
(2001) 02 BOM CK 0083

In the Bombay High Court

Case No : Writ Petition No's. 2420 of 1987 and 517 of 1988

Sunflag Iron and Steel Co. Ltd.

APPELLANT

Vs

Additional Collr. of C. Ex.

RESPONDENT

Date of Decision : 02-02-2001

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 37B
Constitution of India, 1950 — Article 226

Citation : (2001) 4 ALLMR 221 : (2003) 162 ELT 105 : (2001) 3 MhLj 532

Hon'ble Judges : S.K. Shah, J;B.N. Srikrishna, J

Bench : Division Bench

Advocate : V.R. Thakur, for the Appellant; Govind Mishra and L.K. Khamborkar, for the Respondent

Final Decision : Allowed

Judgement

B.N. Srikrishna, J.—These two Writ Petitions, under Article 226 of the Constitution of India, impugn the adjudication orders made against the petitioners u/s 33 of the Central Excises & Salt Act, 1944 (hereinafter referred to as the Act). The facts in both the writ petitions are to a large extent similar, though differing on marginal aspects. The issues of law thrown up by both the writ petitions are identical. Hence, it would be convenient to dispose of both the writ petitions by a common judgment and order.

2. FACTS :

(A) Writ Petition No. 2420 of 1987

(a) The petitioner is a Public Limited company registered under the provisions of the Companies Act, 1956 with its registered office at Nagpur. The petitioner is in the process of setting up an integrated Steel Plant to manufacture mild and alloy steel rolled products at Ekalari/Warthi village of Bhandara district. The project was contemplated in two phases. The first phase comprises installation of sophisticated high technology electrical and furnace with ladle refining facility,

continuous caster and continuous rolling mill. The second phase comprises making of sponge iron, which is the main raw material used in the Steel Industry. The petitioner has entered into technical collaboration with the famous West German Company M/s. Krupps Industrietechnik. In order to construct a facility for carrying out its production activities, the petitioner awarded a site development and factory construction contract to M/s. Bridge & Roof Company, a Public Sector Undertaking. M/s. Bridge & Roof Company has undertaken the work of fabrication and erection of the complete shed of the factory including roofing and cladding. The contract between the parties requires the petitioner to provide duty paid iron and steel items like angles, channels, plates, joists, beams, etc.. M/s. Bridge & Roof Company fabricate certain material out of such duty paid angles, channels, plates, joists, beams, etc. supplied to them and the fabrication is done on the site where the construction of the shed is proposed. These fabricated items are embedded in the construction forming the columns and roofs of the factory shed.

(b) The petitioner and M/s. Bridge & Roof Co., were served with show cause notices on 10-2-1987 by the respondents. It was alleged therein that M/s. Bridge & Roof Company were engaged in the work of fabrication of columns, trusses and other steel structures falling under sub-heading 7308.90 of Central Excise Tariff, 1985; that M/s. Bridge & Roof Company as well as the petitioner were carrying out the activity of manufacturing excisable goods on the Petitioner's premises; that the applicable rules under the Act had not been complied with and the amount of duty had not been paid. The notice, therefore, called upon both the petitioner and M/s. Bridge & Roof Company to show cause as to why penalty should not be imposed upon them under Rule 173Q of the Central Excise Rules, 1944 (hereinafter referred to as the Rules) and to show cause as to why excise duty amounting to Rs. 1,56,163.05 leviable on the excisable goods already removed without payment of duty should not be recovered from them under Rule 9(2) of the Rules. It also called upon them to show cause as to why the goods valued at Rs. 2,67,232.40, which had been seized and released provisionally, should not be confiscated under Rule 173Q of the Rules.

