual circumstances apart from concerning the same subject matter and

learned counsel appearing on either side also made submissions in common. Hence dealt with together for consideration.

2. So far as the Writ Petition in W.P. No. 8825 of 1994 is concerned, the factual claims and legal contentions raised in the affidavit filed in support

thereof may be set out in some detail. The above Writ Petition has been filed for the issuance of a writ of certiorarified mandamus to call for and

quash the notification of the first respondent in No. 59/94-C.E., dated 1-3-1994 particularly paragraph 4 thereof and consequently direct the

respondents to grant exemption to the petitioner under Notification No. 175/86/C.E. as amended to-day. The petitioner claims that he is carrying

on business in the manufacture and sale of aerated waters and other non-alcoholic drinks, fruit juices falling under Chapter 22 of the Central Excise

(Tariff) Act, 1983 since 1-4-1977 in the name and style of M/s. Kali Aerated Works at Virudhunagar Trading and Marketing the products

manufactured in and around the entire district of Kamarajar District, part of Madurai District and part of Ramanathapuram District.

3. The petitioner states that originally the business was founded by the petitioner's paternal grandfather late P.V.S.K. Palaniappa Nadar in the year

1916, under the trade name M/s. Kali Aerated Water Works with Headquarters at Virudhunagar and branches at various places like Madras,

Trichy Tirunelveli, Madurai, Karaikudi, Salem, Kumbakonam and Erode. The business was said to have been started as Joint-Family business

consisting of P.V.S.K. Palaniappa Nadar, his three sons, K. P. Rajendran, K. P. Dharmarajan, father of the petitioner in this Writ petition, K. P.

Ganesan and Mrs. Damayanthi Ammal, the only daughter. It is also stated that the said business was run as Joint Family Partnership Firm and the

Partnership firm was strictly restricted to only the family members of the Founder. With passage of time, it is claimed the sons of the first two sons

were also said to have been inducted into the partnership since the third son had no sons and the son of the daughter referred to supra was also

likewise inducted as partner. The products of the business, it is stated, at all places were being marketed under the brand name of "KALI MARK"

and as the volume of business and the name as well as reputation increased branches at Madurai, Madras, Trichy, Kumbakonam and Salem were

said to have been opened. The said business was said to have been continued by K. P. Rajendran even after the death of the Founder, as the

kartha after due reconstitution of the Firm, in the same trade name. In the reconstituted firm, the family members of the above referred to sons and

daughter were said to have been included, maintaining the identity of the business as Joint Family business.

4. As the volume of the business at the various branches and centres also increased, it is claimed that, the partners resolved to dissolve the Joint

Family nature of it and make the various units themselves independent. Consequently, it is stated that the dissolution was effected on 31-3-1977

and on and from 1-4-1977 all the then existing branches at various centres were made independent with its own financial investment, machineries

and other infrastructural facilities for carrying on such business. It is stated that thereafter all the members of the Joint Family became independent

and continued the business in the same name M/s. Kali Aerated Water Works with respective places in brackets viz., Kali Aerated Water Works

(Virudhunagar) in order to distinguish them from one unit to another unit each one of such units with their factory earmarked and exclusively

allotted a specific marketing area into which the other members shall have no right to market their products in view of the same identical brand

marks as well as the name for the drinks. Thus, it is claimed it has become intellectual property belonging solely to the members of the joint family.

It is stated that in order to safeguard the trade marks and brand names the oldest member of the then joint family was given the authority in a

representative capacity to file appropriate forms for registration of Trade Marks before the Trade Marks Registry and that since all the members of

the joint family had a right to use the trade name and trade marks belonging to the joint family the other members of the joint family have been using

the said trade marks in their respective and specified marketing areas without rivalry or competition among themselves. It is further stated that to

avoid future confusion the members of the erstwhile joint family entered into a mutual agreement, dated 12-3-1993 under which the right to use the

Trade name and Trade marks (once belonged to joint family) had been properly redefined and redeclared among themselves for removal of

doubts and ambiguities and had them registered on 12-3-1993 (documents No. 301/94 on the file of the District Registrar, Madras.)

5. The petitioner states that having regard to its position as a registered small scale industry they have been availing of the exemption to a limit of

Rs. 30 lakhs upto which they need not pay excise duty in view of Notification No. 175/86 C.E., which came to be amended periodically by

Notification No. 223/87, dated 22-9-1987 and 1/93 dated 1-3-1993. Then came the amendment in Notification No. 59/94 C.E., dated 1-3-

1994 with effect from 1-4-1994 incorporating amendments which included the addition of paragraph 4, stipulating that if a person manufacture

accessible goods bearing brand names of another person, then even if it is a small scale industry it will not be entitled to claim the minimum

exemption and duty has to be paid from its first and every production. It is stated that excise duty being a levy on the manufacture or production

cannot be made merely on the user or affixture of the labels containing brand or Trade name, that the mere sale of goods in different label/Trade

names and Trade marks will not amount to manufacture, and since the right acquired is an intellectual property, the same cannot be affected by the

impugned paragraph 4 of the Notification. It is also stated that there is no clear specification as to what is meant by ""belonging to other person"" and

so far as the case on hand is concerned each one is the absolute owner in his particular area and it is incorrect to contend that only one person of

the erstwhile joint family is the owner. Neither the Notification nor any other provision provide for deciding as to who is the owner of the Trade

