

**(1986) 11 AHC CK 0016**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 699 of 1985

Lohia Machines Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 10-11-1986

**Acts Referred:**

Central Excise Rules, 1944 — Rule 10A, 49, 56B, 56E, 9  
Central Excises and Salt Act, 1944 — Section 11A, 2, 3, 3(1), 4  
Constitution of India, 1950 — Article 226  
Finance Act, 1982 — Section 51

**Citation :** (1987) 12 ECC 75 : (1987) 11 ECR 496 : (1987) 28 ELT 234

**Hon'ble Judges :** R.R. Misra, J;N.D. Ojha, J

**Bench :** Division Bench

**Advocate :** Sudhir Chandra, for the Appellant; Ashok Mohiley, for the Respondent

**Final Decision :** Dismissed

## Judgement

R.R. Misra, J.—Lohia Machines Limited, Kanpur (hereinafter referred to as the petitioner) is a Company registered under the Indian Companies Act and is engaged in the manufacture of Nylon filament yarn at one of its units which is called Upper India Polymers. The petitioner manufactures Nylon filament yarn from Nylon chips which, in turn, it manufactures from Caprolactum, which is the basic raw material. This Nylon filament yarn manufactured from Caprolactum is known commercially by the Excise Authorities as Partially Oriented Yarn (hereinafter referred to in short as P.O.Y.) This is subject to Central Excise Duty under Tariff Item No. 18(ii)(i)(a) of the First Schedule to the Central Excises and Salt Act, 1944.

2. Till 31st May 1985 the petitioner was clearing the said P.O.Y. on sale from its factory after payment of appropriate central excise duty. However, with effect from 1st June 1985 part of the said goods was cleared on sale after payment of central excise duty and part of it was sent to certain Texturising Units for converting the said P.O.Y. into textured Yarn.

3. The petitioner, however, made an application dated 18/19th December 1984 to the Assistant Collector, Central Excise, Kanpur (respondent No. 3) for permission to be granted under Rule 56-B of the Central Excise Rules (hereinafter referred to as the Rules). The ground taken was that the P.O.Y. which was to be sent for texturisation was in the state of semi-finished goods and till the time texturisation of the yarn was complete the excise duty had to be deferred. This had to be so because the petitioner did not possess the facility for texturising the yarn at the unit where the P.O.Y. was manufactured and hence had to remove the P.O.Y. to other units which were engaged in the business of texturising yarn. The Assistant Collector, Central Excise, Kanpur acting on the said representation, granted the said permission vide his letter dated 8th January 1985. It was communicated to the petitioner by a letter dated 9th January 1985 from the Superintendent, Customs and Central Excise, Kanpur, addressed to M/s. Upper India Polymers, a unit of the petitioner. This permission as originally granted on 8th Jan., 1985 by the Asstt. Collector, Central Excise, Kanpur, was on a temporary basis and was valid upto 7th July 1985 as mentioned in the order. Subsequently a letter dated 5th June, 1985 was also sent to the petitioner stating the fact that the permission under Rule 56-B of the Rules is valid upto 7th July 1985, a copy whereof has been filed as Annexure 4 to the writ petition. Since the permission granted under Rule 56-B was limited upto 7th July 1985, this led the petitioner to write a letter dated 15th June 1985 addressed to the Superintendent, Central Excise, stating that the permission granted under Rule 56-B should be on permanent basis. A true copy of the said letter has been filed as Annexure 6 to the writ petition. Thereafter on 4th July 1985 the permission was extended by another Collector in the same office only for a further period of six months that is upto 7th January 1986. Communication to this effect was made by the Superintendent, Customs and Central Excise, vide his letter dated 5th July 1985 addressed to the Upper India polymers a unit of the petitioner, a copy whereof has been filed as Annexure 7 to the writ .petition.

