

(1993) 01 CAL CK 0023

In the Calcutta High Court

Case No : Appeal No. 443 of 1978 in Suit No. 195 of 1971

Union of India (UOI)

APPELLANT

Vs

Bata India Ltd.

RESPONDENT

Date of Decision : 12-01-1993

Acts Referred:

Central Excises and Salt Act, 1944 — Section 19C, 2, 3, 40, 40(1)
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1994) 55 ECR 453 : (1993) 68 ELT 756

Hon'ble Judges : J.N. Hore, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ajit Kumar Sengupta, J.—This appeal is from the judgment and decree in Suit No. 195 of 1971. The major issue is whether the goods produced and named as Herefit sheets, thermoplastic sheets and celluloid sheets from cotton and silk fabrics for use in footwear amounted to manufacture to attract excise duty under entry 19 and 22 of the First Schedule to the Central Excises and Salt Tax Act, 1944. The facts of the case in brief are as under:

2. The respondent Bata India Limited a manufacturer and dealer in footwear, for the purpose and in the course of- manufacture of footwear, uses cotton and artificial silk fabrics. These fabrics are purchased by the respondent and after being processed and/or chemically treated the fabrics are incorporated into upper portion of the shoes manufactured by the respondent. The fabrics undergo and/or are subject to the certain intermediary processes before final incorporation in the footwear. Some cotton fabrics are treated in the stiffener solution of urea formaldehyde resin compounded with various other non-plastic ingredients like filter, oil and resin and dissolved in water. The said solution is spread on the cotton fabrics. Some cotton fabrics are treated with a solution of polystyrene compounded with plasticised and other unsaturated elastomer dissolved in a blend of solvent like solvent naptha, acetate and spirit. Thereafter,

the compound and/or, solution is spread on the cotton fabric and dried. The cotton fabrics treated as aforesaid are referred to by the respondent as "herefit sheets", "thermoplastic sheets" and "celluloid sheets" respectively. These descriptions have been coined by the respondent for purpose of their own identification. Artificial silk fabrics are not treated in the aforesaid manner but are coated with a suitable rubber compound dissolved in petrol. Thereafter, the said fabrics are cut into small pieces which are then reactivated with a catalyst solution. Then these pieces are put on to the shoe and the same are then vulcanised. The whole purpose and object of these processes is to ensure that the fabrics become sufficiently adhesive and capable of reinforcing the leather uppers of the footwear manufactured by the respondent either at the toe or at the heel.

3. The respondent alleged in the suit that since 1st March, 1968 the appellant wrongfully and illegally, levied and collected from the respondent excise duties on cotton fabrics processed by the respondent and utilised by it in the course of manufacture of footwear at its factory at Batanagar. In fact, an aggregate sum of Rs. 3,16,973.31p. has been collected as excise duty on the said cotton fabrics for the period between 1st March, 1968 and 23rd February, 1971. Since 1st March, 1968 the appellants also wrongfully levied and collected from the respondent duties on the artificial silk fabrics processed by the respondent and utilised by the respondent in the manufacture of footwear at its said factory. An aggregate sum of Rs. 15,670.27p. has been collected as duties between 1st March, 1968 and 23rd February, 1971. According to the respondent, those levies and/or collections and/or recoveries are illegal, without jurisdiction or authority of law and ultra vires the statute under which they were collected. As the respondent did not and does not produce or manufacture cotton and artificial silk or other textile fabrics as such the respondent was not under any obligation to pay any duty thereupon as the said materials and fabrics were purchased by the respondent from the open market and excise duty or any other duty has already been paid thereupon. The processing of the said fabrics by the respondent did not and does not make or transform them to any new substance or new products. The mere application of the said processes to the said fabrics did not and does not result in the manufacture by the respondent of any new substance or article with a distinctive name, character or use. As such the said processed fabrics are not excisable goods within the meaning of the Central Excises and Salt Act, 1944 and are not liable to duty. The said processed fabrics did not fall within the description of any of the goods mentioned in the said Act or under the items mentioned in the Schedules therein. The respondent's case is that the said processed fabrics are not known to the consumer or to the commercial community or in the market in general under any of the description of items in the First Schedule to the Central Excises and Salt Act, 1944 or any other Acts. Those articles do not come to the market to be bought and sold. The respondent's case is that the said fabrics, after processing are merely unfinished intermediary components which are not marketable and cannot be bought and

