

(1976) 04 CAL CK 0028
In the Calcutta High Court
Case No : Matter No. 211 of 1976

Saifuddin Ebrahimbhai Vadnagarwalla and Another APPELLANT
Vs
Assistant Commissioner of Commercial Taxes and Others RESPONDENT

Date of Decision : 30-04-1976

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 2
Constitution of India, 1950 — Article 226

Citation : (1977) 1 ILR (Cal) 60 : (1976) 38 STC 463

Hon'ble Judges : Ramendra Mohan Dutta, J

Bench : Single Bench

Advocate : Gopal Chakravarti, Narayan Bhattacharjee and Shyama Charan Ganguly, for the Appellant; Sanjoy Bhattacharjee and Ramendra Chandra Deb, for the Respondent

Final Decision : Allowed

Judgement

Ramendra Mohan Dutta, J.—In this application the main point which is involved is whether sales tax is liable to be exempted on "rubberised cotton fabrics", of which the petitioner is a dealer, in respect of the period from January, 1970, till 6th April, 1975. In other words, whether "rubberised cotton fabrics" would come within the meaning of "cotton fabrics" as provided under item 19 of the First Schedule to the Central Excises and Salt Act, 1944 (Act 1 of 1944), which has been referred to in the explanation to Rule 3(28)(a) and (b) of the Bengal Sales Tax Rules, 1941, to give the meaning of the expression "cotton fabrics". The said item 19 of the Act of 1944 provides as follows:

19. Cotton fabrics. -- "Cotton fabrics" means all varieties of fabrics manufactured either wholly or partly from cotton, and include dhoties, sarees, chadars, bed-sheets, bed-spreads, counterpanes and table-cloths, but do not include any such fabrics --

(a) if it contains 40 per cent or more by weight of wool;

(b) if it contains 40 per cent or more by weight of silk ; or

(c) if it contains 60 per cent or more by weight of rayon or artificial silk;.

2. Under Rule 3(28){a) and (b) of the Bengal Sales Tax Rules, 1941, framed under the Bengal Finance (Sales Tax) Act (6 of 1941), and as was in force up to 6th April, 1975, it was provided as follows:

3. In calculating his taxable turnover a registered dealer may deduct from his turnover the following, namely: --

(28)(a) Sales of cotton fabrics, rayon or artificial silk fabrics, woollen fabrics and tobacco other than cigarettes ;

(b) Sales of cotton fabrics, rayon or artificial silk fabrics and woollen fabrics when dyed or printed after they come out of the mill/loom ;

(c) Sales of mill-made cotton fabrics embroidered after they come out of the mill.

Explanation. -- In this clause, the expressions "cotton fabrics", "rayon or artificial silk fabrics", "woollen fabrics" and "tobacco" respectively have the same meaning as in items 19, 22, 21 and 4 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of ,1944).

3. The facts shortly are as follows: Petitioner No. 2, S. Yahya & Co., is a registered dealer under the Bengal Finance (Sales Tax) Act, 1941, and also under the Central Sales Tax Act, 1956, and holds proper registration certificates. The petitioners are dealing in various commodities including rubberised cotton fabrics, rubberised cotton belting, etc., in which both cotton and rubber are mixed up by a manufacturing process. In respect of the said items the petitioners claim exemption in its returns filed with the sales tax authorities on the ground that they come within the meaning of the expression "cotton fabrics", which had been exempted from such sales tax. The granting of such exemption was withdrawn by the authorities concerned in respect of the period commencing from January to December, 1970, and, accordingly, the petitioner preferred appeals, but the Assistant Commissioner of Commercial Taxes also dismissed such appeals. The petitioners have claimed relief in this application not only in respect of the said four quarters of 1970 but also the periods subsequent thereto up to 6th April, 1975, after which an amendment was brought into the aforesaid provision by substitution of a new Rule 3(28)(a) whereby "rubberised cotton fabrics" were not included within the exempted articles and such exemption was withdrawn and made taxable.

