(1986) 06 MAD CK 0012

In the Madras High Court

Case No : Writ Petition No. 2191 of 1985

S.P.S. Jayaram and Co. APPELLANT

Vs

Assistant Collector of Central Excise (Preventive), Madurai RESPONDENT

Date of Decision : 25-06-1986

Acts Referred:

Citation : (1987) 13 ECC 265 : (1987) 12 ECR 469 : (1987) 28 ELT 20

Hon'ble Judges : Shanmukham, J

Bench : Single Bench

Advocate : U.N.R. Rao, R. Vijayendran and Sathya Rao, for the Appellant; K. Jothi, Central Government Standing Counsel, for the Respondent

Judgement

1. This writ petition coming on for hearing on Tuesday the 8th, Monday the 15th, Tuesday the 16th, Thursday the 17th, Wednesday the 23rd,

Monday the 28th and Wednesday the 30th days of April, 1986 and Friday 2nd day of May, 1986 upon perusing the petition and the affidavit filed

in support thereof the order of the High Court dated 19.3.1986 and made herein, and the counter and Reply affidavits filed herein and the records

relating to the prayer aforesaid comprised in the return of respondent to the Writ made by the High Court, and upon hearing the arguments of Mr.

U.N.R. Rao for M/s. C. David, R. Vijayandran and Miss Sathya Rao, Advocates for the petitioner, and of Mr. K. Jothi, Additional Central

Government Standing Counsel on behalf of the Respondent, the Court made the following order :-

The Petitioner is a partnership firm carrying on business under the name and style of S.P.S. Jayaram & Company manufacturing ''Gopal Tooth

Powder''. It has come forward with this proceeding under Article 226 of the Constitution of India for the issue of a writ of mandamus or any other order or direction in the nature of a writ of mandamus directing the respondent not to apply any of the provisions of Act 1 of 1944 and 5 of 1986.

2. To sustain the relief claimed in this petition, Mr. U.N.R. Rao, learned Senior Counsel for the petitioner urged 4 points, 2 of them touching on the

maintainability of the proposed action by the respondent to assess the petitioner''s products named ''GOPAL TOOTH POWDER (PACKETS),

GOPAL TOOTH POWDER (TIN BOUND) and JBT TOOTH POWDER'' to excise duty while the others relating to the merits. Yet another

contention is that the respondent is disabled from taking any action against the petitioner by virtue of the doctrine of ''equitable estoppel''.

3. It is convenient to advert to the arguments relating to maintainability. On an earlier occasion, the petitioner approached this Court in W.P. No.

4694 of 1978 S.P.S. Jayaram & Company rep. by Managing Partner S.P.S. Salvaraj v. The Assistant Collector of Central Excise, Madurai-14

seeking the relief of the forbearing the respondent from enforcing the communication of the respondent dated 25.11.1978 issued to the petitioner.

An order came to be passed in the said writ petition on 14.10.1981 granting two months time to the respondent to follow the procedure as known

to the respondent for taking a decision as to the applicability or otherwise of the provisions of Act 1 of 1944 (Central Excises and Salt Act, 1944)

to the petitioner''s company and adjourning the proceeding to 14.12.1981. Pursuant thereto, the Additional Collector of Central Excise, Madurai-

2 in his reference C. No. V/60/15/3/78CX 3/ Order No. 32/81 dated 10.12.1981 had stated as follows :

After having considered all the evidence on record, I am satisfied that there is no case to be made out. Under the circumstances, I hereby drop all

case proceedings and order the seized goods to be released to the party"".

On 14.12.1981, the writ petition was allowed by this Court. It is therefore contended by the learned Senior Counsel for the petitioner that the

respondent is bound by the communication dated 10.12.1981 issued by the Additional Collector; in other words, even a quasi-judicial authority is

bound by the principles of ''Constructive res judicata''. To put it differently, in the teeth of the communication dated 10.12.1981 issued by the

Additional Collector, the respondent is not entitled to take up the issue once over and decide whether the products manufactured by the petitioner are subject to excise duty while on the other he is bound by the order made by him on 10.12.1981. In this connection, he relied upon the decision

of the Supreme Court in Orient Paper Mills Ltd. Vs. Union of India (UOI), . However, he conceded that if there is a change in the circumstances

or in the law, then, the principle of ''constructive res judicata'' will not stand in the way of the respondent taking any action. Indeed, such is the

principle settled by the above decision. The same principle was reiterated by the Delhi High Court in J.K. Synthetics Ltd. and Another v. Union of

