

(1988) 04 BOM CK 0060

In the Bombay High Court

Case No : Writ Petition No. 1795 of 1986

Sheel Thermoplastics Limited and another

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 15-04-1988

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (1988) 18 ECC 248 : (1988) 20 ECR 314 : (1988) 36 ELT 106

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Judgement

1. The petitioners manufacture PVC leather cloth also known as supported cellular vinyl sheeting. The process of manufacture is briefly as under :

PVC paste is applied in many layers on thin cotton fabric which is the base. The base fabric is first treated with non-thermo-plastic compound which fills intrinsic holes and makes it suitable for carrying the PVC. Several layers of PVC are applied on it. In the end product PVC compound is 6 to 10 times in weight as compared to the base cotton fabric. The percentage of cotton fabric in the final product is only 8% to 15%. The end product has special properties and has characteristics of foamed plastic. The petitioners are registered with Polymers and Plastic Department of the Directorate of Trade and Industry.

2. In September, 1981 or thereabouts the petitioners commenced manufacture of PVC leather cloth. On 5th August 1981 the Excise Department provisionally classified the product under tariff item 19(ii) of the 1st Schedule to the Central Excises and Salt Act, 1944. The petitioners have thereafter been clearing the goods manufactured by them by paying excise duty under tariff item 19(iii).

3. In view of the judgment of the Supreme Court in the case of Union of India (UOI) and Others Vs. Ahmedabad Manufacturing and Calico Printing Co. Ltd. (Calico Mills), Ahmedabad, which was delivered in August 1985 the petitioners realized that they had paid excise duty under tariff item 19(iii) wrongly and

under a mistake of law. In October 1985 they applied for refund of excise duty so paid under a mistake of law. On 21st October, 1985 the petitioners also filed a revised classification list classifying their product under tariff item 68. On 26th November, 1985 the petitioners filed a refund claim for duty paid upto 31st October, 1985. The petitioners' claim was rejected by an order dated 20th March, 1986. The petitioners have also been issued a show cause notice which is annexed as Exhibit "J" to show cause why their claim should not be rejected on the basis of the findings in the earlier order and in view of the claim being beyond the period prescribed u/s 11B of the Central Excises and Salt Act 1944. Hence the petition.

4. Tariff item 19 in the First Schedule to the Central Excises and Salt Act 1944 is as follows :

"19. Cotton Fabrics :-

"Cotton fabrics" means all varieties of fabrics manufactured either wholly or partly from cotton and includes dhoties, sarees, chadders, bed-sheets, bed spreads, counter-panes, tabel-cloths, embroidery in the piece, in strips or in motifs, fabrics, impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials and fabrics covered partially or fully with textile flocks or with preparations containing textile flocks, if (i) in such fabrics cotton predominates in weight, or (ii) such fabrics contain more than 40 per cent by weight of cotton and 50 per cent or more by weight of non-cellulosic fibres or yarn or both :

Provided that in the case of embroidery in the piece, in strips or in motifs, fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials and fabrics covered partially or fully with textile flocks such predominance or percentages, as the case may be, shall be in relation to the base fabrics which are embroidered, coated or laminated or covered, as the case may be

(i) (ii) (iii) Cotton fabrics impregnated, The duty for the time being coated of laminated with leviabale on the base fabrics, preparations of cellulose if not already paid plus derivatives or of other thirty per cent ad valorem." artificial plastic materials.

.. . .

Explanation I. - "Base fabrics" means fabrics falling under sub-item (i) of this Item which are subjected to the process of embroidery or which are impregnated, coated or laminated with preparations of cellulose derivatives or of other plastic materials or which are covered partially or fully with textile flocks or with preparations containing textile flocks .. ."

5. Does PVC leather cloth fall under item 19 which is "cotton fabrics" ? For the purpose of classification what needs to be considered is the final item as it emerges from the process of manufacture. The manner in which this item is

manufactured is immaterial for the purpose of classification. This is so held by the Supreme Court in the case of Union of India (UOI) and Others Vs. Ahmedabad Manufacturing and Calico Printing Co. Ltd. (Calico Mills), Ahmedabad, . In that case the Supreme Court was concerned with a fabric known as "Calikut Special" which contained 38.48% cotton and 61.52% Artificial silk at the final finishing stage. At the intermediate stage this fabric contain 54% of cotton and 46% of artificial silk. The Supreme Court said that contents of the fabric at the final finishing stage after all integral processes had been completed is the basis for classification. The nature and character of goods at intermediate stage is irrelevant. It therefore held that the fabric was to be classified under tariff item 22 which deal with man-made fabrics and not under item 19.

