

(1985) 02 SC CK 0018
In the Supreme Court Of India
Case No : Civil Appeal No. 52 of 1985

Moped India Ltd.

APPELLANT

Vs

Asstt. Collector of Central Excise, Nellore and Others

RESPONDENT

Date of Decision : 26-02-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 10(1)
Central Excises and Salt Act, 1944 — Section 4, 4(4)

Citation : (1986) 8 ECC 63 : (1986) 23 ELT 8 : (1985) 2 SCALE 1379 : (1986) 1 SCC 125 : (1985) 1 SCR 954 Supp

Hon'ble Judges : V. Balakrishna Eradi, J; P. N. Bhagwati, J

Bench : Division Bench

Advocate : F.S. Nariman and K.R. Nambiar, for the Appellant; Gopal Subramaniam and R.N. Poddar, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal by certificate is directed against a judgment of a Division Bench of the High Court of Andhra Pradesh upholding a notice issued by the Assistant Collector of Central Excise, Nellore demanding a sum of Rs. 6,96,177.09 representing the amount of differential duty in respect of Mopeds manufactured by the Appellants and cleared from their Factory during the period from 1st October 1975 upto 30 April 1979. The facts giving rise to the present appeal are few and may be briefly stated as follows :

2. The Appellants manufacture Mopeds under the brand names of Suvega Standard, Suvega Deluxe and Suvega Samrat These Mopeds manufactured by the Appellants are liable to excise duty under the Central Excise and Salt Act, 1944, (hereinafter referred to as the Act). The appellants have 179 dealers all over the country to whom 98% of the Mopeds manufactured by them are sold. Not more than 2% of the Mopeds are delivered at the Factory gate; the bulk of the mopeds representing about 80% of the manufactures are delivered to the various dealers at the depots maintained by the appellants. The Appellants have

entered into agreements with the dealers in connection with the sale of the Mopeds manufactured by them and these agreements are substantially in the same terms and it will, therefore, be sufficient if we refer to a specimen agreement for the purpose of ascertaining the terms and conditions on which the mopeds are supplied by the appellants to the dealers. Clause 2(a) of the agreement provides that the dealer shall keep a deposit of Rs. 6,000 with the appellants as a guarantee for due fulfilment of the agreement and this deposit will carry simple interest at the rate of 4½% per annum and Clause 2(b) declares inter-alia that upon termination of the agreement, the balance of the deposit if any, after deducting all amounts due to the Appellants shall be returned to the dealer with interest. Clause 3(a) of the agreement is material since considerable reliance has been placed upon it on behalf of the Department.

It reads as follows :

The Dealer will get a commission of Rs. 110 (Rupees one hundred and ten only) for Suvega Moped and Rs. 145 (Rupees one hundred and forty five only) per Suvega moped fitted with Shock Absorber which will be introduced shortly.

The Appellants are entitled to change prices from time to time as per Clause 4 of the agreement and that clause proceeds to add that the Appellants shall not be bound to execute the order pending execution with the dealer at the old rate and will be entitled to change the price ruling on the date on which the moped leaves the factory or stockyard of the Appellants. Clauses 5 and 6 are material for the purpose of determination of the controversy between the parties and they read as follows:

5(a) "Unless otherwise agreed specifically to all deliveries to the dealer shall be ex-factory in unpacked condition and the bills/RB/LB/PWB shall be sent through their bankers and all bank charges thereon shall be borne by the dealer. In case the dealer does not honour the Bills sent through bank immediately on presentation by Bankers, the dealer shall be liable to the Company for all damages/losses and expenses incurred in this connection and the same will be recovered from the deposit lying with the company.

(b) The despatches by the company will be insured by the dealer against all risks, pilferage, non-delivery and SRCC including breakage, wherever applicable from the time of leaving of the Company's factory or stockyard until arrival at dealer's premises, and all such expenditure incidental to transit shall be to the account of the dealer.

6. The dealer shall at his; own expenditure maintain such organisation for the sale and service of the said vehicles, including showrooms, service stations, repair shops, parts store rooms, salesmen, etc. The dealer shall train mechanics at their own cost with Company. The dealer shall give three free services to every vehicle sold by him and the company shall reimburse to the dealer at Rs. 4 per each free service rendered by him.

The rest of the clause; of the agreement are not relevant but it might be useful to refer to Sub-clauses (a) & (b) of Clause 10(iii) which provide as follows :

10(iii)(a) The Company upon termination of this agreement may require the dealer to immediately turn over to the company all or any bonafide retail buyers orders that he may have on hand unfulfilled, together with all deposits made thereon by the purchasers and also the list of prospective buyers with the dealer.