(c) M/s. Bridge & Roof Company gave a detailed reply dated 14-3-1987 to the show cause notice served on them. Shortly put, the contention was that the fabrication work done by them consisted of carrying out certain operations like drilling, cutting, welding, riveting on the duty paid columns, angles, plates, etc. supplied by the petitioner and such activity did not amount to "manufacture", nor did it result in the production of any "goods" on which excise duty could be levied. It was contended that columns, trusses and roof girders are merely structural shapes and assembling them for the purpose of construction was a fabrication activity and not a manufacturing activity since the character of the raw material remained as before despite the operations carried out on them. It was also urged that the activity did not result in sale of any new item or new commercial product being brought to the market for sale. A number of judgments of the Central Excise Gold Appellate Tribunal (CEGAT) taking the view

that similar activity did not result in the production of a commercially saleable product and, therefore, did not attract the levy of excise duty were cited. Notable amongst such judgments was the judgment of the CEGAT in the case of 1986 (9) ECC 35 . The reply, in terms, states that the structural of different shapes fabricated within the premises of the petitioner's factory were not capable of being sold like sheets, rods and/or angles, which were commercially known commodities in the market place, as no one had heard about a column, beam, truss or purlin as an item of trade. The petitioner substantially adopted this reply by its reply dated 8-5-1987 and also contended that, for the same reasons, it was not liable to pay excise duty. Thereafter the show cause notice was heard and adjudicated by the Additional Collector. Detailed notes of arguments were filed before the Additional Collector reiterating the submissions of the petitioner and M/s. Bridge & Roof Company citing large number of authorities including the decision of CEGAT in the case of M/s. Aruna Industries (supra). By the impugned order, dated 9-11-1987, the Additional Collector rejected the contention of the petitioner, but took a view that as M/s. Bridge & Roof Company was only a Contractor, it was not liable for excise duty. As far as the petitioner was concerned, the Additional Collector was of the view that as the contractor was carrying out manufacture of excisable goods on the premises of the petitioner, and such goods had been removed without complying with the applicable rules, the petitioner was liable to pay the excise duty. Consequently, the impugned order was made against the petitioner calling upon it to pay the duty of Rs. 1,56,163.05, duty on material worth Rs. 2,67,232.40 seized and provisionally released and penalty of Rs. 1000/-. The Petitioner was also directed to take out Central Excise Licence and follow the rules under the C.E. Act.

(B) Writ Petition No. 517 of 1988

(a) In this case also, there is a contract under which the factory building is being constructed. For the purpose of facilitating construction of the factory building, duty paid material in the form of bars, columns, angles and so on are subjected to the process of cutting, drilling, welding, shaping and fabricated into structural which are then embedded in cement concrete for the purpose of construction of the cold rolling mill plant. This is done under a contract dated 14-3-1987.

(b) Effective from 1-3-1987, the petitioner filed a classification list under Rule 173B of the Rules. In the Classification list, so as not to suppress any material facts, the petitioner had indicated at item 4 that it was doing "Fabrication of columns, trusses, Gantry, Girder, Purlins, etc. for our new Project at our factory site being fabricated by contractor against material supplied by us. "All this material supplied by the petitioner is, duty paid material. Interestingly, in the Remarks column of the Classification List, as against item 4, the petitioner had pointed out" "No Manufacture" as per Section 2(f) of Central Excise & Salt Act, 1944."

(c) On 19th October 1987, the Central Excise authorities served a show cause notice on the petitioner. Referring to the information given at Sr. No. 4 of the

Classification list pertaining to fabrication of columns, trusses, Gantry, Girders, Purlins, etc., the Assistant Collector expressed the view that the product shown was excisable as it falls under sub-heading 7308.90 of the Central Excise Tariff Schedule. The petitioner was, therefore, called upon to show cause as to why the classification sought by the petitioner should not be modified as suggested in the show cause notice. The petitioner by its reply dated November 2, 1987 raised three issues : (i) that the fabrication activity was not "manufacture"; (ii) that in any event the fabricated material was not "goods", which was sold as a distinct commercial product in the market or saleable as such and (iii) that the matter was clearly covered by the decision of the CEGAT in the case of 1986 (9) ECC 35 . The petitioner, therefore, contended that there was no question of its being called upon to pay excise duty thereon and requested that the proceedings be dropped. A personal hearing was given to the petitioner during the course of which, a detailed note of its contentions was filed.

