

(1987) 12 BOM CK 0011

In the Bombay High Court

Case No : Appeal No. 414/86 in Writ Petition No. 852/81

Union of India

APPELLANT

Vs

Babubhai Nylchand Mehta, Bombay

RESPONDENT

Date of Decision : 02-12-1987

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 2

Citation : (1988) 15 ECC 137 : (1988) 33 ELT 292

Hon'ble Judges : V.S. Kotwal, J;M.L. Pendse, J

Bench : Division Bench

Judgement

This Judgment has been overruled by : Union of India and another Vs. Babubhai Nylchand Mehta, AIR 1991 SC 407 : (1991) 31 ECC 455 : (1991) 33 ECR 7 : (1991) 51 ELT 182 : (1990) 4 JT 790 : (1990) 2 SCALE 1269 : (1991) 2 SCC 348 Supp : (1990) 3 SCR 559 Supp : (1991) 1 UJ 488

Pendse, J.—The respondent is a sole proprietor of a concern known as Neptune Water-proof Manufacturing Company and carries on business of making water-proof kraft paper. The respondent manufactures following products known as "waterproof kraft paper" :

- (i) Bitumenised Waterproof packing paper.
- (ii) Polythene-lined kraft packing paper
- (iii) Waxed kraft packing paper
- (iv) Jute-lined bitumenised waterproof packing paper
- (v) Waxed kraft packing paper
- (vi) Hessian-lined kraft paper

The respondent purchases kraft paper from the open market and also other agents as bitumen, polythene, jute fibre and wax and thereafter combines these agents with kraft paper in his factor. Till October 30, 1980 the respondent

classified his products under Item 17(2) of the Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act"), and paid duty accordingly. It is the claim of the respondent that on October 30, 1980 the respondent discovered that none of the products manufactured by him were liable to payment of duty as the products did not fall within the expression "manufacture" within Section 2(f) of the Act. The respondent thereupon filed classification list before the Assistant Collector on October 30, 1980. The respondent claimed that as the manufacturing process was not carried out in bringing into existence various kinds of kraft papers set out hereinabove, the respondent is not liable to pay any excise duty in respect of the products produced in his factory. The Assistant Collector of Central Excise, Bombay by order dated February 16, 1981 held that the kraft paper marketed by the respondent is bitumenised waterproof packing paper, polythene-lined kraft packing paper etc. and were different and distinct products than the original kraft paper purchased by the respondent. The Assistant Collector also held that the processed kraft paper had a definite characteristic, use and value and as such they are different products and therefore squarely falls within the expression "manufacture" u/s 2(f) of the Act and are liable to payment of excise duty. The classification list filed by the respondent was approved directing that the respondent shall pay the requisite duty.

2. The respondent challenged the order of the Assistant Collector by filling Writ Petition No. 852 of 1981 under Article 226 of the Constitution of India. The petition was heard by Justice Mrs. Manohar and by judgment dated April 4, 1985 the order passed by the Assistant Collector was set aside. The learned Judge held that the process carried on by the respondents cannot be considered as a manufacture of a new commodity with a different name and different use. The learned judge in support of the claim relied upon the decisions of Madras High Court and Andhra Pradesh High Court, where identical question was considered. As a consequential relief, the learned Judge directed that the Department should refund the excise duty levied and recovered from the respondents as a result of the order dated February 16, 1981 passed by the Assistant Collector. The decision of the learned Single Judge is under challenge in this appeal.

3. Shri Lokur, learned counsel appearing on behalf of the appellants, submitted that the conclusion of the learned Single Judge that the process carried on by the respondents cannot be treated or considered as a manufacture of a new commodity with a different name and different use is not correct. The submission is devoid of any merit. The Supreme Court in the decision reported in South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, observed while examining the question as to the meaning of expression "manufacture" under the Excise Act, that the word "manufacture" implies a change but every change in the raw material is not manufacture, there must be such a transformation so that a new and different article must emerge having a distinctive name, character or use. Shri Lokur submitted that the Assistant Collector came to the conclusion that the different items came into existence by the process undertaken by the

respondents. The Assistant Collector observed that the original raw material was kraft paper and after process what was sold by the respondents in the open market cannot be considered or known as kraft paper as the different item sold had a different distinctive character, use and value. The learned Judge declined to accept this conclusion of the Assistant Collector by observing that there was no material produced by the Assistant Collector in support of the conclusion. We inquired from Shri Lokur as to what is the material on the basis of which such conclusion was drawn by the Assistant Collector, and the only answer was that the Collector must be knowing how the product is known in the market. It is impossible to accede to this submission. The Assistant Collector is not a trader or is not visiting the market every day to find out how the product is known in the market or even otherwise the Assistant Collector has not examined himself as a witness in the proceedings. In our judgment, the conclusion of the learned Single Judge that there was no material whatsoever before the Assistant Collector and no material was disclosed in the affidavit filed before the learned Single Judge is correct and deserves acceptance.

