
(2004) 01 BOM CK 0041
In the Bombay High Court
Case No : Writ Petition No. 1082 of 1994

Phoenix Mills Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 3

Citation : (2004) 95 ECC 400 : (2004) 168 ELT 310 : (2004) 4 MhLj 335

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Prakash Shah and Jitendra, instructed by Anderson Legal India, for the Appellant; A.J. Rana and K.R. Chaudhary, instructed by T.C. Kaushik, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J.—The short issue involved in the present petition relates to the excisability of the preparation of "printing paste" by the petitioners.

The Facts:

2. The facts giving rise to the present petition as stated in the petition are that the petitioners are, inter alia, engaged in the manufacture of cotton fabrics and man-made fabrics. To carry out the printing operation the petitioners are required to make "printing paste" by using, inter alia, various duty paid organic dyes which they purchase from the dye-stuff manufacturers. The printing paste is an ad hoc preparation. According to the petitioners, for making a pigment printing paste, formulated, standardised and prepared forms of pigments emulsions are used as ingredients and/or mixed in different concentrations with other essential ingredients because the final printing paste does not contain the standard amount of pigment since the depth of shade required varies in the final design produced on the fabrics. According to the petitioners, printing paste is not a marketable commodity but tailor made item to suit the requirements of the

mill, fabric design and the machine on which it has to be used to fix the print on the fabric. Only the individual mill can use the printing paste prepared by the printing master.

3. The Tariff Act came into force with effect from 28th February, 1986. By virtue of Trade Notice No. 48/86, dated 14th July, 1986, the Collectorate clarified that the Chapter Note 6 would apply only to conversion of unformulated/un-standardised or unprepared forms into formulated, standardised or prepared forms ready for use and that mere re-packing or re-labeling of duty paid dyes would not amount to "manufacture" as no new product emerges. Similarly, the addition to various ingredients as set out therein or mixing of two or more formulated standardised and prepared dyes undertaking in the preparation of dye bath for dying and printing purposes would not amount to "manufacture" as these processes were basically in relation to use of such formulated, standardised and prepared form.

4. By order dated 28th May, 1992, the Board directed the respondents to classify the printing paste prepared by the textile mills including the petitioners under Chapter sub-heading 3204.29 of the Tariff Act. In turn, on 31st July, 1992, the Collector of Central Excise, Bombay-I issued Trade Notice No. 25/92 and clarified for the information of the trade that printing paste was appropriately required to be classified under sub-heading 3204.29 of the Tariff Act and that this trade notice was based on the Board's letter No. F. No. 95/1/91-CX. 3, dated 28th May, 1992.

5. By notice to show cause-cum-demand read with corrigendum dated 2nd November, 1992, respondent No. 3, inter alia, called upon the petitioners to show cause to the Additional Collector of Central Excise, Bombay-I as to why the central excise duty amounting to Rs. 20,42,428.20 should not be demanded and recovered from the petitioners under proviso (1) to Section 11A(1) of the then Central Excises and Salt Act, 1994 and penalty should not be imposed on it. The petitioners by its letter dated 31st December, 1992 replied to the said show cause notice, inter alia, contending that the preparation of printing paste does not amount to "manufacture" and that the printing paste cannot be said to be "goods" within the meaning of the Act and that it is not capable of being brought to the market for being bought and sold.

6. By another show cause notice-cum-corrigendum dated 4th February, 1993, again respondent No. 3 called upon the petitioners to show cause to respondent No. 2 as to why the central excise duty amounting to Rs. 7,89,660.67 should not be demanded and recovered from it u/s 11A(1) of the Act and penalty should not be imposed on it. It was, inter alia, alleged in the said show cause notice that the petitioners bring duty paid colour from market and mix it up with other material such as chemicals and kerosene and this mixing brings into existence a new product known as printing paste, classifiable under Chapter sub-heading No. 3204.29 of the Tariff Act. It was further alleged in the said show cause notice that the petitioners during the period from 1st July, 1992 to 31st August, 1992

had manufactured and captively consumed "printing paste" falling under Chapter 32 of the Tariff Act for the purposes of printing of fabrics without payment of central excise duty leviable and due thereon.