(d) On 2842-1987, the Assistant Collector of Central Excise made an order rejecting the contentions urged by the petitioner holding that the fabrication of columns, trusses, Gantry Girders, Purlins, etc., from duty paid raw material supplied by the petitioner amounted to "manufacture" u/s 2(f) of the Central Excise & Salt Act resulting in finished products which were commercially saleable, which attracted excise duty under Tariff Entry No. 7308.90. He, therefore, directed the petitioner to pay the duty in accordance with Tariff Entry No. 7308.90 on such fabricated material which was used for the construction of the factory buildings.

3. Being aggrieved by the aforesaid two orders of adjudication, the petitioners are before this Court.

Preliminary Objection

4. A preliminary objection was raised on behalf of the Revenue by the learned Counsel pointing out that both the orders challenged by these writ petitions are appealable u/s 35 of the Act. Inasmuch as there is an equally efficacious alternate remedy available to the petitioners, the High Court should decline to exercise its writ jurisdiction. It is not in dispute that both the orders impugned before us in the two writ petitions are capable of being appealed against u/s 35 of the Act.

5. Mr. Thakur, learned Counsel for the petitioners, however, contends that the remedy of appeal is hardly an equally efficacious alternate remedy in the facts and circumstances of the case. He pointed out that, though under the scheme of the Act, CEGAT is the penultimate appellate authority, both on facts and law, its orders are not being followed by the authorities under the Act, sometimes without assigning any reason and sometimes in deference to the departmental administrative Circulars issued by the Central Board of Excise & Customs (CBEC). In the instant case, he pointed out that, in neither judgment challenged before this court, is the case of Aruna Industries (supra) adverted to, though it was

directly on the issue nor is any reason given by the adjudicating authorities as to why that judgment, which was binding in the submission of Mr. Thakur, was not followed. Mr. Thakur also drew our attention to the Circular issued by the CBEC F.No.1/9/8/87-CX. 4, dated 5th January 1988 in terms of which a trade notice was issued clarifying that duty paid sheets, angles, channels, beams, plates, etc. which were being subjected to various processes for preparing columns and trusses which go into the erection of shed or erected structures are not immovable goods and clearly fall under sub-heading 7308.90 of the Central Excise Tariff and appropriate duty would be leviable. The trade notice says that the above guidelines will apply in similar cases. He also referred to a Circular No. 1/88 (Annexure-J to W.P.No. 517/88) issued by the Under Secretary, CBEC to all Excise Authorities. In this Circular, the same view is reiterated and a direction was issued that the above guidelines should apply in all similar cases. Mr. Thakur complains that, in view of these guidelines of the CBEC read with trade notice, the Excise authorities are inclined to blindly follow the guidelines even at the cost of ignoring the judgments of the CEGAT taking a contrary view. Considering the total absence of reference to judgment of the CEGAT in the case of M/s. Aruna Industries, (supra) which is pat on the point (as we shall presently see), we are inclined to agree with the learned Counsel for the petitioners. Though not articulated in words, in substance and spirit both the impugned orders appear to follow the CBEC guidelines by ignoring the binding judgment of the CEGAT. Mr. Thakur complains that this is not a solitary case and requested us to make some observations on the binding nature of CEGAT judgments.

6. The Circular issued by the CBEC is made binding on the Excise authorities by reason of Section 37B of the Act. Section 37B provides that in its discretion, the CBEC may, for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit and that such officers and all other persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the CBEC. There is no doubt that whenever such instructions are issued by the CBEC, they are binding on all officers in the Excise Department. The question, however, arises as to what would be the situation if there is a binding judgment of the CEGAT and there is a contrary circular or order issued by the CBEC. This issue seems to be exercising the minds of the assessee appearing in the Excise proceedings.