4. Shri Lokur submitted with reference to the decision of the Supreme Court reported in *Empire Industries Limited and Others Vs. Union of India and Others*, that the process undertaken by the respondents amounts to manufacture. The Assistant Collector has not set out in his order what is the process undertaken by the respondents, nor has cared to ascertain the same. The learned Judge was also not given assistance in this respect. The Division Bench, while admitting the appeal, directed the respondents to file an affidavit setting out the process and accordingly affidavit has been filed sworn by the respondent on July 18, 1986. The perusal of the affidavit indicates that for manufacturing Bitumenised Waterproof packing paper, kraft paper is mounted on a roller and then it is passed over a tank containing liquid bitumen. As the first roll of kraft paper crosses the bitumen tank roller with a thin coat or layer of bitumen on one side, the second roll of kraft paper is released. Kraft paper coming from the two sides is pressed against each other by a rubber roller which is positioned in between the two rollers. The end-product is the two sheets of kraft paper pressed against each other with the help of a thin layer of bitumen sandwiched between them. On perusal of the affidavit, we have no hesitation in concluding that the process undertaken by the respondents cannot be treated as manufacturing a new and different article. The kraft paper purchased by the respondents from the open market does not cease to be so by mere application of bitumen liquid. The process for preparation of other items is also identical. In our judgment, even after perusing the affidavit of the respondents, the conclusion is inescapable that the respondents did not undertake manufacture of different products with different characteristics and use. The reliance by the learned Single Judge on the decision of the Madras High Court reported in 1980 ELT 579 *Standard Packagings and Others Vs. Union of India*, *Standard Packings v. Union of India* is appropriate.

5. Shri Lokur then submitted that Item 17(2) of the Schedule to the Act clearly provides that forty per cent ad valorem duty shall be levied on all kinds of paper,

including paper which have been subjected to various treatments such as coating, impregnating, corrugation, creping etc. It was urged that as the respondents had undertaken the process of coating and impregnating the kraft paper, the liability to pay excise duty under Item 17(2) cannot be avoided. The submission is not correct. Item 17 and 17 part (2) reads as under :

"17. Paper and paper board, all sorts (including pasteboard, millboard, strawboard, cardboards and corrugated board), in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power.

(1) (2) Paper board and all other kinds of paper Forty per cent (including paper or paper boards which have been ad valorem. subjected to various treatments such as coating, impregnating, corrugation, creeping and design printing) not elsewhere specified."

The mere perusal of this item makes it clear that the liability arises in relation to manufacture of paper and for which any process is ordinarily carried on with the aid of power. It is not in dispute that the respondents carry out the process of coating and impregnating with the aid of power, but Shri Sathe, learned counsel appearing on behalf of the respondents, very rightly submitted that these processes are carried out not in relation to the manufacture and that being the principal requirement of impost of levy under Item 17(2), the mere fact that process of coating and impregnating is carried out cannot attract levy of duty. The liability to pay duty arises because of manufacture of paper and it is not in dispute that the respondents do not manufacture any paper but purchase kraft paper from the open market. The process carried out by the respondents on such kraft paper does not amount to manufacture, and therefore, Item 17(2) is not attracted to the work undertaken by the respondents. In our judgment, the view taken by the learned Single Judge does not suffer from any infirmity as to warrant interference in this appeal.

6. Shri Sathe urged that the learned Single Judge directed the Department to make refund of duty collected as a result of the order dated February 16, 1981 but did not give any directions in respect of duty paid prior to that date. It is open for the respondents to approach the Department by making requisite refund application and as the duty recovery was without any authority of law, the Department would be bound to repay the same. As the respondents have not filed any cross-appeal or cross-objections to the Judgment delivered by the learned Single Judge, it is not permissible to give any directions in that connection in the present proceedings. The respondents have also not stated in the petition as to the period from which the duty was paid and in respect of which clearances said duty was paid. All this would require investigation by the Department and that exercise is not possible in the present proceedings.

7. Accordingly, appeal fails and is dismissed with costs.