4. For the said four quarters of 1970, the assessment had been completed by respondent No. 2, Commercial Tax Officer, China Bazar Charge, by his order dated 2nd July, 1974. The petitioners' claim for exemption of the taxable turnover in respect of the said rubberised cotton fabrics was turned down and the same was included within the total gross turnover. By rejecting the petitioners' claim for exemption from sales tax of cotton fabrics from the gross

turnover, the authorities imposed additional tax of Rs. 11,601.33 under the State Act and Rs. 1,353.82 under the Central Act for the said four quarters for the year 1970. The said Commercial Tax Officer, respondent No. 2 herein, while rejecting the claim as aforesaid treated the entire turnover for exemption as only one item of rubberised cotton belting although the turnover included many other items. It appears that the respondents have purported to take the view that the superimposition of cotton cloth with rubber made it a commodity different, from cotton fabrics in spite of the fact that the meaning which has been given to the expression "cotton fabrics" is wide enough to include rubberised cotton fabrics. It is contended that by taking such a narrow view the authorities have acted in express violation of the said statute. The authorities concerned understood the matter all throughout in the correct way up to the quarter ending 1969 and, on that basis, granted such exemption in respect of such rubberised cotton belting or fabrics, but it would seem that since the publication of a judgment [1973] 31 S.T.C. 115, of the Gujarat High Court touching this point the authorities have been influenced by the same to change their mind to the prejudice of the petitioners.

5. The petitioners thereafter preferred separate appeals both under the State Act as also under the Central Act before the Assistant Commissioner of Commercial Taxes, Barrabazar Circle, respondent No. 1 herein. The said two appeals were disposed of by a common order made by the said respondent No. 1 by his order dated 7th August, 1975, whereby the said two appeals were rejected and the orders of respondent No. 2 passed in respect of the said assessment for the said four quarters for 1970 were confirmed. The petitioners thereupon moved this writ court under Article 226 of the Constitution of India.

6. On behalf of the respondents, a preliminary point of law has been taken as regards the maintainability of this application. It is contended that this application is not maintainable in view of the fact that the petitioners have moved this court without first exhausting the alternative remedy provided by the said statute to seek their remedy; but such remedy should not be made available to the petitioners because they have not given any particulars in the petition to satisfy this court as to why they should not pursue the further remedy after dismissal of their appeal by taking the matter to the Tribunal as provided by the said statute.

7. It is contended that the case made out in the petition is limited to the said four quarters for the year 1970. There is no averment in respect of the periods subsequent thereto but only in the prayer portion the same has been referred to, while claiming an order for injunction. No reason has been ascribed as to why such order for injunction should be granted in respect of the said subsequent periods. Accordingly, the petitioners are not entitled to seek their remedy in this writ court but they should be sent to their proper forum as provided by the statute. If the petitioners were to move this court the petitioners are obliged to satisfy this court as to why the petitioners could not pursue their remedy before

the said authorities any further after the petitioners' appeals were dismissed by the appellate authority. Accordingly, the petitioners, not having done so, are not entitled to such an omnibus order for injunction on a petition under Article 226 of the Constitution. Accordingly, this petition is not maintainable in law.

8. In answer to the said preliminary point Mr. Chakravarti, the learned counsel appearing on behalf of the petitioners, contends that his clients were getting such exemption all throughout up to the quarter ending 1969 in respect of the identical goods, viz., rubberised cotton belting, under the identical law as was provided by the said statute granting such exemption and which provisions continued to remain the same until 6th April, 1975, when the said Rule 3(28)(a) was expressly substituted so as to include rubberised cotton fabrics within the list of articles, which were not exempted from sales tax. The petitioners have no complaint so far as the subsequent period starting from the amendment is concerned. It is contended that both the Commercial Tax Officer as also the Assistant Commissioner, Commercial Taxes, have applied the law as laid down by the said Gujarat High Court case in Hind Engineering Co., Rajkot Vs. Commissioner of Sales Tax, , and have been influenced by the said decision and failed to apply their mind to ascertain the correct law as laid down by the said judgment and thereby exceeded their jurisdiction by failing to apply the statutory provisions of the Bengal Sales Tax Rules, 1941, which was not considered in the said Gujarat High Court case [1973] 31 S.T.C. 115 cal. Even apart from that, Mr. Chakravarti, the learned counsel, drew my attention to paragraph 29 of the petition, wherein the petitioners have stated that they have no further effective, adequate, speedy and alternative remedy. Accordingly, it would be futile and unnecessarily expensive to pursue such remedy where the same results would be bound to follow. The petitioners have also made averments in the petition regarding the non-applicability of the said decision of the Gujarat High Court to the facts and circumstances of this case and about the respondents' acting improperly, unjustly, unfairly, illegally, without and/or in excess of jurisdiction and about their failing to exercise their jurisdiction vested in them in law. There is further averment in the petition that respondent No. 1 had committed an error apparent on the face of the record of assessment.

