
(1985) 07 BOM CK 0056
In the Bombay High Court
Case No : Writ Petition No. 28 of 1983

M.R.F. Limited

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 03-07-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)

Citation : (1986) 9 ECC 198 : (1985) 22 ELT 5

Hon'ble Judges : G.F. Couto, J;G.D. Kamat, J

Bench : Division Bench

Judgement

Couto, J.—Whether rubberised tyre cord warp sheets should be classified for the purpose of levying excise duty under Item 16A(2) or under either Item 19I(b) or Item 22 of the Central Excise Tariff is the question that falls for determination of this Court. The petitioners indeed challenge in this writ petition the orders dated 15th October, 1982, and 6th December, 1982, made by the second and third respondents respectively, seeking to levy excise duty on rubberised tyre cord warp sheets employed in the manufacture of automobile tyres under Item 19I(b) or Item 22, instead of under Item 16A(2), of the Central Excise Tariff, as well as Tariff Advice No. 52/80, dated 22nd September, 1980.

2. The petitioners are a company incorporated under the Companies Act, carrying on the business of manufacturing automobile tyres and rubber products in their factories, inter alia, at Usgao, Goa. They utilise tyre cord warp sheets and cotton fabrics viz., nylon tyer cord warp sheets, rayon tyer cord warp sheets and grey industrial cotton fabrics, for the manufacture of tyres and repair materials for repair of tyres. These tyre cord warp sheets and cotton fabrics go into the basic structure of tyres, after being duly rubberised in an integrated and continuous process. It appears that these rubberised tyre cord warp sheets are of a sticky nature, having a limited shelf life of about six weeks and requiring to be handled with liner cloth.

3. It further appears that no excise duty was being charged to the petitioners on

account of rubberised tyre cord warp sheets being used in the process of manufacturing automobile tyres and that the petitioners had filed on 25th August, 1981, a classification list claiming that rubberised cotton warp sheets (cotton tyre cord) to fall under Item 16A(2) of the Central Excise Tariff. However, by a notice dated 21st October, 1981, the third respondent required the petitioners to show cause why the said classification list should be accepted and the product should not be reclassified under Item 19I(b). The petitioners replied on 25th November, 1981, to the said show cause notice and finally, the second respondent made the impugned order dated 15th October, 1982. It seems that after this order, the petitioners addressed a letter dated 11th November, 1982 to the second respondent drawing his attention to the fact that the order dated 15th October, 1982. It seems that after this order, the petitioners addressed a letter dated 11th November, 1982, to the second respondent drawing his attention to the fact that the order dated 15th October, 1982, was relating only to the rubberised cotton tyre cord warp sheets and did not cover the processing of rayon or nylon tyre cord. Then, the third respondent issued the impugned order dated 6th December, 1982, to the effect that the earlier order dated 15th October, 1982, was covering both cotton and rayon or nylon tyre cord warp sheets and, therefore, the petitioners should classify these products either under Item 19 or Item 22, as the case may be. Similarly, the fourth respondent has freshly classified the said warp sheets as fabrics falling under Item 19 or Item 22 of the Central Excise Tariff if they are cotton or man-made warp sheets, respectively.

4. The petitions challenge the impugned orders and the above referred to fresh classification of the rubberised tyre cord warp sheets by the fourth respondent on several grounds, amongstttt other, on grounds relating to the constitutional validity of the amendments introduced by the Central Excises and Salt and Additional Duties of Excise (Amendments) Act, 1980, in the definition of "manufacture" given in Section 2, by adding clauses (vi) and (vii), as well as the retrospective amendments affecting the meaning of the expression "duty of excise" and Rules 9 and 49 of the Central Board of Excise and Customs Rules. We do not propose to dwell in and to deal with these questions, since on one hand, we agree with Mr. Nariman that is not necessary for the decision of the case before us, and on the other, as were informed across the bar, such questions had been raised in several writ petitions pending before the Supreme Court. The learned Counsel, therefore, while reserving the petitioners' right to canvass those questions as and when necessary, did not, with his characteristic and habitual fairness, advance any arguments and did not make any submissions in that respect. It was indeed contended by him that in the light of the material before the Court and Tariff Advice No. 49/84, dated 1st October, 1984, of the Central Board of Excise and Customs, the question before us has narrowed down and is practically restricted to the determination of whether or not rubberised tyre cord warp sheets constitute a new saleable manufactured product, commercially known and considered in the trade to be different from the tyre

