
(1982) 06 BOM CK 0018

In the Bombay High Court

Case No : Misc. Petition No. 239 of 1979

Swan Mills Ltd. and another

APPELLANT

Vs

H.R. Amarnani and others

RESPONDENT

Date of Decision : 23-06-1982

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 38 ECR 306 : (1982) 10 ELT 445

Hon'ble Judges : S.C. Pratap, J

Bench : Single Bench

Judgement

1. By the impugned order dated November 20, 1978, the Assistant Collector of Central Excise, Bombay, held that the products covered by the classification list filed by the petitioners herein Messrs Swan Mills Limited in respect of unprocessed Rayon multifold yarn and H.D.P.E. yarn was classifiable under Tariff Item No. 68 and consequently duty at 5% ad valorem on the entire value u/s 4 of the Central Excise Act was payable by the manufacturer. Aggrieved by the said order the petitioners have filed this petition under Article 226 of the Constitution challenging the validity of the said order on various grounds set out in the petition. After notice of this petition was served upon the respondents, the Superintendent of Central Excise issued to the petitioners notice (Exhibit G to this petition) to show cause why central excise duty as stated in paragraph (a) of the said notice and as to why penalty as stated in paragraph (b) of the said notice should not be demanded and recovered. On receipt of the said show cause notice, the petitioners amended this petition challenging the validity of the said notice and seeking reliefs also on the basis thereof.

2. When this petition was called out for final hearing, Mr. M.I. Sethna, learned Counsel for the respondents, raised a preliminary objection to the effect that the petitioners had not adopted the procedures prescribed under the Central Excise Act in pursuance either of the order of November 20, 1978 or of the show cause notice (Exhibit G to this petition). He also submitted that as at this stage, there

is no material before this Court to properly appreciate, consider and adjudicate the rival contentions on the questions raised in this petition. Mr. S.T. Thakore, learned Counsel for the petitioners, has, on the other hand, submitted that it was unnecessary for the petitioners to go through the gamut of departmental procedures particularly in view of a Division Bench ruling of this Court in *Garware Nylons Limited v. Union of India & others* 1980 ELT 249, which, according to the learned Counsel, really concludes the question involved in this petition in favour of the petitioners and against the respondents. On behalf of the petitioners, he submitted that if, as held in the aforesaid ruling, nylon twine is nothing but nylon yarn other than textile yarn in spite of the same (nylon yarn) being dealt with in the manner referred to in the said ruling, then there is no reason why in this case the yarn in question which would be man-made non-cellulosic other than textured within the meaning of Tariff Item No. 18, should not remain the same after doubling thereof. Submission is that the aforesaid Division Bench ruling as also the rulings referred to and relied upon in the said Division Bench ruling cover the case of the petitioners in their favour. In these circumstances, it would be a futile exercise to go through the gamut of departmental procedures when this Court has already decided a virtually similar matter in the above ruling in *Garware Nylons*" case.

3. There is substance in the contention advanced by the learned Counsel for the petitioners. Going through the ruling in *Garware Nylons*" case I find that the ratio thereof does support the petitioners" contention. I also find that the cases relied upon in *Garware Nylons*" case also go to support the case and contentions of the petitioners herein. Mr. Sethna submitted, however, that in *Garware Nylons*" case itself one of the learned Judges (Masodkar J.) has in fact made certain observations in favour of the excise authorities and the said observations would go against the petitioners" contentions herein. Though factually that does appear to be so, it also cannot be ignored that Masodkar J. has also made extensive observations which go to support the case of the petitioners herein. It has also been observed by Masodkar J. that benefit of doubt, if any, must go to the assessee. And ultimately Masodkar J. has also agreed with the conclusions reached in the main judgment delivered by Mrs. Sujata Manohar J. The ruling in *Garware Nylons*" case, on a fair reading thereof, does lend support to the petitioners" contentions.

4. The main and perhaps the only difficulty in the way of the petitioners, however, is that as in the case of *Garware Nylons* the petitioners here have not led any evidence whatsoever, have not filed any affidavit whatever and have not produced any materials as to how the yarn after doubling is known generally and popularly. In *Garware Nylons*" case extensive evidence and material was led on the aforesaid aspects. Affidavits also were filed. Opportunity had also been given to excise authorities to cross-examine assessee"s witness if the authorities so desired. In the present case nothing of the kind has occurred. Indeed, as record shows, immediately after the order of November 20, 1978, the petitioners filed the instant writ petition. And when pending this petition show cause notice was

issued to the petitioner, the petitioners challenged the same by way of amendment to this petition. In these circumstances, it would not be just and fair to the excise authorities to decide the matter merely by placing reliance on the Division Bench ruling in *Garware Nylons* case. Justice does require that the excise authorities must have materials and evidence before them, on the basis whereof the said authorities themselves may come to a conclusion different from the one which they have presently reached. It would also be just and fair that the petitioners should be given full-fledged opportunity to satisfy the excise authorities in the aforesaid behalf. This, of course, is subject to the principle that in matters such as this burden is primarily on the excise authorities to establish that the article here falls not under Tariff Item No. 18 but under the residuary Tariff Item No. 68. All in all, ends of justice require setting aside the impugned order and the impugned show cause notice and sending back the matter and the proceedings to the concerned excise authorities for a full-fledged hearing afresh and de novo with full-fledged opportunity to the petitioners herein and to thereafter only pass an order one way or the other on merits and in accordance with law.

5. In the result, this petition is allowed. The impugned order dated November 20, 1978 (Exhibit E to the petition) as also the impugned show cause notice dated February 2, 1979 (Exhibit G to the petition) are both set aside and quashed. The proceedings are sent back to the excise authorities. The excise authorities shall issue fresh notice of hearing to the petitioners and shall provide the petitioners full-fledged opportunity in all respects in respect of the subject matter in dispute. The proceedings in pursuance of this order shall be held afresh and de novo and regardless of the previous orders and the previous show cause notice. The excise authorities will thereafter pass appropriate order in the matter one way or the other on merits and in accordance with law. The petitioners have also made a request for refund of certain amounts which they have already paid by way of duty which, according to the petitioners, were illegally collected. This prayer for refund will also have to be considered while considering and deciding proceedings in pursuance of this order. The petitioner have, in pursuance of an interim order of this Court, furnished in favour of the Prothonotary and Senior Master of this Court a bank guarantee. Since this petition is now being disposed of, the petitioners should, in the very terms in which the petitioners furnished the bank guarantee in favour of the Prothonotary and Senior Master of this Court, furnish a bank guarantee in favour of the Collector Excise, Bombay. This guarantee should be furnished within a period of two months from today. On the petitioners furnishing the said guarantee, the bank guarantee already furnished in favour of the Prothonotary and Senior Master of this Court shall stand revoked.

6. Rule earlier issued on this petition is made absolute in terms aforesaid. In the circumstances of the case, however, there will be no order as to costs.