4. The petitioner again insisted that permission under Rule 56-B be granted to it on permanent basis. In the meantime, it appears that the Asstt. Collector reconsidered the matter and on 16th July 1985 passed an order for the withdrawal of the permission granted under Rule 56-B because according to him P.O.Y. was not in the nature of semi-finished goods. Against this order of withdrawal, the petitioner approached the Collector, Central Excise, Kanpur, and argued that any action to put an end to the permission already granted should be preceded at least by a show cause notice and an opportunity to the party for explaining its case. As a result of this argument, the order of withdrawal was kept in abeyance by a letter dated 10th July 1985 from the Superintendent, Customs and Central Excise, addressed to the petitioner. This abeyance was till such time as the .Collector Customs and Central Excise arrived at Kanpur Headquarters, since he was not available .at that time, and a final decision in the matter was taken. Thus, according to the own request of the petitioner itself, the order of withdrawal of the permission under Rule 56-B was kept in abeyance and

the show cause notice was issued to it vide letter dated 2nd August 1985 and the petitioner was afforded an opportunity in the matter. In the meantime the petitioner filed the present writ petition and challenged the aforesaid show cause notice dated 2nd August 1985 as well as the earlier order of withdrawal dated 16th July 1985.

5. During the pendency of the above writ petition in this Court, under an interim order dated 19th September 1985, the Assistant Collector was directed to decide the matter by 1st October 1985 by a reasoned order. In compliance with the said directions of this Court and after consideration of the entire facts and circumstances of the case, the Assistant Collector, Central Excise, passed a reasoned order dated 1st October 1985 under which he cancelled the permission granted under Rule 56-B of the Rules. While doing so, the Assistant Collector held that P.O.Y. is known in trade circles as a distinctively identifiable commodity capable of being bought and sold as such. It is not in the nature of semi-finished goods and P.O.Y. is classifiable under Tariff Item No. 18 II of the First Schedule. He further held that under the amended Rule 9 and 49 P.O.Y. must discharge central excise duty before it is taken for texturising purposes and that in view of the aforesaid amended rules any circular issued earlier has lost its importance. The result was that the extension of the permission originally granted under Rule 56-B which was valid upto 7th January 1986 came to an end on 1st October 1985. The petitioner accordingly filed an amendment application dated 3rd October 1985 for amending the relief clause in the writ petition by adding clause (e) and prayed for the quashing of the order dated 1st October 1985 passed by the Assistant Collector.

6. Ultimately when the petition was being finally heard by us, learned counsel for the petitioner filed another amendment application on 14th August 1986 praying to amend relief clause by adding reliefs to quash the orders dated 5th June 1985 and 5th July 1985 and commanding the respondents not to interfere with the removal of goods under Rule 56-B on the basis of permission originally granted to it. This amendment application was also allowed by the Court.

7. Before we enter to examine the other rival contentions of the parties, let us deal first with the objection taken by the learned counsel appearing on behalf of the Union of India regarding alternative remedy. The petitioner has no doubt failed to mention in the memorandum of the writ petition that it has filed an appeal against the impugned order dated 1st October 1985 but the petitioner has admitted before us that the said appeal has been filed and is still pending. The contention on behalf of the petitioner is that the said remedy of appeal is not an efficacious alternative remedy and now that after the writ petition has been admitted and the counter and rejoinder affidavits have been exchanged and that this Court had come to a conclusion in its interim order dated 15th October 1985 that an important question of law is involved in the case, the writ petition should not be thrown out on the ground of alternative remedy. For this submission, he relies on the case reported in *Municipal Council, Khurai and Another Vs. Kamal*

Kumar and Another, . In this case although the Supreme Court observed that the High Court would not ordinarily entertain a petition under Article 226 of the Constitution of India where an alternative remedy is open to an aggrieved party, it has jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case.

8. The other case relied on behalf of the petitioner is of A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another, . In this case the petitioner had disabled himself from availing himself of the statutory remedy by his own fault in not doing so within the prescribed time. The Supreme Court held that such a petitioner cannot certainly be permitted to urge that as a ground for the Court dealing with a petition under Article 226 to exercise its discretion in his favour. This authority is, in our opinion, not applicable to the facts of the present case.

9. Shri Ashok Mohiley, learned counsel for the Union of India, has very heavily relied on the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, which has been subsequently followed by the Supreme Court in other cases. Their Lordships have laid down in this case that if an Act provides for a complete machinery to challenge an order of assessment, the same can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution.

10. We have considered the rival submissions of the parties on the question of alternative remedy. Since in the present case the facts are all admitted and the dispute raised is only on questions of law and the writ petition has been entertained at the admission stage and counter and rejoinder affidavits have been exchanged and the impugned order dated 1st October, 1985 has come into existence during the pendency of the writ petition, we are inclined to exercise our discretion in not refusing to consider the reliefs prayed for by the petitioner on the ground of alternative remedy. This view of ours also finds support from the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, wherein their Lordships have held that if a High Court entertains a writ petition and hears as case on merits, the writ petition cannot thereafter be rejected on the ground that statutory remedy was not availed of. Accordingly now we proceed to consider the writ petition on merits.