Mark or Trade name, whenever any dispute arises. Further, it is stated that the provision made in paragraph 4 of the notification virtually creates

discrimination among small scale industries and paragraph 4 is arbitrary, vague and unreasonable. It is stated that the petitioner cannot be denied

the benefits of exemption under the Notification No. 175/86 as amended by Notification No. 1/93 and that the denial not only constitutes an

unreasonable restriction but also unreasonably differentiates among small scale industries, as such and consequently is unconstitutional. While

adverting to Section 5 of the Act, it is stated that the sale of goods on various trade names and trade marks is outside the purview of the legislation.

It is also stated that though the Government has a right to impose conditions for granting an exemption or concession, the law does not permit...

(sic) any such condition based upon the use of a brand name or trade mark.

6. In each one of the above writ petitions also similar claims have been made and contentions have been raised by the respective petitioners.

7. The respondents have filed their counter-affidavit contending that the various petitioners are manufacturers of aerated (soda and sweet drinks)

falling under Chapter/Heading 2201 and 2202, that they use the brand names KALIMARK/KALI/KALI KOLA/BOVONTO/TRIO/SOLO and

Club Soda, that the Central Government permitted an interrelated scheme of General SSI exemption under Notification No. 1/93-C.E., dated 28-

2-1993, providing for duty concessions to the small scale industries, that such concession among other things accorded complete exemption from

excise duty for the value of clearance upto Rs. 30 lakhs by the unit and for the value of clearances from Rs. 30 lakhs to 75 lakhs concessional rate

of duty. It is also stated that paragraph 4 of the Notification No. 1/93 was amended under Notification No. 59/94 with effect from 1-4-1994 and

the said paragraph No. 4 prior to 1-4-1994 and thereafter in so far as it is relevant for the purpose read as hereunder :

Para 4 (prior to 1-4-1994)

The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods under a brand

name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification :

Para 4 (after 1-4-1994)

The exemption contained in this notification shall not apply to the specified goods bearing a brand name or trade name (registered or not) of

another person :

Relying upon the above and the Explanation to Nos. IX & X to paragraph 4 of the said Notifications it is pleaded for the respondents that if a

manufacturer affixes the brand name or trade name (registered or not) of another person then such a person is not entitled to claim the benefit of

exemption and therefore the petitioners cannot claim to be entitled to the benefit of exemption. While contending that the levy and exemption are

parts of the same scheme of taxation having been devised to carry into effect the purpose of the legislation, it is claimed that the charging Section

and the relevant exemption notification must be considered and read together and viewed thus, the language used in the notification is not only plain

and meaningful, but there is also no ambiguity whatsoever. It is stated that the exemption has been granted to genuine units who fulfil the conditions

stipulated in the notification itself and the question as to whom such concession has to be granted or the nature of conditions to be imposed are all

matters of policy and not only the notification should be construed as a whole but any bifurcation or severance of any portion alone from

consideration will defeat the very purpose of the exemption as also the scheme underlying the notification. The claim made on behalf of the

petitioner of the alleged violation of Article 14 and 19(1)(g) of the Constitution of India has been denied by the respondents. In reiterating the stand

of the respondents that issuing notifications granting exemption is a policy matter and such power can be exercised from time to time either granting

or withdrawing the concession, it is stated that the impugned action is quite in accordance with law and the exercise of power in this regard is

reasonable, just and in keeping with the policy and larger public interest. It is claimed that the object of the amendment as incorporated in para 4, is

meant to ensure that the benefit reaches genuine people and is not abused by manipulation or fragmentation big units in order to claim an undue and

undeserved benefit. The other claims and contentions on behalf of the petitioners in the affidavit have been meticulously traversed in great detail.

The writ petition is also said to be not maintainable and the filing of such writ petition should be discouraged.

8. Mr. C. Natarajan, learned counsel for the petitioners contended as hereunder :

The provision contained in paragraph 4 of the notification in question must be so construed as to apply to only exclude from the benefit of the

exemption, if at all, a manufacturer who affixes the specified goods with the brand name or trade name (registered or not) of another person and

not a manufacturer, who uses such brand name or trade name not exclusively belonging to another person or which jointly belongs to himself and

another or other persons who similarly use the same. While the right to a trade mark or trade name or ownership in this regard accrues out of

actual use and not necessarily on account of mere registration and the registration merely afford certain protection envisaged under the Trade and

Merchandise Marks Act, 1958 and to certain extent in the ordinary common law of the country, the Authorities of the Central Excise Department

can neither claim nor be conferred with the powers of adjudicating upon disputes relating to the right to ownership or otherwise, in respect of a

brand name or trade name and the authorities under the Act have no other go but to accept the claim of ownership made by a manufacturer and

proceed accordingly for all purposes of the Act, including the notification under consideration.