7. In the case of *The Paper Products Ltd. Vs. Commissioner of Central Excise*, the Supreme Court had occasion to consider the true nature and effect of the Circulars issued by the CBEC u/s 37B of the Act. The Supreme Court reiterated that, in a catena of decisions, it has been held that Circulars u/s 37B of the Act are binding on the Department and the Department cannot be permitted to take a stand contrary to the instructions issued by the Board. It was also pointed out that the position may be different with regard to an assessee who can contest the validity or legality of such instructions, but so far as the Department is concerned, such right is not available. [See *Collector of Central Excise, Patna Vs.*

Usha Martin Industries, etc., . In the case of M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, , the Supreme Court held that the whole objective of such Circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. Consequently, the Supreme Court held :

"It does not lie in the mouth of the Revenue to repudiate a Circular issued by the Board on the basis that it is inconsistent with a statutory provision. Consistency and discipline are, according to this Court, of far greater importance than the winning or losing of court proceedings."

In the case of Collector of Central Excise, Bombay Vs. Jayant Dalal Private Ltd., , the Supreme Court took a view that it is not open to the Revenue to advance an argument or even file an appeal against the correctness of the binding nature of the Circulars issued by the Board. Similar is the view taken in the case of Collector of Central Excise, Bombay Vs. Kores (India) Limited, Thane, .

8. It is true that in all these decisions the Apex Court has pointed out the binding nature of the Departmental Circulars. A perusal of these cases suggests that in all these cases the assessee was entitled to some benefit under the Circulars/ Orders issued by the Board and the Revenue was contending that the Circulars/ Orders were illegal and, therefore, such benefit could not be made available to the assessee. In such situation the Supreme Court pointed out that once the CBEC has taken a policy decision with a view to maintain uniformity in the matter of classification or collection of excise duty it was not open to any officers of the Revenue to contend to the contrary and that any benefit flowing therefrom would be available to the assessee. The observations of the Supreme Court in the case of Paper Products Ltd. (supra) clearly point out that these Circulars cannot operate to the detriment of the assessee, whose right to challenge their legality, reasonableness or efficacy is always open. Thus, as far as the assessee is concerned, he has the choice of falling back on the Circulars, if they are advantageous to him, and challenge them if they restrict his rights.

9. Turning then to the binding nature of the judgments of the CEGAT, we find that the proposition has never been doubted that the judgments of the CEGAT are binding on the Revenue Authorities. In the case of Morarji Gokuldas Spinning Weaving Co. Ltd. and another Vs. Union of India and others, , it was pointed out by a learned Single Judge of this court that an order passed by the Central Government in exercise of its revisional powers (under the law as it stood when no appeal was provided) was binding on the Excise Authorities. In the case of 1986 (9) ECC 137 , which was a case after the CEGAT was established, the CEGAT itself took a view that judgments of the CEGAT are binding on the Revenue Authorities and even the fact that they had merely filed an appeal against a particular judgment did not detract from its binding nature.

10. In the case of 1988 (17) ECR 731 it was reiterated that unless the orders of the CEGAT are stayed or reversed by a superior forum, the decisions cannot be

ignored or brushed aside by quasi judicial authorities in the Department. Though these are decisions of the CEGAT, we agree with the view taken therein. The judgment of the Madras High Court in the case of Sree Rajendra Mills Ltd. v. Joint Commercial Tax Officer, Salem, [1978 (2) E.L.T. (Mad.) : 1971 28 STC 483 holds similarly under the Sales Tax Act. To similar effect are the observations of the Andhra Pradesh High Court in the case of Koduru Venkata Reddy v. Land Acquisition Officer and R.D.O. Kavali, (1987) 67 STC 424 and State of Andhra Pradesh v. Commercial Tax Officer and Anr., 1988 63 Comp Cas 273. In the case of Ram Singh and Sons Engineering Works and Anr. v. The State of Uttar Pradesh and Anr., 1977 STC 39, the Allahabad High Court had taken the same view. Though these judgments were with respect to decisions of the High Court and their binding nature, the principle is the same, namely, enforcement of judicial discipline and prevention of chaos.