7. The petitioners vide its letter dated 10th February, 1993 replied to the aforesaid show cause notice and, specifically, mentioned therein that, vide order No. 2/93, dated 21st April, 1993 issued by the Board in exercise of powers conferred upon it; u/s 35B of the Act, it was, inter alia, clarified that preparation of printing paste prepared from formulated, standardised or prepared dyes by simple mixing with other material shall not amount to "manufacture", as such it shall not be classifiable under Chapter sub-heading 3204.29 of the Tariff Act.

8. The petitioners were granted personal hearing by respondent No. 3 on 23rd June, 1993 and 16th March, 1994. The petitioners specifically relied upon Order No. 2/93, dated 21st April, 1993 issued by the Board in respect of their contentions.

9. According to the petitioners, printing paste consists of different essential ingredients having some common properties and some different. Those properties are mixed depending on the requirement at the time of use thereof. Each ingredient has particular role to play in printing, details of which are not necessary for the present purpose. Thus, according to the petitioners, for the following reasons printing paste are not excisable goods :-

(a) It being a physical mixture cannot be said to be a result of manufacture as defined under the Central Excises and Salt Act, 1994 ("Act" for short) or the Central Excise Tariff Act, 1985 ("Tariff Act" for short) as clarified by the Central Board of Excise and Customs ("the Board" for short) vide order No. 2/93, dated 21st April, 1993;

(b) It is not "goods" because it is not capable of being brought into the market to be bought and sold as it has a very limited shelf-life; and

(c) It being unformulated, unstandardised or unprepared forms of formulated, standardised, prepared dyes including pigments dyes cannot by virtue of Chapter 6 of the Chapter 32 of the Tariff Act, be the result of manufacture.

10. The respondent No. 2 after hearing the petitioners vide his order-in-original confirmed the demand made pursuant to the aforesaid two show cause notices holding that the preparation of printing paste amounts to manufacture and in view of the earlier order of the Board dated 21st April, 1993, it is classifiable under Chapter sub-heading 3204.29.

11. Being aggrieved by the aforesaid order-in-original, the petitioners invoked writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India by filing present petition.

Submissions:

12. At the outset, Mr. Prakash Shah, learned Counsel for the petitioners urged

that the order No. 2/93, dated 21st April, 1993 issued by the Board is binding upon the respondents which clarified that the preparation of printing paste out of formulated, standardised and prepared dyes by simply mixing with other material does not amount to "manufacture", as such not classifiable under Chapter sub-heading 3204.29. Therefore, no central excise duty can be levied or recovered on the preparation of printing paste as it does not amount to "manufacture". He further criticised the impugned order saying that the respondent No. 2 has not decided the issue independently. He has merely relied upon the order of his superior and thereby abdicated his powers which has vitiated the impugned order. It is further submitted that respondent No. 2 has failed to take into consideration the affidavit of experts in respect of shelf-life of the printing paste. It is further contended that the findings recorded by respondent No. 2 that the concept of "manufacture" and marketability are not the determining factors in order to define suitability of any product under Central Excise Law is unsustainable in law in view of the judgment of the Apex Court in the case of Collector of Central Excise, Baroda Vs. M/s. Ambalal Sarabhi Enterprises (P) Ltd., and Bhore Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay, . The learned Counsel for the petitioners thus contends that the impugned order is liable to be quashed and set aside.

Per contra:

13. Mr. A.J. Rana, learned Senior Counsel for the respondents tried to support the impugned order and contended that no case as argued before this Court was made out by the petitioners in their reply to the show cause notices nor it has pleaded that the printing paste was prepared from formulated, standardised and prepared dyes with simple mixture with other materials. He, thus, submits that it is not open for the petitioners to contend that the printing paste prepared by them does not amount to "manufacture" and, as such, not classifiable under Chapter sub-heading 3204.29 of the Tariff Act. He further submitted that the order No. 2/93, dated 21st April, 1993 issued by the Board is of no assistance to the petitioners in view of the fact that the petitioners could not substantially prove that the printing paste which was used was manufactured out of standardised/formulated pigments/dyes by simple mixing, by leading cogent evidence. He submits that the petitioners could not produce any evidence to establish their manufacturing process.