9. Construction in derogation of such common law as well as statutory rights have to be avoided by restricting the ambit of the notification which is

merely one made in exercise of subordinate legislation. If the line of interpretation urged for the department has to be accepted, it will result in both

the registered owner as also the unregistered owner/user being denied the benefit of exemption and permitting such a construction would therefore

be not only harsh but also arbitrary and unreasonable since the petitioners other than the registered owners have proprietary rights which rank as

much if not greater than that of the registered owner. The stand taken for the revenue is therefore said to be violative of Article 14 of the

Constitution of India, in view of the hostile discrimination it is said to perpetrate as also on account of being arbitrary and unreasonable. It is also

contended that the ownership of the brand or trade name has no relevance or nexus to the object of ameliorating the condition of or according

protection to a small scale industry and the same is also opposed to the very object contained in Sec. 5A of the Act and on this ground also the

notification is liable to be set aside. Consequently, it is contended that paragraph 4 of the notification must be so strictly construed as to avoid

anomalies resulting from a liberal or wide interpretation of the language of the notification.

10. Mr. K. Jayachandran, learned counsel for the Revenue contended as hereunder :

The exemption granted being itself a concession, it is always open to the Government to make it available, subject to any terms and conditions and

unless the conditions are strictly complied with one cannot avail of the concession since there is no vested right in any one to have an exemption or

concession in the payment of excise duty. It is stated that the question relating to grant of exemption or concession, the circumstances under which

and the person in whose favour it has to be granted are all matters of policy within the discretion of the legislature or the Government, as the

delegate, and the notification must be read as a whole to give effect to the object so as to prevent any abuse or manipulation by parties to flout the

law and evade payment of excise duty due to the State. There is no ambiguity in the notification and it is clear and specific and being an exemption,

the notification has to be construed strictly against the subject. It is also stated that the registered document virtually admits the ownership of Mr.

K. P. R. Sakthivel and indicates permission given by him to the others to use them in different and respective areas to prevent unhealthy

competitions and transgressing to the other areas and therefore the claims made on behalf of the petitioners to the contrary are not tenable. The

permitted, concurrent and honest user though may be an effective answer or good defence to an accusation of violation or infringement of the rights

of the owner has no relevance or concern with the aspects relating to levy of excise duty and exemption which have got to be decided strictly in

accordance with the notification under question. The claim based upon common law, it has been stated, has no application to the case and no merit

whatsoever. The claim on behalf of the petitioners that the exemption was meant to benefit small scale industries of all kinds has been denied and it

was stated that amendments introduced by Notification No. 1/93-C.E., and subsequently thereafter brought about a change in the very concept

and scheme underlying the exemption and therefore the contentions to the contra has no merit. It is contended that the object of paragraph 4 of the

notification is to ensure the real benefit of exemption to reach genuine small manufacturers who are pitted against giants and not those who adopt

the device of fragmentation, division and bifurcation so that larger units can come smaller to enjoy the benefits of exemption and consequently the

alleged violation of Articles 14 and 19(1)(g) of the Constitution of India are not enable.

11. Learned counsel appearing on either side adverted to some of the judicial pronouncements of the Supreme Court as also of the various High

Courts and it will be useful to refer to some relevant only of those relevant decisions :

(a) The decision in Consolidated Foods Corporation Vs. Brandon and Company Private Ltd., is that of a learned Single Judge of that Court,

wherein it has been held that a trader acquires a right of property in a distinctive mark merely by using it upon or in connection with his goods

irrespective of the length of such user and the extent of his trade and a trader who adopts such a mark is entitled to protection directly the article

having assumed a vendible character is launched upon the market. Registration under the statute does not confer any new right to the mark claimed

or any greater rights than what already existed in common law and at equity without registration. While emphasizing the above decision, it has also

been held that the registration itself does not create a trade mark and that the trade mark exists independently of the registration which merely

affords further protection under the statute. Priority in adoption and use of a trade mark is superior to priority in registration. Equally, it has been

held that for the propose of claiming such proprietorship of a mark, it is not necessary that the mark should have been used for considerable length

of time and that it is sufficient if the article with the mark upon it has actually become a vendible article in the market with intent on the part of the

proprietor to continue its production and sales. It was also held therein that only a person claiming to be the proprietor of a trade mark used by him

or proposed to be used by him could make an application for the registration thereof.

