(1983) 03 MAD CK 0069

In the Madras High Court

Case No : Writ Petition No. 2628 of 1979

Spencer and Co. Ltd., Madras APPELLANT

Vs

Assistant Collector of Central Excise, Madras and Another RESPONDENT

Date of Decision : 25-03-1983

Acts Referred:
Central Excise Rules, 1944 — Rule 8(1)
Central Excises and Salt Act, 1944 — Section 2

Citation : (1984) 2 ECC 188 : (1983) 14 ELT 2098 : (1983) 2 MLJ 451

Hon'ble Judges : Gokulkrishnan, J

Bench : Single Bench

Advocate : K.K. Venugopal, for M.N. Krishnamani and C.H. Krishnakumar, for the Appellant; K.N. Balasubramaniam, for the Respondent

Judgement

Gokulkrishnan, J.—Messrs Spencer and Co. Ltd., Madras have filed this writ petition praying to call for the records of the Assistant Collector of Central Excise, Madras IV division, pertaining to C. No. V/1.D/17/1/78 dated 29-8-1978 and quash the same by issuing a writ of certiorari under Article 226 of the Constitution of India.

2. By the impugned order, the Assistant Collector of Central Excise, Madras IV division, has treated Messrs Spencer and Co. Ltd., as ''bottlers'' for Messrs Modern Bakeries India Ltd., and the soft drink ''77'' bottled by Messrs Spencer and Co. Ltd., as production by and on behalf of Messrs Modern Bakeries India Ltd. On this finding, the Assistant Collector held that the exemption contemplated in notification No. 211/77, dated 4th July, 1977 is not applicable to Messrs Spencer and Co. Ltd.

3. Notification No. 211/77-Central Excise, dated 4-7-1977 which grants exemption from excise duty, to certain commodity, reads as follows :-

"In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts aerated waters not containing extracts of Cola (Kola) nuts, and falling under Sub-item (2) of Item No. 10 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) from so much of the duty of excise leviable thereon as in excess of twenty-five per cent ad valorem :

Provided that the exemption containing in this notification shall apply only to the first clearance for home consumption not exceeding fifty lakh bottles, by or on behalf of a manufacturer from one or more factories during any financial year subsequent to 1977-78 and for such clearance not exceeding thirty-seven lakh bottles, during the period commencing on the 4th day of July, 1977 and ending on the 31st day of March 1978."

Item 1(d) of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) reads as follows :

The notification thus applies to the first clearance for home consumption not exceeding fifty lakh bottles by or on behalf of a manufacturer in the stated period.

4. In defining ''manufacture'' S. 2(f) of the Central Excises and Salt Act states that the word ''manufacturer'' shall be construed according to the terms of that section and it "shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

Aggrieved by the order of the Assistant Collector, Messrs Spencer and Co. Ltd., have prayed for the above relief on the following averments. Messrs Spencer and Co. Ltd. is a registered company and is engaged in the manufacture of aerated waters, sweet drinks etc. The drink ''77'' is one such product. For the manufacture of all these products including ''77'' they are purchasing raw materials from outsiders. The raw materials mainly consisted of the following :-

1. Composition (or essence)

2. Sugar

3. Citric acids

4. Preservatives

5. Carbon dioxide

6. Water.

The manufacturing process consists of the preparation of sugar syrup, mixing of the composition in small quantity, adding of citric acids and preservatives, treating of the solution with carbon dioxide, bottling of the product corking it etc. All these processes take one after another, in the premises of the company in their plant with the latest equipments. The plant is an automatic one. The company has invested a huge amount for setting up the plant.

5. The composition for the drink ''77'', which is one of the several raw materials,

is purchased by Messrs Spencer and Co. Ltd. from Messrs Modern Bakeries India Ltd., New Delhi. Messrs Modern Bakeries India Ltd. are only the suppliers of the raw materials. The composition itself is manufactured by the Central Food and Technological Research Institute, Mysore. The composition is supplied to Messrs Spencer and Co. Ltd. by way of outright sale for a price.

6. After the raw material, namely, the composition, is sold, the supplier of the raw material ceases to have any proprietary interest in the same. The final product is out a product of Messrs Spencer and Co. Ltd., since they purchase the raw materials in an outright sale and since the profit, if any, made or the loss if any incurred, would belong to, or be borne by them, and not any of the suppliers of the raw materials. Except supplying one of the raw materials, the suppliers of raw materials have no part to play.