11. Now let us first examine the reliefs prayed for by the petitioner in the writ petition as amended. In this regard, we find that by efflux of time, the reliefs regarding quashing of show cause notice dated 2nd August, 1985 and the earlier order of withdrawal dated 16th July, 1985 have merged into the impugned order dated 1.10.1985 and as such no relief in this regard is required to be granted.

12. As regards the relief of commanding the respondents not to interfere with the removal of the alleged semi-finished goods in the form of P.O.Y. till the time this petition is decided by this Court, this reliefs is only by way of interim measure till the pendency of the present writ petition and is not available after

the decision of the writ petition. The next relief is for commanding the respondents not to interfere with the removal of the goods under Rule 56-B on the basis of permission originally granted to it. This limited prayer also cannot be granted inasmuch as the original permission granted under Rule 56-B, in the absence of the impugned order dated 1st October, 1985, was valid upto 7th January 1986 and the said time having run out, this relief also cannot be granted now. Now coming to remaining relief for quashing the order dated 1st October 1985 the same is also not now available to the petitioner inasmuch as under the said order also that has been done is to recall permission temporarily granted to the petitioner under Rule 56-B which was valid upto 7th January, 1986. On the date of the decision of this writ petition even that time upto 7th January 1986 has also expired and now there is no permission under Rule 56-B in existence at present. The question as to whether under the impugned order dated 1st October, 1985 the temporary permission under Rule 56-B, which was valid only upto 7th January, 1986, could be validly cancelled is now only of academic importance. Hence also no useful purpose will be served to consider the quashing of order dated 1st October 1985 and no relief, therefore, can be granted. There is no other relief prayed for in the writ petition. As such, in our opinion, the writ petition deserves to be dismissed.

13. However, despite the above the after hearing Shri Sudhir Chandra for the petitioner and Shri Ashok Mohiley for the Union of India in detail, we propose to deal with the merits of the rival contentions and express our opinion on the same.

14. The first contention raised by the petitioner in the above case is that permission granted on 8th January, 1985 was permanent in nature. To consider the same, it has become necessary to examine the exact terms of the original order dated the 8th January 1985 passed by the Assistant Collector, Central Excise. Shri Ashok Mohiley, learned counsel for the Union of India, was directed to produce the original order. He has accordingly done the same before us. The original order dated 8th January, 1985 passed by the Assistant Collector under Rule 56-E reads as under :-

"Permission under Rule 56-B as requested by the party is granted for a period of six months i.e. upto 7th July, 1985 provided all the conditions stipulated under Rule 56-B are fulfilled and the procedure prescribed under the rules is also followed. Range Supdt. be asked that it will be his responsibility to ensure that all the conditions and procedure under Rule 56-B is followed before the party avails of this facility".

(Emphasis supplied)

It is thus clear that the permission granted originally on 8th January, 1985 by the Assistant Collector was neither conditional nor it was granted on a permanent basis. It was granted temporarily upto 7th July 1985 and thereafter extended, as indicated above, upto 7th January, 1986 although vacated earlier by the impugned order dated 1st October, 1985. Shri Ashok Mohiley appearing on behalf

of the Union of India is, therefore, in our opinion, right in his contention that the permission as originally granted to the petitioner under Rule 56-B and as extended from time to time was in fact, never granted on permanent basis. The second limb of the argument of Shri Mohiley in this connection is that Rule 56-B does not contemplate the grant of permission on permanent basis. Since in the present case as already seen above the permission under Rule 56-B was granted only on a temporary basis, the question as to whether Rule 56-B contemplates grant of permission on permanent basis does not arise for determination in the present case and we refrain from expressing our opinion on this pet of the argument. Therefore, upon scrutiny of the record we find that the argument advanced on behalf of the petitioner that the permission granted under Rule 56-B as on 8th January, 1985 was permanent in nature lacks substance and is rejected.

15. The other submission on behalf of the petitioners is that once permission had been granted under Rule 56-B, the same cannot be reviewed under inherent powers particularly when there is no provision under the Central Excise Act for review.

