

(1974) 09 BOM CK 0010
In the Bombay High Court
Case No : A.F.O.D. No. 257 of 1972

Union of India (UOI)

APPELLANT

Vs

Mansingka Industries Pvt. Ltd.

RESPONDENT

Date of Decision : 06-09-1974

Acts Referred:

Central Excise Rules, 1944 — Rule 173C
Central Excises and Salt Act, 1944 — Section 2, 2(4), 3, 35, 36
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : (1979) 4 ELT 158

Hon'ble Judges : Mukhi, J;Deshmukh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mukhi, J.—This is an appeal by the Union of India in the Department of Central Excise against a decree passed by the learned Joint Civil Judge, Senior Division, Jalgaon, in favour of the respondents Mansingka Industries Private Limited" a Company incorporated under the Indian Companies Act and inter alia manufacturing vegetable products at Pachora in District Jalgaon.

2. The respondents-plaintiff filed a suit in the court of the Civil Judge, Senior Division, at Jalgaon, contending that the Union of India had illegally recovered from them certain moneys purported to be excise duties under the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act of 1944")

3. As stated, the suit was decreed by the learned trial Judge, who inter alia ordered that an amount of Rs. 60,334.66, being the balance amount illegally collected as excise duty, be refunded to the respondents.

4. Two short points arise in this appeal. But before we discuss them it is necessary to set out some facts.

5. It has been stated that the respondents are manufacturers of vegetable products and under Item No. 13 of the First Schedule to the Act of 1944 the

excise duty leviable before the 1st of March, 1969 was by weight i.e. per quintal of the excisable goods.

6. By the Finance Act of 1969, which came into force on the 1st of March, 1969, Item No. 13 of the said First Schedule was amended so that from that date the excise duty leviable was made ad valorem. Therefore, the duty of excise which was earlier chargeable on the actual weight of the vegetable products i.e., the excisable goods, was altered to ad valorem duty on the value of the vegetable products.

7. Under Rule 173-C the respondents were required to file a price list of goods assessable ad valorem for the purpose of determination of value in accordance with Section 4 of the Act of 1944. It would appear that the respondents' price lists were not accepted by the Central Excise Authorities and that the respondents were ordered to pay excise duty on higher prices.

8. After some correspondence with the Central Excise Authorities the respondents disputed the power of the Central Excise Authorities to levy excise duty on the basis of a wholesale price, which included the price of the tin-containers and freight. The respondents filed the suit in the Court of the Civil Judge, Senior Division, at Jalgaon, being Special Regular Civil Suit No. 58 of 1969, praying therein that the orders of the defendants modifying the price list furnished by the respondents and then approving the price lists as prepared by the defendants and purported to have been made under the provisions of the Act of 1944 and the Central Excise Rules, 1944, and demanding from the respondents duty of excise on a higher value than warranted should be declared illegal and that the amount charged in excess of what should be lawfully charged under the Act of 1944 and the Rules be declared to have been illegally charged and an order for refund should be made. The respondents also prayed for an order and injunction restraining the appellants from making such illegal orders and collecting duty of excise on such basis which, according to the respondents, was an illegal levy.

9. It required to be noticed that the principal ground on which such demand for duty of excise was challenged was that, the value at which the vegetable product duly packed in tin-containers of 16.5 Kgs. of net capacity having been determined by the Government as not to exceed the maximum sale price fixed statutorily under the Vegetable Oil Control Order, 1947, the cost of non-excisable tin-containers in which the excisable goods were packed and the freight paid thereon ought to be deducted before the levy of the duty of excise could be made on the value of the vegetable product.

10. It is to be noticed that the respondents, after lodging their protests, made payments of the duty as sought by the appellants without prejudice to their right to resort to legal steps to obtain relief.

11. It is appropriate at this stage to refer to the fact that with effect from September 1968 the maximum price for sale of the relevant vegetable product

was fixed by the Government of India in exercise of powers conferred by the Vegetable Oil Products Control Order, 1947, read with the relevant provisions of the Essential Commodities Act, 1955.

12. The grievance of the respondents, therefore, is that to the value of the vegetable product that is to say, hydrogenated oil in the case before, us, falling under Item No. 13 of the First Schedule of the Act of 1944 the appellants have illegally and improperly added the value of the tin-containers which are not excisable goods under Item 13 as well as the railway freight. In other words, the contention of the respondents is that the appellants have illegally and improperly disallowed the deduction of the cost of the tin-containers and the railway freight. It is not disputed that the value of the tin-containers is Rs. 3.78 and the railway freight is Re. 0.99 P. per tin of 16.5 Kgs.

13. On the question of quantum, therefore, there is no dispute. It may also be mentioned that there was at one time a difference of opinion between the parties as to which maximum price was applicable because the Government of India in the relevant Notifications prescribed different maximum prices as between the producer and wholesaler, and the wholesaler and the dealer. Fortunately, this dispute has been resolved and need not therefore be discussed by us.