Hence according to the petitioner, Messrs Spencer and Co. Ltd., the exemption contemplated in the abovesaid notification is applicable to them, and they are paying duty at 25 per cent ad valorem upto the production limit of 50 lakh bottles and on the excess of it, at the rate of 56 per cent ad valorem, in respect of all the drinks manufactured by them, including ''77''.

7. By letter dated 5th February 1978, the petitioner submitted a revised apportionment list as well as a revised classification list to the first respondent.

8. However, the petitioners received a show-cause memo dated 2nd March 1978 from the first respondent alleging that Messrs Modern Bakeries India Ltd., became the real manufacturers and that therefore the provisional classification list would therefore be finalised fixing the levy at a standard rate of 58 per cent after withdrawing the exemption granted under notification No. 211/1977 dated 4-7-1977. The petitioner submitted their reply explaining as to how they are the manufacturers of the drink ''77'' and not Messrs Modern Bakeries India Ltd., and claimed entitlement to the exemption. Nevertheless, the first respondent held that Messrs Modern Bakeries India Ltd., are the real manufacturers of ''77'' and not Messrs Spencer and Co. Ltd., and also orally intimated the petitioner that the Government of India made it clear in their decision dated 3-4-1978 in P. No. 9/1/78 CXI that Messrs Modern Bakeries India Ltd., were the real manufacturers and that the Law Ministry had also expressed the same view according to the said order. In this view, the first respondent passed the impugned order dated 25-8-1978, withdrawing the exemption granted in notification No. 211/77 dated 4-7-1977 with effect from 4-7-1977 in the case of the petitioner company.

9. Inasmuch as the Central Government and the Law Ministry have decided against the petitioner, as intimated by the first respondent, and in view of the fact that the first respondent by letter dated 2-3-1978 has stated that the Government of India had already decided the matter and has issued instructions accordingly, the petitioner felt that it would be futile on their part to approach the Central Board of Revenue or the Central Government by way of revision as provided in the Act. Such approach by the petitioner would only illusory and

cannot be deemed to be a remedy in the eye of law in view of the above said circumstances.

10. In the supplemental affidavit, the petitioner mentioned a case decided by the second respondent, viz., the Government of India, which pertained to Messrs Surat Bottlers holding that mere use of the brand name by a manufacturer will not make the brand-name-holder the manufacturer. The petitioner also referred to the case of Messrs Punjab Beverages in which the Government of India have taken the view in their order dated 4-7-1978 that merely because the supplier of the raw material, the essence, had entered into a franchise agreement and had allowed his brand name to be used for the product, will not become the manufacturer of the final product.

11. In the counter affidavit filed on behalf of the respondents, they have admitted that Messrs Spencer and Co. Ltd. are using raw materials as set out in paragraph 2 of the affidavit for the purpose of manufacturing ''77'', but would contend that under the terms of the agreement between Messrs Modern Bakeries India Ltd., and the petitioner-company, it is clear that Messrs Spencer and Co. Ltd., are only ''bottlers'' for Messrs Modern Bakeries India Ltd., who are the real manufacturers of ''77''. It is further contended that the petitioner cannot invoke the jurisdiction of this court under Article 226 of the Constitution since there is alternative remedy by way of revision to the Board of Central Excise and Central Government. They denied that any order of the Government of India regarding the manufacture of ''77'' was ever read out to the petitioner''s representatives as claimed by them. In general, the respondents denied all the allegations contained in the affidavit and the supplemental affidavit filed by the petitioner.

12. Mr. K. K. Venugopal, learned counsel arguing for the petitioner, took me through the relevant provisions of the Central Excises and Salt Act and the Rules made thereunder, touching the rate of duty payable for aerated waters etc. According to Mr. K. K. Venugopal, the terms of the agreement between Messrs Spencer and Co. Ltd., and Messrs Modern Bakeries India Ltd., the provisions in the Central Excises and Salt Act and the Rules made thereunder, particularly, Rules 175-A, 175-B, and 175-E amply establish that Messrs Spencer and Co.. Ltd., are the manufacturers of the soft drink ''77'' and not Messrs Modern Bakeries India Ltd. To substantiate his contention in this regard, the learned counsel cited the decisions reported in Poona Bottling Co. and others v. Union of India and others, 1981 ECR 350; 1981 ELT 389; In re : Surat Bottling Co. Ltd., 1980 ELT 355 and In re : Punjab Breweries, Ltd., Chandigarh, 1980 ELT 475, which I will be considering in the subsequent paragraphs. Finally, the learned counsel submitted that Messrs Spencer and Co. Ltd., are the manufacturers of ''77'' and therefore they are entitled to exemption as per the Notification. Messrs Spencer and Co. Ltd., are neither agents nor bottles for Messrs Bakeries India Ltd.