16. In Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., it has been held by the Supreme Court that Rule 10A of the Central Excise Rules as it stood at the relevant time was residue in nature. It contemplates residuary powers of making a demand in special circumstances not foreseen by the framers of the Act or the Rules. Their Lordships have also held that from the provisions of Section 4 of the Act read with Rule 10A, there is an implied power to carry out or complete an assessment not specifically provided for by the Rules. Although Rule 10A stood deleted on 1.10.1985, yet we find that in its place Section 11A has been inserted in the Central Excises and Salt Act, 1944 with effect from 17.11.80 to cover the same field. Similar is also the view taken by the Karnataka High Court in Shyam Sunder U. Nichani Vs. Assistant Collector of Central Excise, Bangalore and Another, . In this case the said High Court has held that Section 11A of the Central Excises & Salt Act, 1944 is not only a recovery provision but it also enables the original authority to reopen the classification list and reassess the goods by withdrawal of approval already granted and the same is not without jurisdiction.

17. We find that the duty which was deferred wrongly under Rule 56-B was sought to be collected at the stage of pre-texturisation of the P.O.Y. This object could be achieved by cancelling the temporary permission already .granted under the impugned order dated 1.10.1985. Hence there is, in our opinion, an implied power to pass the impugned order dated 1.10.1985, recalling the permission granted earlier under Rule 56-B. In this view of the matter also the Assistant Collector was competent in law in recalling the permission granted by him under Rule 56-B by the impugned order dated 1st October, 1985.

18. That apart, in the present case only sub-clause (i) to the above Rule 56-B of the Rules is applicable. The same reads as under :-

"56-B. Special procedure for removal in bond of finished excisable goods or semi-finished goods for certain purposes. - The Collector may, by special order and subject to the execution of a bond by the manufacturer and subject to such conditions as may be specified by the Collector, permit a manufacturer to remove -

(i) excisable goods which are in the nature of semi-finished goods, for carrying out certain manufacturing processes, or

(ii) excisable goods for carrying out tests, to some other premises of his or to the premises of another person and to bring back such goods to his factory, without payment of duty, or to some other licensed premises of his or to the premises of another assessee and allow these goods to be removed on payment of duty or without payment of duty for export from such other licensed premises or his or from the premises of such assessee to whom the goods. have been sent :

Provided that this rule shall not apply to the goods known as "prototypes" which are sent out for trial or development test."

A scrutiny of the above sub-rule will show that the permission which is to be granted to a manufacturer under the said rule to remove the goods relate to such goods which are in the nature of semi-finished goods. If, however, the Assistant Collector, Central Excise, had under a wrong impression that P.O.Y. is in the nature of semi-finished goods, and had granted permission under Rule 56-B of the Rules, we see no reason as to why under the law he cannot, on realising and appraisal of the correct fact that P.O.Y. manufactured by the petitioner is not semi-finished goods, recall that order. In our opinion, if the original permission granted by the Assistant Collector by his order dated 8th January, 1985 rested on a foundation which was ultimately found to be wrong, it was certainly competent in law for the Assistant Collector, therefore, not to continue with the aforesaid illegal order and to withdraw the same. Mere withdrawal of a wrong order passed earlier, under the circumstances, does not, in our opinion, amount to a review of that order.

19. Learned counsel appearing for the petitioner has submitted that the P.O.Y. are not goods and are also not known as such at common parlance. Let us now examine the settled legal principles which govern as to what is the meaning to be attributed to the word "goods" as used in Section 3(1) of the Act and what is doctrine of common parlance and when it is applicable.

20. Section 3 of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) is the charging section. The said section, in so far as it is relevant for our purposes, reads as follows :-

"(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods (other than salt) which are produced or manufactured in India ... and at the rates set forth in the first schedule."

The Act does not define the word "goods". Therefore, the legislature must be

taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become "goods" there must be something which can ordinarily come to the market to be bought and sold and is known to the market. (See the case of Union of India (UOI) Vs. Delhi Cloth and General Mills, .

21. We have, therefore, to examine as to whether P.O.Y. is an article known as "goods" in the trade circle. Since excise duty is an indirect tax in which the burden of the imposition is passed on to the ultimate consumer, in order to attract the same the article manufactured must be capable of sale to a consumer.