(b) In the event of the termination of this agreement, however, the dealer shall not be released from any obligation arising out of any transaction entered into or consummated prior to the date of such termination, either by him or his branches.

There are the material terms and conditions on which mopeds are supplied by the appellants to the dealers.

3. The Appellants submitted their price lists for approval to the excise authorities and the price lists showed the price charged by the Appellants to the dealers after deducting the so-called commission of Rs. 110 in respect of Suvega Standard Moped, Rs. 145 in respect of Suvega Deluxe Moped and Rs. 165 in respect of Suvega Samrat Moped. The price lists were approved by the excise authorities and excise duty was paid by the Appellants on the basis of these price lists at the time of clearance of the mopeds. This practice continued right upto 30 April 1979 when the Assistant Collector of Central Excise, Nellore took the view that the appellants were not entitled deduction of the commission of Rs. 110 for Suvega Standard, Rs. 145 for Suvega Deluxe and Rs. 165 for Suvega Samrat mopeds from the price charged to the dealers for arriving at the excisable value of the mopeds liable to excise duty. The Assistant Collector of Central Excise, Nellore thereupon issued a notice dated 15 May 1979 to the Appellants demanding a sum of Rs. 6,96, 177.09 representing the amount of differential duty in respect of mopeds manufactured and cleared by the appellants from their factory during the period 1st October 1975 to 30 April 1979. This demand was purported to be made by the Assistant Collector of Central Excise under Clauses (a) and (b) of Rule 10(1) of the Central Excise Rule 1944. The appellants thereupon preferred a writ petition in the High Court of Andhra Pradesh contending that the appellants were entitled to deduction of the amount of commission in arriving at the excisable value of the mopeds and the demands made by the Asstt. Collector of Central Excise was therefore, not justified.

4. The Writ Petition filed by the appellants came to be heard by a Division Bench of the High Court of Andhra Pradesh. Though it is difficult to ascertain what exactly was the view taken by the Division Bench, it appears that they came to the conclusion that the dealers were related persons vis-a-vis the appellants and "the discount of Rs. 110, 145 and 165 for the different varieties of mopeds was being given for organising sale and providing facilities and this was clearly an example of the mutual interest which the related person and the appellants are having in the business of each other. The Division Bench, it seems, mixed up two

different points, one relating to the question whether the dealers are related persons and the other relating to the question whether the commission of Rs. 110, 145 and Rs. 165 allowed in respect of different varieties of mopeds to the dealers could be regarded as trade discount or not. The ultimate decision however was that the commission of Rs. 110, 145 and Rs. 165 in respect of different varieties of mopeds was not trade discount and, therefore, in any event, it was not liable to be deducted from the price charged to the dealers and the Assistant Collector of Central Excise was consequently right in making a demand of Rs. 6,96,177.09 from the appellants. The appellants being aggrieved by the decision of the Division Bench preferred the present appeal after obtaining a certificate from the High Court.

5. Mr. Nariman learned Counsel appearing on behalf of the appellants assailed the judgment of the Division Bench of the High Court on both the grounds on which the impugned demand was challenged in the High Court. He contended that there was absolutely nothing to show that the dealers were related persons vis-a-vis the appellants and the Division Bench of the High Court was, therefore, clearly in error in taking the view that the dealers were related persons. Now the concept of related persons was for the first time introduced in the Act by the amending Act 22 of 1973 and the expression 'related person' came to be defined in Clause (c) of Sub-section (4) of Section 4 to mean a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee and sub-distributor of such distributor. This definition came up for consideration before this Court in the *Union of India v. Bombay Tyre International Ltd.* 1[1984] 1 SCC 467 where this Court construing, the definition held ;

On a proper interpretation of the definition of 'related person' in Sub-section (4) (c) of Section 4, the words a relative and a distributor of the assessee do not refer to any distributor but they are limited only to a distributor who is a relative of the assessee within the meaning of the Companies Act, 1956. So read, the definition of "related person" is not unduly wide and does not suffer from any constitutional infirmity.

6. It is therefore obvious that the dealers vis-a-vis the appellants under the last part of the definition in Sub-section (4)(c) of Section 4, could not be said to be related persons since they were admittedly not relatives of the appellants within the meaning of the Companies Act, 1956, But the argument urged on behalf of the department was and, that is the argument which found favour with the Division Bench of the High Court, that the dealers were related persons within the meaning of the first part of the definition in Sub-section 4(c) of Section 4. It was contended on behalf of the department that the dealers were so associated with the appellants that they had interest directly or indirectly in the business of each other. Now this part of the definition also came up for consideration before this Court in another decision namely, *Union of India (UOI) and Others Vs. Atic*

Industries Ltd., , and the Court pointed in that case :

What the first part of the definition requires is that the person who is sought to be branded as a "related person" must be a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other. It is not enough that the assessee has an interest, direct or indirect, in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest, direct or indirect, in the business of the assessee. It is essential to attract the applicability of the first part of the definition that the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The quality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect. That would not make any difference, so long as each has got some interest direct or indirect, in the business of the other.