9. The learned counsel also refers to paragraph 26 of the petition wherein it has been stated by the petitioners that unless the order for injunction would be granted restraining the authorities concerned from assessment, the petitioners will suffer irreparable loss and injury in that the assessment raising illegally a huge demand of tax will bring complete ruination of the petitioners' business. It has been contended that this averment is sufficient explanation as to why the petitioners cannot wait any further and why the relief must be sought for in the writ court so that the business might be saved thereby. It is contended that on the basis of such exemption the petitioners have entered into various contracts and have done extensive business, but, if the same is not allowed in the same way as it was being allowed in the previous years, the financial condition of the business would suffer a great set back. Mr. Chakravarti also contends that in so

far as the facts are concerned there is no dispute. The only point is whether the Gujarat High Court case [1973] 31 S.T.C. 115 ghc applies in respect of the expression "rubberised cotton fabrics" as defined by the Bengal Sales Tax Rules, 1941.

10. The preliminary point has been indicated in the affidavit-in-opposition filed on behalf of the respondents and in answer thereto the petitioners have filed an affidavit-in-reply dealing with the said allegations and have stated therein that since there is erroneous exercise of jurisdiction by the respondents, the petitioners are entitled to seek speedy and more effective remedy by an application under Article 226 of the Constitution. It is contended that the further remedy as provided for revision by a petition before the Tribunal u/s 20 of the Bengal Finance (Sales Tax) Act, 1941, would be more costly than what would cost the petitioners in making the application before this writ court. In paragraph 3(a) of the affidavit-in-reply, it has been stated as follows :

....I further say that a revision petition can be made before the West Bengal Commercial Taxes Tribunal u/s 20 of the Bengal Finance (Sales Tax) Act, 1941, and for obtaining stay pending disposal of the revision application further court-fee and onerous procedure has been prescribed. The right thereby given is, therefore, in no sense a remedy that Article 226 of the Constitution of India provides.

11. Mr. Chakravarti points out that regarding the period subsequent to 1970 and up to 6th April, 1975, it has been pleaded that the position is exactly similar both in points of fact and in points of law and, as such, the relief by way of injunction has been prayed for in respect of the subsequent periods to prevent the multiplicity of proceedings. The facts in respect of rubberised cotton belting are the same in respect of the entire period up to 6th April, 1975, and, as such, the relief should be the same in respect of the said entire period. Under similar circumstances such relief has been granted by this court and, particularly, in National Rubber Works v. Commercial Tax Officer Matter No. 161(W) of 1964 -- (Calcutta High Court). as also in the case of Dilip Kumar Mukherjee Vs. Commercial Tax Officer and Others, . The petitioners have made averments regarding the aforesaid facts in paragraph 3(b) of the affidavit-in-reply. Mr. Chakravarti has also drawn my attention to the copies of notices for assessment for the subsequent periods up to 6th April, 1975, which have all been annexed to the affidavit-in-reply.

12. On behalf of the respondents, the case of Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others, , and the case of Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, ., have been relied on for the proposition that where the aggrieved party has an alternative remedy as provided by the Income Tax Act, but has chosen not to pursue the same and has been seeking to move the writ court, he must require a strong case to be made out to enable this court to entertain the writ petition. It is also contended that these two cases are authorities for the

proposition that where the assessee gives no explanation for not preferring the appeal, his writ petition should be dismissed in limine. It is contended that there is no explanation given in the petition as to why the petitioners had ceased to pursue the remedy provided by the Bengal Finance (Sales Tax) Act, 1941, and applied before this writ court for seeking his remedy.

13. On behalf of the petitioners, Mr. Chakravarti referred to the later Supreme Court case of *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, where the Supreme Court observed as follows :

We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

14. It is contended by Mr. Chakravarti that this court has entertained this application and the matter has been argued at length on merits and, accordingly, in any event, the application should not be dealt with only on the preliminary point. Mr. Chakravarti points out that the above observation was made in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, by Shah, J., sitting with Hegde, J., in the judgment delivered on 21st July, 1970. The very same learned Judges decided also the earlier case of *Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, the judgment whereof was delivered on 4th December, 1969, that is, a few months prior to the judgment in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*. It is contended that the High Court should follow the latest opinion of the Supreme Court whereby the Supreme Court had revised the earlier opinion as laid down in the case of *Sovachand Mulchand Vs. The Collector of Central Excise and Land Customs and Others*.