cord warp sheets. And if so, whether the rubber contents in such rubberised tyre cord warp sheets predominate over its cotton contents. We are one with the learned Counsel in this regard, for we indeed do think that these are the only relevant and material questions that need be considered and determined for the decision of the present writ petition. We will, therefore, address ourselves to those questions.

5. But, before proceeding to deal with them, it is expedient, proper and necessary to express our views on the question as to whether or not this Court should exercise its extraordinary writ jurisdiction in the present case where, admittedly, the petitioners did not avail themselves of the statutory remedies by way of appeal or revision provided by the Central Excises and Salt Act and, on the contrary, directly approached this Court with the present writ petition.

6. Ordinarily, the High Court will not exercise its extraordinary writ jurisdiction when the statute provides for adequate remedy to give redress to a party to his grievances. However, it may be pointed out that, in given cases, the High Court may intervene under Article 226 of the Constitution and would not be prevented from doing so by such fetters as provisions for appeal or revision. Therefore, the question that is to be considered is whether, on the facts and circumstances of the present case, the petitioners were justified in approaching directly this Court without taking recourse to the statutory remedies provided by the relevant law.

7. Mr. Nariman, while dealing with this question, contended that it is quite clear from the impugned order dated 15-10-1982 that the same is based on a complete mis-construction of the Tariff Items and that the second respondent, while passing the said order, had failed to pay regard to the test of preponderance of weight. This defect in the impugned order touches jurisdiction inasmuch as it involves interpretation of the Tariff Items. In such circumstances, he submitted that the interference by the High Court in exercise of its writ jurisdiction is entirely justified as held by that Supreme Court in *Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others*, . Secondly, the impugned orders had been made by following a Tariff Advice dated 22nd September, 1980. The said Tariff Advice is being challenged in the petition and could not be the subject-matter of an appeal or revision. Thirdly, this Court had admitted the present writ petition on 14th February, 1983, after hearing the respondents. Therefore, in such a case, it would not be proper for this Court not to exercise its writ jurisdiction as observed by the Supreme Court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, as well as by a Division Bench of this Court in *Leukoplast (India) Private Ltd. and others Vs. Union of India and others*, . Besides, this Court, while dealing with the prayer of the petitioners for interim relief, by its order dated 7th March, 1983, granted the said interim relief on the following conditions viz., (i) the respondent was permitted to make assessment as and when necessary; (ii) the petitioners to give bank guarantee of 25 per cent of the assessment and to furnish a bond with one surety for the remaining 75 per cent of the assessment and (iii) the petitioners to furnish a

written undertaking to the Court that in case the petition fails, they would pay the amount due with interest at the rate of 10 per cent per annum from the date of assessment till payment. Pursuant to the said order of this Court, the petitioners had approached the respondents requesting them to state at what stage the assessment of the rubberised tyre cord warp sheets should be done for the purposes of excise duty. In spite of that, the respondent did not take any action and it is apparent from these facts that they themselves wanted an adjudication of the issue by the Court. Fourthly, the learned Counsel submitted that three elements utilised in the tyre manufacture viz., (i) bead chafer fabric, (ii) bead wrap fabric and (iii) breaker fabric are being treated by the respondents as rubber products which are not assessable as fabrics under Tariff Item 19 nor are they assessable to duty under Tariff Item 16A on account of the existing exemption notifications. As such, there is a clear departure on the part of the respondents in respect of the rubberised tyre cord warp sheets for the purpose of their classification for assessment of excise duty. All these circumstances fully justify the interference by this Court in the exercise of its writ jurisdiction.

