

(1988) 10 MAD CK 0048

In the Madras High Court

Case No : Writ Petition No's. 1504, 1706, 3863, 6912, 6929 to 6931 of 1982
and 7834/83

S.N. Mohideen

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-10-1988

Acts Referred:

Central Excise Rules, 1944 — Rule 8, 8(1)
Central Excises and Salt Act, 1944 — Section 11, 2, 4(4)

Citation : (1989) 22 ECC 226 : (1989) 39 ELT 376

Hon'ble Judges : S. Ramalingam, J

Bench : Single Bench

Advocate : Nalini Chidambaram, for the Appellant; T. Somasundaram, for the Respondent

Judgement

1. The petitioner is the same in all the Writ Petitions which are disposed of by this common order.

2. The case of the petitioner is that he is a dealer of hand-made biris and he is also a manufacturer in hand-made biris. - As a dealer, he used to purchase hand-made biris manufactured by others, affix his brand name, namely "MADRAS MUNIM BEEDIES" and sell the same. He states that on all the biris, namely on the biris purchased from the other manufacturers, the petitioner used to affix the brand label, namely "MADRAS MUNIM BEEDIES". The petitioner claims that after the stage of manufacture was over and after the biris were made fit for consumption by the public without any further process at all, the petitioner used to affix the brand label, namely "MADRAS MUNIM BEEDIES".

3. The First Schedule to the Central Excises and Salt Act, 1944 in tariff in Item 4 II 3 reads as follows :-

"(i) Biris is the manufacture of which any process has been conducted with the aid of machine operated with or without aid of power; and

(ii) other biris".

By Notification No. 19/75-C.E., dated 1.3.1975 made in exercise of power conferred by rule 8 of the Central Excise Rules, the Central Government exempted other biris falling under Item No. 4II(3)(ii) from the whole of the duty of excise leviable thereon subject to the proviso contained therein. By a subsequent Notification No. 32/79 exemption was also granted for other biris subject to the provisos contained therein. Both these provisos state that the exemption will not be available to any biris which are sold under a brand name, whether registered or not, that is to say, a name or a mark, such as, a symbol, monogram, label, etc., which is used in relation to such biris for the purpose of indicating a connection in the course of trade between the biris and some person using such name or mark. Briefly stated, the exemption from the levy of excise duty or the concession rates provided under these exemption notifications would be available only to biris which are sold without a label indicating the brand name.

4. For the biris manufactured by the petitioner, as well as the unbranded biris purchased by the petitioner and sold in the market after affixing the label, the petitioner had been paying excise duty during the period from 1.3.1975 to 2.2.1982.

5. The petitioner states that during the first week of February, 1982, he consulted his Counsel and he became aware of the illegality in the excise duty collected from him and it was thereafter he instructed his counsel to take legal proceedings for recovery of the amounts which were collected from the petitioner.

6. Accordingly W.P. No. 3863 of 1982 has been filed for a writ of Certiorari Mandamus for quashing the proviso to the Notification No. 19/75 dated 1.3.1975 and for directing the respondents to refund the sums specified in the Writ Petition stated to be collected from the petitioner for the period from 1.3.1975 to 7.6.1977. The prayer in the other Writ Petitions are also similar, except in W.P. Nos. 6912 and 6929 of 1982 relief relate to the refund of additional excise duty, while W.P. No. 7834 of 1983 relates to the refund of special excise duty.

7. The principal contentions urged on behalf of the petitioner by Mrs. Nalini Chidambaram, learned Senior Counsel are : (1) In so far as his turnover relating to the purchase of unbranded biris from the other manufacturers is concerned, the petitioner is not liable to pay any excise duty since there is no manufacturing process involved in the mere affixture of labels. (2) The petitioner affixes the label only to the wrapper within which about ten biris are bundled and a wrapper is not a container and consequently no manufacturing process is involved in so labeling the wrapper. (3) The provisos to Notification Nos. 19/75 and 32/79 are ultra vires Article 14 of the Constitution of India, because there is discrimination between branded and unbranded biris. Unbranded biris are given a special treatment and exemption, while a hostile treatment is meted out to branded biris. But at the same time in the First Schedule to the Act, no such classification is found and the only classification found therein is between machine made biris

and hand-made biris.