Here on the facts it is difficult to see how it can at all be contended that the appellants had any interest in the business of the dealers or that the dealers had any interest in the business of the appellants. We shall presently analyse the terms of the agreement between the appellants and the dealers but one thing is clear from the terms of the agreement that the appellants sold the mopeds to the dealers on principal to principal basis and if that be so, it is not possible to say that the appellants had any interest in the business of the dealers. The dealers were wholesale buyers of the mopeds manufactured by the appellants and since the transactions between them were on principal to principal basis, it is difficult to appreciate how the appellants could possibly be said to have any interest, direct or indirect, in the business of the dealers. The dealers could not, therefore, be said to be related persons vis-a-vis the appellants. We must in the circumstances hold that the Division Bench of High Court was in error in holding that they were related persons. It is indeed surprising that though the Division Bench of the High Court took the view that the dealers were related persons, the Division Bench did not determine the excisable value of the mopeds on the basis of the price at which the dealers in their terms sold the mopeds to the consumers, but took into the account only the price charged by the appellants to the dealers. If the dealer were related persons, the excisable value of the mopeds could have been determined only on the basis of the price at which the dealers sold the mopeds to the retailers or the consumers. But, as we have pointed out, it is not possible to hold that the dealers were related persons and hence the excise duty on the mopeds was liable to be determined only on the basis of the wholesale price charged by the appellants to the dealers.

7. That takes us to the second question, namely, whether the Division Bench was right in taking the view that the Commission of Rs. 110, 145 and 165 per moped in respect of different varieties of mopeds sold to the dealers could not be said to

be trade discount. Mr. Nariman, Learned Counsel appearing on behalf of the appellants contended that this Commission allowed to the dealers was clearly trade discount and was, therefore, liable to be deducted in determining the exciseable value of the mopeds by reasons of Sub-section (b)(ii) of Section 4 of the Act. Now it is true that this amount allowed to the dealers has been referred to in the agreement as commission but the level given by the parties cannot be determinative because it is for the court to decide whether the amount is trade discount or not, whatever be the name given to it. If we look at the terms of the agreement, it is clear that the agreement was between the appellants and the dealers on principal to principal basis. The clauses of the agreement which we have set out above clearly show beyond doubt that under the agreement, the mopeds were sold by the appellants to the dealers and the dealers did not act as agents of the appellants for the purpose of effecting sales on behalf of the appellants. It is clear from Clause 5(a) of the agreement that the bills in respect of the mopeds delivered to the dealers were to be sent by the appellants through their bankers and it was the responsibility of the dealers to retire the bills for the purpose of taking delivery of the mopeds. Clause 5(b) of the agreement laid an obligation on the dealers to insure the mopeds against all risks, pilferage, non-delivery and SRCC including breakage from the time the mopeds left the factory or stockyard of the appellants until they arrived at the premises of the dealer and this again would show that the dealers acted as principal to principal in purchasing the mopeds from the appellants. The dealers were also liable under Clause 6 of the agreement to maintain adequate organisation for sale and service of the mopeds including show rooms, service stations, repair shops, spare parts, salesmen etc. and the mechanics were also to be trained at the cost of the dealers. The relationship between the appellants and the dealers was clearly on principal to principal basis and in the circumstances it is difficult to see how the amount of Rs. 11,145 and 165 allowed to the dealers. in respect of different varieties of mopeds could be regarded as anything other than trade discount. The appellants charged to the dealer the price of the mopeds sold to them less the amount of Rs. 110, Rs. 145 and Rs. 165 in respect of different varieties Of mopeds. These amounts allowed to the dealers were clearly trade discount liable to be deducted from the price charged to the Sealers for the mopeds. purpose of arriving at the exciseable value of the moped

8. We therefore, allow the appeal, set aside the judgment of the Division Bench of the High Court and quash the notice dated 15.5.1979 issued by the Assistant Collector of Central Excise made and the order dated 25.9.79 made in pursuance of that notice. If any payments have been made by the Appellants under the order dated 25 September 1979, the respondents will refund the same to the appellants within 3 months from the date of receipt of this order. The Bank Guarantee given by the appellants will stand discharged, There will be no order as to costs.