8. This view was, however, strongly opposed by Mr. Dias, the learned Counsel appearing for the respondents. He, while conceding with great fairness as usual, that the impugned order dated 15-10-1982 is difficult to be sustained, contended that the question before the Court does not relate only to the interpretation of a Tariff Item but involves also disputed questions of facts and, therefore, it is not open to the Court to exercise its writ jurisdiction in this case. In fact, the question that rubberised tyre cord warp sheets constitute or not a manufactured product that is a saleable new product, so understood in the trade and commercially, is open, for, though the petitioners allege that such rubberised tyre cord warp sheets are not marketable and do not constitute a manufactured distinct product, the fact remains that the reasons given are not relevant and satisfactory. The sticky nature of the said rubberised tyre cord warp sheets and its limited shelf life, in no manner, justify the stand of the petitioners that they are not an independent and a new manufactured product. The question, according to the learned Counsel, is not whether the said rubberised tyre cord warp sheets are actually sold in the open market but whether such rubberised tyre cord warp sheets are saleable and constitute a distinct product. The material before the Court is not sufficient to permit this Court to arrive a clear finding on these disputed questions of fact and hence, the writ jurisdiction of this Court is not attracted to the facts and circumstances of the case. He further submitted that the other point to be considered is whether in the rubberised tyre cord warp sheets, cotton or rubber predominates. This is not established on record and, therefore, it is a matter that has to be decided by the respondents after the necessary evidence is adduced.

9. Only the second respondent filed a return and has averred in para 1 of his affidavit that the tyre cord warp sheets and cotton fabrics purchased by the petitioners are made to undergo a rubberizing process resulting in the manufacture of a completely new product called in the trade "rubberised tyre

cord warp sheets". Therefore, the stand of the second respondent is that rubberised tyre cord warp sheets constitute a manufactured product that is commercially known, as well as in the trade, as a product different from the original tyre cord warp sheets. Thus, the question as to whether or not the rubberised tyre cord warp sheets constitute a new product is disputed. However, this disputed question is not of much relevance for the disposal of this petition as we presently will show and, therefore, will not justify the non-exercise by this Court of its writ jurisdiction. As regards the second point which, according to the learned Counsel for the respondents, is disputed, we fail to agree with him. In fact, as rightly pointed out by Mr. Nariman, the respondents had acted, while passing the impugned order, on the basis that predominance of weight of cotton or rubber is not all relevant for the purpose of classifying the rubberised tyre cord warp sheets for the assessment to excise duty. We say so because, in the impugned order dated 15-10-1982, the second respondent has specifically stated that in case tyre cord warp sheets falling under Tariff Item 19 or Tariff Item 22 are rubberised, the final product would still remain as rubberised cotton fabrics or man-made fabrics, as the case may be, even though the rubber content predominates in weight. This clearly shows that, to the mind of the second respondent, the question of predominance of weight of cotton or rubber was entirely irrelevant. Further, as also contended by Mr. Nariman, since the petitioners had filed a classification list bringing the rubberised tyre cord warp sheets under Tariff Item 16A(2), it was the duty of the second respondent to consider the predominance in weight of cotton in the said rubberised tyre cord warp sheets if, in his opinion, the said product was to be classified either under Item 19 or Item 22. This was compulsorily to be done because the predominance of weight is the essential test laid down in the very definition of "cotton fabrics". Thus, since the second respondent considered as irrelevant the predominance of weight, it necessarily follows, according to the learned Counsel, that he accepted as correct the contention of the petitioners while making the classification under Tariff Item 16A that the rubber contents were in predominance. In our view, these submissions of Mr. Nariman are entirely correct and, therefore, it is wrong to say that the question of predominance of rubber contents in the rubberised tyre cord warp fabrics utilised by the petitioners in the manufacture of tyres is in dispute.

10. In the impugned order dated 15-10-1982, the second respondent, after quoting the Tariff Items 16A(2), 19I(b) and 22I(b), observed that from the reading of the said Tariff descriptions it was clear :-

"that the classification of the goods is based on the base material and predominance with reference to the base material determines the character of tariff item under which an article falls."

After having so stated, the respondent, without giving any reason, proceeded further and added that :-

"In case tyre cord warp sheets falling under T.I. 19 or 22 are rubberised the final

product would still remain as rubberised cotton fabrics or man-made fabrics as the case may be even though the rubber content predominates in weight."

