

(1987) 05 CAL CK 0010
In the Calcutta High Court
Case No : Civil Order No. 156 (W) of 1986

Trot Shoe Company Private Ltd. and Another	APPELLANT
Vs	
Assistant Collector of Central Excise and Others	RESPONDENT

Date of Decision : 05-05-1987

Acts Referred:

Citation : (1987) 30 ELT 864

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : R.N. Bajoria, S.K. Bagaria and C.M. Ghorawat, for the Appellant; S.N. Banerjee and Sadananda Ganguly, for the Respondent

Judgement

Suhas Chandra Sen, J.—The petitioner No. 1, Trot Shoe Company Private Limited, carries on business of manufacturing footwear at its factory situated at No. 19/4A, Munshigunj Road, Calcutta. On the goods manufactured by the petitioner company, Central Excise Duty at all material items was levied under Tariff Item No. 36 of the First Schedule to the Central Excises and Salt Act, 1944. In order to manufacture shoes, the petitioner company buys Cotton fabric in fully manufactured condition from the market. The manufacturers of cotton fabric have to pay excise duty as and when they manufacture cotton fabric. The case of the petitioners is that the cotton fabric is a marketable commodity and they buy this commodity from the market which has already borne excise duty. For the purpose of manufacturing footwear, cotton fabric is used by the petitioner in a special manner. Rubber solution is pasted on the one side of the fabric. Such rubber solution is prepared by mixing, inter alia, natural rubber with fillers accelerators and solvent oil. Two such sheets of pasted fabric are then pressed together so as to make the same thick enough for being used to make the "upper" for manufacture of shoes. At this stage, the said semi-processed material is sticky and has got adhesive properties. The "uppers" thus prepared has to be immediately used for manufacture of shoes because the tackiness and the adhesive properties of the "upper" is of very limited duration. Immediately

after the two sheets of pasted fabrics are pressed together so that the same is thick enough for being used as "uppers" the pasted fabric is immediately cut into different sizes for stitching of the complete "uppers". These "uppers" are soft and shapeless. The "uppers" are thereafter lasted on not aluminium lasts. Thereafter, "the "uppers" are put on the soles and the entire materials are then directly vulcanised for manufacturing shoes.

2. The case of the petitioners is that the manufacturing of shoes is one continuous process beginning with pasting of rubber solution on one side of the fabric and ending with vulcanization to form the shoes.

3. The case of the Excise Department is that the pasting of rubber solution on the cotton fabric amounts to manufacture of rubberised cotton fabrics, which is an independent excisable item. Since the petitioner company not only produces shoes but also produces rubberised cotton fabric, excise duty is leviable on rubberised cotton fabric regardless of the fact that this fabric may be used ultimately for the purpose of manufacture of shoes which admittedly is an excisable item.

4. In the letter dated 10-12-1985 the Assistant Collector of Central Excise, Calcutta, "G" Division wrote to the petitioners to the following effect:

"The product in question cannot be considered as Unfinished/Semifinished goods since after sandwiching the rubber the rubber compound in between two layers of cotton fabrics, the resultant goods become processed cotton fabrics which are actually used as raw material for manufacture of footwear, another distinct product under item No. 36 of the C.E.T. Manufacturing of processed cotton fabrics under item No. 19-I(b) is complete as soon as the two layers of cotton fabrics come out of the roller with rubber compound sandwiched in between.

You are accordingly requested to furnish the particulars of such goods manufactured and consumed during the period of 30-4-1984 to to-date immediately. The value of such goods and the percentage of normal profit may also please be furnished".

5. In reply, the petitioner wrote on 16th December, 1985.

"It is a matter of regret that in spite of the said requests, the details and/or particulars asked for in the said letter have not been supplied to us. In your said letter you have simply alleged that by sandwiching the rubber compound in between two layers of cotton fabrics, processed cotton fabrics are manufactured and that the manufacture of such processed cotton fabrics is complete as soon as the two layers of cotton fabrics come out of the roller with rubber compound sandwiched in between. You would kindly appreciate that at the aforesaid stage of coming out of the roller the said materials are only semi-finished/unfinished process inputs which are not at all capable of being marketed. At the aforesaid stage the materials have got a sticky surface which serves the purpose of adhesion in the process of manufacture of shoes. In fact, it is not feasible/

possible to market the said semi-finished/unfinished materials as the life thereof is very short and the same have to be used in the manufacture of shoes within a short time and if not so used the same would get hardened and become unfit for further use. Admittedly the said semifinished/unfinished material is not even vulcanised by us. You would kindly appreciate that there cannot be any manufacture of rubberised cotton fabrics in the absence of vulcanisation. It is only the process of vulcanisation which transforms the rubber from soft plastic state to a well bounded elastic state which is an absolute necessity for manufacture of the rubberised cotton fabrics. If the said semi-finished/unfinished process material, which is not even vulcanised, is brought to the market, there will be a total loss of its tackiness and adhesive property which will render it useless".