22. In paragraph 17 of the writ petition, it has been admitted by the petitioner that P.O.Y. even though marked in a very small fraction, is mainly consumed by independent units which texture it and consumed by independent units which texture it and thereafter sell the same. In paragraphs 18 and 19 of the writ petition, it has been further stated that whenever P.O.Y. is sold without texturisation to other consumers, it attracts duty, and that this position is beyond the pale of any doubt and controversy. It is also an admitted fact that till 31st May, 1985 the petitioner was clearing the said P.O.Y. on sale from its factory after payment of the appropriate central excise duty. It is thus clear that even the consumers of P.O.Y. bought the same because it performs a specific function for. Under the circumstances, we hold that P.O.Y. are "goods" within the meaning of Section 3 of the Act and is marketable as such.

23. The doctrine of common parlance is to the effect as to how is the product identified by the class or section of people dealing with or using the product. It is generally by its functional character that a product is so identified. In this connection the following observations of the Supreme Court made by his Lordship Mr. Justice Pathak in Civil Appeal No. 3435 of 1984 - Atul Glass Industries (Pvt.) Ltd. Vs. Collector of Central Excise, decided on 10th day of July, 1986 are noteworthy :-

"It is a matter of common experience that the identity of an article is associated with its primary function. It is only logical that it should be so, when a consumer buys an article, he buys it because it performs a specific function for him. There is a mental association in the mind of the consumer between the article and the need it supplies in his life. It is the functional character of the article which identifies it in his mind."

24. It is cardinal principle of law that the test of common parlance is attracted only when the statute does not contain any definition. In the present case, let us examine as to whether P.O.Y. is included in the definition of any of the excisable articles. For this purpose, we have to refer to the First Schedule of the Act which specifies duties leviable on excise goods. Tariff Item No. 18 to the First Schedule is as under

"Tariff Item 180

(I) ...

(II) Man-made Filament yarns

(i) Non-cellulosic

(a) Other than textured

(b) textured.

Explanation : "Textured Yarn" means yarn that has been processed to introduce crimps, coils, loops or curls along the length of the filaments and shall include bulked yarn and stretch yarn.

(i) Cellulosic

(ii) Metallised."

25. In the writ petition, the petitioner has specifically admitted that it had been paying duty on P.O.Y. under Tariff Item No. 18(II)(i)(a) of the First Schedule. It is clear from the relevant portions of paragraphs 17 and 18 of the writ petition which are as under :-

"17. ...There is no doubt that P.O.Y. (Partially Oriented Yarn) comes under the classification of "other than texturised" yarn.

18. That it is further stated that when even P.O.Y. (Partially Oriented Yarn) is old without texturisation to other consumers, excise duty under tariff item No. 18(II)(i)(a) is paid, i.e. on "other than textured" yarn. And where the manufacturer sells textured yarn, the excise duty is payable under tariff item No. 18(II)(i)(b)."

It is thus clear that the theory of common parlance as advocated to by the learned counsel for the petitioner is not applicable to the present case and P.O.Y. are not only goods but they are excisable and are covered under Tariff Item 18(II)(i)(a) of the First Schedule.

26. The next contention raised on behalf of the petitioner is that P.O.Y. is semi-finished goods vis-a-vis texturised yarn and that P.O.Y. is not marketable. It is further contended that at any rate marketability-is not the criteria of semi-finished goods. These contentions are sought to be refuted by Sri Ashok Mohiley, learned counsel for the Union of India. His submission is marketable as goods. He submits that even the petitioner itself was paying duty on P.O.Y. before 31st May, 1985 and even thereafter is still paying excise duty on P.O.Y. which is sold as such. In the alternative, he submits that at any rate even the semi-finished goods are in law goods which are excisable. This leads us to notice the settled principles which govern nature of semi-finished goods and their excisability.

27. Section 2(f) of the Act defines the words "Manufacture" to include any process incidental or ancillary to the completion of a manufactured product.

28. In South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, , it has been held that the Act charges duty on manufacture of goods. The word "manufacturer" implies a change but every change in the raw material is not a

manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use.

29. In *Union of India (UOI) Vs. Delhi Cloth and General Mills*, , it has been held as under:-

"Excise duty is on the manufacture of goods and not on the sale, Mr. Pathak is, therefore, right in his contention that the fact that the substance produced by them at an intermediate stage is not put in the market would not make any difference. If from the raw material, has been brought into existence a new substance by the application of process one or more of which are with the aid of power and that substance is the same as refined oil" as known to the market an excise duty may be leviable under Item 23 (the present Item 12)".