13. Mr. K. N. Balasubramaniam, learned counsel appearing for the respondents contended that Messrs Spencer and Co. Ltd. are only bottlers for Messrs Modern

Bakeries India Ltd. and cannot be classified as manufacturer as per the definition u/s 2(f) of the Act, and therefore, the petitioner-company are not entitled to the exemption claimed.

14. The agreement between Messrs Modern Bakeries India Ltd., and Messrs Spencer and Co. Ltd., inter alia states that Messrs Modern Bakeries India Ltd., are the sole manufacturers of the composition, the formula for which is an industrial secret of Messrs CPTRI, Mysore, from which a non-alcoholic beverage syrup is prepared which is used in the preparation of a non-alcoholic beverage for sale in bottles and other containers and in other forms or manners. Trade mark ''77'' is owned by Messrs. Modern Bakeries India Ltd. Messrs Modern Bakeries India Ltd., have the exclusive right to prepare and sell the composition and the syrup. Messrs Modern Bakeries India Ltd., will sell and deliver to Messrs Spencer and Co. Ltd., the composition. The bottler, viz. Messrs Spencer and Co. Ltd., shall make advance payment for each consignment of the composition by a crossed demand draft only. Messrs Modern Bakeries India Ltd., reserve to themselves the right to produce and sell the beverages in the territory of the bottler either by themselves or may appoint one or more bottlers for the whole or part of the territory. Messrs Spencer and Co. Ltd., must abide by the conditions and directions of Messrs Modern Bakeries India Ltd., in respect of the composition, syrup and bottling the same under the trade name ''77''.

15. Thus, on a reading of the whole agreement it is clear that Messrs Spencer and Co. Ltd., are the sole manufacturers of the bottled beverage ''77'' and that the composition, which is one of the ingredients, is supplied by Messrs Modern Bakeries India Ltd., subject to various restrictions and conditions, since Messrs Modern Bakeries India Ltd., want to preserve the trade name ''77'' to themselves and also reserve to themselves the right to distribute the same in the named territories. This will not mean Messrs Spencer and Co. Ltd., are only bottlers for Messrs Modern Bakeries India Ltd., and that Messrs Modern Bakeries India Ltd., are the real manufacturers of the beverage ''77''. On the other hand, the agreement clearly spells out that Messrs Spencer and Co. Ltd., are the purchasers of the composition for making the drink ''77'' after adding various ingredients to form the drink, Messrs Modern Bakeries India Ltd., has nothing to do with such preparation, nor have they anything with the selling and realising profits therefrom by Messrs Spencer and Co. Ltd.

16. The definition of ''manufacturer'' occurring in Section 2(f) of the Central Excises and Salt Act according to Mr. K. N. Balasubramanian, has a definite meaning as per as English dictionary and considering such a meaning, it will lead only to the irresistible conclusion that Messrs Modern Bakeries India Ltd. are manufacturers of the beverage ''77''.

17. Mr. K. N. Balasubramaniam, learned counsel appearing for the respondents, advanced his argument only on the question as to who is the ''manufacturer'' of the beverage ''77''.

18. The exemption under the Notification would apply only to the manufacturer of the beverage and according to the learned counsel, Mr. Balasubramaniam, Messrs Modern Bakeries India Ltd. are the manufacturers of the beverage ''77''. Referring to the user of the word ''franchise'' in the agreement between the two companies. Mr. Balasubramaniam contended that ''franchise agreement'' means ''agreement to sell somebody''s goods'' and therefore Messrs Spencer and Co. Ltd., are selling the goods of Messrs Modern Bakeries India Ltd., since Messrs Spencer and Co. Ltd. are only bottlers for Messrs Modern Bakeries India Ltd.

19. No doubt, the learned counsel contended that ''77'' beverage bottles have the inscription that the bottling is done on behalf of Messrs Modern Bakeries India Ltd., but such a contention was refused on behalf of the petitioner by producing in court a bottle of the beverage ''77'' and displaying that there is no such inscription thereon. The statement of the petitioner was found to be correct.

20. With reference to the phrase ''manufacturing on his own account'' occurring in Section 2(f) Mr. K. N. Balasubramaniam brought to my notice the meaning of ''one''s own account'' given in the Concise Oxford Dictionary given as ''for and at one''s own purposes and risk''. Relying on this, the learned counsel submitted that Messrs Modern Bakeries India Ltd., satisfy the definition of ''manufacturer'' and therefore they must be considered to be the ''manufacturer'' of ''77'' and not Messrs Spencer and Co. Ltd.

