

(2017) 04 AP CK 0011
In the Andhra Pradesh High Court
Case No : 285 of 2010

M/s. Maheshwari Industries, represented by its Proprietor, Sri Narayan Das?Lohiya Vs M/s. Annapurna Industries, represented by its G.P.A. Holder Sri Vidyut Rai

Date of Decision : 07-04-2017

Acts Referred:

[Central Excise Act, 1944](#), [Section 5A\(1\)](#),
[Section 35G](#) - Power to grant exemption from duty of excise
- Appeal to High Court

Citation : (2017) 04 AP CK 0011

Hon'ble Judges : V. Ramasubramanian, J.Uma Devi

Bench : DIVISON BENCH

Advocate : Gandra Mohana Rao,? Sundari R. Pisupati

Final Decision : Allowed

Judgement

1. Two different Assesses manufacturing and selling plastic moulded chairs have come up with these 4 appeals questioning (i) the denial of the benefit of the Exemption Notification No.8/2003, dated 01-3-2003 and (ii) the imposition of penalty.

2. We have heard Mr. Gandra Mohan Rao, learned counsel for the appellants and Ms. Sundari R. Pisupati, learned Standing Counsel for the respondents.

BRIEF FACTS:

3. Both the appellants herein are Small Scale Industrial Units manufacturing plastic moulded chairs. The case of the appellants, on which there is no dispute on facts, is that both the appellants purchase moulds with certain brand names. While Maheshwari Industries purchased moulds containing the inscription Maniyar for the manufacture of chairs, the other appellant Annapurna Industries purchased moulds with the inscription Rose Kamal, Lal Kamal etc. Admittedly, the turnover of each of the appellants was less than Rs.One Crore. Therefore, the appellants claimed the benefit of Exemption Notification No.8/2003, dated 01-3-2003.

4. On 06-10-2005, a search of the premises of the appellants was conducted. It was alleged by the officials that the appellants are engaged in the manufacture and sale of the branded items, not entitled to the benefit of the Exemption Notification and that therefore the appellants ought to have registered themselves under the Central Excise Act, 1944.

5. According to the appellants, they deposited an amount of Rs.10 lakhs each under pressure, after the search. Thereafter, a show cause notice No.107/2005, dated 26-05-2005, was issued to the appellant Annapurna Industries. Similarly, a show cause notice No.4/2006, dated 05-4-2006, was issued to the other appellant Maheswari Industries.

6. The appellants submitted their detailed replies. In the replies, the appellants pointed out that they merely purchased moulds along with a marking inscribed in the moulds and that therefore they cannot be treated as selling branded items within the meaning of paragraph 4 of the Exemption Notification. In so far as Maheswari Industries was concerned, one Mr. S.S. Maniyar was examined to show that he did not own any brand name or trade mark. He was cross-examined by the officials of the Department. Similarly, in the case of Annapurna Industries, one Rahmatullah who sold the moulds was examined.

7. However, the Additional Commissioner of Customs passed an Order-in-Original No.38/2006, dated 16-01-2007, in the case of Maheswari Industries. Similarly, he passed an Order-in-Original No.46/2006, dated 14-02-2007 in the case of Annapurna Industries. By these Orders-in-Original, the demand was confirmed and a penalty was also imposed.

8. The appellants filed independent appeals. By an order dated 26-9-2007, the Commissioner (Appeals) confirmed the demand of excise duty, but reduced the penalty to the extent of Rs.10 lakhs for each of the appellants.

9. As against the confirmation of demand, the appellants filed appeals in Excise Appeal Nos.3/2008 and 4/2008. As against the order of the Commissioner (Appeals) in reducing the quantum of penalty by Rs.10 lakhs, the Department filed separate appeals in Excise Appeal Nos.863 and 867 of 2007.

10. By an order dated 13-01-2010, the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) dismissed the appeal filed by Maheswari Industries in Appeal No.E/4/2008 and allowed the Departments appeal in Appeal No.E/867/2007 in so far as the quantum of penalty is concerned. Therefore, Maheswari Industries has come up with two appeals, one in C.E.A.No.285 of 2010 as against the order in Appeal No.4/2008 and another in C.E.A.No.320 of 2010 as against the order in Appeal No.867/2007.