(b) In *Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd.*, the Apex Court was concerned with the claim relating to

infringement, registration of trade mark, copyright and designs. That was a case, where the family business of manufacturing a product under a

brand name with family members involved in the business having shares and directorship in all companies of the family - son of the sole proprietrix

of such a company became the Managing Director of another company, which started marketing of the family product, but subsequently

commencing business of manufacturing the same product. While considering the claim therein from the angle of acquiescence, it was observed that

acquiescence is one of the defences available under the 1958 Act. Acquiescence is sitting by, when another is invading the rights and spending

money on it. Such conduct is inconsistent with the claim for exclusive rights in a trade mark, trade name etc., and if the acquiescence in the

infringement amounts to consent, it will be a complete defence to the charge of infringement. In the very same decision, the Court also held that it is

a settled principle of law relating to the trade mark and that there can be only one mark, one source and one proprietor and it cannot have two

origins. While dealing with the claim of the opposing party therein proclaiming itself as a rival of the plaintiff and as joint owner, the Court held it to

be impermissible in law and further proceeded to hold that even then, the joint proprietors must use the trade mark jointly for the benefit of all and

that it cannot be used in rivalry and in competition with each other.

(c) The decision in *Chogmal Bhandari and Others Vs. Deputy Commercial Tax Officer, II Division, Kurnool*, has been relied upon to contend that

the statutory authorities under the special enactments like the Sales Tax Act in that case could not claim to have powers to declare that a Deed of

Trust executed by the settlors was hit by 53 of the Transfer of Property Act, though such authorities could determine in a summary fashion as to

whether or not a person was holding the monies on behalf of the other for the limited purpose of the Act.

(d) In the decision in *Sivaganga Samasthanam Devasthanam v. Spl. Commissioner & Commissioner of Land Administration, Madras - 1992 2*

L.W. 440, a learned single Judge of this Court has held that the revenue authorities will have no right to adjudicate the dispute of title and that if

there is a claim before such authorities, it must be got adjudicated before the Ordinary Civil Courts in accordance with law.

(e) The decision in *I.E. Newspapers (Bombay) P. Ltd., v. Union of India* was relied upon for the proposition that a piece of subordinate legislation

does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature and the same can be challenged not

only on the ground that it does not conform to the statute under which it is made but also on the ground that it is contrary to some other statute, in

view of the well settled principle that subordinate legislation must yield to plenary legislation, in addition to the ground of challenge that such

subordinate legislation is unreasonable, not in the sense of not being reasonable but in the sense that it is manifestly arbitrary.

(f) In the decision reported in *Supreme Court Employees Welfare Association v. Union of India* it has been held that the Rules whether made

under the Constitution or a Statute, must be intra vires the parent law under which power has been delegated and that they must also be in

harmony with the provisions of the Constitution and other laws. It was also held therein that if the Rules do not tend in some degree to the

accomplishment of the objects for which power has been delegated to the authority, Courts will declare them to be unreasonable and, therefore

void.

(g) In *London Rubber Co. Ltd. Vs. Durex Products, ,* it has been held that it is the duty of the Court to give full effect to the language used by the

Legislature and that it has no power either to give that language a wider or narrower meaning than the literal one, unless the other provisions of the

Act compel it to give such other meaning. It was also held therein that it was not obligatory upon a proprietor of a trade mark to apply for its

registration so as to enable him to use it.

(h) In *Banner and Co. Vs. Union of India (UOI), ,* a learned single Judge of Calcutta High Court held that putting the brand name on a specified

goods does not change the goods and that therefore it cannot amount to

"manufacture" in terms of Section 2(f) of Central Excises and Salt Act, 1944. It was also held therein that SSI exemption-brand name Notification No. 175/86-C.E., dated 1-3-1986 and amending Notification No. 223/87-C.E., dated 22-9-1987 denying exemption benefit to goods manufactured by small scale manufacturers, but bearing brand name of a large scale manufacturer is unreasonable and consequently unconstitutional and violative of Article 14 of the Constitution of India. Learned single Judge was also of the view that the amending Notification No. 223/87 did not justify the denial of exemption and that the distinction under the notification between a small scale unit selling its product with its own brand and the unit selling the goods purchased from and sell the product of the small scale industry of the brand name is unreasonable and arbitrary.

(i) In Nectar Beverages Pvt. Ltd. Vs. Union of India, , a learned single Judge of Karnataka High Court while talking a directly contrary to the one taken in the decision of the Calcutta High Court (referred to supra), held that theof tax is not a matter of rightit was well within theGovernment not to extend the benefit ...by making a difference treating SSInames of others as a class by themselvesfrom those SSI Units using their own or no names. It was also held thereinbeing the one granted with the SSI Units, which has toearn a good market for their goodsGovernment is entitled to ensure thethe move of the brand name holders,.....the goodsSSI Units.emphasising the importance of the brand name factor, it has also been held that SSI Units using brand name of others are a class by themselves because the goods produced by them have certain advantages in the market and consequently, it cannot be contended that the provision denying the benefit of exemption to the SSI units using brand name of others have no nexus between the basis of the classification and the object of the notification.

