(2000) 12 MAD CK 0104

In the Madras High Court

Case No : Writ Petition No. 9845 of 1993 and W.M.P. No''s. 15154 and 17933 of 1993

Madura Coats Ltd. APPELLANT

Vs

Collector of Central Excise, Madurai-II RESPONDENT

Date of Decision : 22-12-2000

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3
Constitution of India, 1950 — Article 226

Citation : (2002) 141 ELT 320

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : N.S. Sivam, for the Appellant; M. Vaithialingam, SCGSG, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—In this Writ of Certiorari, it is prayed for quashing the impugned proceedings dated 26-2-1993, the show cause notice issued by the Collector of Central Excise, Madurai, the first respondent herein and the proceedings dated 7-4-1993, the show cause notice issued by the Assistant Collector of Central Excise, Tirunelveli Division, the second respondent herein.

2. The short facts which are required for the disposal of the writ petition are given below :-

''(a) M/s. Madura Coats Limited, Ambasamudram, the petitioner herein is a leading manufacturer of various varieties of threads, made out of multifolding and twisting the Cotton, Nylon, etc. Single strands of Nylon Polyester and Polypropylene filament yarns are twisted and made into "Threads". The physical properties of Nylon render the threads get loosened at the ends, which reduce the strength of threads to a certain level. The petitioner came to know that an American Company had invented a Resin called "ELVAMIDE" which makes Nylon threads get bonded and secured. Therefore, the petitioner-company requested for the permission of the Government of India to import ELVAMIDE. Accordingly permission was granted. The ELVAMIDE are in the form of "Granules". These granules are dissolved in Methylated Spirit and water by heat process, in the prepared ELVAMIDE solution, the Nylon threads are dipped and dried in heating chambers, such treated Nylon Sewing Threads kept the strands together.

(b) in January, 1993, the Assistant Collector of Central Excise, Tirunelveli, the second respondent herein visited the petitioner-company and enquired about the preparation of ELVAMIDE solutions. The Officials of the petitioner-company explained the physical and chemical properties of the ELVAMIDE granules. On 26-2-1993, the Collector of Central Excise, Madurai, the first respondent herein issued a show cause notice to the petitioner company holding that the ELVAMIDE solution is a prepared Adhesive solution classifiable under the Heading 3506. Therefore, the petitioner should pay excise duty. On 12-3-1993 the petitioner company sent a letter to the respondent requesting to furnish the copies of the documents relied on in the show cause notice. Though on 2-4-1993 the Collectorate of Central Excise sent some documents, they have not sent the other important documents relating to the test report. On the other hand, they sent another notice dated 7-4-1993 stating that the Elvamide solution is classified under Heading 3506. Again, the petitioner company through letters requested the Collector for the copies of the test report of the samples taken by the Department. But, without furnishing those copies, another notice dated 4-5-1993, was sent by the respondent to the petitioner company asking the petitioner company to appear before the Collector and to give reply to the impugned proceedings. Under those circumstances, the petitioner has filed this writ petition.''

3. The contention of the Counsel for the petitioner challenging the impugned proceedings is as follows :-

"The Elvamide solution which has a limited shelf life prepared in captive consumption is not an excisable product. Excise authorities have no jurisdiction or power to impose double taxation. Elvamide granule cannot be used as such and the same has to be made into solution for further use. Because of the limited shelf life, no readymade solution of Elvamide can be made and marketed. Section 3 of the Central Excises and Salt Act empowers the authorities to impose duty specified in the Schedule of the Central Excise Tariff Act on the manufactured and excisable goods only. The change of primary forms, solid to liquid or liquid to solid, can never be reckoned as manufacture. The Elvamide granules made into solution by mixing with Methylated spirit and water cannot be reckoned as a new commodity. Therefore, when no product known as Elvamide solution is available in the market ready for use and the Elvamide granule can be used only for preparing solution which has limited shelf life, this cannot be reckoned as excisable product. Consequently, the first and second respondents have no authority to direct classification of Elvamide solution as an excisable product."

4. In reply to the above contention, the following submissions were made by the Counsel for the respondents :-

"(1) The writ petition is not maintainable as against the show cause notices. The show cause notices are only proposal for taking further action. The petitioner has got every right and opportunity to defend their case by submitting their objection in the adjudication proceedings. In the event of their not able to convince the adjudicating authority the petitioner has a statutory remedy of filing an appeal before the appellate authority. Moreover, the question involved in this petition is a question of fact and not a question of law. It is for the petitioner to product evidence to adjudicating authority and prove that no new product has been emerged after the process of mixing.

(2) The petitioner has engaged in the unauthorised manufacture and clearance of binding solution, a prepared adhesive, falling under sub-heading 3506 of Central Excise Tariff Act, 1985. The bonding solution made out of Elvamide granules, Methylated Spirit and water, has got a specific character and specific end-use as adhesive which did not exist before. Therefore, the process of mixing, heating and cooling which brings into existence a new product called Bonding Solution, can rightly be called as manufacture. The bonding solution is obtained with a distinct property and use after the process of manufacture. The resultant product is clearly recognisable as a different product, a prepared adhesive classifiable under sub-heading 3506 of Central Excise Tariff Act, 1985. Therefore, the respondents have got power to impose duty on the product which is excisable."