11. Similarly, by a separate order dated 15-9-2010, CESTAT dismissed the appeal of Annapurna Industries in Appeal No.E/3/2008 and allowed the Departments appeal in Appeal No.E/863/2007. Therefore, Annapurna Industries has come up with two appeals in C.E.A.Nos.88 and 107 of 2011.

12. Thus, there are four appeals on hand, two by one assessee and two by another assessee. Out of the two appeals filed by each assessee, one relates to confirmation of demand and another relates to imposition of penalty.

QUESTIONS OF LAW:

13. The appeals, in our considered view, raise the following common substantial questions of law:

(i) Whether the purchase of standard moulds containing certain names as inscriptions and the manufacture of products out of those moulds with the same names, would tantamount to the manufacture of goods bearing a brand name or trade name so as to be deprived of the benefit of exemption in terms of paragraph-4 read with Explanation (A) under para-5 of the Exemption Notification No.8/2003, dated 01-3-2003?

(ii) Whether the Tribunal and the respondents were right in denying the benefit of the CBEC Circular bearing No.52/52/94, dated 01-9-1994 to the appellants?

QUESTION No.(i):

14. By a Notification No.8/2003-CE, dated 01-03-2003, the Government of India granted exemption from payment of duty of excise, to first clearances up to an aggregate value not exceeding Rs.One Crore made on or after the first day of April in any financial year. This exemption was granted in exercise of the power conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, with a view to grant a reprieve to small scale industries. The fact that the appellants herein are small scale industries and the fact that they made clearances within the ceiling limit prescribed in the Notification, so as to be eligible for the grant of exemption, are not disputed by the Department. But the stand of the Department is that the cases of the appellants would fall within the exclusion contained in para-4 of the Exemption Notification.

15. Paragraph-4 of the Exemption Notification made it clear that the benefit of the Notification will not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person. The expressions brand name and trade name are defined in the Explanation under para-5 of the Exemption Notifications. The definitions contained in the Explanation read as follows:

(A) brand name or trade name means a brand name or a trade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person;

(B) where the specified goods manufactured by a manufacturer bear a brand name or trade name, whether registered or not, of another manufacturer or

trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer or trader;

16. Keeping in mind paragraph-4 of the Exemption Notification read with the Explanation (A) and (B) under para-5, we shall now go back to the facts as recorded by the Original Adjudicating Authority. Since there cannot be any dispute on facts in appeals arising under Section 35G of the Central Excise Act, 1944, we shall go only by the facts as narrated by the Original Adjudicating Authorities in the show cause notices. Paragraph-7.1 of the show cause notice issued as against Annapurna Industries which contains the reasons for the denial of exemption reads as follows:

7.1. On verification of the above mentioned records and the depositions made by the concerned persons, it is observed that M/s. Annapurna Industries have manufactured and cleared plastic moulded chairs exclusively bearing the brands Lalkamal, Rosekamal, Ceilo and National from June 2003 onwards. AI also manufactured PP Mats without any brand during the period. Lalkamal, Rosekamal, Ceilo and National brands and the moulds (including mould designs), with which the said branded chairs were manufactured, belong to Shri S.Rahmatullah, Proprietor of Rosekamal Moulded Furniture, Bangalore. This fact is confirmed as the stock of goods, available during the course of search and seizure of the same vide panchanamas dated 06.10.2005 and 14.10.2005, bear the brand name of Lalkamal, Rosekamal, Ceilo and National etc., embossed and affixed on them. The officers also found moulds and mould designs of the said brands in the factory of AI during the search on 06.10.2005 as seen from the Panchanama. Further the concerned persons in their respective statements confirmed that AI manufactured the said goods with the said brand names from June 2003 onwards. The dealers/buyers of the said goods also confirmed in their respective statements that they received moulded plastic chairs with the said brands from AI from June 2003 onwards. Shri S. Rahmatullah of M/s. Rosekamal Moulded Furniture has procured the said moulds and supplied to AI as seen from the documents available in private records. He has stated in his statements dated 07.10.2005 and 03.04.2006 that Lalkamal, Rosekamal, Ceilo, Maharaja gold and National brands with which AI manufactured the said goods, are owned by him. The said brands are being embossed on the said chairs. In addition, AI are affixing the labels containing the said brand names, as evidenced by the labels recovered from them (Annexure C1-2) and the labels affixed on the seized goods.