(j) The decision reported in Bhudan Singh and Another Vs. Nabi Bux and Another, was relied upon for highlighting the manner of construction of a statutory provision. Paragraph 9 of the decision on which strong reliance was placed is as follows :

9. Before considering the meaning of the word "held" in Sec. 9, it is necessary to mention that it is proper to assume that the law makers who are the representatives of the people enact laws which the society considers as

honest, fair and equitable. The object of every legislation is to advance public welfare. In other words, as observed by Crawford in his book on Statutory Constructions that the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every pieces of legislation. Consequently, where the suggested construction operates harshly ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute was not the one intended by the law makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the Legislature, there is little reason to believe that it represents the legislative intent.

(k) In Machine Well Engineers Vs. Union of India (UOI), , a Division Bench of the Allahabad High Court had an occasion to deal with a situation

where one class of Small Scale Industry which manufactures goods and sells them in open market or to the purchaser, who affixes into the goods

its brand name is exempted from excise duty upon the tune of Rs. 20 lakhs in terms of the notification dated 1-3-1986 but the other Small Scale

Industry who after the manufacture of the goods affixes on it the brand name of the purchaser under an Agreement with the purchaser but such a

class of Small Scale Industry would not be entitled for the exemption. The Division Bench of the Allahabad High Court held that the Notification

No. 223/87-C.E., dated 22-9-1987 to suffer the vice of Discrimination and arbitrariness and consequently declared the right of the petitioner

before Court to the benefit of exemption Notification No. 175/86-C.E. dated 1-3-1986. While coming to such a conclusion the Division Bench

concurred with the view of learned single Judge of the Calcutta High Court in Banner and Co. Vs. Union of India (UOI), - referred to supra].

(l) In Subhash Photographics and Others Vs. Union of India (UOI) and Others, , the Supreme Court held that it is not for the Courts to question

the wisdom of the Government or for that matter the Policy of the Board which is part of the Government since the legislations under consideration

are not merely taxing statutes but are also potent instruments in the hands of the Government for regulating the economy and industrial development

of the country, by deciding as to which industry require encouragement and

which do not. It was also held therein that where the validity of a subordinate legislation is in question the Court has to consider the nature, objects and the scheme of the instrument as a whole and on the basis of that examination it has to consider what exactly was the area over which and the proposes for which power has been delegated by the governing law. In *Hind Plastics and Another Vs. Collector of Customs, Bombay and Another*, , the Supreme Court held that the question as to what should be taxed is a matter not to be decided by the Courts but by appropriate instrumentalities or functionaries of the State. It was also held therein that whether it is statute, statutory instrument or an ordinary instrument, the interpretation placed has to accord with the intention of the maker as evidenced by the words/language used.

(m) In *Collector of Central Excise, Bombay-I and Another Vs. Parle Exports (P) Ltd.*, , the Supreme Court held that Courts while construing a statute or notification will give much weight to the interpretation put upon it at the time of enactment or issue and since by those who have to construe, execute and apply such provisions. The Court also held therein as hereunder :

12. How then should the Courts proceed? the expressions in the Schedule and in the notification for exemption should be understood by the language employed therein bearing in mind the context in which the expressions occur. The words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. It is, however, necessary to bear in mind certain principles. The notification in this case was issued under Rule 8 of the Central Excise Rules and should be read alongwith the Act. The notification must be read as a whole in the context of the other relevant provisions. When a notification is issued in accordance with power conferred by the statue, it has statutory force and validity and, therefore, the exemption under the notification is, as if it were contained in the Act itself. See in this connection the observations of this Court in *Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI)*, : See also *Kailash Nath and Another Vs. State of U.P. and Others*, . The principle is well settled that when two views of a notification are possible, it should be

construed in favour of the subject as notification is part of a fiscal

enactment. But in this connection, it is well to remember the observations of the Judicial Committee in *Coroline M. Armytage & Other v. Frederick*

Wilkinson 1878 3 A.C. 355

There is only, however, in the event of there being difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of

liberality of construction arises the judicial Committee reiterated in the said decision at page 369 of the report that in a Taxing Act provisions

establishing an exception to the general rule to taxation are to be construed strictly against those who invoke its benefit. While interpreting an

exemption clause, liberal interpretation should be imparted to the language thereof, provided no violence is done to the language employed. It must,

however, be borne in mind that absurd results of construction should be avoided.

(n) The Supreme Court of India, in the decision reported in *Asst. Collector, Surat v. J. C. Shah etc.*, - 1978 2 E.L.T. 317, while interpreting the

words, "the same person" in Rule 12A(V) of the Rules, has held down as follows :

Para 5

Apart from this consideration, however, on a plain construction of the relevant clause, the context seems to require that the words, "the same

person" cannot receive the liberal construction for which the appellants contend. The respondent Shah owns a factory in which there are nine

powerlooms. He is a partner in two other factories in which there are 24 and 19 powerlooms respectively; but the production of artificial silk

fabrics attributable to these two factories cannot be said to be production or manufacture by or on behalf of the same person. The production in

the first factory is by or on behalf of the respondent himself, while the production or manufacture in the other two factories is by or on behalf of two

separate partnership of which the respondent happens to be one partner. We, therefore, feel no difficulty in holding that for the purpose of Item

12A(v), the three persons cannot be said to be the same as claimed by the appellants. If it was the intention of the legislature to exclude cases like

the present from the purview of the exemption clause, then it must be held that the legislature has failed to use appropriate words to carry out the

intention. We were told that for subsequent years, the relevant item in the

Schedule has been suitably modified and the present question, is therefore, not likely to arise in future.