India and Others 1981 ELT 328 and it is worthwhile to refer to the principle, namely, an authority can depart from his earlier stand only for cogent

reasons, such as fresh facts are brought on record or the process of manufacture has changed or the relevant Tariff entry has undergone

modification or subsequent to the earlier decision, there has been a pronouncement of a High Court or the Supreme Court which necessitates the

reconsideration of the issue. In this case, as rightly pointed out by Mr. Jothi, learned Additional Central Government Standing Counsel, there is a

change in the principle of law. In the supplemental affidavit filed on behalf of the petitioner in W.P. No. 4894 of 1978 S.P.S. Jayaram and

Company rep. by Managing Partner S.P.S. Salvaraj v. The Assistant Collector of Central Excise, Madurai-14, the petitioner has referred to the

definition of section 2(m) of the Factories Act and submitted that the petitioner''s premises where the manufacturing process is carried on will not

fall under the said definition. The case of the respondent herein is that proceeding as could be seen from his counter is that the petitioner''s premises

is a factory manufacturing goods and is not exempted from the levy of excise duty because its clearance in the year 1976-77 had exceeded Rs. 30

lakhs. It is further stated in the said counter that the petitioner will have opportunity to prove its contentions about the number of persons employed

through the attendance register. Thus, one of the points urged by the petitioner is that its premises is not a factory within the meaning of section

2(m) of the Factories Act, 1948 and therefore the products manufactured by it are not subject to excise duty. It may not be out of place to refer to

the petitioner''s letter dated 20.11.1980 addressed to the Assistant Collector of Central Excise, Madurai-2 wherein it is stated :

Ours is not a ''Factory'' conforming to the definition of Factory u/s 2(m) of the Factories Act"".

It is common ground that the factory concept has no relevance now in determining whether the petitioner''s products are subject to excise duty or

not. Thus, it is factually established that there is a change in the application of law and therefore the petitioner is not entitled to call to its aid the

principle of ''constructive res-judicata''.

4. In the view I am of taking, it is unnecessary for me to advert to the argument advanced by the learned counsel for the respondent that the order

dated 10.12.1981 passed by the Additional Collector is not an order passed by the adjudicating authority and therefore, it is not open to the

petitioner to plead the principle of ''constructive res judicata. In any event, I find that such a contention is hardly tenable because, ultimately this

Court allowed W.P. No. 4694 of 1978. So too, it is unnecessary to examine whether the order dated 10.12.1981 can be treated as an order

passed by quasi-judicial authority because, according to the learned counsel for the respondent, what was communicated to the petitioner is that

the action was dropped.

5. The other point advanced by the learned Senior Counsel for the petitioner is that unless the petitioner''s products satisfy the Indian Standard

Specifications and the Drugs and Cosmetics Act, 1940 and the Rules made thereunder, the provisions of the Excise Act cannot be invoked. On

the materials available in this case, the petitioner is disabled from raising such a contention. First of all, the petitioner itself has declared that its tooth

powder conforms to the Indian Standard Specifications as laid down by the Indian Standard Institution as early as on 11.11.1983. Secondly, the

respondent has produced a certificate dated on 3.2.1986 bearing Report No. SBG/635 issued by Sunderson Pharmaceuticals (Analytical

Division), Government Approved Laboratory, Korpogam House, Madurai-14 to the effect that ''Gopal Tooth Powder'' is of Standard Quality as

defined in the Act and the rules made thereunder. The certificate was issued under the Drugs and Cosmetics Act, 1940 and the Rules made

thereunder. These two documents will fairly establish that the products manufactured by the petitioner not only conform to Indian Standard

Specifications but also the provisions of the Drugs and Cosmetics Act and the Rules made thereunder. Consequently, the contention that the

respondent cannot invoke to his aid the provisions of the Excise Act to levy excise duty on the products of the petitioner has to be rejected.

6. Let me now turn to the argument relating to ''equitable estoppel'', I hasten to add that the basic ingredient necessary to sustain the principle of

equitable estoppel is wholly absent in this case. It is too difficult to find from the averments in the affidavit of the petitioner or from the documents

produced by it that there was any representation either in words or by conduct of the respondent which was acted upon by the petitioner. Unless

this basic ingredient is established there is no scope for the application of the doctrine of equitable estoppel. Hence, this point also fails.