17. Similarly, the reasons stated in para-8.1 of the show cause notice issued to Maheswari Industries reads as follows: 8.1. On verification of the above mentioned records and the depositions made by the concerned persons, it is observed that M/s. Maheswari Industries have manufactured and cleared plastic moulded chairs of Maruti and Blossom brands (their own brands) up to November 2003. They have exclusively manufactured and cleared Maniyar brand plastic moulded chairs, baby chairs and stools from December 2003 onwards. Maniyar

brand belongs to M/s. Maniyar Plast Limited, Jalgaon, who also manufacture the same goods with same brand. This fact is confirmed as varieties of the said goods mentioned in the stock statements maintained by Shri Pavan Soni and Shri Anand Sarda and the varieties mentioned at page 1 (price list of M/s. Maniyar Plast Ltd) of record Sl. No.2 are same. This fact is also confirmed as the stock of goods, available during the course of search and seizure of the same vide panchanama dated 06.10.2005 bear the brand name of Maniyar embossed on them. Further the concerned persons in their respective statements confirmed that M1 manufactured the said goods with the brand name Maniyar from December 2003 onwards. The dealers/buyers of the said goods also confirmed in their respective statements that they received Maniyar brand plastic chairs and stools from MI from December 2003 onwards. Shri Shrikanth Maniyar, Director of M/s. Maniyar Plast Ltd., has stated in his statement dated 18.11.2005 that Maniyar brand, with which MI manufactured the said goods, is owned by M/s. Maniyar Plast Ltd, who also manufacture the plastic moulded chairs and stools with the same brand name. Maniyar brand is being embossed on the said chairs and stools. In addition, MI are affixing the labels containing Maniyar brand, as evidenced by the labels recovered from them (Annexure C1-1) and the labels affixed on the seized goods. MI are not registered with Central Excise department from the beginning and did not pay any Central Excise duty on the said plastic moulded chairs, baby chairs and stools manufactured and cleared by them.

18. A careful look at paragraph 4 of the Exemption Notification shows that to be deprived of the benefit of the Exemption Notification, two preconditions are to be satisfied namely (a) that the specified goods should bear a brand name or trade name; and (b) that the brand name or trade name should be that of another person. As to what constitutes a brand name or trade name is indicated in the Explanation under para-5 of the Exemption Notification. A combined reading of clauses (A) and (B) would show that to be a brand name or trade name, the following criteria should be satisfied:

- (1) It must be a name or mark such as symbol, monogram, label, signature or invented word or writing;
- (2) It must be used in relation to such specified goods, for the purpose of indicating a connection in the course of trade between such goods and some person using such name or mark, with or without any indication of the identity of that person; and
- (3) The mere fact that the specified goods manufactured by a person bear a brand name or trade name of another manufacturer, is not sufficient to conclude that those goods are manufactured by such other manufacturer or trader.

19. Therefore, it is clear that a person may be taken to be manufacturing specified goods, bearing a brand name or trade name only if the name, mark or symbol used as such, is intended to indicate a connection in the course of trade

between such specified goods and some person using such mark or name. If the use of the brand name or trade name is not intended for the purpose of indicating a connection in the course of trade between such specified goods and the person using such name or mark, then the same may not fall within the definition of the expression brand name or trade name under the Explanation under paragraph 5 of the Exemption Notification.

20. In the light of the definition of the expressions brand name and trade name, given in the Explanation under the para-5 of the Exemption Notification, the Adjudicating Authority ought to have proved in the case of Annapurna Industries that the names Rosekamal, Lalkamal etc., had a connection in the course of trade between plastic moulded chairs and Rahmatullah. Similarly the revenue ought to have proved in the case of Maheswari Industries that the use of the name Maniyar was with an intention to indicate a connection in the course of trade between plastic moulded chairs and the company Maniyar Plast Limited.

21. The requirement of a connection in the course of trade between the specified goods and the person using a brand name or mark, is a requirement traceable to the Intellectual Property Rights Regime. While the right to prevent others from infringing the trade name or trade mark of a person flows out of registration of the trade name or trade mark in accordance with the statute, the right to prevent others from passing off their goods as that of another, originated from the common law regime. In the case of a registered trade mark, the registration itself may be sufficient for the proprietor of a mark, without establishing a reputation in the market, to seek a prohibitive order. But in the case of an unregistered mark, the person seeking relief should establish a reputation in the market. The establishment of such a reputation, under the IPR regime is actually tested with reference to the existence of a connection in the course of trade between such goods and the person using the mark or name on such goods.