From the above quoted portions of the impugned order, it is clear that the question before us relates to the interpretation of Tariff Items as rightly pointed out by the learned Counsel for the petitioners. The test of predominance of weight is inserted in the definition of "cotton fabrics" and, therefore, the failure of the second respondent in considering the said test involves a question of interpretation of the said Tariff Items and touches the jurisdiction. Secondly, we may point out that the petitioners had specifically stated in the petition that the impugned orders were made by following the Tariff Advice dated 22nd September, 1980, and that is why no reasons were given as to why the tyre cord warp sheets when rubberised continue to be rubberised cotton fabrics and are assessable under Tariff Item 19. The petitioners challenges in the present writ petition the said Tariff Advice also and no appeal lies against such Tariff Advice. Then, as rightly pointed out by Mr. Nariman, this writ petition was admitted after hearing the respondents on 14-2-1983. Therefore, on 7th March, 1983, this Court granted interim relief to the petitioners on some conditions and further permitted the respondents to make assessment as and when necessary. It appears that in spite of this interim order of this Court and in spite of the fact that the petitioners moved the respondents in that respect, no action was taken. Now, as held by this Court in *Leucoplast (India) Private Limited*, following the decision of the Supreme Court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, when an alternative remedy exists and the High Court entertains a petition and hears it on merits in spite of such alternative remedy having not been availed of, the petition cannot be rejected on the ground that a statutory remedy was not availed of. In the above circumstances, we feel loathe to decline to exercise our writ jurisdiction and are of the considered opinion that this is one of those cases where the High Court should act under such extraordinary jurisdiction.

11. We shall now turn to the merits of the case. We have already mentioned that Mr. Nariman submitted that the rubberised tyre cord warp sheets do not constitute a new manufactured product, considered as such commercially and in the trade. He indeed urged that the cotton tyre cord warp sheets which are purchased by the petitioners from the open market are utilised in the manufacture of tyres in order to keep in place the rubber used for the production of tyres. The said cotton tyre cord warp sheets are rubberised by being dipped in a rubber latex solution which contains adhesives. After this is done in an integrated and continues process, the so rubberised cotton tyre cord warp sheets become completely different from the original product purchased by the petitioners from the open market. However, these rubberised tyre cord warp sheets are not a manufactured product within the meaning of "manufactured product" in the relevant provisions of law. In fact, the said rubberised tyre cord warp sheets are extremely sticky and have to be handled with due care and with the use of cotton liners. Their shelf life is very limited, going upto six weeks.

They are utilised in the manufacture of tyres in a continuous process and, therefore, they do not constitute a manufactured product, since the process of transformation of the original cotton tyre cord warp sheets will be complete only with the full manufacture of the tyre. And placing reliance on the judgments of the Supreme Court in the cases of Empire Industries Limited and Others Vs. Union of India and Others, and Union of India & others v. M/s. Real Honest Textiles (Civil Appeal Nos. 586-92 of 1979) delivered on 6th May, 1985 copy of which was produced, the learned Counsel stated that a product utilised in the manufacture of a particular commercial item can be said to have been "manufactured" only when the result of one or the other process there is transformation of the said product into a new commodity commercially known as distinct and separate commodity having its own character, use and name, and only then such commodity is liable to duty. This view of the Supreme Court is, he further added, in line with its earlier decision in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, wherein the Supreme Court observed that there are several criteria for determining whether a commodity is consumed in the manufacture of another and that the generally prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture and that when there is no essential difference in identity between the original commodity and the processed article, it is not possible to say that one commodity has been consumed in the manufacture of another. The same view had been taken by the Supreme Court in Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, Therefore, according to the learned Counsel, for the purposes of making a particular commodity used in the manufacture of another article liable for excise duty, the process or processes utilised should create something which has a distinct name, character and use and should be considered as a distinct commodity in the trade, since only then, that particular commodity will partake the nature of a "manufactured" product.