15. To my mind, quite apart from the above principles as laid down by the Supreme Court, the preliminary point cannot succeed, because there are enough materials on record wherefrom the court is satisfied that there is justification for the petitioners to apply before the writ court before exhausting the remedy as provided under the statute. I am satisfied that in the circumstances as stated hereinabove it is futile on the part of the petitioners to wait for the decision in respect of the several quarters' assessments, where identical question would be involved. The petitioners in the given circumstances have undoubtedly the more speedier and less expensive remedy in the writ jurisdiction of this court. I am satisfied also that the facts in respect of the period from January, 1970, till 6th April, 1975, are identical except for the amounts involved and, as such, one decision would govern the entire period of assessment. The petitioners have done business on the basis of tax exemption enjoyed by them all throughout and if, ultimately, the decision goes against the petitioners in respect of one assessment year, that is, for the four quarters of 1970, then the same would be an additional burden in so far as the petitioners' business is concerned. Besides that, it appears from the affidavit-in-reply of the petitioners that for obtaining a stay order after moving the West Bengal Commercial Taxes Tribunal, further

court-fees have to be paid and the same would be more costly than what would cost the petitioners in making this application before the writ court. Furthermore, as pointed out by Mr. Chakravarti, in the case of Dilip Kumar Mukherjee Vs. Commercial Tax Officer and Others, , such relief has been given to the petitioners in the said case under very similar circumstances in respect of the subsequent periods of assessment. For all these reasons, to my mind, the preliminary point has no merit and should be rejected.

16. It has to be noticed that the expression "cotton fabrics" as defined by item 19 of the First Schedule to the Central Excises and Salt Act, 1944, has been incorporated in the definition of "cotton fabrics" as provided under Rule 3(28) of the Bengal Sales Tax Rules, 1941. Whatever be the meaning of "cotton fabrics" in the said Act of 1944, the same would attach to the definition of "cotton fabrics" as provided by the Bengal Sales Tax Rules, 1941. It has to be remembered that this is a taxing statute and, as such, it has to be strictly construed and, accordingly, whatever meaning has been given to the expression has strictly to be applied to find out if a particular commodity comes within the meaning given by item 19 of the First Schedule to the Act of 1944. The expression means : (a) all varieties of fabrics which would undergo manufacturing process ; (b) it may be made only of cotton or partially from cotton and partially from other materials; (c) it would include certain specified items, namely, dhoties, sarees, chadars, bed-sheets, bed-spreads, counterpanes and table-cloths ; (d) the same would not include any such fabrics in the case of wool, silk and rayon or artificial silk if the same would exceed certain percentages mentioned therein in manufacturing the articles along with cotton. It would be noticed that the expression "cotton fabrics" has been defined under several other categories as well, but, for the purpose of this case, it is not necessary to go into the same. The opening words of the definition are : "means all varieties of fabrics" and significantly such fabrics must be manufactured fabrics. It is to be noticed that the expression "either wholly or partly from cotton" would signify that the fabrics so manufactured must contain some portion of cotton. The required percentage has not been mentioned there. But, in respect of certain fabrics, where cotton would be mixed with wool, silk, rayon or artificial silk, they must not exceed the percentage of such wool, silk, etc., as specified thereafter. In other words, if such articles, such as wool, silk, etc., as mentioned thereunder, would not exceed such percentages, then the same so mentioned would come within the meaning of the expression "cotton fabrics". It is an artificial definition in the sense that a special meaning has been attached to the expression "cotton fabrics" and, as such, the ordinary common sense or dictionary meaning would not be applicable to find out the meaning of the expression "cotton fabrics". Accordingly, it would be of little consequence that superimposition of cotton cloth with rubber would make it a different commodity or not as considered by the authorities concerned. What is to be enquired into is whether it comes within the meaning attached to the expression "cotton fabrics" as defined by item 19 of the First Schedule to the Central Act of 1944.