sold. They must be used immediately in the stage of manufacture of footwear, else processed fabrics lose all efficacy and become totally useless. In fact, those processed fabrics cannot be and are not stored, stocked or transported from the Batanagar factory to any other place, neither the cotton fabrics after processing nor the artificial silk fabrics after processing become finished products. So, no duty is leviable on the said processed fabrics under Items 22(B) or 19 of the Schedule as amended by the Finance Act of 1969. In any event, the said two items could not be lawfully levied for the period prior to 11th May, 1968 as amendment to the said Act was not retrospective only. The respondent made payments under the mistaken belief that the duty was legally due, when, in fact, such duty could not be levied and realised by the appellants-defendants and according to the respondent, such mistake was discovered by the respondent on 1st April, 1968 for the first time. Between 1st April, 1968 and 23rd February, 1971 the respondent has paid under protest an aggregate sum of Rs. 3,10,063.31p. in respect of duty demanded by them for the processed cotton fabrics for the said period. Between the said period the respondent has also paid under protest an aggregate sum of Rs. 15,670.27p. in respect of duty demanded by them in respect of the processed artificial silk fabrics. Such payments were made by the respondent as the appellants or their agents did not allow the said fabrics to be removed from the said place where they were processed to the place where they would be ultimately fixed on to the shoes and/or utilised in the next stage of manufacture. The non-removal of the said processed fabrics would have entailed cessation of the manufacture of footwear and also in loss of the processed fabrics themselves as, according to the respondent, the processed fabrics had a very short life unless they were utilised immediately after they were processed. As such the respondent's case is that the appellant is bound to return Rs. 3,16,943.31p. and Rs. 15,670.27p. paid by the respondent to the appellant under mistake of law and under coercion.

4. The case of the appellants, on the other hand, is that in addition to the manufacture of footwear the respondent has been manufacturing in its factory at Batanagar various other products including processed cotton fabrics and-processed artificial silk which have been used as raw materials in the manufacture of footwear by the respondent. After purchasing the fabrics from the open market the respondent subjects them to different process in its said factory and the resultant products are used by the respondent as raw materials in the manufacture of footwear. The appellants do not admit that the said fabrics are processed in the course of manufacture of footwear as those materials are quite distinct and independent processes and the said processes have nothing to do with the process of manufacture of footwear. The process of the manufacture of the said herefit sheets, thermoplastic sheets and celluloid sheets are carried out in one of the sections of the said factory known as "Resin section" where machine is employed by the respondent consisting of rollers over which the sheets of cotton fabrics are allowed to move slowly and from one to the other roller and the respective coating is applied on the surface of the sheets. While

passing through the roller grips, the coating becomes of uniform thickness. Then it is passed through a hearing chamber where the material is stored for a good adherence and then the whole sheet becomes covered on one side with uniform layer of coating composition and after leaving the storing chamber, the direction or the face of the basic fabrics is reversed and again coated in the similar manner. After the same process, the material is fit for storing, stacking, handling and transportation. The respondent also manufactured processed fabrics by putting two sheets of fabrics with a layer of rubber compound in between and then the material is passed through a set of steam heated rollers to cure or vulcanize the rubber layer. After the said curing or vulcanisation the two sheets of fabrics are well bonded together. The appellant's case is that these processes are not integrated or continuous manufacturing process. Moreover, the place of manufacture of the said processed cotton fabrics and the place of manufacture of the said processed artificial silk fabrics are quite distinct and separate from the place of manufacture of footwear in the respondent's factory at Batanagar. The place where the said processed cotton fabrics is manufactured is called "Chemical Factory" and the place where the processed artificial silk fabrics are manufactured is called "Rubber Manipulation Department". After they are manufactured they are stored in the chemical factory and from there they are transported to the leather factory by trolley where they are cut into sizes and used in the manufacture of footwear. The respondent also maintains separate accounts of the processed cotton and artificial silk and delivery of the same to the footwear departments. In fact, the despatch of the processed fabrics to different footwear departments are covered by invoices showing measurement, description, value and quantity of the processed fabrics used and utilised in the process of such manufacture of shoes. According the appellant, they have not wrongfully or illegally collected any levy or excise duty on the processed cotton fabrics and processed artificial silk as the processed cotton fabrics are subject to levy of duties under Item No. 19 of the First Schedule to the Central Excises and Salt Act, 1944. In fact, the respondent paid without any protest since the year 1960 when excise duties were first leviable on these processed cotton fabrics. The respondent took out requisite Central Excise licence for the manufacture of the processed cotton fabrics and in the year 1963 took out licence for the manufacture of processed artificial silk fabrics and the said licences were then renewed from year to year till the year 1971. The processed silk fabrics are subject to excise duty under Item No. 23 of the Act of 1944.