21. The learned counsel further submitted that the agreement is not a mere assignment of trade mark, but on a reading of the agreement as a whole it will be clear that Messrs Spencer and Co. Ltd., are the bottlers for Messrs Moderns Bakeries India Ltd. As I have already observed, such a inference is not possible from the agreement in question.

22. The further argument of Mr. K. N. Balasubramaniam was to the effect that a mere financial responsibility on the part of Messrs Spencer and Co. Ltd., will not bring them within the definition of ''manufacturer'' u/s 2(f) on the basis that Messrs Spencer and Co. Ltd., are manufacturing the beverage ''77'' on their own account''. I am not able to appreciate this contention. The argument, as such, and the preparation of the beverage called ''77'' by using the composition supplied by M/s. Modern Bakeries India Ltd., as one of the ingredients, cannot in any manner make Messrs India Ltd., as one of the ingredients, cannot in any manner make Messrs Modern Bakeries India Ltd., as ''manufacturers'' of the drink ''77.

23. I have already set out the averments made in the affidavit in support of this writ petition showing that the drink ''77'' is made up of -

1. Composition (or essence)

2. Sugar

3. Citric acid

4. Preservatives

5. Carbon dioxide

6. Water.

Allegations on this aspect have not been controverted in the counter affidavit. From this it is seen that it is a fragmental portion of the ingredients that is supplied to the petitioners by Messrs Modern Bakeries India Ltd., and that fragmental portion by itself would not constitute the drink ''77'' consumed by the public. The facts in this case point to the only irresistible conclusion that it is Messrs Spencer and Co. Ltd., who are the manufacturers of the drink ''77'' ''on their own account'' and by no stretch of imagination could it be said that Messrs Modern Bakeries India Ltd., are the manufacturers of that beverage. No doubt, Messrs Modern Bakeries India Ltd., prepare and supply the composition which is one of the ingredients for making the beverage ''77''.

24. The dictionary meaning cited by Mr. K. N. Balasubramaniam need not be gone into in detail when there is a clear definition given in the Act itself. I do not think the reference to the meaning given in the Dictionary for the word ''manufacturer'' and for the phrase ''on his own account'' could advance the case of the respondents any further on the facts and circumstances above referred to.

25. In one of the letters written by Modern Bakeries India Ltd., which has reference No. /22-77/(II)/77-78/3380 dated 13-3-1978 addressed to the Assistant Collector, Central Excise, (IV) (Divn) Madras, they have stated thus -

"We wish to inform you that Messrs Spencer and Co. Ltd., Madras have been given the franchise to manufacture and market the new soft drink ''77'' in Madras city and certain neighbouring districts. Our role is restricted only to the supply of components required for the drink. The entire manufacturing operations, distribution and marketing are left to Messrs Spencer and Co. Ltd. The product also comes in their financial account. The new drink is, therefore, not a product of Modern Bakeries India Ltd. As already intimated to you earlier, the new drink does not have any cola nut extract. We request you to take the above facts into consideration and assess Messrs Spencer and Co. Ltd., Madras only for purposes of excise duty."

The above letter is a clear indication through the mouth of Messrs Modern Bakeries India Ltd., who are the suppliers of the concentrate, that it is Messrs Spencer and Co. Ltd., that are the manufacturers of the soft drink ''77''.

26. Mr. K. K. Venugopal rightly pointed out the various documents filed by Messrs Spencer and Co. Ltd., as also Rules 175-A, 175-B and 173-C under Chapter VIIA of the Central Excise Rules relating to the removal of excisable goods on determination of duty by producers, manufacturers of private warehouse licensees and submitted that the documents would amply establish that it is Messrs Spencer and Co. Ltd., who are the manufacturers of the beverage ''77'' and that they are entitled to the exemption granted under the Notification.

27. In Poona Bottling Co. Ltd. v. Union of India, 1981 ECR 380 = 1981 E.L.T. 389, the Delhi High Court had occasion to deal with the very same Notification No. 211/77, dated July 4, 1977 in the matter of Poona Bottling Company. The Poona Bottling Company carried on the business of manufacturing and bottling of soft drinks. They purchased essences from Messrs Parle under franchise agreement. The Union of India through its officers issued a show cause notice requiring the Poona Bottling Company to pay differential duty without claiming exemption under the aforesaid notification on the ground that they were not independent manufacturers of the soft drinks. The Delhi High Court held -