17. As stated hereinabove, Rule 3(28)(a) of the Bengal Sales Tax Rules, 1941, has been substituted by the West Bengal Government, Finance Department, Notification No. 1823-F.T. dated 1st April, 1975. And the same had come into effect from 7th April, 1975. The substituted Rule 3(28)(a), with explanation thereto, reads as follows :

Sales of all varieties of textile fabrics (other than satranchi, carpets and druggets) made wholly or partly of cotton, staple fibre, rayon, artificial silk or wool including handkerchiefs, towels, bed-sheets, bed-spreads, table-cloths, napkins, dusters, cotton velvets and velveteen, tapes, niwars and laces.

Explanation. -- In this sub-clause the expression "textile fabrics" does not include pure silk cloth, canvas cloth, rubberised, plasticised, rexine or water-proof cloth, belting and pipes including hose pipes.

18. From the above it would appear that the State Government has specifically withdrawn such exemption, inter alia, on canvas cloth, rubberised, plasticised, rexine or water-proof cloth, belting and pipes including hose pipes, so that such items are now excluded from the exemption from imposition of sales tax. The meaning given to item 19 is no longer applicable to the expression "cotton fabrics" and the expression now used under the Bengal Rules is textile fabrics instead of cotton fabrics. As stated herein-above, there is no dispute with regard to the period commencing from 7th April, 1975, as the same is covered by the new Rule 3(28)(a), which is substituted in the place and instead of the earlier one attached to the expression "cotton fabrics" and, accordingly, it has to be borne in mind that if the manufactured article would come within the definition of "cotton fabrics", as defined under item 19, then whether or not the manufactured fabric would change its character altogether or would be transformed into another substance would be of little consequence. Once the requirements of the definition would be complied with, there is an end of the matter. It would appear from the explanation to Rule 3(28) of the Bengal Sales Tax Rules, 1941, that the expression used therein "have the same meaning as in item 19..." In other words, the expression "cotton fabrics" within the meaning of the Bengal Sales Tax Rules would also mean all varieties of fabrics manufactured either wholly or partly from cotton with the inclusion of the items as enumerated under item 19 and with the exclusion of the items mentioned thereunder. It has further to be remembered that in so far as the assessment in the case before me is concerned, it relates to four quarters beginning from January and ending with December, 1970. There is no dispute before me as to the applicability of Rule 3(28) of the Bengal Sales Tax Rules, 1941, and item 19 of the First Schedule to the Central Excises and Salt Act, 1944, in respect of the assessment in question before me.

19. Keeping the above in mind, the Gujarat case [1973] 31 S.T.C. 115, has to be considered because it has to be noted that the said decision was made on the basis of the Bombay Sales Tax Act, 1959, and the assessment in question was in respect of the years prior to 1st March, 1966, It has been observed and noted at

page 122 of the Reports in the said Gujarat case [1973] 31 S.T.C. 115, that the expression "declared goods" was defined under Sub-section (10) of Section 2 of the Bombay Sales Tax Act, 1959, to mean declared goods as defined in the Central Sales Tax Act, 1956. It is observed that Section 7 of the said Act provides for a single point levy of sales tax or general sales tax on declared goods. By virtue of entry 15 of Schedule A, "cotton fabrics" were included among the goods, the sale or purchase of which was to be free from all taxes. Entry 15 of Schedule A read at that time as under :

"cotton fabrics" as defined in item No. 12 of the First Schedule to the Central Excises and Salt Act, 1944.

20. It has been noted in the said case that item 12 of the First Schedule to the Central Excises and Salt Act was, at the material time, in terms identical with the present item 19 of the said Act of 1944. It has further been noted in the said judgment that upon coming into force of the Bombay Ad: of 1959, exemption from liability to pay sales tax was granted to "cotton fabrics" and that the legislature, by reference, incorporated the definition of the said expression as found in the Central Excises and Salt Act, 1944, in the Bombay Act for defining the said article for its own purposes.