6. In the case of Collector of Central Excise v. Multiple Fabrics Pvt. Ltd. 1987 (29) E.L.T. 481 the Supreme Court considered the question of classification of PVC Conveyer Belting. The Excise Department submitted that it should be classified under Tariff item 22 which dealt with man-made fabrics. The Supreme Court held that PVC conveyer belting could not be treated as man-made fabric. It was classifiable under residuary item 68 of the Central Excise Tariff. In that case PVC conveyor belting consisted of PVC which was reinforced with textile fabric. The percentage of textile fabric was 43.3% as against PVC content which was 56.7% PVC compounding was done simultaneously with the weaving of the fabric from yarn. The process of manufacture was conversion from yarn to fabric as also the application of PVC, both being carried on simultaneously. The Supreme Court held that in view of the high percentage of PVC compound in the final commodity it could not be treated as man-made fabrics for the purpose of item 22.

7. In the case of Hind Engineering Co., Rajkot Vs. Commissioner of Sales Tax, the assessee manufactured rubber belting which was manufactured by superimposition of canvas with rubber. The Gujarat High Court held that a new commercial article emerged from the process of manufacture. Canvas cannot be considered to continue to retain its identity as canvas and it could not be classified as cotton fabric under item 19.

8. The ratio of these judgments directly applies to the present case where the percentage of PVC compound is almost 90% while cotton fabric which is used to reinforce PVC compound is only 10%.

9. In tariff item 19 "cotton fabrics" are defined to mean, inter alia, fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials if in such fabric cotton predominates in weight or such fabric contains more than 40 per cent by weight of cotton 50% or more by weight of non-cellulosic fibres or yarn or both. In the present case the final product is PVC leather cloth. It contains only around 10% cotton fabric. The weight of cotton is much less than 40% in the final product. It cannot, therefore, be classified as cotton fabrics. It falls under residuary entry 68.

10. It was urged by Mr. Desai that in view of the proviso to item 19, only the

cotton fabric which is so laminated or coated has to be looked at and the subsequent manufactured product has to be ignored. In my view this cannot be a correct interpretation of the proviso. The Supreme Court has clearly held that what is classifiable is the final product. The fact that cotton fabric, which constitutes a mere 10% or thereabouts in the final product, was originally used in the process of manufacture does not make the item classified as a cotton fabric under item 19. The final product in the present case cannot be considered as a cotton fabric, coated, laminated or otherwise.

11. Mr. B. A. Desai learned counsel for the respondents relied heavily upon a decision of the Supreme Court on the case of Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan & Others, reported in 1980 E.L.T. 383 (S.C.) In that case the Supreme Court was required to consider whether Tyre cord fabric was Rayon fabric covered by item 18 of the schedule to the Rajasthan Sales Tax Act 1924. For the manufacture of Rayon tyre cord fabric Rayon fibre is spun into Rayon and twisted into cord. The cords are arranged lengthwise and are commonly described as the "warp". They are packed 25 to the inch. By a process of weaving, cotton threads are wafted through a loom across the cords. The wefts are thinner and fewer than the cords, being not more than two to five per inch. Rayon cord fabric so manufactured is used as a component in the manufacture of tyres. The Supreme Court considered the definition of fabric and of textile. It said, "What is fabric ? The Mercury Dictionary of Textile terms defines "fabric" as a term which covers" all textiles no matter how constructed, how manufactured, or the nature of the material from which made", and the expression "textile" is described as "any product manufactured from Fibres through twisting, interlacing, bonding, looping or any other means, in such a manner that the flexibility strength, and other characteristic properties of the individual fibres are not suppressed."

12. The Supreme Court said that tyre cord fabric admittedly consists of woven or knit fibres and therefore should be considered as a textile fabric. When the purchaser buys the product it is the entire integrated woven fabric which he buys. Since item 22 covers all varieties of fabrics, its language is wide enough to include Rayon tyre cord fabric.

13. This judgment can have no application to the present case because PVC leather cloth is a totally different product. It is not manufactured by weaving fibres together. It is essentially a PVC compound which is reinforced by a base of cotton fabric which constitutes a mere 10% of the final product. It cannot be considered as cotton fabric looking to the definition of cotton fabric in item 19. Mr. Desai, however, strongly relied upon the observations of the Supreme Court in paragraph 13 of that judgment. Paragraph 13 reads as follows :

"13. It was contended by Shri L. N. Sinha, for the respondents, that industrial fabrics are not envisaged within the expression "rayon fabric" in Item 22 of the First Schedule to the Central Excises and Salt Act. As we have already pointed out, the item refers to "all varieties of fabrics" and it will be noticed that Item

22(3) speaks of fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial plastic materials which, we are told, would include rubberised cloth, tarpaulin cloth, P.V.C. cloth, water proof cloth and tent cloth. A whole range of fabric is included."

The Supreme Court was not called upon to consider the classification of PVC leather cloth, nor did it consider this aspect in any manner. It merely reproduced in this paragraph the argument of the respondents and the illustrations given by the respondents' Advocate of items which may be classified under tariff item 22. These observations cannot therefore be considered as obiter dicta of the Supreme Court. They do not have any binding force, as contended by Mr. Desai, Mr. Hidayatullah, learned counsel for the petitioners urged that the observations of the Supreme Court are "sub-silentio".