11. Thus a conspectus of these judgments leaves no doubt in our minds that the judgments and orders rendered by the CEGAT are binding on all Excise Officers unless they are set aside by this Court or by the Supreme Court in appeal.

12. By its judicial hierarchy, the judgment of the CEGAT binds the Revenue Officers. By virtue of Section 37B of the Act, administratively issued Circulars/Orders and trade notices equally bind the Revenue Officers. In such a situation, assuming there is a conflict between a Circular, order or trade notice issued u/s 37B of the Act and a binding judgment of the CEGAT, we have no hesitation in holding that it would be the judgment of the CEGAT which ought to be followed by the Revenue Officers. The Supreme Court in a recent judgment in Government of Andhra Pradesh and Ors. v. A.P. Jaiswal and Ors. - AIR 2001 SCW 101 had occasion to consider the application of the principle of stare decisis to judgments of Tribunals. Observes the Supreme Court (vide-paragraph 24):

"24. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by Courts then there will be chaos in the administration of justice, which we see in plenty in this case. This Court in the case of S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, held thus at pages 24-25 of AIR SCW:

"At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same tribunal was incorrect, it ought to have referred the matter to a Larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter

Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules or precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every Presiding Officer of a Judicial Forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate Court is bound by the enunciation of law made by the superior Courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to Larger Bench if it disagrees with the earlier pronouncement."

The reason for saying so is quite obvious. The Circulars/orders or trade notices are not binding on the assesseees at all and their efficacy and legality is always open for challenge at the instance of them. As far as the judgments rendered by the CEGAT are concerned, they are equally binding on the assesseees as well as the Department. In a contest, therefore, the Circular's/guidelines/orders or trade notices issued u/s 37B must necessarily yield. Thus, we hold that all officers functioning under the Act are bound by the judgments rendered by the CEGAT as long as such judgments are not stayed or reversed by a superior forum i.e. the High Court or the Supreme Court. We also hold that if at all there is a situation of conflict between a Circular/guideline/order or trade notice issued u/s 37B of the Act and a binding judgment of the CEGAT, it is the binding judgment of the CEGAT which has to be followed by the authorities under the Act. The observations of the Division Bench of this Court in the case of Yashwant Sahakari Sakhar Karkhane Ltd. Vs. Union of India (UOI) and Others, fully support the view which we are inclined to take. It is an elementary proposition that an administrative circular issued by an authority, however high, can never override a binding judgment of judicial or quasi judicial authority. This is the quintessence of rule of law.

13. In the facts and circumstances of the case, therefore, we are inclined to agree with the contentions of Mr. Thakur that driving the petitioners to the appellate authorities would be of no use. Faced with the circulars/guidelines/orders or trade notices u/s 37B of the Act, which have already taken a view in the matter, the assessee would have little chance to persuade the departmental authorities to take a contrary view. Mr. Thakur is right when he contends that there is no equally efficacious alternate remedy. Hence, we are of the view that these writ petitions need to be entertained.

14. The charging Section in the Central Excise Act is Section 3. Section 3 provides that excise duty shall be levied and collected on all "excisable goods" which are "produced" or "manufactured" in India, at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. Thus, the charging event is the "production" or "manufacture" of "excisable goods". It is not the "goods" which

are subjected to the duty, but the act of producing or manufacturing them, which is subjected to the duty. Conversely, if there is no manufacture or production of any "excisable goods", then there can be no levy of excise duty u/s 3 of the Act.

15. The concept of "production" or "manufacture" and the concept of "goods" are well established in Excise Law. The exact contours of the two concepts have been explored with sufficient succinctness by the decided cases and a reference to them would facilitate the process of our decision.