21. What has to be kept in view is the difference between the language used in the Bombay Act and the Bengal Act in defining the expression "cotton fabrics". In so far as the Bengal Act is concerned, the expression "have the same meaning as in item 19" does not create any difficulty to find out the scope of the said expression "cotton fabrics" and, more so, when it is in respect of the year 1970. But, in the Bombay Act, the matter related to a period in respect whereof difficulty arose to find out whether "cotton fabrics" was actually exempted from taxes or not. The expression used in the Bombay Act is "as defined in item No. 12". That has been particularly taken note of by the learned Judges of the Gujarat High Court as would appear from the following passage appearing at page 129 :

For the purpose of showing that rubberised cotton fabrics are treated as cotton fabrics within the meaning of the Central Excises and Salt Act, our attention was invited to a book entitled "Indian Customs and Central Excise Tariff", which is an official publication issued by the Department of Commercial Intelligence and Statistics, Government of India. It was published on 30th June, 1967, and sets out the rates of excise duty on excisable goods as on 30th June, 1967. Item 19 of the First Schedule is found at page 74 of this publication and at page 78 of the said publication, the notification of the Government of India under which some varieties of "cotton fabrics" have been exempted from "so much of duty as was in excess of the duty" specified in the said notification, is reproduced. The notification does not relate or refer to the payment of the additional excise duty, if any, leviable thereon. Besides, it appears from the text of the notification that the notification granting such exemption was first issued on 1st March, 1966, and that it was amended from time to time and the last of such amendment was

made by the notification dated 26th May, 1967. It would, therefore, appear that there is nothing to show that when item 19 was incorporated by reference into the Bombay Sales Tax Act by the notification dated 6th April, 1962, rubberised cotton fabrics were treated as covered by the said item. The subsequent additions or alterations to the Central Excises and Salt Act, which were made for the purpose of granting exemptions, cannot be deemed to have been incorporated into the Bombay Sales Tax Act....

22. The above observation of the learned Judges would clearly show the difficulties that they were confronted with in incorporating into the Bombay Sales Tax Act the said provisions as defined in the Central Excises and Salt Act, which was then in force at the material point of time. No evidence was adduced nor the said statute was brought to their Lordships' notice to show what was the exact state of affairs prior to 1962. Mr. Chakravarti has produced before me the Indian Customs Tariff, 44th issue, as was in operation on 31st December, 1957, published by the Department of Commercial Intelligence and Statistics, Government of India, Calcutta, which contains in item 12 the same definition of "cotton fabrics" as is to be found now in item 19 of the current tariff. It is contended by Mr. Chakravarti that if the said Indian Customs Tariff, as was in force in 1957, was available or brought to the notice of the learned Judges of the Gujarat High Court, then their decision might have been different.

23. To my mind, the case of Hind Engineering Co. [1973] 31 S.T.C. 115. was decided on the basis of the facts and circumstances involved in that case and the same should not be applied in so far as Rule 3(28) of the Bengal Sales Tax Rules of 1941 is concerned. There is no difficulty in this case to apply the provisions of Rule 3(28) of the Bengal Sales Tax Rules of 1941 read with item 19 of the Central Excises and Salt Act, 1944, and to find out whether rubberised cotton beltings have been exempted from sales tax or not. In the Gujarat case [1973] 31 S.T.C. 115, because of the difficulties, as indicated above, the entire legislative history had to be gone into and, thereafter, it was found out that in so far as rubberised belting was concerned, the same could not be applied to the definition as given in the said statute because no materials were placed before the court to apply the said statute in that case. Under such circumstances, the Gujarat case [1973] 31 S.T.C. 115 had to be decided on the basis of the popular sense of the word and by not applying the statutory provision as provided by law.

24. In the case of Dilip Kumar Mukherjee Vs. Commercial Tax Officer and Others, , the question for consideration was whether zarda could be included in the expression "Jobacco" of the category of chewing tobacco within the meaning of item 9 of the First Schedule to the Central Excises and Salt Act, 1944, in spite of the fact that for the purpose of manufacturing zarda various other ingredients such as essence jafran and tabak, besides tobacco cuttings were used to make it an attractive finish. It was held that even though thereby the character was changed yet it came within the meaning of item 9 of the First Schedule to the Act of 1944. Similarly, in the case of Tungabhadra Industries Ltd., Kurnool v.

Commercial Tax Officer, Kurnool [1960] 11 S.T.C. 827 at 835 (S.C.), the Supreme Court considered the question whether hydrogenated groundnut oil (commonly called vanaspati) was "groundnut oil" within the meaning of Rule 18(2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The Supreme Court after considering the matter from all these aspects, held on this point as follows :

There is no use to which the groundnut oil can be put for which the hydrogenated oil could not be used, nor is there any use to which the hydrogenated oil could be put for which raw oil could not be used. Similarly, we consider that hydrogenated oil still continues to be "groundnut oil" notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus improving its keeping qualities for those who desire to consume groundnut oil. In our opinion, the assessee-company was entitled to the benefit of the deduction of the purchase price of the kernel or groundnut, under Rule 18(2), which went into the manufacture of the hydrogenated groundnut oil from the sale turnover of such oil.