(o) In Union of India Vs. Pillaiyar Soda Factory, , a Division Bench of this Court, to which I was a party while construing a similar exemption

notification and laying down the principles underlying the interpretation of exemption notification held as follows :

P. 13 A bare reading of the explanation unmistakably shows that the expression ""common trade mark aerated waters"" implies aerated waters

which are sold under the same trade mark or under the same brand name in more than one factory, whether belonging to one or more

manufacturers. Thus, the sale must be with the "same" trade mark or brand name in order to attract the categorisation of "common trade mark

aerated waters", for the purpose of the notification. Can the use of a "similar" or "deceptively similar" or "deceptively identical" trade mark used by

a manufacturer be said to be the manufacture and sale with the "same" trade mark of brand name ? Notification No. 148/82-C.E. has used the

expression that "common trade mark aerated waters" would mean aerated waters which are manufactured with the "same" trade mark or brand

name in more than one factory. The notification does not use the word "similar" or "identical" but "same". The intention of the authorities in issuing

the notification is, therefore, quite clear and unambiguous. The concept of "similar" or "deceptively similar" or "more or less identical" is a concept

borrowed from the Trade and Merchandise Act or the Copyright Act, which is not of exactitude but of latitude. That concept has relevance to an

action in "passing off" etc. It is aimed for the protection of innocent or unwary customers. In our opinion, it would not be proper to import that

concept while interpreting a notification issued under the Central Excise Rules, as it would have the effect of enlarging or restricting the scope of the

notification. Fiscal laws, it is trite, must be strictly construed. The notification issued under the fiscal laws have equally to be strictly construed. The

words used in the notification must be understood according to their plain phraseology. Nothing should be presumed. Nothing should be implied.

The true test must always be the language used. The authorities used the expression "same" in the Explanation to explain as to when manufacture

can be said to be under a "common trade mark". The authorities did not use the

word either "similar" or "identical". The word "same" has an absolutely different meaning than the word "similar" or "identical". For example, if it were said that A and B live in the "same" house, it would imply that they were living in "one" house, while if it were said that A and B live in "similar" houses or in "identical" houses, obviously, the implication would be that A and B live "separately". Therefore, the word "same" cannot be construed to be synonymous with "similar" or "identical", or even deceptively similar and deceptively identical. Since the language used in the notification is clear, it is not permissible to interpret the meaning of the word occurring therein by taking recourse to modes other than the plain language. The expression "same" has to be understood in the context of the intention of the authorities issuing the notification. the authorities intended to deny the benefit of individual exemptions only where one or more manufacturers sell the product under the "same" trade mark or brand name. It is a fundamental rule for the construction of statutes, that where the language is plain and clear, the words must be held to have been used, according to the plain and ordinary meaning of the term to determine their connotation or meaning. Therefore, using the well settled rule of interpretation, the conclusion is irresistible that the Collector fell in error in construing "same" as "similar" or even "deceptively similar" to deny the benefit of individual exemption to the writ petitioners under the notifications.

12. I have very carefully considered the submissions made by learned counsel appearing on either side. The reliance placed on the decision of Allahabad High Court [Machine Well Engineers Vs. Union of India (UOI), and of Calcutta High Court Banner and Co. Vs. Union of India (UOI), are inappropriate, in that though in those (two) cases a provision similar to the one under consideration now before me came up for consideration, the facts and circumstances as also the issues which arose for consideration in those cases were totally different from the peculiar facts and issues arising in the present case. From the reported judgments, it can be seen that in those cases, the "manufacturers" concerned were sought to be denied the benefit of exemption merely on the ground that they manufacture a particular kind of goods and affixed the brand or trade name of another person. The respective High Courts found that the manufacturers

concerned there is actually manufactured and supplied goods to the large scale units concerned, according to the specifications given by such large scale units and after putting the brand name of such large scale units on such goods. It is in that context, the Courts took the decision that the manufacture was complete even without the brand name being put on the specified goods and that the distinctions sought to be made for exemption was neither justified nor warranted with reference to the very object of the "notification" according exemption. In substances, the learned Judges, who decided these cases were of the view that there could be no difference between a manufacturer, who produces and markets himself the goods so manufactured where even putting any brand name or trade name on such goods or a manufacturer, who manufactures and supplies the goods, specification of a large scale unit putting brand name of such large scale unit also, as of such large scale unit. So far as the case on hand is concerned, it is a case of different persons, using the very same brand or trade names for the goods manufactured and marketed by them in their own individual capacity and right and not on account and at the request of the owner of the trade or brand name. The affixation of the Trade or brand name in these cases before me was not for the benefit of or as per his directions and orders of the owner of the Trade or brand name. A learned single Judge of Karnataka High Court in Nectar Beverages Pvt. Ltd. Vs. Union of India, has taken a view, contrary to the one taken by Allahabad and Calcutta High Courts, (referred to supra). Although all the factual details are not available from the reported Judgment, the position is obvious from paragraph 9.3 of the Judgment, which reads as hereunder :