7. The law is well settled that so far as fiscal statutes are concerned, their application depends entirely upon the language found in the enactment

and should there be any ambiguity in the language employed, it has to be interpreted in favour of a citizen and against the Revenue. So too, there

can be no presumption as to a tax. In other words, the right to tax has to be found in the enactment itself and not elsewhere. If any authority is

needed, reference may be made to the judgment of a Division Bench of this Court in W.A. No. 41 of 1980 dated 29.4.1986. This requires

reference to the particulars as to how and from what ingredient, the petitioner''s products, namely, ''Gopal Tooth Powder (Packets), Gopal Tooth

Powder (Tin Round) and Jet Tooth Powder'' are manufactured. According to the petitioner, the products are composed of (i) Sacred ash

(Vibuthi) 07.5%; (ii) Calcium Carbonate 1.00% and (iii) Sodium bicarbonate 1.00% plus sweetening agent, colouring agent and flavours. It is

submitted by the petitioner that this ash or vibuthi is cleaned, coloured and medicated. It is seen from the supporting affidavit of Dr. Jacob Groves

Denial filed by the petitioner that ash (vibuthi) undergoes the following different mechanical processes. According to him, the following are the

processes in respect of a bag of 50 kgs. of vibuthi-ash.

(i) The ash is sieved manually. There is machinery for mechanical sieving as well. Mud, sand and bigger particles of ash are separated from the finer

grains of ash.

(ii) The above is mixed with a mixture of Calcium Carbonate and sodium bicarbonate weighing 1/2 Kg. (1%).

(iii) The above mixture is further mixed with pink food colour plus saccharin weighing 100 gms. Ratio is 1 : 500. Mixing is done by hand.

(iv) To the above is added 358 ml. of a flavouring mixture consisting of camphor (Karpooram), Thymol (Sms Uppu), Manthol (Puthia Uppu). This

is highly volatile. The mixing is done manually and the product is hand-seived once again, Resultant product is packed in callaphane/Kraft paper

packets of 20 gms. each"".

8. Immediately it is necessary to notice that the excise duty is leviable on the manufacture of goods but not on the sale. The immediate question,

therefore, is whether the transformation of ash into tooth powder is a manufacture within the meaning of Section 2(f) of the Central Excises and

Salt Act, 1944. Section 2(f) reads :

Manufacture includes any process incidental or ancillary to the completion of a manufactured product"".

I am excluding the other sub-sections as they are not relevant for my present purpose. As rightly pointed out by the Rajasthan High Court in

Ramnugar Cane and Sugar Company Ltd. Jaipur and Others v. Union of India and others 1983 ELT 6 the definition of ''manufacture'' is inclusive

and the eight clauses appended to the definition are merely illustrative and not exhaustive. In my interpretation the ingredients of a manufacture as

visualised by Section 2(f) are : (a) There must be a transformation; (b) From such transformation, a new and different article must emerge, and (c)

Such new article must have a distinct name as a commercial commodity of its character or use should be different from its component part or parts.

9. Before I proceed further, it is convenient at this stage to advert to the argument advanced by the learned Senior Counsel for the petitioner to the

effect that unless tooth powder is ''dentifrice'' it will not come under Tariff 33.06. According to Tariff 33.06, any preparation for oral or dental

hygiene, including dentifrices (for example tooth paste and tooth-powder) and denture fixative pastes and powders is subject to excise duty at

15%. According to the learned Senior Counsel for the petitioner, ''dentifrice'' is not described in the Act and he had taken much pains, in this

connection to refer to a book called ''A textbook of Preventive Dentistry'' by Richard E. Stallord, D.D.S., Ph. D., Adjuct Professor, School of

Public Health, University of Minnesots, Minnespolis, Minnasota and the affidavit of Dr. Jacob Graves Daniel, he had referred to 10 text books of

different authors and had stated that as a result of his study of the said books on the subject of Dentifrice, he is persuaded to conclude that ash of

any kind cannot be used as an ingredient of a dentifrice. It is, therefore, contended by the learned Senior Counsel for the petitioner that ash will

never be a dentifrice and therefore tooth powder made out of ash will never be dentifrice and hence will fall outside the purview of Tariff Item No.