14. Mr. Rana further urged that the gate passes produced by the petitioners did not establish or did not connect the product of the petitioner in question with the certificate issued, as such the same cannot be relied upon by the petitioners. He submits that no material was placed by the petitioners to show that the printing paste actually used was actually purchased from the very establishment whose certificate was produced. He also pointed out that neither any of the affidavits makes reference to the petitioner mill as a purchaser of printing paste nor do they refer to their transaction with the petitioners. He, thus, submits that no link is established between these documents and the printing paste used by the

petitioners. Under these circumstances, in his submission, none of the contentions of the petitioners can be accepted. In addition to these submissions, Mr. Rana further contended that burden of proof was on the petitioners to establish that the printing paste used by it used to be prepared from formulated/ standardised or prepared dyes and therefore, it did not amount to manufacture. He thus prayed that the petition is liable to be dismissed holding it to be without any substance.

In rejoinder:

15. Mr. Shah, learned Counsel for the petitioners taking last submission first, submitted that it is not correct on the part of the Revenue to contend that the burden of proof lies on the petitioners. According to him, in view of the Apex Court judgment in the case of Commissioner of Central Excise, Chandigarh-I and Collector of Central Excise, Chandigarh Vs. Markfed Vanaspati and Allied Industries and Others, , burden of proof is on the Revenue to establish that the printing paste used by the petitioners was an outcome of the process of "manufacture", He has also relied upon the judgment of the Larger Bench of the Apex Court in the case of Union of India and others Vs. Indian Aluminium Co. Ltd. and another, to contend that it is a settled law that the burden to prove that there was "manufacture" and what was used was manufactured by the petitioners was on the Revenue. He further submitted that in view of the judgment of the Apex Court in the case of Bhor Industries Ltd. (supra) liability to pay excise duty arises only when manufacture of goods is established coupled with the fact that what was manufactured was marketable or capable of being marketed. According to him the marketability is an essential ingredient in order to be dutiable under the Schedule to the Tariff Act.

16. Having considered the rival submissions at length, the controversy lies in a very narrow compass which can be adjudicated upon the text of the show cause notices itself. The show cause notice dated 2nd November, 1992 incorporated at Exh. "E" issued by respondent No. 3 specifically, states, "for the purposes of printing of fabric the petitioners require "printing paste", and the assessee bring duty paid colour from market and mix it up with other material such as chemicals and kerosene. The mixing giving rise to the substance known as "printing paste" is classifiable under Chapter sub-heading 3204.29 of the Tariff Act".

The second show cause notice dated 4th February, 1993 also incorporates same averments. When the show cause notices were issued the Order No. 2/93, dated 21st April, 1993 issued by the Board was not in the field. Therefore, the "printing paste" prepared from formulated, standardised and prepared dyes by simple mixing with other materials bringing into existence a product known as "printing paste" was treated as "manufacture" by the respondents for all the time till the clarification issued by the Board could see the light of the day. The clarification issued by the Board that the printing paste prepared from formulated, standardised and prepared dyes by simple mixing with other materials shall not amount to "manufacture", as such, not classifiable under Chapter sub-heading

3204.29 of the Tariff Act has taken out the wind of the show cause notices issued by the Revenue to the petitioners. As a matter of fact, the burden to prove that the printing paste used by the petitioners was not manufactured from the formulated, standardised or prepared dyes by simple mixing with other material was on the Revenue, especially, when the show cause notices issued were pregnant with the admission on the part of the Revenue as indicated in the opening part of this para. The Revenue having chosen to issue show cause notices, burden of proof was on the Revenue. Mr. Rana is not right in contending that the burden of proof was on the petitioners. The burden always lies on the person who asserts that the particular goods are excisable. It lies at first on the party who would be unsuccessful if no evidence at all was given on either side. There is essential distinction between burden of proof and onus of proof. The burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Onus means the duty of adducing evidence. Assuming that onus, has shifted on the petitioner, then, the evidence produced by the petitioners has substantially established the link between the material supplied and used by the petitioners.

17. The concept of marketability to which the respondent No. 2 had given go-bye cannot be said to be legal in view of the law laid down by the Apex Court in the case of Bhor Industries Ltd. (supra) and reiterated in the case of Ambalal Sarabhai Enterprises (supra); wherein the Apex Court ruled that marketability is an essential ingredient in order to make the goods dutiable under the Schedule to the Tariff Act. Thus, taking overall view of the matter the impugned order cannot stand to the scrutiny of law and the same is liable to be quashed and set aside. The impugned order dated 31st March, 1994 is thus quashed and set aside.

In the result, petition is allowed. Rule is made absolute in terms of this order with no order as to costs.