9.3 SSI Units using brand names of others are class by themselves, because the goods produced by them have certain advantages in the market.

Therefore it cannot be held that the classification is arbitrary and based on irrelevant considerations. Concession is granted obviously to SSI Units

who has to struggle hard to earn a good market for their goods and to prevent brand name holders adopting the device of manufacturing those

goods through SSI Units - Contention is accordingly rejected.

Learned single Judge of Karnataka High Court was of the view that the "Explanation", which is similar to the one under consideration in this case,

denied the exemption because the brand name belongs to someone else, who is not eligible for exemption and the real basis to deny such

exemption is equation made by equating the manufacturer with the brand name holder. Learned single Judge of Karnataka High Court was also of

the view that concession is granted obviously to SSI Units, who has struggle hard to earn a good market for their goods and to prevent brand

name holders adopting the device of manufacturing those goods through SSI Units in order to avoid the payment of excise duty. As noticed earlier,

it was also held therein that concession from levy of tax is not a matter of right and though even a fiscal regulation has to satisfy the requirements of

Article 14 of the Constitution of India, a greater latitude is given to the law maker in the matter of classifying the subjects for taxation, having regard

to the diverse and complicated problems of administration involved therein.

13. On going through the different views expressed in the above referred decisions, I am of the view that the decision of learned single Judge of

Karnataka High Court is acceptable to me and with great respect to learned Judges of the other High Courts, who rendered different views, I am

unable to subscribe myself to their views. Even that apart I am also of the view that the facts and circumstances of the present case pose not much

of defects or problems in coming to the conclusion that the petitioners are not entitled to the exemption in view of paragraph 4 of the notification

under consideration. The earlier part of this Judgment would make it clear that the trade or brand name though originally belonged to the joint

family of the Founder of the business, the trade and brand names had since been registered only in the name of K.P.R. Sakthivel and that the

others appear to have been permitted by the said K.P.R. Sakthivel to use the trade name and additional trade marks in their respective areas of

marketing as per the registered mutual deed of Agreement, dated 12-3-1993 for manufacturing and marketing the products so manufactured by

them. As a matter of fact, the expenses relating to the advertisement were to be equally shared by all the petitioners, who have been permitted to

use the trade name or mark. A careful analysis of the deed of mutual arrangement would go to show that the various members of the erstwhile

undivided family have divided and bifurcated among themselves. The right to manufacture and market their products in the "specified areas" have

been earmarked for them for their own exclusive operation without transgressing on the areas earmarked for others. In substance, the business activities and financial commitments and prospects of the various members of the family appear to be distinct and separate, while the trade or brand name, has been held in proprietorship by K.P.R. Sakthivel, the others using the same with his permission, subject to the arrangement recorded in the deed of mutual arrangement. The fact that a deed of mutual arrangement has been entered into between parties and the registered trade or brand name proprietor has permitted the others to use the same for their own business in their respective areas may be an effective answer or defence to any claim or charge of infringement of a trade or brand name, but in my opinion it cannot detract from the obvious and inescapable position that the other petitioners are really using the trade or brand name registered in the name of K.P.R. Sakthivel, who alone for all purposes is supposed to be the proprietor of the trade mark. This being the factual position, there can be no difficulty in coming to the conclusion that the petitioners manufacture the goods by affixing the goods so manufactured by them, with a brand or trade name of another person and that therefore they will not be eligible for the grant of exemption claimed by them.

14. The submissions made by learned counsel for the petitioners on the basis of the nature or extent of rights of an individual to a trade or brand name, registered or not, either under the common law or under the Trade and Merchandise Act, 1958 and the decisions relied upon for that purpose have no relevance whatsoever in adjudicating the liability of the petitioners to pay the excise duty or for that matter in deciding upon the eligibility or claim of the petitioners for the grant of exemption from the payment of excise duty under the notification in question. The submission of learned counsel for the petitioners that the notification has the effect conferring upon the statutory authorities under the Act power to decide the right to property or title, which is normally the privilege of the ordinary Civil Courts and the further claim that the notification has the effect of overriding the property rights or right to use the trade mark/name in question has no merit of acceptance. The above plea made on behalf of the petitioners proceeds on pure surmises and wishful thinking. The provisions of the Act or the Rules in the notification have no concern with the

internal disputes or claims relating to proprietary rights or privileges of the parties pertaining to the trade or brand name in question. The authorities

merely advert to these aspects in a summary manner to arrive at a decision as to whether the petitioner satisfy the requirements of notification under

which exemption or concession rate is claimed. As notified earlier, the trade or brand name in question has been registered in the name of K.P.R.