25. Similar consideration came up for decision before several courts of India.

26. In the case of B. Dar Laboratories v. State of Gujarat [1968] 22 S.T.C. 160, a Bench of the Gujarat High Court considered a case where the assessee was a manufacturing chemist who sold the preparation described as "Ipco Dental Creamy Snuff", which was generally applied to the gums. The preparation contained 55 per cent snuff, 40 per cent water, 2.5 per cent preservative and 2.5 per cent flavouring agents and it was in the form of a paste filled in collapsible tubes, which were packed in cartons. On the question whether it was tobacco and was exempt from sales tax under entry 49 in Schedule A to the Bombay Sales Tax Act, 1959, and the Central Excises and Salt Act, 1944, it was held that the articles sold by the assessee completely retained its essential character as snuff and has only certain flavouring agents, preservative and water added to it to change its physical condition in order to make it more acceptable to the customers who used it for application to the gums. The article was held to be tobacco and was, therefore, exempted from sales tax by virtue of entry 49 in Schedule A to the Bombay Sales Tax Act, 1959. In the case of State of Orissa v. Samsuddin Akbar Khan & Co. [1975] 35 S.T.C 179, a Bench of the Orissa High Court at Cuttack also considered a similar case whether gudakhu manufactured out of tobacco and having as its other constituents, lime, molasses, gerumati and some essence to give it flavour, was covered by the expression "tobacco" as defined in Section 2(c) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, and was exempted from tax under the Orissa Sales Tax Act, 1947, and the Central Sales Tax Act, 1956. This Orissa case⁸ has followed the above Calcutta case in Dilip Kumar Mukherjee Vs. Commercial Tax Officer and Others, , and the Gujarat case in B. Dar Laboratories v. State of Gujarat [1968] 22 S.T.C. 160. and held that gudakhu came within the definition of manufactured tobacco and, as such, was tax-free.

27. The only question which is left open is whether the relief should be granted to the petitioners in respect of the assessments for the period subsequent to December, 1970, up to 6th April, 1975. Such reliefs have been granted in the case of Dilip Kumar Mukherjee Vs. Commercial Tax Officer and Others, . To my mind, in this case the same facts and the same points of law are involved in respect of all these years and the matter dependent only on the construction of the statute and, the same having been done here, the petitioners should be entitled to get relief up to 6th April, 1975. In my opinion, Mr. Chakravarti's contentions are acceptable. Under those circumstances, I hold that "rubberised cotton fabrics" come within the meaning of the expression "cotton fabrics" as defined by the Bengal Sales Tax Rules, 1941, and are exempted from sales tax under Rule 3(28) of the Bengal Sales Tax Rules, 1941, and, as such, the disallowance of exemption on the said turnover by the respondents is without jurisdiction, ultra vires and void. I further hold that the decision reported in Hind Engineering Co., Rajkot v. Commissioner of Sales Tax [1973] 31 S.T.C. 115, of the Gujarat High Court is not applicable to the facts and circumstances of the instant case and by applying the said decision herein the respondents have acted with material irregularity and had assumed jurisdiction which they had not in assessing on the turnover relating to cotton fabrics, which includes "rubberised cotton fabrics" for the four quarters of the year 1970. The assessment in respect of the turnover relating to cotton fabrics, which includes "rubberised cotton fabrics", for the four quarters of the year 1970 is struck down.

28. In view of my above findings, the respondents cannot proceed with the assessment or demand for any subsequent period of assessment from the first quarter 1971 to 6th April, 1975, only in respect of cotton fabrics which includes rubberised cotton fabrics and, in the circumstances, a writ in the nature of prohibition do issue limited to the extent of cotton fabrics including rubberised fabrics alone. It is made clear that this will not prevent assessment in connection with the rest of the total turnover in respect of any assessment of returns as filed by the petitioner.

Accordingly, the rule is made absolute.

Let a writ in the nature of mandamus and prohibition issue.

There will be no order as to costs.