5. The whole point for determination is whether the respondent is the producer or manufacturer of the said goods and as such liable to pay excise duty thereon or those products are only intermediary processes, used to complete the footwear.

6. The question, therefore, arose whether the processed fabrics are distinct finished marketable products having distinct names, character and use and the Trial Court framed the following issues :

(1)(a) Are the processes adopted by the respondent for manufacture of the said fabrics only an intermediary process as alleged in paragraph 3 of the plaint?

(b) If not, does the application of the said processes to the said fabrics result in the manufacture, by the respondent of new substance or article with a distinctive name, character or use?

(c) Does the plaintiff company manufacture cotton fabrics and artificial silk fabrics?

(2) Are the said fabrics liable to duty as falling under Item Nos. 19 and 22 of the First Schedule to the Central Excises and Salt Act, 1944?

(3) Is the notice u/s 80 of the CPC legal, valid and sufficient?

(4) Are the levies, collections and recoveries of the duties by the defendant illegal, without jurisdiction and ultra vires as alleged in paragraph 7 of the plaint?

(5) Is the suit barred by limitation?

(6) Is the suit barred by the principles of waiver, estoppel and acquiescence?

(7) Has this Hon'ble Court jurisdiction to entertain this suit in view of the provisions of the Central Excises and Salt Act, 1944?

7. The grounds of appeal also go by the issues as were framed by the Trial Court. The learned Counsels of the parties also addressed us on the basis of the said issues. Thus the grounds raise, besides the issues on merits, the preliminary issues which are more or less the same as raised before the Trial Court. The learned Counsels of the parties reiterated before us the same contentions as were urged before the Trial Court.

8. The learned Trial Judge found that processes adopted by the respondents for manufacture of the said fabrics are only intermediary processes and their application does not result in the manufacture of any new substance or article with a distinctive name, character or use nor does the respondent company manufacture cotton fabrics and artificial silk fabrics. Therefore, no question of levying the excise duty under Item Nos. 19 and 22 of the First Schedule of the Central Excises and Salt Act, 1944 on such fabrics could at all arise.

9. The other issues relating to the validity of the Notice u/s 80 of the Code of Civil Procedure, the bar of limitation, estoppel and jurisdiction of the Court to entertain the suit were also decided in favour of the respondent plaintiff. There was, thus, a decree in favour of Bata India Limited, the respondent herein in terms of its prayers together with interest awarded at the rate of six per cent and costs as earlier mentioned.

10. The grounds taken in the appeal by the appellant, Union of India mainly centre on the question whether the processes adopted by the respondent for the manufacture of herefit sheets, thermoplastic sheets and celluloid sheets amount to manufacture of end-products so that the application of the process can be said

to involve manufacture of cotton fabrics and artificial silk fabrics impregnated or coated with artificial plastic materials so as to attract the levy of Central Excise in terms of Items No. 19 and 22 of the First Schedule to the Central Excises and Salt Act, 1944.

11. Now, we turn to the substantive issues that arises from the appeal, i.e., the question of leviability of excise duty on the herefit sheets, thermoplastic sheets and celluloid sheets and the question whether the application of the processes result in manufacture of cotton fabrics and artificial silk so as to cover under Items No. 19 and 22 of the First Schedule to the Central Excises and Salt Act, 1944.