33.06. There are several fallacies in this argument. Taxable item is not dentifrice; on the other hand, any preparation for oral or dental hygiene

including dentifrices (for examples, tooth-paste and tooth powder) and denture fixative pastes and powders is made taxable. The genus, therefore,

is a preparation of oral or dental hygiene while the species are dentifrices. In turn, dentifrices include toothpaste, tooth-powder etc. When the

taxable item itself should indicate what is meant by dentifrices, it is wholly unnecessary to look for its meaning especially when the meaning can be

understood from the examples indicated in the said item. According to the said item, toothpaste and tooth-powder are examples for dentifrices. In

other words, tooth-paste tooth-powder fall under the category of ''dentifrices''. Indeed, according to Webster''s Dictionary ''dentifrices'' means -

Tooth-powder''. Even according to Chambers 20th Century Dictionary of 1983 Edition, the meaning of dentifrice is given as ''a substance used in

rubbing or cleaning the teeth - tooth-paste or tooth-powder. Therefore, the argument that the petitioner''s products are not dentifrices and

therefore they will not fall under Tariff Item 33.06 carries no merit.

10. Let me now revert to the point whether there is a manufacture when the ash is transformed into tooth-powder as contemplated by Section 2(f)

of the Act. In this case, there is a transformation when ash is converted into tooth-powder. In other words, a new and different article emerges and

such new article has a distinct name as a commercial commodity, i.e., what was ash originally is turned into tooth-powder. It is needless to state

that these are two different commercial commodities commonly or popularly known. After ash, vibuthi is transformed into tooth-powder, its use as

well as its character become different. In other words, there is such a transformation as to produce a different article which bears by itself a

commercial name quite different from its component part and is put to use different from its component part. The learned Senior Counsel for the

petitioner would point out that even now ash is being used for cleaning teeth. I must immediately state that such use is only out of necessity. To put

it differently, when the user has no means to buy tooth-powder or when the tooth-powder is not readily available, resort is made to the use of ash.

It may not be out of place to point out that even the charcoal powder or brick powder is being used by the people at lower rungs and this is also

out of necessity. Such users never call neither ash nor charcoal powder nor brick-powder as tooth-powder. Therefore, such use by itself will not

be a decisive factor in determining whether a transformed product has a distinct use quite different from its component part. As a matter of fact, the

petitioner does not market its product as medicated or scented ash. On the other hand, it takes care in naming the transformed product as

''toothpowder''. Therefore, it is too late in the day to doubt that ash-vibuthi and tooth-powder are two different and distinct commercial

commodities. If, after transformation, vibuthi is turned into tooth-powder and is sold as such, it is no more open to the petitioner to contend that

there is no change either in the use of ash-vibuthi or in the transformed product ''tooth-powder, by the process employed by the petitioner, ash is

transformed into tooth-powder. By such process, there is a completion of a manufactured product. In other words, at the completion of such

process, we have a new end product namely, ''tooth-powder''. To put it differently, but for the above process, there would not be a new end-

product, namely, ''tooth-powder''. Thus, the process is not only incidental or ancillary but is essential to the completion of a manufactured product,

namely, ''tooth-powder''.

11. Indeed in the decision in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and in

Empire Industries Limited and Others Vs. Union of India and Others, a passage from American decision is quoted with approval and it is

worthwhile to reproduce the same and it is as follows :

Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and

manipulation. But something more is necessary and there must be transformation; a new and different article must emerge, having a distinctive

name, character or use (1907) 52 L. Ed. 336 .

Even the decision is Empire Industries Limited and Others Vs. Union of India and

Others, which preferred to the decision in Union of India (UOI)

Vs. Delhi Cloth and General Mills, quoted with approval the following passage in Union of India v. R. Mansukhrai, EBWARI - (1978) 2 S.C.C.

472 .

The word ''manufacture'' is defined in Section 2(f) of the Act as including any process incidental or ancillary to the completion of a manufactured

product. The rolling of a billet into a circle is certainly a process in the course of completion of the manufactured product, viz., circles. In the

present case, as we have already indicated earlier, the product, that is sought to be subjected to duty, is a circle within the meaning of that word

used in Item 26-A(2). In the other two cases which came before this Court, the articles mentioned in the relevant items of the First Schedule were

never hold to have come into existence, so that the completed product, which was liable to excise duty under the First Schedule, was never

produced by any process. In the case before us, circle in any form are envisaged as the completed product produced by manufacture which are

subjected to excise duty. The process of conversion of billets into circles was described by the Legislature itself as manufacture of circles"".