22. Since the definition of the expressions brand name and trade name under Explanation (A) of the Exemption Notification cover both registered and unregistered marks, the Explanation (A) also uses the words connection in the course of trade.

23. Therefore, if the revenue wants to deny the benefit of the Exemption Notification to the appellants herein, the revenue was obliged to establish that in the eyes of the public, there was a connection in the course of trade (1) between Rosekamal and Lalkamal Chairs with Rahmatullah and (2) between Maniyar Chairs and Maniyar Plast Limited. The consumers of the plastic moulded chairs, should be in a position to link Rosekamal and Lalkamal chairs with Rahmatullah and Maniyar with Maniyar Plast Limited. If in the minds of the consuming public such a connection in the course of trade, does not exist, then what was sold under these names cannot be treated to have been sold under a brand name or a trade name within the meaning of Explanation (A) under Para 5 of the Exemption Notification.

24. In the cases on hand, all that the revenue has alleged is that Rahmatullah sold plastic moulds imported by him containing these names. In fact Rahmatullah was not even the creator of the names Lalkamal and Rosekamal etc. He claimed to have imported the moulds, which also had these names inscribed in the moulds. Therefore, there was no claim either by Rahmatullah or by the Department that in the mind of the public a connection in the course of trade had been established between the specified goods and Rahmatullah. The same is the case in respect of Maniyar also.

25. It is this essential requirement of establishment or existence of a connection in the course of trade between the specified goods and their manufacturer that has been overlooked by the Department as well as by the CESTAT. Hence, we are of the considered view that the first question of law is to be answered in favour of the appellants.

26. As a matter of fact even in cases where the registered proprietor of a trade mark had assigned it in favour of an Independent Manufacturer, the Supreme Court took a position that the benefit of exemption cannot be denied. This was in the case of Commissioner of Central Excise, Bangalore v. OTTO Bilz (India) Pvt. Ltd. In that case, the trade mark BILZ was owned by a German company and they had assigned it in favour of the Assessee which was a small scale industry, for use in India exclusively. Therefore, the Supreme Court held that the Assessee cannot be considered to be using the trade mark of another person, when they had a right to use the trade mark.

27. Similarly, in Commissioner of Central Excise, Hyderabad v. Stangen Immuno Diagnostics , the Supreme Court was concerned with a case where the Assessee was using a brand name that was registered in favour of another person. But the Assessee claimed that they had an independent right to use the name and logo. While remitting the matter back to the Commissioner for a fresh consideration, the Supreme Court indicated in paragraph 12 of its order that what is necessary in such cases is to see whether the trade name or trade mark establishes a connection between the product and the person. Therefore, as we have indicated earlier, the revenue should establish a connection in the course of trade between the goods and the owner of the trade mark or trade name.

28. Again in Commissioner of Central Excise, Pune-1 v. General Pharmaceuticals (P) Ltd .,, the assessee was alleged to be using the trade mark of another company. When that other company filed an affidavit stating that they had no objection to the use of the trade mark by the assessee, the Tribunal held the issue in favour of the assessee. The same was upheld by the Supreme Court.

29. However, relying upon the decision of the Supreme Court in Commissioner of Central Excise, Trichy v. Grasim Industries Ltd ., it is contended by Ms. Sundari R. Pisupati, learned standing counsel for the Department that the expressions brand name and trade name are qualified by the words that is to say. Therefore, it is contended by the learned standing counsel that any symbol or monogram or

mark could also be a brand name or trade name.

30. We have no quarrel with the above proposition. But what is important, as emphasized by the Supreme Court in *Grasim Industries Ltd* itself is that the use of the name must indicate a connection in the course of trade between the product and the company. It is this essential requirement that is not satisfied in these cases.

31. In the next decision namely *Commissioner of Central Excise, Delhi v. Ace Auto Comp . Ltd .*, relied upon by the learned standing counsel for the Department, the small scale industry was actually manufacturing clutch plates and covered assemblies under its own brand name Ace along with the symbol and logo of TATA. Therefore, the Supreme Court came to the conclusion that it was a clear case of use of a brand name belonging to another person. Therefore, the said decision is of no avail to the respondents.