5. On the basis of these rival contentions, elaborate arguments were advanced by the Counsel for the parties.

6. Before dealing with these contentions, it shall be noticed that Madura Coats of Tuticorin Unit filed writ petitions in W.P. Nos. 17458 to 17460 of 1991 challenging the similar impugned proceedings proposing to impose excise duty on the production of the solution and the same have been dismissed by the order dated 26-7-1999 on the ground that the impugned proceedings were only show cause notices.

7. It is pointed out by the Counsel for the petitioner that though they were dismissed, ultimately, the Department dropped the proceedings, as it was not established by the respondents that the said solution was excisable. However, we are now concerned with the present impugned proceedings by which the show cause notices have been issued by the respondents to the petitioner company proposing to impose excise duty stating that it would fall under Heading 3506.

8. It is the contention of the petitioner that it does not fall under the Heading 3506 so as to impose any duty, but it will fall under Heading 3806 as the shelf life of the product is limited and as such, the goods are not marketable and excisable.

9. Let us now first go into the maintainability of the writ petition.

10. According to the Counsel for the respondents that there are various decisions to hold that writ petition cannot be entertained as against show cause notices, inasmuch as those show cause notices are only proposal and the Department would finalise the issue only after affording full opportunity to the writ petitioner and as such, writ would not lie as against the show cause notices.

11. When the similar contention was raised before this Court, this Court in Madura Coats Ltd. Vs. Asstt. Collector of C. Ex., would hold that writ petition can be dismissed on the said ground at the time of admission before issuing Rule Nisi. But, once the writ petition is admitted and Rule Nisi issued. It cannot be held that at the final stage, that too, when the parties have incurred all the expenses and the Court has gone into the matter fully, we cannot ask the petitioner to go and face the adjudication proceedings before the authority concerned after a long number of years.

12. This writ has been filed in 1993. It is pending for nearly seven years. Therefore, taking support of the view expressed by this Court in Madura Coats Ltd. Vs. Asstt. Collector of C. Ex., relying upon the decision of the Supreme Court, I am constrained to hold that this Court would go into merits, especially when it is pointed out by the petitioner that the respondents had no jurisdiction to pass the impugned order with a proposal to impose duty on the product which is not excisable.

13. As held by this Court, the existence of an alternative remedy or availability of the opportunity to defend the case before the authority concerned is not a ground for refusing the relief of Writ of Certiorari, where it appears on the face of the proceedings or on undisputed facts that the authority had acted without jurisdiction or in excess of jurisdiction. Similarly, the pendency of the proceedings for several years should also be taken into consideration at the time of final disposal of the case, as to whether the petitioner should be relegated to the statutory alternative remedy.

14. In that view of the matter, I am to hold that this Court is well within the jurisdiction at this final stage after having issued Rule Nisi to find out whether the relief sought for by the petitioner in this writ petition could be granted or not.

15. Let us now deal with the question involved in the case. The question is whether the Elvamide solution is excisable or not?

16. According to the Counsel for the petitioner, the Elvamide solution which has limited shelf life of two months is not marketed or sold and as such, it is not an excisable product. But, it is contended by the Counsel for the respondents that the solution is a bonding solution, a prepared adhesive classifiable under sub-heading 3506 of the Central Excise Tariff Act, 1985 and the resultant product is clearly recognisable as a different product and therefore, it is excisable.

17. The learned Counsel for the petitioner has cited several authorities of the Apex Court giving the guidelines to decide with regard to the excisability of the

product. Some of them are the following.

18. In Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd., the Supreme Court would observe as follows :-

''The duty of excise is on the manufacture of goods and for an article to be "goods", there must be known in the market as such or they must be capable of being sold in the market as goods. Actual sale is not necessary. User in the captive consumption is not determinative of that the article capable of being sold in the market or known in the market as goods. Even transient items of articles can be goods, provided that they were known in the market as distinct and separate articles having separate uses, there would still become goods if they were capable of being marketed even during the said short period.''

19. In Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, , the Apex Court would hold thus :-

The duty of excise is leviable under Entry 84 of List I of the Seventh Schedule on goods manufactured or produced. That is why the charge u/s 3 of the Act is on all "excisable goods" "produced or manufactured". The expression "excisable goods" has been defined by Clause (d) of Section 2 to mean ''goods'' specified in the Schedule..... Therefore, where the goods are specified in the Schedule they are excisable goods but whether such goods can be subjected to duty would depend on whom duty is proposed to be levied. The expression "produced or manufactured" has further been explained by this Court to mean that the goods so produced must satisfy the test or marketability. ..... The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, moveable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for levying excise duty linking if with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying an selling. Since the solution that was produced could not be used as such without any further processing or application of heat or pressure, it could not be considered as goods on which any excise duty could be levied.''

20. In Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay, the Supreme Court would observe as follows :-

''Section 3 of the Act enjoins that 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. "Excisable goods" u/s 2(d) of the Act means goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. Therefore, it is necessary, to find out whether there are goods, that is to say, articles as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not "goods" known to the market. Marketability, is therefore, an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985.''