12. As a matter of fact, I had the benefit of a recent ruling of a Division Bench of this Court to which I was also a party in W.A. No. 411 of 1980.

The processes involved in that case are : drilling, trimming and tailoring to suit the requirements and conveniences of the customers. Except drilling,

trimming and tailoring, the brake linings suffered no change. Yet, the Division Bench held that the product which the petitioners before it purchased

from M/s. Rane Brake Linings Ltd., Madras and other manufacturers of brake linings are obviously unfinished products and they cannot be put to

the utility for which they are meant unless the processes which the petitioners adopted or resorted to are completed and therefore, certainly the

mischief of ''manufacture'' as defined in Section 2(f) of the Act is attracted. Till the unfinished brake lining is trimmed, drilled and tailored, it cannot

be used by the customer for the purpose for which it is meant. Drilling, trimming and chamferring lead to the completion of a manufactured product,

namely, brake lining adaptable to the use in a particular vehicle. The facts in this case stand on a stronger footing than those in the case in W.A.

No. 411 of 1980. After ash is transformed into tooth-powder, it loses not only its identity but also its commercial name, character and use. It might

be that if the tooth-powder is put into the water, the ash can be obtained. But this is wholly irrelevant in the teeth of the definition of ''manufacture''

occurring in section 2(f) of the Act. I have already pointed out that by the process adopted by the petitioner, what was originally ash was turned

into tooth-powder which has a distinct and different name as a commercial commodity and which has a character and use quite different from its

component part, namely, ash-vibuthi. To reiterate, the process had led to the completion of a manufactured product namely, tooth-powder. Thus,

there is no escape from the conclusion that the process adopted by the petitioner is a manufacture within the meaning so section 2(f) of the Act and

therefore, its products ''Gopal Tooth Powder (Packets), Gopal Tooth Powder (Tin Round) and Jet Tooth Powder'' are subject to excise duty.

13. The Division Bench in W.A. No. 411 of 1980 - 1980 ELT 775 The Brakes India Ltd. Padi v. The Superintendent of Central Excise & 2

Others had noticed several decisions such as Union of India (UOI) Vs. Delhi Cloth and General Mills, ; South Bihar Sugar Mills Ltd., etc. Vs.

Union of India (UOI) and Others, ; Union of India (UOI) Vs. Hindu Undivided Family Business known as Ramlal Mansukhrai, Rewari and

Another, ; Allenbury Engineers Pvt. Ltd. Vs. Ramkrishna Dalmia and Others, , Extrusion Processors Pvt. Ltd. v. N.R. Jadhav, Superintendent of

Central Excise and Others - 1974 T. L.R. 1655; Metro Readywear Company v. Collector of Customs 1976 K.L.T. 642 1978 ELT 520 ; Deputy

Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, ; Empire Industries Limited and Others Vs.

Union of India and Others, and as I am bound by the decision of the Division Bench, I am avoiding referring to several citations brought to my

notice by the learned Senior Counsel for the petitioners. They are : Commissioner, Sales Tax Vs. Bechu Ram Kishorilal, ; Colgate Palmolive

(India) Ltd. v. Union of India and Others 1980 E.L.T. 268 ; The State of Tamil Nadu Vs. K.M. Natarajan, .; Deputy Commissioner of Sales Tax

(Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, ; Commissioner of Sales Tax Vs. Dunken Coffee Manufacturing Co., ; The

State of Gujarat Vs. Sukhram Jagannath, ; B. Dar Laboratories Vs. The State of Gujarat, and State of Maharashtra Vs. The Central Provinces

Manganese Ore Co. Ltd., .

14. In the result, the writ petition fails and is dismissed with costs.

ORDER

15. This petition coming on further orders on this day in the presence of Mr. C. Daniel, Advocate for the petitioner and of Mr. R. Joshi, Additional

Central Government Standing Counsel on behalf of the respondent the court made the following order :

The writ petition was dismissed with costs by my order dated 2.5.1986. However, I did not fix the costs and therefore, the matter is posted before

me. Taking into consideration the points involved, I fix the advocate''s fee at Rs. 500 (Rupees Five hundred only).