14. In fact the observations of the Supreme Court do not even fall under the category of a precedent "sub-silentio". Where in a case, a particular point of law involved in the decision is not perceived by the court or present to its mind, although such point was logically involved in the facts and a decision is given without pronouncing on the point, the point passes sub-silentio. (See Salmond or Jurisprudence, 12th Ed. P. 27). The decision will not be a precedent. In the case before the Supreme Court the question of classification of PVC cloth did not arise even remotely. The observations merely reproduce some illustrative items given by the Advocate for the respondents as falling under item 22 without any consideration. Such observations cannot have any binding force.

15. Mr. Desai also relied upon a decision of the Calcutta High Court in the case of Saifuddin Ebrahimhai Vадnagarwalla v. Assistant Commissioner of Commercial Taxes and Others, reported in 1976 Sales Tax Cases 463. In that case the question was whether rubberised cotton fabric obtained by mixing cotton and rubber in the process of manufacture could be considered as cotton fabric as defined under item 19. The Calcutta High Court observed that the opening words of the entry defined cotton fabric to mean all varieties of fabrics, and these were manufactured fabrics. The fabrics so manufactured must contain some portion of cotton. The required percentages are mentioned in the entry. If articles such as wool, silk etc. do not exceed such percentages, the same would come under the definition of cotton fabrics. It would therefore be of little consequence that superimposition of cotton cloth with rubber would make it a different commercial commodity. What is to be enquired into is whether it comes within the definition of "cotton fabrics" under item 19. This judgment is based on the nature of rubberised cotton fabrics and whether the definition in item 19 covers such a fabric. It can have no application to PVC leather cloth which is not a manufactured fabric at all.

16. The last case cited by Mr. Desai is in the case of Porritts and Spencer (Asia) Ltd. Vs. State of Haryana, where the Supreme Court held that cotton and woollen "dryer felts" manufactured by the assessee, which are woven textile felts of a kind commonly used in paper making machinery, are textile fabrics and hence

they are textiles within the meaning of the Punjab General Sales Tax Act, 1948. This judgment also is of no assistance in the present case since the commodity involved is totally different.

17. It was next submitted by Mr. Desai in the alternative that this final product should be classified under tariff item 22 and not under tariff item 68. This submission was made by in the course of arguments. Till then it was nobody's case that PVC leather cloth could be classified under tariff item 22, which deals with man-made fabrics. Throughout, the stand of the Excise Department has been that this product falls under tariff item 19, while the stand of the petitioner throughout been that it falls under item 68 which is the residuary item. There is no material before me which would show that this product can be classified as man-made fabric. In fact, under tariff item 22, man-made fabric means all varieties of fabrics manufactured either wholly or partly from man-made fibres or yarn. In the present case the product is not manufactured from man-made fibres or yarn at all. It is not classifiable under tariff item 22.

18. It was next submitted by the respondents that there is a delay in filling the petition. But the petitioners have paid excise duty under a mistake of law. They discovered their mistake in 1985 after the Supreme Court judgment in the case of Union of India v. Ahmedabad Manufacturing and Calico Printing Co. Ltd. Immediately thereafter they have applied for revised classification and refund. They have filed this petition on 21st July 1986. This is a fit case for condonation of delay. The petitioners are therefore entitled to claim refund of excise duty so paid under a mistake of law.

19. It was lastly argued that an alternate remedy by way of appeal is available. After this petition has been fully argued I am not inclined to reject it on the ground that an alternate remedy is available. There is a serious dispute as to classification involving a substantial point of law. At the stage of final hearing the petition cannot be dismissed on this ground [See in this connection Ashok Leyland Limited Vs. Union of India and others, , M.R.F. Limited Vs. Union of India and others, , Leukoplast (India) Private Ltd. and others Vs. Union of India and others, .

20. The rule is made absolute in terms of prayer (a), (b)(ii) and (b)(iii).

The petitioners are entitled to a refund of the excise duty paid by them from September 1981 upto February 1986, on the basis that their item was classifiable under tariff item 68 and not under Tariff item 19. As from 11th May 1982, under an Exemption Notification No. 182/82 the product of the petitioner is exempt from payment of Excise duty. For refund of excise duty after the coming into force of this notification, the petitioners shall be given the benefit of this exemption notification. The petitioners to furnish to the respondent No. 2 a detailed statement setting out the particulars of refund claimed by them. The second respondent to finalise the refund claim with in 8 weeks of receipt of the statement and to refund the amount forthwith thereafter.

In the circumstances of the case it will be just and proper if the respondents are directed to pay interest at the rate of 12% per annum on the amount so refundable. It is ordered accordingly.

The respondents to pay to the petitioners costs of the petition.

The respondents apply for stay of this order. Application rejected.