12. The Trial Court has taken the view that the fact that the goods produced for distinct names, i.e. herefit sheets, thermoplastic and celluloid sheets (toe cap) cannot constitute distinct and separately identifiable goods. The nomenclatures are also given to them by the manufacturer merely for the internal identification in the process of manufacture of footwear. They are not, however, end-products though they emerge through operation at some stage of the manufacturing operations meant for shoes. These products are not brought into existence as a new substance as independent commodity emerging with a distinctive name, character or use in the commercial sense. These sheets are manufactured only for utilisation in the manufacture of shoes and are part of ingenious process devised by the respondent plaintiff. The process of affixing these sheets to the heels and toes of the shoes is so highly specialised operation that its efficacy is only known to the respondent. The Trial Court has noted and also accepted the arguments made on behalf of the respondent-plaintiff that these sheets have at no stage any commercial name. The names whereby they are identified are mere descriptions coined by the respondent for their convenience. These names have no currency in the market or in common acceptance as names conveying identify of any distinctive commercial goods. The Trial Judge also held that the processes through which the sheets emerge are part of the continuous integrated manufacturing processes adopted by the respondent-plaintiff in manufacturing footwear. Till the shoes are finally manufactured as finished product no intermediary products entering into the manufacture in the process of manufacturing can be said to be a product with distinct name, character or use because the emergence of such products is inextricably bound up with the total process for the ultimate end-product at its finished stage, i.e. footwear, in this case. No intermediary process could be separately so identified as to amount to manufacture of suitable goods. The said sheets went through some process starting with cotton fabrics and the artificial silk fabrics being coated with rubber compound followed by re-activation with catalyst solution, then cut into a variety of desired sizes according to the sizes of shoes to be manufactured, are nothing more than raw materials required for the manufacturing operations of shoes. The Trial Judge finally came to the finding that the sheets and the pieces of processed cotton and artificial silk fabrics not being the end-products as such do not attract the provisions of the Central Excises and Salt Act for levy of the duty.

13. We find from the record that before arriving at the conclusion the Trial Judge had examined a few rubber technologists, such as, Mr. Sushil Ch. Nandi, Lecturer in Chemical Engineering, Jadavpur University, Mr. Shyamal Kr. Sanyal and the Purchase Manager of respondent-plaintiff Mr. Muralidhar Bhatia. These witnesses were unanimous in their view that the products in question cannot constitute end-product by themselves and was merely raw material for use for the manufacture of shoes.

14. The Chemical Examiner of Central Excise Department, Mr. Surojit Sen was also examined as witness whose view is, however, diametrically opposed. He claims that these sheets are finished products as the fabrics are processed and impregnated or coated with artificial plastic material. They could be identified as finished products under [Section 19C(iii) of Central Excises and Salt Act, 1944] . He does not share the view that these fabrics processed into sheets for use in shoe making were mere intermediary products. They are identifiable goods manufactured and are, therefore, suitable as they are capable of classification under the Tariff also. The learned counsel for the appellant submitted that Bata India Ltd., respondent-plaintiff have been manufacturing the said items after taking separate manufacturing licence for the same purpose. The licence is being renewed from year to year. The separate identity of the manufacturing for the manufacture of these particular sheets is according to him a clear indication that the manufacture of the sheets is manufacture of suitable items on the basis of classification as provided for by the Act. He further pointed out that the manufacturing operation is carried on in a separate factory and that separate accounts are regularly maintained for the said three types of sheets emerging on being impregnated with materials and coated with chemicals of characteristic composition. Therefore, it is urged that its manufacture should be viewed to be manufacture of suitable items irrespective of the fact that they are used in manufacturing of further products. It was further urged that the materials having been processed and coated with chemical formula acquire a new character, use and name. It was, therefore, canvassed that such a product has got independent marketability as a distinct product.

15. To our mind, the niceties of the technicalities for the manufacture of the sheets are not the decisive test. As we have seen so far, there is no denying the fact that coating of cotton fabrics, silk fabrics as well as artificial silk fabrics turns the fabrics into a special kind of sheets through stages of processing with rubber and other chemicals being impregnated into the fabrics. The crux of the matter is whether those sheets are known to the market as a distinctive and finished commodity with a separate name. This again rests on the answer to the question whether the sheets are capable of being taken to the market and bought and sold. It is only in that event it can be said that a new product has emerged in the process of production of shoes and despite its captive use by the respondent-plaintiff it is dutiable.

16. The case of the respondent-plaintiff is that the processed materials i.e., the

sheets are not available in the market and these are special invention of Bata Shoe (I) Ltd. and are used by them for their internal production only. The learned Counsel for the respondent-plaintiff stressed as fact that the product is not marketable and unless ordinarily marketable no intermediary product emerging in the process of manufacture of the end-product is dutiable. To reinforce his contention, the learned Counsel further emphasised that there can be no question of these sheets being marketable because the special solution with the help of which these sheets are used in the manufacture of shoes is an absolute trade secret of Bate Shoe (I) Ltd. Therefore, there cannot be any marketability of the products. It is also contended that nobody in the market is in possession of the solution and the know-how of embodying the sheets into the shoe as its components and, therefore shall buy the sheets even if offered for sale in the market.