16. In the case of Union of India (UOI) Vs. Delhi Cloth and General Mills, , the Supreme Court had an occasion to make observations on both these concepts in Excise Law. As to the expression "manufacture", the Supreme Court (in para 14) says:

"The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance", however minor in consequence the change may be."

As to the connotation of the term "goods", the Supreme Court explained it in para 17 by saying:

"These definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold."

Finally, in para 18, the Supreme Court says :

"These considerations of the meaning of the word "goods" provides strong support for the view that "manufacture" which is liable to excise duty under the Central Excise and Salt Act, 1944 must be the "bringing into existence of a new substance known to the market"."

17. In the case of Union Carbide India Limited Vs. Union of India (UOI) and Others, , the Supreme Court referred to Entry 84 of List I of Schedule VII to the Constitution, which speaks of "duties of excise on tobacco and other goods manufactured or produced in India" and highlighted that the expression "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer and that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold." The Supreme Court reiterated its views in the case of South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, .

18. Thus, armed with twin concepts of "manufacture" and "goods", we shall now examine whether the petitioners before us carried out any "manufacture", or whether the fabricated structural amount to "goods" within the meaning of the expression as explained by the Supreme Court.

19. In this connection, Mr. Thakur cited the judgment of the CEGAT in the case of 1986 (9) ECC 35 . In this case, the assessee was carrying out an activity, which is exactly part materia with the activity of the petitioners. There also, the

assessee had entered into a contract for supply, fabrication and erection of structural steels and cladding works of Rolling Mills and Steel Melting Shop (a shed) in the project area. For the purpose of carrying out the fabrication and erection of structural engineering works, the assessee used to supply duty paid material, which consisted of iron and steel products like plates, angles, joists, channels, rods and strips as per required specifications. The contractor used to fabricate them by subjecting them to the process of cutting, drilling, riveting, welding and joining as required by the technical designs. The Excise Authorities called upon the assessee to pay excise duty by taking the view that it was "manufacturing" or "producing" excisable "goods", which fell within the applicable Tariff entry. In a well considered judgment the CEGAT held that, in the first place, the activity of fabrication of the raw material indicated that it did not amount to manufacture and it was merely an act of fabrication or facilitation of the iron rods, angles, channels and so on for being fitted into the structure that was being built. Assuming that it was amounted to manufacture, the CEGAT took the view that the goods were not manufactured in a factory as defined in Section 2(m) of the Factories Act. Finally, it also held that the fabricated structural could not be considered as "goods" within the meaning of Section 3 of the Act. Support was taken from the fact that all these fabricated structurals were embedded in cement concrete and thus became immovable and, therefore also, they were not "goods". It is pointed out in the judgment of the CEGAT that the expressions "trusses", "columns", "purlins", "girders" and "beams" do not refer to identifiable, distinct goods, which have commercial sale ability, but merely indicate the function a structural member has to carry out. They are not hawked the way goods like sheets, angles can be hawked and sold. That sheets and angles are well known commodities in the market place, but no one has heard of a truss on a purlin as an item of trade, is the reasoning of the tribunal. Aruna Industries" judgment was followed in several cases, which were cited by the learned Counsel for the petitioners. Instead of multiplying authorities, we would prefer to go to the last in the series, 1999 (82) ECR 677 . In this judgment too, the CEGAT had a similar situation, and after considering the thrust of the previous judgments, the CEGAT came to the conclusion that there is no authority in law for levying duty on immovable structures like factory building, power plant, etc.; that erection of sheds at site with the help of various duties paid articles of iron and steel is only a fabrication activity which does not amount to manufacture as no new or distinct commercial article comes into existence; fabrication of steel structural by cutting to size, drilling holes and welding or remolding of materials does not amount to manufacture as these processes undertaken were in the nature of intermediate processes. In coming to these conclusions, the tribunal relied on two judgments of the Supreme Court and one judgment of the Madhya Pradesh High Court to which a reference is called for.