8. The learned Counsel for the respondents submits that so far as the manufacture of tobacco is concerned, a special definition is found in Section 2(f) (ia) of the Central Excises and Salt Act (hereinafter referred to as "the Act") which states that manufacture in relation to tobacco includes labeling or relabelling of containers. Therefore, even though the petitioner may be merely labeling the hand-made biris purchased by him from others, he would still be manufacturer within the definition of Section 2(f)(ia) of the Act. The second submission of the learned Counsel for the respondents is that the averments in the affidavit of the petitioner show that the petitioner is affixing the labels on the biris purchased by him and therefore the affixture of labels of the leaf containers, within which the manufactured tobacco is put, would amount to a process of manufacture. Thirdly the learned Counsel further submits that even otherwise, assuming for the purpose of argument, that the petitioner has been affixing the labels only on the wrapper, within which ten or more biris are bundled, still the wrapper being a container, the same would be a process of manufacture. The fourth submission of the learned Counsel for the respondents is that the provisos to the Notification Nos. 19/75 and 32/79 are not hit by Article 14 of the Constitution of India. He says that the Government had taken a rational decision to grant exemption in favour of hand-made biris which are sold without a brand name. Under rule 8 of the Central Excise Rules, Government is enabled to grant exemption subject to such conditions as may be prescribed and in the circumstances of the case, the Government had granted exemption subject to the condition that the biris should not be sold under a brand name. It is next submitted by the learned Counsel for the respondents that the Writ Petitions are liable to be dismissed on the ground of laches since they relate to a claim for refund of the Excise duty paid by the petitioner during the period from 1975 to 1982 and the only explanation offered by the petitioner contained in paragraph 7 of the affidavit would not enable the petitioner to seek the aid of this Court to exercise its discretionary jurisdiction in ordering refund. Lastly it is submitted by the respondents' Counsel that if at this distance of time any order for refund is made, it would result in unjust enrichment of the petitioner, since there is no proof forthcoming that the petitioner had not passed on his liability of excise duty to the ultimate consumer. He draws specific attention to paragraph 9 of the counter in which a stand is taken that the petitioner has passed on the liability for excise duty to the ultimate consumer of the biris and if refund is ordered it will result in unjust enrichment of the petitioner.

9. In reply, the learned Counsel for the petitioner states that the circumstance under which the petitioner had to approach this court in 1982 had been explained in paragraph 7 of the affidavit and if it is found that the provisos to the two notifications are violative of constitutional mandate, the petitioner should not be denied the benefit of refund merely on the ground of laches. Secondly it is submitted that petitioner had not passed on the liability of excise duty to the ultimate consumer and in proof thereof certain bills are produced in this Court to

show that the petitioner sold the biris for a consolidated sum without specifically mentioning the excise duty paid thereon.

10. These rival submissions are carefully considered and the following is the resultant position. It is not in dispute that biris would fall within the category of manufactured tobacco. The special definition contained in Section 2(f)(ia) of the Act would therefore be attracted. It states that the manufacture in relation to manufactured tobacco would therefore be attracted. It states that the manufacture in relation to manufactured tobacco would include the labelling of containers. The averments in the affidavit of the petitioner shows that the petitioner is affixing the labels on the biris purchased by him. It is a known fact that manufactured tobacco is put inside a special leaf (Tandoo leaf) and rolled into a biri. The leaf is the container within which the manufactured tobacco is preserved for ultimate use by the consumers. From the averments in the affidavit of the petitioner, it is clear that the brand label is affixed by the petitioner on the biris purchased by him from others. Consequently there is no difficulty in holding that the petitioner is affixing labels on the leaf containers and this process would bring the petitioner within the scope of the word "manufacturer" under the Act, attracting excise duty. The submission of the petitioner is that the brand label is not affixed on the biris, but is affixed only on the wrapper paper, within which ten or more biris are bundled. The submission of the petitioner is that a wrapper is different from a container and since Section 2(f)(ia) mentions only the container and not a wrapper, labelling the wrapper is not a process of manufacture. Support for this proposition is drawn from Section 4(4)(d) of the Act, which, while defining "value" in relation to excisable goods, states that packing means wrapper, container, bobbin, pirn..... in which or on which the excisable goods are wrapped, contained or wound. The learned Counsel submits that since Section 4(4)(d) makes a distinction between a wrapper and a container, it would mean that both cannot be the same and in so far as Section 2(f)(ia) is concerned, the word used being a container and not a wrapper, labelling of wrapper is not a process of manufacture. The learned Counsel refers to the definition of the words "wrapper" and "container" in dictionaries and tries to draw out the distinction between the two. The learned Counsel for the respondents, on the contrary submits that as the word "container" would include wrapper also, since container is the genus and a wrapper is a specie thereof.

11. In "Words and Phrases" Volume I Second edition by John B. Saundens, the definition of the word "container" is as follows :-

"The expression "Container" includes a Wrapper (Pharmacy & Medicine) Act, 1941, Section 11.

"Container" includes sacks, boxes, pirn and other articles. (Prevention of Damages by Pets. Act, 1949) Section 28.

"Container" includes any bundle or package and any box, cask or other receptacles whatsoever (Customs and Excise Act, 1952) Section 307.

"Container" includes any basket, pail, tray, package or receptacle of any kind, whether open or closed.

(Food and Drugs Act, 1955) Section 135(1).