17. The learned counsel further submitted that if the product merely answers the description as given in Article 19(3)* it does not suffice for the purpose of its leviability. The further requirement is that the commodity so answering the description must be in addition a marketable commodity i.e. a product brought and sold in the market as a distinct commodity with a separate name and distinct use. His view is that after processing and coating of the materials with the chemical solution they are mere raw unfinished tacky with a short longevity. Such goods could by no means be an end-product inviting the levy of the duty. It is further stressed that it is the actual market condition which should determine the character of any product as a dutiable product. Any contingent prospect of marketability in the absence of existing marketability is no test. The learned Counsel for the respondent-plaintiff then rules out the prospect of marketability of the sheets altogether. The sheets come out of the factory after being coated with chemical solution and they are directly carried in a special trolley to the shed where they are cut into various sizes according to the requirement without loss of time and fitted to the heels and toes of the footwear instantly to avoid the risk of loss in the efficacy of the sheets as raw material. The transition time from the manufacture of the sheets and their use in the manufacture of footwear is so brief that such sheets can never be marketable. Arrangements for instant use of the sheets in manufacture of shoes are made so that the reaction after the chemical coating given to the footwear is not destroyed. Therefore, marketing the sheets as independent commodity is not operationally viable, even if viable, it will also entail prohibitory costs.

18. The learned Trial Judge has, on these arguments, found that the processing of the fabrics into sheets cannot be said to be manufacturing operation of products known to the market accepting the line of argument advanced on behalf of the respondent-plaintiffs and they relied upon the following decisions of the Supreme Court in that behalf:

(1) Union of India (UOI) Vs. Delhi Cloth and General Mills,

(2) South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others,

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

(4) Allenbury Engineers Pvt. Ltd. Vs. Ramkrishna Dalmia and Others,

(5) Sales Tax Commissioner v. Jaswant Singh Charan Singh reported in AIR 1967 SC 1954;

19. In the first case, Delhi Cloth & General Mills Co. Ltd. (supra) the Supreme Court has held that the mere fact of processing does not lead to a conclusion that there is manufacture. Manufacture requires that there should be such processing as results in the emergence of a substance known to the market. According to the Supreme Court, the definition of "manufacture" in Section 2(f) cannot be equated with processing. Processing is distinct from manufacture in the sense of bringing into existence a new substance to the market liable to duty. This decision supports the case of the respondent-plaintiff in that the substance brought into existence, viz. the three kinds of sheets are not allegedly articles known to the market. Therefore, Section 2(f) cannot apply. The sheets cannot be said to assume the character of goods to be liable to Excise Duty as they are not at all marketable according to the respondent's contention.

20. The second decision of the Supreme Court relied upon South Bihar Sugar Mills (supra) also lays down the principle that the Act charges duty on manufacture of goods. The word "manufacture" implies a change, but every change in the raw material is not manufacture. The legislature must be taken to have used the word "goods" in its ordinary dictionary meaning, the same not being defined by the Act. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. The goods subjected to duty must be goods known as such in the market. We are told by the respondent that in the present case the sheets that are brought into existence by the operation are not marketable. That aspect has, however, been seriously contested. Anyway, if they are not marketable according to this ratio of the Supreme Court, they cannot be treated as goods. Unless the manufacture is of goods the dutiability is not attracted. We are not, however, placed with evidence as to the fact that the products in question are not marketable. To this aspect, we shall address ourselves later on.

21. The third case, i.e. Ramlal Mansukhrai (supra), also emphasises that whatever comes out of any processing or operations can attract duty if they are bought and sold in the market. In that case, billets of copper alloys were rolled into circles and the circles as such are known to the market as finished products and were marketed. In the commercial community the ingot circles were also known as ingot circles although those ingot circles could not be used for preparing utensils. They have to be prepared into utensils. But the product at that stage fully satisfied the description as contained in Item No. 26(a)(2) of the Excise Schedule. The provisions make it clear that the legislature was aware that billets converted into circles are marketable and decided that Excise Duty should

be leviable. It is not only that the billets converted into circles were marketable, but the legislature also held that the billets so converted into circles amounted to manufacture. But in the present case no new product known to the market has come into existence. Therefore, it can be said that the respondent-plaintiff manufactures three different types of sheets which are goods fit to be brought into the market.