"On merits, the short question for consideration is whether the petitioners were manufacturers of soft drinks for and on behalf of Messrs Paris Modern Bakeries with whom they had entered into franchise agreement. The petitioners would be deemed to be manufacturing the soft drinks for and on behalf of Messrs Parle and/or Modern Bakeries only in two contingencies, namely, (a) when they are employees of the said companies or (b) their agents. The petitioners are admittedly not the employees of Messrs Parley and/or Modern Bakeries. They are independent persons. They have installed their own machinery, they employ their own labour, the investment made belongs to them, they sell the soft drinks manufactured to their own customers though in a particular area. In such circumstances they cannot be termed as servants by any stretch of argument. The mere fact that they were using trade mark of Messrs Parle or that Messrs Parle had control over the quality and also had right of inspection and control over price, will not make the petitioner their own servants.

Agent is defined in Section 162 of the Contract Act, as ''a person employed to do any act for another or to represent another in dealing with third persons''. Agency is a relationship that exists between two persons who are called ''the agent'' is considered in law to represent the other, called the ''principal'' in such a way as to be able to effect the principal''s legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. The petitioners under the agreement have no such right to represent Messrs Parle and/or Modern Bakeries so as to affect their legal position in respect of strangers. Therefore, they cannot be termed as agents. In all these circumstances, in our considered view, it cannot be said that the petitioners were manufacturing the soft drink, for and on behalf of Messrs Parle and/or Modern Bakeries".

The Delhi High Court further observed -

"Can it be said, in view of the terms of the franchise agreements, that the petitioners were not the manufacturers of the soft drinks and Messrs Parle and/or Modern Bakeries were the real manufacturers ? Under the franchise agreement various restrictions have been imposed on the petitioner companies while buying the essence for the beverage for manufacturing soft drinks such as approval of the plants by Messrs Parle, maintenance of the records of chemicals test, sale and distribution of beverage in particular area, types of bottles or too be used, control over retail sale price, company''s right of inspection etc. All these terms relate to the safeguard of trade mark interests. In our view, these restrictions do not lead to the conclusion that the petitioners were manufacturing soft drinks for and on behalf of Messrs Parle or Modern Bakeries. The entire manufacturing activities are being carried on by the petitioners themselves. The soft drinks known as ''Gold spot'', ''Limca'', Thums up, Rimsin, ''77'' have acquired a specific popularity in the country. There are valuable trade marks and all the above mentioned terms are to safeguard the interests regarding trade mark. It cannot be said that the petitioners were not the manufacturers or that they were manufacturing the soft drinks on behalf of Messrs Parle or Modern Bakeries. As a matter of fact, the Government itself has taken a similar view in Surat Bottling Co. Ltd., 1980 E.L.T. 353 (Order-in-Review No. 404 of 1980 dated 15-4-1980). There is one other aspect which we may mention. Under the Act the Excise duty is payable on manufacture by the manufacturers. If Messrs Parle are the manufacturers and its total manufacture is to be considered in deciding whether the exemption of 28 per cent of duty can be claimed, the notice has to be issued to Messrs Parle and not to the petitioners. It is a contradiction to issue the show cause notice and claim duty, from petitioners and at the same time issue notice to Messrs Parle. This shows complete non-application of mind."

The abovesaid decision on all four applies to the facts of the present case.

28. In In re : Punjab Beverages Ltd., Chandigarh, 1980 E.L.T. 475 while reviewing the case of Punjab Breweries Ltd., the Government of India held :-

"It is not uncommon where goods are manufactured under a franchise agreement that the manufacturer of such goods has to abide by some of the basic conditions stipulated by the owner of the trade mark who has to jealously guard quality, specifications and other such standards of the product to be manufactured by parties to whom franchise benefit is given. Such stipulations do not amount to either interference with the working of the manufacturer or any dilution in the legal character of the manufacturer. The party buy the concentrates and manufactured aerated water out of the concentrates on their own account. They are also independent assessees under the Sales Tax and Income Tax Acts. The affixing of the trade mark Fanta and Campa on the products would also not mean that the product was manufactured for and on behalf of either Coco-Cola Export Corporation or Pure Drinks Private Ltd."

In this review order, the Government of India drew to their support the judgment reported in Messrs Cibatul v. Union of India, 1978 E.L.T. 68.

29. Thus, on the facts of the present case and also on the principles laid down in the above quoted decisions, it is clear that Messrs Spencer and Co. Ltd. are the manufacturers of the beverage known as ''77'' and therefore the exemption granted under the Notification No. 211/77 is available to them.

30. In the circumstances, the impugned order dated 25-8-1978 passed by the first respondent is quashed and the rule nisi made absolute. There will be no

order as to costs.