21. In the light of the guiding principles laid down by the Apex Court, let us now deal with the facts of the present case.

22. It is not seriously disputed that the Elvamide which is in the form of granules was imported by the petitioner company from the foreign country after obtaining permission of the Government of India in order to make it a solution which would enable the Nylon threads to get bonded and secured at the ends. The granules are dissolved in Methylated Spirit and water by heat process. The prepared Elvamide solution has limited shelf life and gets fermented and spoiled if it is not consumed within few days. The Elvamide solution is solid only as granules. In the prepared Elvamide solution the Nylon threads are dipped and dried in heating chambers. Such treated Nylon sewing threads would keep the strands together.

23. Therefore, the Elvamide granules imported by the petitioner company cannot be used as such and the same have to be made into a solution for further use and the prepared solution has a limited shelf life. Because of the limited shelf life, no readymade solution of Elvamide can be made and marketed. Therefore, the imported Elvamide granules are made into solution and consumed captively.

24. Section 3 of the Act empowers the authorities to impose duties specified in the Schedule of the Central Excise Tariff Act, 1985 on the manufactured excisable goods. With the evaporation of the dissolving medium, the dissolved granules becomes sedimented.

25. It is contended that since no physical changes take place and the physical properties remain unaltered and since primary form and its physical characteristics continue to remain as such and no process altering the characteristics of product takes place. Elvamide solution cannot he held as an excisable product.

26. The change of primary form, solid to liquid or liquid to solid, can never be reckoned as "manufacture" unless there is a transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name.

27. In the present case, it is an admitted fact that the Elvamide granules is made into solution by mixing with Methylated Spirit and water. Under those circumstances, it cannot be contended that a new commodity is formed due to the above process.

28. There is also no dispute that the above solution has limited shelf life and no product known as Elvamide solution is available in the market ready for use.

29. In the impugned proceedings dated 26-2-1993, it is clearly admitted that Elvamide is dissolved in the mixture of water and Isopropanol by heating in a

vessel and then the said solution is allowed to cool and bonding solution is ready for use. It is also admitted that from the test report, shelf life of bonding solution is approximately two months.

30. The above factors are mentioned in the impugned proceedings dated 26-2-1993 which are given below :-

"Elvamide is dissolved in a mixture of water and Isopropanol by heating in a vessel. Then the mixture is stirred well and heated upto 60?C. The solution is allowed to cool and bonding solution is ready for use.

The bonding solution is having high adhesive property because of mixing Elvamide i.e. synthetic resin with methylated spirit as solvent. Because of the above property, the solution is used in nylon thread. The bonding content in bonded nylon thread will be around 5%.

Each lot consists of 100 litres of solution and some times it can be kept for about 10 days in open condition.

Bonding is a process where twisted nylon thread, is bonded by passing the thread through bonding solution and then drawn through heating chambers of bonding machine to dry the thread.

End use of nylon bonded thread is mainly for high speed stitching of leather goods.

In his further statement Shri Luke Augustine, Twisting and Finishing Manager, Water Mill, on 28-1-93, has stated, inter alia, that:

(i) by increasing the quantity of Elvamide, the concentration of the bonding solution will also increase;

(ii) from manufacturing details of Art. D. 1072 No. 655, it appears that Fevicol mixture and Elvamide solution are equivalent and alternative to one another, but during his tenure M/s. MCL had not tried or used fevicol mixture at all;

(iii) Elvamide is a synthetic resin of polyamide group and hence a polymer; Elvamide solution is a polymer solution, and for all practical purposes, they call it as bonding solution;

(iv) the process of bonding gives extra protection to nylon thread during high stitching leather goods operations;

(v) bonding solution primarily is an adhesive because of its resinous properties as seen from the Forensic Test report;

(vi) from the test report, shelf life of bonding solution is approximately two months and about further shelf life, he has no knowledge."

31. In view of the above clear admission, it is quite obvious that the Elvamide solution having limited shelf life is not marketable.

32. In order to be goods an article must be something which can ordinarily come to the market and is brought for sale and must be known to the market as such. Therefore, the marketability in the sense that the goods are known in the market or are capable of being sold and purchased in the market is essential.

33. The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use.

34. The duty is attracted not by captive consumption of any article but it must be goods within the meaning of the Act which, apart from having a distinctive name and known as such, must be marketable or capable of being marketed.

35. An article does not become goods in common parlance unless by production or manufacture something new and different is brought out which can be bought and sold. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. Therefore, any goods to attract excise duty must satisfy the test of marketability.

36. The duty is attracted not by captive consumption of any article but it must be a goods within the meaning of the Act which apart from having a distinctive name and known as such must be marketable or capable of being marketed.

37. These requirements have not been satisfied in the present case, since there is no prima facie material found in the impugned proceedings that this Elvamide solution is marketable and it cannot be contended that it is a manufacture of new goods, especially when it is admitted.

38. To sum up, the Elvamide solution is not excisable. The question is answered thus.

39. Hence, the impugned proceedings are quashed and the writ petition is allowed. Consequently, connected W.M.Ps. are closed.