22. The Supreme Court in the cases of *Allenberry Engineer Pvt. Ltd.* (supra) and *Jaswant Singh Charan Singh* (supra) examined the import of the definition of the word "manufacture" and has come to the conclusion that it is the ordinary meaning as commonly understood that should govern what the word "manufacture" should imply. Fabricating material by physical labour or skill or mechanical power would be manufacturing process if the product is vendible and used as such, having a distinctive name, character or use. Anyway, it is the popular meaning and not the scientific and technical meaning which should be adopted.

23. Before proceeding with the substantive ground, for convenience the preliminary grounds may be first disposed of. The major preliminary ground is the bar of civil jurisdiction. The appellant, the Union of India has challenged the competence of the Civil Court to admit the suit. It is submitted on behalf of the appellant that the Central Excise Act is a special and self-contained Act and there is, therefore, bar of civil jurisdiction; there cannot be any remedy by way of suit as the matter does not pertain to civil jurisdiction of the court. The remedies by way of appeal revision are the only remedies that could be availed of. Therefore, the respondent could not abandon resort to such statutory remedies and take its grievance to the Civil Court as the cause of action. For this purpose reliance was placed on Section 40(1) of the Act which, according to the learned Counsel, imposes a bar but this argument does not appeal to us. Unlike most of the special Acts, the Central Excise Act does not contain any clear provision for bar of civil jurisdiction. Section 40, Sub-section (1) referred to by the learned counsel for the appellant cannot be read as an absolute bar of jurisdiction of Civil Court. It merely indicates immunity from or protection against claims or damages against the Government dues or any of its officer for acts done in good faith under the Act or the Rules. However, the Section does not say that the liability of the Government or its officers in respect of act done illegally and contrary to the provisions of the Act or the Rules is also saved. This has been the view of the Supreme Court in *Lala Ram Swarup and Others Vs. Shikar Chand and Another*, . That apart, the element of good faith having been introduced as a condition to the availability of the immunity u/s 40(1) suits cannot be said to be totally prohibited. This has been held by the High Court of Andhra Pradesh in *Bommidala Poornaish Vs. The Union of India*, . This position is correct u/s 40, both before and after its amendment by the Amending Act, 1973 effective from 19-5-1973. In the present case, the suit was filed in 1971. Therefore, the question of jurisdiction of the Court has to be decided with reference to the provisions as were in force before 19-5-1973. The un-amended provision as

applicable to the instant case was in the following terms: -

"40. Bar of suits and limitation of suits and other legal proceedings -

(1) No suit shall lie against the Central Govt. or against any officer of the Government in respect of any order passed in good faith, or, any act, in good faith, done, or ordered to be done, under this Act.

(2) No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the Act or orders complained of.

24. It cannot, however, be lightly brushed away that where the levy or collection of any so-called tax or duty is wholly without authority of law, the Civil Court's jurisdiction for declaring that such a levy or collection has been made without jurisdiction and passing a decree for the revision thereof is not barred under the provisions of the Excise Act or the Rules framed thereunder. The Supreme Court in *Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana*, has held that a suit in Civil Court will always lie to question the order of the Tribunal created by a statute even if its order is expressly or by necessary implication made final, if the said Tribunal passed its powers or declines to act, in violation of the provision. Therefore, it can be said that where the levy is imposed on an article and the imposition is illegal the Civil Court will have jurisdiction. This view has been taken by the Madras High Court in *Union of India Vs. Hoechst Pharmaceuticals Ltd., Bombay*, .

25. The next question is about the limitation of time. But, we need not determine that issue as it is interlinked with the question whether there was in fact illegality in the levy and collection of the duty as pleaded by the respondent-plaintiff before the Trial Court. In case, we hold that the duty was lawfully imposed it will become unnecessary to decide whether there is any question of limitation or not.

26. The question of validity of the notice u/s 80 of CPC was not pressed before the Trial Court. Therefore, it is not open to the appellant to reagitate the issue in the present appeal.

27. We are not in disagreement with the submissions made on behalf of the respondent-plaintiff that unless vendible no product can be subject to the levy of the duty. Therefore, it is a matter of evidence whether end-product, i.e., the sheets which are solely consumed by its manufacturer for its ultimate product, footwear, could have a market. Apparently they should, because according to the respondent's own assertion respondent have special expertise to the manufacture of these sheets which are essential component of the shoes as the strengthening materials for the toes and heels. That being so, the other manufacturers of shoes specially the small manufacturers who cannot afford to have a large plant exclusively engaged in the production of these sheets shall be

induced to buy such sheets.