12. In Pio Food Packers" Case (supra), the Supreme Court observed that there are several criteria for determining whether a commodity is consumed in the manufacture of another and that the generally prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. It was further added that commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. This view was reiterated by the Supreme Court in Chowgule's case (supra). In fact, the Court observed therein that the test for determining whether

manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity, but is recognised in the trade as a new and distinct commodity. The same view was once again reiterated in the case of *M/s. Real Honest Textiles* (supra). Thus there is no doubt whatsoever that a product utilised in the manufacture of another commodity can be said be manufactured for the purpose of being liable to excise duty only when such product undergoes, in the process or processes of production, such a change that it loses its original identity and name and becomes commercially a different and distinct one.

13. We have already observed that it is the contention of Mr. Nariman that the rubberised tyre cord warp sheets, though different from the original cotton tyre cord warp sheets, do not constitute a commodity which, due to the rubberizing changes of the warp sheets, become a commercially known different product which is saleable and is available in the market. He, in fact, urged that though the original cotton tyre cord warp sheets undergo a change, nonetheless the rubberizing of the said warp sheets do not make them a new product since the process or processes utilised in such rubberizing do not make them a complete product. In fact, the rubberised tyre cord warp sheets are in a continuous process of change and become an integral part of the tyre itself. Such rubberised tyre cord warp sheets are of a very sticky nature and have a very limited shelf life. Consequently, according to the learned Counsel, such products cannot be said to be manufactured products falling within its meaning as explained by the Supreme Court in the above referred to authorities. We are, however, unable to agree with the learned Counsel in this regard because, first of all, the material before us not sufficient to make us arrive at a clear finding that the rubberised tyre cord warp sheets are not a complete product after the process of rubberizing is done. We have already observed that the second respondent has specially taken the stand that such rubberised tyre cord warp sheets are a new product that is saleable. Thus, the question as to whether or not the rubberised tyre cord warp sheets are known in the trade as an independent and distinct product is disputed. Secondly, the petitioners themselves had stated in para 6(a) of the petition that though the shelf life of the rubberised tyre cord warp sheets is of six weeks at the most, in an emergency, arising for instance due to power cut, the said rubberised tyre cord warp sheets are sent to other factory belonging to the petitioners for the purpose of manufacture of tyres. However, they should be handled with care and with the use of cotton liners. In other words, by making this averment, impliedly, the petitioners has admitted that rubberised tyre cord warp sheets can be manufactured in an independent factory and thereafter, utilised in a different factory, provided this is done within the period of six weeks. This means that the petitioners had clearly shown that though the rubberised tyre cord warp sheets are utilised in the process of manufacture of tyres in a continuous and integrated manner, nevertheless they constitute an independent and completes product when they are used in the manufacture of tyres. The learned Counsel for the petitioners had produced for our perusal some samples

of the rubberised tyre cord warp sheets, as well as of the original cotton tyre cord warp sheets. We noticed that, even at naked eye, there is a vast difference between the original product and the rubberised one. Definitely, a basic and substantial change is made in the original product, for the original product is a woven cotton fabric where cotton only exists while, in the rubberised sheets, the said cotton fabric cannot be seen at all and is fully covered by coating of rubber. This being so, the fact that the rubberised tyre cord warp sheets are not put in the market would not make any difference for the purposes of their chargeability to excise duty if such rubberised tyre cord warp sheets are covered by any Tariff item. We draw support for this view from the decision of the Supreme Court in Union of India (UOI) Vs. Delhi Cloth and General Mills, . In fact, the Supreme Court has observed in that case that excise duty is on the manufacture of goods and not on the sale and, therefore, the fact that the substance produced by the manufacturer at an intermediate stage is not put in the market would not make any difference to the chargeability of the substance to excise duty if it is covered by an item in Schedule I of the Act. We, in the circumstances, are of the clear view that the original tyre cord warp sheets, after their rubberisation, undergo due to the said process a substantial and basic change and they are transformed in a new product which is substantially different from the original one in its identity. Therefore, though admittedly such rubberised tyre cord warp sheets are not put in the market, nevertheless that is not a relevant consideration for the purposes of not making them liable to the payment of excise duty.