20. In the case of Bajaj Tempo Limited Vs. Union of India, , the learned Single Judge of the Madhya Pradesh High Court was faced with a similar situation. There too, the petitioner was fabricating trusses, columns and purlins by process of

cutting, drilling and welding of steel plates, channels and angles which were used immediately for erection of a shed at site. These raw materials were all duty paid raw materials. The learned Single Judge took a view that there was no "manufacture" of goods or products, that the activity was only fabrication activity simpliciter and that there was no excise duty leviable on the structural fabricated by the petitioner. This judgment was confirmed by the Division Bench of the Madhya Pradesh High Court in the case of Union of India (UOI) Vs. Bajaj Tempo Ltd., .

21. In the case of Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P., , a tube mill and welding head were erected and installed by the appellant, which was a manufacturer of steel pipes and tubes, by purchasing certain items of plant and machinery from the market and embedding them to earth and installing them to form a part of the tube mill and purchasing certain components from the market and assembling and installing them on the site to form part of the tube mill which was also covered in the process of welding facility. The Supreme Court held that the basic test of levying duty under the Act was two fold:- (1) that any article must be goods, and (2) that it should be marketable or capable of being brought to the market. It also took the view that the goods which are attached to the earth and thus become immovable do not satisfy the test of being goods within the meaning of the Act, nor can they be said to be capable of being brought to the market for being bought and sold. As both the tests postulated were not satisfied in the case of the appellant, it was held that there was no incidence of excise duty on the fabricated material. In our view, this judgment is squarely applicable to the cases before us.

22. In the case of Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut, , Mono Vertical Crystallisers had to be assembled and erected at the customers factory. Such assembly and erection was done either by the appellants or by the Customer. The appellants before the Supreme Court used to collect fabrication material for fabricating them into Mono Vertical Crystallisers which were erected and attached by foundations to the earth. The Supreme Court took a view that these Mono Vertical Crystallisers were not "goods" within the meaning of the Act and, therefore, not exigible to excise duty. The test applied was that the goods which were attached to the earth became immovable and did not satisfy the test of being goods within the meaning of the Act, nor could they be said to be capable of being brought to the market for being sold. The Supreme Court reiterated the view taken in its earlier judgment in the case of Quality Steel Tubes (P.) Ltd. (supra) that the erection and installation of a plant cannot be held to result in excisable goods. If such wide meaning is assigned to the term, as would result in bringing into its ambit structures, erections and installations, it surely would not be in consonance with the accepted meaning of excisable "goods" and their exigibility to duty.

23. The same view is reiterated by the Supreme Court in its latest judgment in the case of Triveni Engineering and Industries Ltd. and Another Vs.

24. As against this catena of judgments cited by the learned Counsel for the petitioners, Counsel for the Revenue strongly relies on the judgments of the CEGAT in the case of 1984 ECR 1057; 1989 (19) ECC 73 to contend to the contrary. In Bokaro (supra), the assessee was carrying out fabrication and machining work in respect of which it used to sell steel structurals and also carry out job work. The operations carried out on structural steel plates and flats consisted of cutting to sizes, drilling holes to enable bolting, welding to facilitate further assembly at erection sites and applying shop paint to prevent rusting during storage. It was contended by the assessee that these processes and operations did not result in the manufacture of new goods, that the articles in question did not undergo any material change in commercial parlance and in the trade the articles in question continue to be the same even after the said operations. It was also contended that, as a result of the said operations, no different commercial article or commodity came into existence. After examining the material on record, the tribunal found that the contract pertained to fabrication of structures according to drawings and specifications with one coat of shop paint and delivery of fabricated structures to the erection sites. In other words, the assessee was a Company which carried out the work of fabrication and work in its factory and supplied them to its customer at the erection site by carrying out several processes on raw steel. The Tribunal pointed out that if the works carried out by the appellants were considered in isolation, one might be led into concluding that it does not constitute manufacture, but it has to be remembered that the work carried out by the appellants is of highly intricate, specialised and technical nature. After the processes were done by the appellants, the raw material consisting of beams, angles, etc. get such shape and character that they could be readily fitted into structures. The tribunal drew an analogy with pre-fabricated houses, or a walking stick, or a toy made from wood and held that the identity of such articles must be held to be different from raw materials which have gone into their making; such activities would certainly be called manufacturing activities. In fact, this judgment was considered carefully by the CEGAT in the case of Aruna Industries (supra) and, in our view, rightly distinguished.