"Container" means a basket, box, cask, craft, keg, sack, fray, or other similar receptacles which is or has been or intended to be used in connection with the transport of Horticultural produce (London country I Act, 1959) Section 11.

"Container" includes any form of packaging of goods for sale as a single item whether by way of wholly or partly enclosing the goods or by way of attaching the goods round, some other article and in particular includes a wrapper or confining band (Weights and Measures Act, 1963) Section 58.

12. In 1975 II Andhra Weekly Report Page 272 (A.P. Dairy Development Corporation v. Union of India) it is held that a container may be made of metal or plastic or paper or any other material and with the advance of science new material are being manufactured which are used for packaging.

13. It is not impossible to conceive that the word "container" will comprise packages, boxes, casks, receptacles, tubes, sacks, etc. A wrapper paper when used to contain certain number of biris can certainly fall within the word "container" occurring in Section 2(f)(ia) of the Central Excise Act. Therefore, the resultant position is that even if the petitioners were to affix the labels only on the wrapper paper which contains biris, such process of affixing the labels would come within the definition of manufacture attracting the levy of excise duty. Hence the first two submissions of the learned Counsel for the petitioner are rejected as unsustainable.

14. The third submission of the petitioner is that the provisos to Notification Nos. 19/75 and 32/79 are violative of Article 14 of the Constitution of India in so far as they make classification between the branded biris and unbranded biris. This submission of the petitioner is misconceived. In fact, there is no classification involved. It is simply a case of grant of exemption. Rule 8 states that the Central Government may, from time to time, by notification in the Official Gazette, exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or from part of the duty leviable on such goods. It is an admitted fact that Notification Nos. 19/75 and 32/79 are made by Central Government in exercise of powers vested in them under Rule 8. When exercising such power of grant of exemption, the Central Government is entitled to grant exemption subject to such conditions as may be specified in the exemption notification. In both these notifications the condition that is prescribed for exemption is that the biris should not be branded. Therefore, the power under Rule 8 has been exercised by the Government in granting exemption subject to the conditions specified therein. By issuing Notification Nos. 19/75 and 32/79, the Government is not attempting to make any invidious classification but is restricting the grant of exemption only to unbranded biris.

15. In dealing with the power of grant of exemption, the Supreme Court has held in the case reported in Union of India (UOI) and Another Vs. Parameswaran Match Works and Others, as follows :-

"The concessional rate of duty can be availed of only by those who satisfy the conditions which have been laid down under the notification In the matter of granting concession or exemption from tax, the Government has a wide latitude or discretion. It need not give exemption or concession to every one in order that it may grant the same to some.

The Division Bench of this Court has held in Jayprakash Match Works, Kovilpatti and Others Vs. Union of India and Others, that an exemption can be given having regard to the process of manufacture or to a consumer or class of consumers depending on the policy of the Government either to discourage or encourage the consumption of such excisable goods, therefore, it cannot be said that the conditions imposed by the notification were either arbitrary or irrational.

16. In Match House Vs. Superintendent of Central Excise and Another, it is held that Rule 8(1) of the Central Excise Rules, confers wide discretionary powers on the Central Government in the matter of granting exemption. Any particular order of exemption could be questioned only when it is contrary to the provisions of the Central Excises and Salt Act or that the conditions imposed thereunder for getting the concessions are either not germane or foreign to the particular item in respect of which the conditions are imposed or that the conditions are not consistent with the operative provisions of the Act itself.

17. In the instant case, affixing of brand label on the container has been held to be included within the definition of manufacturing process. If that be so, an exemption granted depending on a part of manufacturing process, viz., a germane fact would be valid. In this view of the matter, it cannot be held that grant of exemption under the impugned notification restricting to unbranded biris is either unreasonable or arbitrary. The exemption has rightly been restricted by exercise of the power under Rule 8 of the Central Excise Rules, which enables the Government to grant exemption subject to such conditions as may be specified.

18. Though much might be said in favour of the respondents, on the two technical objections raised by them, namely, that the petitioner is guilty of laches and if refund is ordered at this distance of time, it would result in unjust enrichment of the petitioner, it is not necessary to go into the details of these two contentions since it has already been held that the petitioner's contentions that no manufacturing process is involved in affixing the brand labels to the biris or to the wrapper within which biris are bundled as well as the contention of the validity of the proviso to Notification Nos. 19/75 and 32/79 are held not acceptable for the reasons already stated above.

19. Consequently W.P. Nos. 3863 of 1982, 6912 of 1982, 6929 of 1982, 6930 of 1982, 6931 of 1982 and 7834 of 1983 are dismissed. No costs.

20. W.P. Nos. 1504 and 1706 of 1982 : The learned Counsel for the Petitioner is not pressing these petitions and they are also dismissed. No costs.