14. This takes us to the next contention of Mr. Nariman. According to him, even if rubberised tyre cord warp sheets are a product different from the original one, nonetheless they are exempted from payment of excise duty because, due to the predominance of rubber, they constitute rubberised products, which are covered by the exemption from excise duty granted by Notification No. 71/68-C.E., dated 1st April, 1968 as amended by Notification No. 27/73-C.E., dated 1st March, 1973. It will be, at this stage, useful to refer to the definition of cotton fabrics in Tariff Item 19 in order to appreciate the force of the above submissions of Mr. Nariman, especially in the light of the stand taken by the second respondent in the impugned order dated 2nd May, 1982, that the predominance in weight of rubber content is entirely irrelevant for the purpose of classifying a tyre cord warp sheet which is rubberised. Item 19 reads, in the relevant portion, as under :-

"Cotton Fabrics" means all varieties of fabrics manufactured either wholly or partly from cotton..... if (i) in such fabrics cotton predominates in weight, or (ii)..... 19 I. Cotton fabrics, other than (i) embroidery in the piece, in strips or in motifs (ii) fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials, and (iii) fabrics covered partially or fully with textile flocks or with preparations containing textile flocks."

It is clear from the meaning given to cotton fabrics in Item 19 that the test for

the classification of a fabric as cotton fabric is that the cotton predominates in weight in such fabrics. It is true that, in Item 19 I, it is laid down that cotton fabrics subjected, inter alia, to the process of rubberizing are included in the said Item. However, from the main definition of cotton fabrics, given in the body of Item 19, it is clear that the test to classify a fabrics as cotton fabric is the predominance in weight of cotton in such fabrics. Therefore, the rubberised cotton fabrics which fall under Item 19 I must necessarily be those cotton rubberised fabrics in which cotton predominates in weight. That the test of the base material utilised in the fabrics is the relevant one for its classification becomes also clear from Item 22 of the Excise Tariff where man-made fabrics are defined. It is, in fact, stated therein that man-made fabrics means all varieties of fabrics manufactured either wholly or partly from man-made fibres or yarn....., in each of which man-made (i) cellulosic fibre or yarn, or (ii) non-cellulosic fibre or yarn, predominates in weight. This view, which otherwise flows clearly from the very definitions of "cotton fabrics" and "man-made fabrics" was accepted as correct by the fourth respondents themselves, for on the basis of such interpretation, they issues Tariff Advice No. 49/84, dated 1st October, 1984, in relation to rubberised cotton fabrics. In the said Advice the fourth respondents expresses themselves as under :

"It is considered that "Rubberised Cotton Fabrics" are classifiable under Item 19(1)(b) of the C.E.T. if the cotton predominates in weight on the basis of the total weight of the "Rubberised Fabrics" under consideration. If it does not, the "Rubberised Fabrics" would get classified under Item 16A(2) or 68 of the C.E.T., depending on whether or not these could be considered as rubber plates, sheets or strips unhardened."

And this Advice was followed by the Customs, Excised &Gold (Control) Appellate Tribunal in M/s. Falcon Tyres Ltd., Mysore v. Collector of Central Excise, Bangalore, (Appeal No. 829 of 1983) decided on 24th April, 1985, a copy of which was placed before the Court by the petitioners. It is thus clear that the Central Board of Excise and Customs, the fourth respondent herein, has realised that the test of predominance in weight is the criterion to be followed in order to classify a product as cotton fabric under Item 19.

15. Now, it is clear from the impugned orders that the second respondent was of the opinion that rubber or cotton content in the rubberised tyre cord warp sheets was entirely irrelevant for the purpose of their classification under any Item of the Tariff. This stand, as we already have shown, is entirely erroneous. We have also already mentioned that Mr. Dias contended that the questions to whether or not rubber predominates in the rubberised tyre cord warp sheets is in dispute. In our view, it is clear from the record that no such dispute exists, because the petitioners had on the basis of such predominance of rubber contents classified the rubberised tyre cord warp sheets as falling under Item 16A(2) of the Tariff and the second respondent had turned down such classification on the ground that irrespective of the rubber contents the said products were falling under Item