6. The case of the respondents has been stated in the affidavit of Subhas Chandra Varshney, affirmed on 11th April 1986. There it has been asserted in paragraph 10 that the petitioner No. 1 manufactures shoes and uses unvulcanised D.I. Cloth (rubber compound Sandwiched in between two layers of Cotton cloth) as "uppers". The aforementioned D.I. cloth is a product coming under the purview of the Tariff Item No. 19-I(b). The process of rubberising comes within the process of manufacture within the meaning of Tariff Item No. 19-I(b).

7. It has further been stated in that affidavit that there is no distinction between vulcanisation and unvulcanisation. Due to advancement of technology, unvulcanised D.I. Cloth is subjected to vulcanisation only at the final stage of the process of manufacture of canvas shoes. The petitioner No. 1 has been using two layers of cloth with rubber compound sandwiched in between with the aid of power driven rollers and other processes, such as, tailoring the D.I. Cloth. The process of vulcanisation brings fixity of two layers to the quality of such cloth. It has further been asserted that test results of four samples of the aforementioned cloth indicate that the percentage of cotton was more than 50. The product in question could not be treated as unfinished/semi-finished as after sand witching, the rubber compound in between two layers of cotton fabric becomes processed cotton fabrics.

8. The allegation that the product does not have a market has generally been denied that no particulars have been given.

9. The petitioner has a substantial case if the allegations made by the petitioner are true. But it is very difficult to proceed on this basis in a writ jurisdiction that the allegations are true when the allegation have been refuted in the affidavit-in-opposition.

10. The case of the petitioners is that no new marketable product has emerged as a result of making of the "uppers". It has been state< that the making of the "uppers" does not require any process of manu facture. Thirdly, it has been asserted that the "uppers" that are manu factured by the petitioners have to be

used up immediately, otherwise the stickiness of the product will disappear and make the product unusable. Lastly, it was asserted that the whole thing from the beginning to end is one continuous process which ends in manufacture of shoes. In my judgment, all these questions should be gone into and decided by the respondents on examination of facts. If the goods manufactured by the petitioners does not have any market at all, the petitioners will be entitled to succeed. But that is a question basically of facts.

11. I was referred to a large number of decisions of the Supreme Court and also various High Courts by both the sides. It is not necessary to refer to those decisions. The principles applicable to any cases like this is a well settled. But the question in this case, in my opinion, are the basic question of fact which must be established before the application of the principles of law laid down by the Supreme Court as well as the High Court.

12. In particular, strong reliance was placed by the petitioners on a judgment of the Supreme Court in the case of Union Carbide India Limited Vs. Union of India (UOI) and Others, . That was a case where aluminium cans were made by the manufacturer of flashlights. The aluminium cans were not sold in the market but were used for the purpose of manufacturing flashlights. In that case, the Supreme Court found that at the point where the aluminium cans were sought to be charged with the excise duty, the cans were in a crude and elementary form incapable of being employed as a component in as flashlight. The cans had sharp uneven edges and in order to use them as a component in making flashlight cases, the cans had to undergo various processes such as trimming, threading and redrawing. After the Cans were trimmed, threaded and redrawn, they were reeded, beaded and anodized or painted. It was at that point only that the cans become a distinct and complete component capable of being used as a flashlight case for housing battery cells and having a bulb fitted to the case. The Supreme Court was faced with the question whether the aluminium cans produced by the appellant company could be described as "goods" for the purpose of excise duty inasmuch as they were not marketable and were prepared entirely by the appellant for the flashlight manufactured by it.

13. The Supreme Court found that there were only two manufacturers of flashlight in India, the appellant being one of them. It was further found that the aluminium cans prepared by the appellant were employed entirely by it in the manufacture of flashlights and were not sold as aluminium cans in the market. The Supreme Court found that there was no satisfactory material to the contrary to rebut the allegations of the petitioners. The records of that case revealed that whatever aluminium cans were produced by the appellant were subsequently developed into a completed and perfected component for being employed as flashlight cases. It was observed by the Supreme Court that "We find it difficult that the elementary and unfinished form in which they exist immediately after extrusion suffices to attract market".

14. It will be clear that that decision was based on the facts of that case. If in

this case the Department finds that the "uppers" on which excise duty is sought to be levied are not sold by the petitioner and have no market, there cannot be any question of levying excise duty. But that is a finding of fact which will have to be examined by the Department. It is for the assessee to produce evidence to show that it does not sell any "uppers" and that there is no market for the "uppers".

15. Therefore, this writ petition must fail. All the questions are left open to be agitated on merit by the petitioners before the respondents. The respondents are directed to act in accordance with law.

16. There will be no order as to costs

17. Oral prayer for stay of operation of the order made on behalf of the petitioners is refused.