32. We should point out at this juncture that the object of the Exemption Notification is to confer a benefit upon small scale industries having a turnover of less than the prescribed limit. The purpose of the notification is to encourage small scale industries. But at the same time the notification sought to exclude small ancillary units of Big Industrial Houses which had a brand name or a trade name. These are the days when huge Industrial Houses outsource the production of their products to small units. When these small scale industries actually work on the wings of Big Industrial Houses, they cease to require any protection or exemption. The object of Para 4 of the Exemption Notification in excluding Small Scale Industries manufacturing goods bearing a brand name or trade name, is to deny the benefit of exemption to those units which have the support of big brand names or trade names. Therefore, the Adjudicating Authority ought to have understood Paragraph 4 of the Exemption Notification in the right perspective.

33. The law on the scope of interpretation of Exemption Notifications is fairly well settled. Whether or not a person would come within the purview of the Exemption Notification, would depend on the manner in which the Exemption Notification is couched and at this stage strict rules of interpretation would apply. But once it is found that a person is entitled to the benefit of the Exemption Notification, the interpretation of the clauses containing the procedural aspects may have to be liberal.

34. In the cases on hand, there is no dispute about the fact that the appellants herein are Small Scale Industrial Houses entitled to the benefit of the Exemption Notification. Therefore, the appellants are entitled to a gate pass to enter into the domain created by the Exemption Notification. After such entry, the question as to whether they fall within the exclusion contemplated under paragraph 4 may have to be seen in the context of the object and scope of the Original Notification. If so viewed, it will be clear that neither Rahmatullah nor Maniyar Plast Limited can be said to have established such a reputation in the market

that a connection in the course of trade between them and their products is established through the brand name. Hence, the view taken by the authorities including the Tribunal is contrary to the object and purpose of the Exemption Notification.

35. Therefore, the first question of law is to be answered in favour of the appellants.

QUESTION No.(ii):

37. The second question of law revolves around the circular bearing Circular No.52/52/94, dated 1-9-1994 and it does not require great elaboration. The said Circular was as a result of a clarification sought by the Ministry in respect of a practice prevalent in the lock industry. In the lock industry, there was a practice to use a name or mark, even though such mark or name is not owned by any particular person. Such marks are freely available and any manufacturer can use them. Therefore, the opinion of the Law Ministry was sought in this regard and the same was extracted in the Circular dated 01-9-1994. Paragraphs-3 and 4 of the Circular dated 01-9-1994 read as follows:

3. In this connection, the relevant extracts of the opinion of the Law Ministry are reproduced below :-

Perusal of the said explanation (Explanation IX to the Notification No.1/93-C.E.) will show that to satisfy the requirements of brand name or trade name, it is necessary that the trade name must indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication or identity of that person. Unless connection between the trade name and the person with whom that trade name is to be identified can be established, the requirement of brand name or trade name as provided for in the said notification will not be satisfied. It is an admitted case of the department that in respect of locks, the units are making locks bearing the same name or mark even though there is no person who claims ownership to that mark or name. The names being used in the manufacture of locks by these small scale units do not belong to any particular manufacturer and any unit is free to use any name. Therefore, in our view, even without the issue of Notification of 4th/11th May, 1994 units which are using trade name or brand name, which does not belong to any person, were eligible for exemption under the said notification because of explanation IX in the said notification. Admittedly, the notification, dated 4th/11th May, 1994 is clarificatory in nature and the purpose could have been achieved by issuing a clarification to the field formations.

4. From the above mentioned opinion of the Law Ministry, it is clear that if a brand name is not owned by any particular person, the use thereof will not deprive a unit of the benefit of the small scale exemption scheme. This applies not only to locks but to all other goods specified in Notification No.1/93-C.E.

38. It is clear from the above that if certain names are available in the market

freehold for anyone to use, the industry cannot be taken to be manufacturing goods under the brand name of some other manufacturer.

39. Therefore, the second question of law is also to be answered in favour of the appellants. Accordingly, both questions of law are answered in favour of the appellants. As a result, the Original Demands are liable to be set aside. Once the demands go, the penalties would also go as a consequence.

40. Therefore, all the appeals are allowed. No costs. The miscellaneous petitions, if any, pending in these appeals shall stand closed. No costs.