25. It was rightly pointed out in Aruna Industries (supra) that the CEGAT had considered the terms of contract in Bokaro (supra) and based its decision on the nature of work to be carried out. The terms of contract in Bokaro showed that raw materials were only cut to size, welded, fixed and fabricated according to drawings and thereafter assembled structures were delivered at the site. These facts do distinguish the judgment in Bokaro (supra). In our judgment, considering the peculiar nature of the terms of contract before it, the tribunal rightly took the view in Bokaro that processes carried out on the raw steel for fabricating them into structurals, which were to be delivered at site, indicated that the assessee therein was carrying out manufacture of goods. Such is not the case before us.

26. The judgment rendered by the CEGAT in the case of Richardson & Cruddas Ltd. (supra) also does not carry the matter in favour of the Revenue. In fact the tribunal observes that in Aruna Industries case the contracts comprised of construction and completion of works. There was a sale of raw materials by one party to the other; it was a composite contract for work and labour and not for sale of goods. It further says that the assessee had erected structures on the site allotted to them by VSP and that since the assessees were only erecting a construction and were fabricating the materials on the spot, the workers were merely "birds of passage" and, therefore, they cannot be considered as "workers" within a factory and the structures cannot be deemed to be fabricated in a "factory". In the case of the assessee before us, these are precisely the facts. The learned Counsel for the Revenue is not able to show us that, in the case of assessee before us, there is a contract for sale of goods or that the fabricated pre-structural were carried out/manufactured at some factory and delivered at site of the Petitioner. On the other hand, it was fairly conceded that the contracts in both the cases before us involved erection and construction of the shed and cold rolling steel mill for which purpose the contractor at site fabricated certain duty paid raw materials which were supplied by the assessee. These factors, in our judgment, did not exist in the case of Richardson & Cruddas (supra) and, therefore, the CEGAT had no difficulty holding against the assessee. In our view, even this judgment does not militate against view taken in Aruna Industries.

27. Having considered the matter from all these aspects, we are satisfied that, the cases of the petitioners before us fall within the matrix exactly similar to the one in Aruna Industries and had the assessing similar to the one in Aruna Industries and had the assessing authorities applied their minds carefully to the judgment in Aruna Industries case, there would not have been any difficulty in arriving at the correct decision. Having not done so, there is an error.

28. We are, therefore, of the view that in both the cases, fabrication of structural at the site of the principal by using raw materials supplied by the principal did not amount to "manufacture", nor was it done at "factory", nor were the goods saleable or capable of being brought to the market for being bought or sold. We further notice that in both the cases the fabrication was with the immediate purpose of using in the factory shed or steel cold rolling mill which were being constructed and there was never an intention to sell it in the market. These facts, in our judgment, make it amply clear that the materials fabricated at the site by the contractors in both the cases were not exigible to excise duty u/s 3 of the Act. Hence, the orders in both the cases need to be set aside in exercise of writ jurisdiction.

29. In the result, we allow both the writ petitions. The orders impugned in both the writ petitions are quashed and set aside.

30. At the request of Shri Mishra, learned Counsel for the Respondents, in order to facilitate the Department to carry out the matter in appeal to the Supreme

Court, the amount deposited in this court in W.P. No. 2420/87 shall not be refunded to the petitioner for a period of two months from today. The Bank Guarantees given in W.P. Nos. 2420/87 and 517/88 are to be kept alive by the Petitioner for a period of two months.

31. Rules are accordingly made absolute in both the cases with no order as to costs.