28. Again, no case has been made out by the respondent that they are holding monopoly in the manufacture of these particular sheets or such sheets are only used in their shoes to the exclusion of all other manufacturers. If these sheets are a common component for manufacture of the type of shoes the respondent manufactures the sheets would definitely be vendible. It is just this one circumstance which in our opinion is crucial to the determination of the matter, It may be, in this connection, mentioned that the respondent in their contentions before the Trial Court did not altogether rule out the possibility of marketing the sheets. The respondent never made the claim that they have monopoly in the manufacture of shoe with such sheet as re-enforcement material for the shoe-uppers. So, similar type of shoes wherein such sheets are embodied have to be as a necessary implication assumed to be manufactured by Other shoe manufacturers. In this context, the assertion of the respondent that the manufacture of shoe is a guarded secret of the respondent actually goes as evidence against the respondent. It goes to enhance the vendibility of the sheets, other shoe manufactures not being in possession of the technical know-how to manufacture as efficacious as the respondent's product shall be more drawn to buy them.

29. There is some amount of prevarication on the part of the respondent. While they say that the sheets cannot be marketed as the transition time between the removal of the sheets from their manufacturing plant to the next plant and the affixation of the sheets at such next stage is so short that it rules out marketing, transfer by sale not being operationally viable for use by third party. But finally, however, the respondent's witness, Mr. Bhalotia, its Purchasing Officer admits that the sheets can be marketed but its purchaser would not know how to use it (vide answer to question No. 48). These two statements are contradictory. If the marketing of taking them to an unresponsive market does not arise. We feel that there is a smoke screen created where the respondent says that after its output in its manufacturing plant the sheets are to be immediately affixed to the shoes without loss of time which rules out marketing. The immediate affixation becomes necessary for the reason that the sheets before being despatched are treated with the adhesive solution.

30. We hold that the sheets are vendible, it is also a fact that the description of the Item No. 19C(3) and Item under category 22 of the First Schedule of Excise Act agrees with the essential nature of the sheets. These items are fabrics impregnated or coated with the preparation of celluloid derivatives or other artificial plastic materials. Thus the legislature is aware that such sheets have markets and though intermediary, such sheets constitute finished product in that they have markets. It is not also categorically asserted by the respondent that they have no market at all. They say that the marketing is not viable. It is established law that actual sale is not necessary. It is sufficient if the manufacture is that of goods that are excisable. Where the goods find place as

items in the Schedule of the Act the presumption shall be that the goods are excisable goods. They can cease to be excisable no doubt if they have no market but as we have observed, the assertion of the respondent as regards non-marketability lacks corroboration. No evidence has been adduced that the sheets are not marketable. On the other hand, as contended on behalf of Union of India the respondent has submitted to the levy by taking licence on 1st October, 1960 for processed cotton fabrics and on 23rd April, 1963 for processed Art Silk Fabrics and got the licences renewed upto 1971. Prima facie, this circumstance amounts to admission to the leviability. The possibility of the sheets being used in manufacture of other final products than shoes cannot be ruled out, either. There is nothing before us as rules out such possibility. At any rate, it is not necessary to attract duty that the goods should be sold. Suffice it, if there is manufacture or production of the goods, Manufacture or production of the goods is the taxable event. Whether the goods are sold or consumed or not used thereafter is wholly irrelevant. The above proposition becomes irresistible if we keep in mind the effect of the charging section, i.e. Section 3 read with 2(f). There are decisions of the Supreme Court to this very effect. See Union of India v. Delhi Cloth & General Mills (supra), Shinde Bros. v. Dy. Commissioner AIR 1976 SC 1512; South Bihar Sugar Mills (supra).

31. We are, therefore, unable to share the view taken by the learned Trial Judge that the goods were not excisable and the duty as mentioned in the plaint was levied and collected by mistake and without the authority of law.

32. In our opinion, the three type of sheets manufactured by the respondent are excisable goods even though they are used as articles at the intermediary stages in the process of manufacture of a final and different product vis. footwear. They may be raw materials for manufacture of further goods but they by themselves constitute goods. The view we take is reinforced by the fact that the case answered the description of Item Nos. 19 and 22 of the Schedule. Therefore, the levies and. collections were lawful.

33. The decision on the merits against the respondent renders the question of limitation unnecessary and does not call for determination. Accordingly, the appeal fails.

34. There will be no order as to costs.

J.N. Hore, J.

I agree.