30. In *M.R.F. Limited Vs. Union of India and others*, the Bombay High Court has also taken the view that rubberising of the warp sheets amounts to manufacture as a new product comes into existence and constitute a complete and independent product and that marketability is no consideration for liability to excise duty. The fact that the rubberised type cord warp sheets are not put in the market would not make any difference in the chargeability of the substance to excise duty if such rubberised tyre cord warp sheets are covered by any "tariff item."

31. In *Metal Forgings Private Ltd. and Anr. v. Union of India and Ors.* - 1985 (20) E L T 280 the Delhi High Court has taken the view that in law there can be manufacture even at the intermediate stage if a distinct and different product known to the commercial world comes into existence. In this case by the process of forging, a forged product of iron and steel came into existence. It acquired distinguishable identity as forged product. The view taken by the Delhi High Court was that once an article comes into existence with the definite identity, the process of manufacture is complete and it is eligible to duty. Merely because a manufactured goods is used subsequently for manufacturing another article, it cannot be concluded that the earlier process of manufacture was not complete or finished goods had not come into existence. In that case the forged products of iron and steel were identifiable and usable as machine parts without any further process and were, therefore, liable to duty under Item 68 of the Central Excise Tariff.

32. It has been held in the case of *Oudh Sugar Mills Ltd. v. Union of India* (1982) E L T 937 by this Court that any by-product or intermediate or residual product in the manufacture of particular goods will be covered by the word "production" as it finds place in Section 3 of the Central Excises and Salt Act and that the said word obviously refers to finished and semi-finished articles made from raw materials. Rules 9 and 49 of the Rules which provide for the levy of duty of an intermediate product on removal also lend support to the above view.

33. Applying the above principles to the facts of the present case, it is amply clear that if a product which comes into existence at one stage is a product

known to the market and is saleable as such it becomes a manufactured product which attracts excise duty. In the present case the petitioner manufactures Nylon Filament yarn from caprolactum, which is the basic raw material. In our judgment, this new and different product," i.e. P.O.Y. has a distinctive name, character and use. This P.O.Y. is, in our opinion, not semi-finished goods. On the other hand, it is commercially known to the market as goods and is saleable as such. It is thus a manufactured product which attracts excise duty.

34. Further, in paragraph 18 of the writ petition, as already extracted above, it is admitted to the petitioner that P.O.Y. when sold without texturisation to consumers is excisable under Tariff Item No 1811(i)(a). Hence, at any rate, since duty is on manufacture and not on "Sale so P.O.Y. even if not actually sold as a result of manufacture, it will make no difference to its excisability if it is covered by the description in the tariff as aforesaid [See Union of India v. Delhi Cloth and General Mills (Supra)].

35. The next contention urged on behalf of the petitioner is that Rule 56-B is applicable to the case of the petitioner and the duty is liable to be deferred till the P.O.Y. is texturised. This contention has no merit as we have already held above that Rule 56-B is not applicable to the case of the petitioner. The said Rule applies only to the case of semi finished goods. Hence, duty on P.O.Y. is not liable to be deferred till the stage of texturisation.

36. The other submission made by Sri Sudhir Chandra that circular of 1980 issued in regard to P.O.Y. is applicable and binding on the excise authorities and that since P.O.Y. and texturised yarn is the same commodity and Rule 9 relates to continuous process of manufacture, the question of applicability of amended provisions of Rules 9 and 49 does not arise. These Rules have been amended by Section 51 of the Finance Act, 1982, the relevant portion whereof reads as under :-

"51. Retrospective effect for certain amendments to Central Excise Rules and validation - (1). The amendments made in Rules 9 and 49 of the Central Excise Rules, 1944, by the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. G.S.R.74(E) dated the 20th February, 1983, shall be deemed to have, and to have always had, effect on and from the date on which the Central Excise Rules, 1944 came into force.

(2) Any action or thing taken or done or purporting to have been taken or done before the 20th day of February 1982 under the Central Excise Act and the Central Excise Rules, 1944 shall be deemed to be, and to have always been for all purposes, as validly and effectively taken or done as if the amendments referred to in Sub-section (1) has been in force at all material times and, accordingly notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, -

(a) all duties of excise levied, assessed or collected or purporting to have been levied, assessed or collected before 20th day of February, 1982 on any excisable

goods under the Central Excises Act, shall be deemed to be, and shall be deemed to have always been, as validly levied, assessed or collected as if the amendments referred to in sub-material times:

(b) no suit or other proceedings shall be maintained or continued in any court for the refund of, and no enforcement shall be made by any court of any decree or order directing the refund of, any such duties of excise which have been collected and which would have been validly collected if the amendments referred to in subsection (1) had been in force at all material times:

(c) refund shall be made of all such duties of excise which have been collected but which would not have been so collected if the amendments referred to in Sub-section (1) had been force at all material times:

(d) recovery shall be made of all such duties of excise which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be would not have been refunded, if the amendments referred to in Sub-section (1) had been in force at all material times."