19, implying thereby his acceptance of the allegation of the petitioners that the rubber contents in rubberised tyre cord warp sheets were predominating over the cotton contents. In addition, we may point out that, with the permission of the Court, the petitioners filed an affidavit-in-rejoinder wherein they specifically stated in para 4 that a rubberised tyre cord warp sheet, after impregnated with rubber loses its identity as fabrics and enters in the family of rubber products. It is further specifically alleged that one square metre of rubberised tyre cord warp sheets weights more than twice the weight of one square metre of the same grey fabric in its original state. By grey fabric the petitioners refer to the cotton tyre cord fabric utilised by them in the initial process of manufacture of tyres. Though this fact was specially stated by the petitioners, the respondents chose not to file an affidavit denying the said allegations. It is true that they were not entitled to file, as a matter of right, such affidavit but since a new fact has been brought on record, it would have been only reasonable for the respondents to seek the leave of the Court to file an affidavit denying the correctness of such statement if at all they challenged it. Thus, by having kept quiet, the respondents had made it abundantly clear that they accept the contention of the petitioners that the contents of runner in the rubberised tyre cord warp sheets predominate over its cotton contents. We are, therefore, of the clear view that the rubberised tyre cord warp sheets having a predominant rubber contents are to be considered as rubber products.

16. Rubberised tyre cord warp sheets undoubtedly fall, in our view, under Item 16A(2) of the Central Excise Tariff, for such Item covers unhardened rubber products, whether vulcanised or not and whether combined with any textile material or otherwise. But, are such rubberised tyre cord warp sheets exempted from excise duty ? The learned Counsel for the petitioners answered this question in the affirmative because, according to him, by virtue of the Notification No. 71/68-C.E., dated 1-4-1968 as amended by Notification No. 27/73-C.E., dated 1-3-1973, such products are exempted from excise duty. The said notification deals with exemptions from excise duty accorded to plates, sheets and strips unhardened and reads as under :-

"In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the M.F. (D. & R.) No. 31/64-C.E., dated 1-3-1964 the Central Government hereby exempts all rubber products, in the form of plates, sheets and strips unhardened whether vulcanised or not, and whether combined with any textile material or otherwise (other than the products which are made either wholly or partly of rubber and which are used for the resoling, retreading or repairing of tyres, including the products, commonly known as tread rubber, camelback cushion compound, cushion gum, tread gum and tread packing strips) falling under sub-item (2) of Item No. 16A of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) from the whole of the duty of excise leviable thereon.

"The clear terms of the above notification leave no margin for doubt and we are, therefore, one with the learned Counsel. As such, we hold that the rubberised tyre cord warp sheets being unhardened sheets of a rubberised product combined with textile materials squarely fall within the purview of the said notification and are, therefore, exempted from the payment of excise duty.

17. We have already held that the rubberised tyre cord warp sheets constitute a product which is distinct from the original cotton tyre cord warp sheets in their identity and, therefore, they are falling within the meaning of a "manufactured product" for the purposes of being liable to the payment of excise duty. We have also held the view that the rubberised tyre cord warp sheets are exempted from the payment of duty by virtue of the Notification No. 71/68-C.E., dated 1-4-1968 as amended by Notification No. 27/73-C.E., dated 1-3-1973. We would like to point out that even if the original cotton tyre cord warp sheets were not undergoing a basic change in its identity as a result of their rubberisation, nevertheless as rightly pointed out by Mr. Nariman, such rubberised tyre cord warp sheets would not be liable to excise duty because this would amount to a double duty on the same product. In fact, it is the case of the second respondent in the impugned order dated 15th October, 1982, that despite the rubberisation, the rubberised tyre cord warp sheets continue to be cotton fabrics for the purposes of duty. Now, admittedly the original cotton tyre cord warp sheets were liable for excise duty and such duty was paid. So if, as held by the second respondent, the said warp sheets continue to be cotton fabrics, a fresh classification for the purpose of excise duty is not called for and if duty is charged on the same product, naturally it will be a double taxation on the same product. This obviously the respondents were not entitled to do. And on this ground also the petitioners are bound to succeed in this petition.

18. In the result, this petition succeeds and consequently, the rule is made absolute in terms of prayers (a), (b) and (c). Costs by the respondents.