Sakthivel and that it is an indisputable fact that the other petitioners are using the trade or brand name registered in the name of the said K.P.R.

Sakthivel, merely by virtue of the permission granted, of course as recorded in the deed of mutual arrangement. The said factual position by itself is

sufficient to reject their claims for exemption in view of the specific provisions contained in paragraph 4 of the Notification in question. Unlike even

the claimants before the Allahabad and Calcutta High Courts, the petitioners herein are manufacturing and marketing the goods manufactured by

them, for themselves and on their own account, after affixing and using the brand/trade name registered in the name of K.P.R. Sakthivel.

Consequently, on the peculiar facts and circumstances of the case, it is obvious and clear that the petitioners cannot claim exemption under the

Notification in view of the categorical stipulation contained in paragraph 4 of the Notification in question.

15. The further plea based on the violation of Article 14 or 19(1)(g) of the Constitution of Indian is also liable to be rejected. It is by now well

settled that any exemption from the payment of any tax or public duty is merely a concession or a bounty, which cannot be claimed by any one as a

matter of right. Equally, it is well settled that the legislature or the Government concerned is not bound to tax everything to tax something. The

legislature or the Government has wide range of discretion and latitude in choosing or picking up persons or objects for taxation or for conferring

any benefit of exemption or concession and so long as the differential treatment meted out is based on some relevant consideration, the provision

cannot be challenged as being either arbitrary or unreasonable. The levy of excise duty or for that matter the denial of a concession or exemption

cannot be said to constitute any violation of the fundamental rights to carry on any business, trade or profession, unless the levy of tax itself is

shown to be unconstitutional or patently unwarranted in law. A challenge of arbitrariness or unreasonableness when made should be considered

not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. Viewed either from the nature of the levy or the scheme

underlying the exemption notification, as also the object and purpose of such exemption, the provision contained in paragraph 4 of the Notification

in question denying the benefit of exemption to the category of manufacturers who use the brand or trade name belonging to others for his own

product cannot be said to be palpably arbitrary or demonstrably unreasonable so as to render the said provision unconstitutional. As has been

rightly contended on behalf of the Revenue, the notification has to be construed in its entirety. The provisions contained in paragraph 4 of the

Notification have been devised to avoid evasion of tax by unscrupulous and unjust manipulations or device and consequently it requires to be

construed strictly, being a notification relating to exemption and against the person claiming exemption. Otherwise, the very object of introducing

such a provision would be completely defeated. There can be no meaning or merit in a claim on behalf of the petitioners that once granted the

exemption cannot be subjected later to any further conditions as pre-requisites to claim such an exemption. The stipulation contained in para 4 in

question operates as an exception or a proviso to main Notification granting exemption or concession. Though the exemption was meant to benefit

Small Scale Units, it was always related to and meant to depend upon the quantum of total production and clearance in a particular Financial year.

The Registration of the unit as a Small Scale Industry was also an additional requirement and not the only requirement or guiding factor to identify a

Small Scale Unit for purpose of exemption. Since the production and clearance in excess of the ceiling limit in a financial year was at all times a

disqualifying factor or consideration of ineligibility to claim the benefit of exemption, the stipulation in para 4 was only meant to effectively ensure

that the criteria relating to the maximum ceiling is not flouted or short circuited by ingenuous moves or manipulations to create separate entities by

adopting the process of fragmentation or division of one unit into several units in order to defeat the very purpose underlying the exemption. Both

the original notification according exemption and the latter Notification curtailing the area of operation of the exemption, confining it only to certain

specified circumstances have got to be construed and read with together. The provisions in para 4 in question curtails and restricts the operation of

the exemption notification and does not itself impose any duty. That ex-hypothesis has been imposed by the Statute and the rules made thereunder.

As a matter of fact, the question relating to the grant of an exemption or the withdrawal of the same or modification or restriction of the privilege of

exemption earlier granted are also matters pertaining to Policy governed by the Will of the legislative wisdom and of the law making authorities and

the same cannot ordinarily be interfered with by Courts. Further, the impugned para 4 does not have the effecting of varying or altering the

character of the levy from Excise Duty into any other levy nor within the competence of the State, either pursuant to a legislation or subordinate

legislation. Thus, on a careful consideration of the various submissions noticed supra, I am of the view that the petitioners have not made out any

sufficient cause or substantiated any patent legal infirmity in the provision contained in paragraph 4 of the Notification in question so as to justify

interference by this Court with the said provision.

16. For all the reasons stated above, the claims on behalf of the petitioners are liable to be and shall stand hereby rejected as devoid of merit.

Consequently, the writ petitions shall stand dismissed. No costs.