37. The affect of this amendment was two-fold. Firstly, that excise duty was to be charged even in respect of clearance within the factory of manufacture until and unless such removal was covered by the third proviso to Rule 9(1) sub clause (1) of Rule 49. At present Tariff Item No. 18 of the Central Excise Tariff is not notified under Rule 56-A of the Rules. Since the duty payable on texturised and non-texturised yarn is the same, as such untextured yarn must discharge central excise duty before it is taken for texturising purposes. Secondly, the said rule as amended by the Finance Act 1982 has the effect of nullifying any decision, order or guidelines which are inconsistent with the amended provisions of Rules 9 and 49. Thus, in our opinion, the contention raised on behalf of the petitioner that the controversy is covered by the earlier departmental circular of Sept., 1980 and the said circular has binding effect is not tenable. It is further held that under the amended Rules 9 and 49 of the Rules, the POY must discharge excise duty before texturisation. In the result according to us no permission at all under Rule 56-B can be granted or even extended in regard to POY to the petitioner.

38. In the last, we are left with one more submission advanced by Sri Ashok Mohiley on behalf of the Union of India. Before we enter upon the same it is relevant at this stage to mention that during the course of hearing before us it is the admitted case of both the parties that under a Notification dated 1st July 1983 it has been laid down that if a duty has been paid at the untexturised stage, no further duty is payable on the goods after texturisation.. There is no dispute between the parties on this part of the matter. In paragraph 24 of the counter-affidavit filed by the Assistant Collector, this position is admitted.

39. Sri Ashok Mohiley contended that it is the admitted case of the parties (see interim order dated 4.10.1985) that the present case the liability of the petitioner

to pay excise duty on P.O.Y. is to the extent of about Rs. 10 lac per day. He submits that as per application dated 15th June 1985 (Annexure 6 to the writ petition in column 6(II)(a) which requires specification of duration of processing and return of the processed goods, the petitioner has mentioned that the goods will not be returned to the factory of origin and will be cleared from the processing factories. From the facts mentioned in the interim order dated 15.10.1985 of this Court, the admitted position that emerges is that ordinarily it takes about six weeks for texturisation of P.O.Y. Therefore, the argument raised is that although the petitioner was clearing excise duty on P.O.Y. till 31st May 1985 (before the filing of the present writ petition) yet the making of application of permission u/s 56-B of the Act is -only a clever device adopted on behalf of the petitioner to postpone its liability, running into about several crores of rupees within a period of about six weeks only, although according to him the aforesaid period of six weeks is not a definite period during which texturisation must be got done by the petitioner. In case it is held and found that duty is to be paid after texturisation, the petitioner is likely to take longer period of duration for texturisation to enable it to defer payment of heavy amount of excise duty. For this submission regarding device to defer duty, he also relies on the well known case of *Mc. Dowell and Company Ltd. v. Commercial Tax officer Secunderabad* (1985) U.P. T C 747. True it is that as held by the Supreme Court in the *Mc. Dowell's* case (supra) that it is upto the court to take stock to determine the nature of the new and sophisticated legal device to avoid tax and to expose the devices for what they really are and to refuse to give judicial benediction but the fact remains that, in the present case it is the Central Excise department itself which was virtually inveigled into a trap by the petitioner suggesting erroneously that P.O.Y. is semi-finished goods and it is entitled to permission under Rule 56-B with the object of getting the benefit of deferment of excise duty every day to the extent of Rs. 10 lacs, and for at least six weeks or more as already stated above. That may be so but we will rest ourselves by observing that although at times Industrial magnates may devise ways and means to delay and defer payment of -legitimate heavy taxes" and duties yet such an attempt is likely to succeed only till the time the case is finally decided by the court and for that, the matter cannot be helped. We see no good ground to draw any adverse inference against the petitioner on this score.

40. In the result, in view of the discussion and the findings arrived at by us all the contentions raised on behalf of the petitioner lack merit. The writ petition fails and is dismissed with costs.