14. The claim of the respondents as the plaintiffs in the suit, is, therefore, for recovery of the amount levied illegally on the value of the tin-containers and on account of the freight on the products.

15. The appellants have taken up two defenses. According to the appellants, the article manufactured by the respondents viz., the vegetable oil, is such that it cannot be presented for sale in the market without a container. The appellants even contended that the vegetable product becomes fully manufactured and assessable only after the same is packed in tins and that this process is ancillary to the manufacture of the product and without which the vegetable product cannot be sold in the market. According to the appellants, their act in not allowing abatement on account of the cost of the tin container and the cost of freight is quite consistent with the Explanation to Section 4 of the Act of 1944 (as it was before the amendment in 1973). It was also the contention of the appellants that the Central Excise Authorities were bound to accept the maximum price fixed by the Central Government from time to time as the respondents had been selling their vegetable oil products at such prices. In other words, the attitude of the department seems to have been that the tin-containers were to be taken as part of the product presented in the market and the argument which was urged was that packing of hydrogenated vegetable oil is incidental to the process of manufacture of the vegetable product itself.

16. The second defence taken up by the appellants was that the respondents had not exhausted the remedies provided by the Act of 1944 and that in any event the suit was barred u/s 40 of the Act of 1944, as it stood then.

17. It would appear that this defence was taken up in the form that the suit was

not maintainable by the respondents without exhausting the remedies provided by the Act of 1944, Actually it would seem that the defence intended to be taken up by the appellants was not that the remedy provided by the Act of 1944 had first to be exhausted before a suit could be filed but that a suit could not be instituted at all and that the respondents' only remedy was under the Act of 1944 itself.

18. Now, taking the question of value on which the ad valorem duty of excise could be lawfully levied by the Central Excise Authorities, it is appropriate to notice one of the price lists which is on record. This price list, which is for the period from the 1st of March, 1962 to the 7th of March, 1969 mentions the wholesale price by producer to wholesale buyer for the vegetable product packed in tin-containers containing 16.5 kgs. as being Rs. 65.58. The freight to destination is shown as 0.99 P. and the cost of tin-containers at Rs. 3.78.

19. According to the respondents, the value for the purpose of assessment u/s 4 of the Act of 1944 would, therefore, be Rs. 65.58 less Rs. 4.77. The Central Excise authorities contend that the value for the purpose of ad valorem duty must include the value of the container as well as the cost of freight.

20. Some of the relevant provisions of the Act of 1944 and the Rules made thereunder may now be noticed.

21. Section 2(4) of the Act of 1944 defines "excisable goods" to mean "goods specified in the First Schedule as being subject to a duty of excise and include salt".

22. Section 2(f) defines "manufacture" as including any process incidental or ancillary to the completion of a manufactured product.

23. Item No. 13 of the First Schedule with which we are concerned refers to vegetable product in the following words : -

" Vegetable product" means any vegetable oil or fat which, whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption."

It is obvious that Item No. 13 read with Section 2(d) of the Act of 1944 would clearly show that the excisable goods which are the subject-matter of this appeal consist of hydrogenated vegetable oil or what is popularly known as "vanaspati".

24. Section 3 is the charging section and it provides in terms that -

"There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods...which are produced or manufactured in India".

This shows that the duties specified in the First Schedule are duties leviable only on excisable goods and as we have noticed the duty may be levied on the basis of weight or at a fixed tariff or ad valorem.

25. Section 4 of the Act of 1944 which at least before its amendment in 1973 has

been the subject matter of consideration in various cases provides for determination of value for the purposes of duty. Thus the value of any article or excisable goods which is chargeable to duty at a rate dependent on the value of the article is to be determined in the manner provided.

26. It is important to notice that u/s 4 such value is deemed to be value as provided therein. This will show that the authorities concerned are to determine the value of an article on the basis of the several factors enumerated viz. (1) the wholesale cash price, (2) the time factor i.e., when the article is removed from the factory, and (3) the place at which the wholesale market exists.

27. Now, there was an Explanation to Section 4 of the Act of 1944 (before its amendment) which provided as follows : -

"In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid."

28. The next provision of law which may be noticed is Rule 173-C of the Central Excise Rules, 1944, which provides that an assessee has to file the price list of the goods assessable ad valorem and that the proper officer shall approve the price list in such a manner as to bring the value shown to be the correct value for the purpose of assessment as provided in Section 4 of the Act. A duty is, therefore, cast on the proper officer to determine the value in terms of Section 4 of the Act of 1944 and not otherwise.

29. As we have mentioned, Section 4 of the Act of 1944, before its amendment, came in for determination in many cases. In *Voltas Limited v. A.K. Roy*, 73 Bom. LR 229, a Division Bench of this Court interpreted the term "wholesale cash price" as contained in Clause (a) of Section 4 of the Act of 1944 and held that the phrase "wholesale cash price" as used in the section was in contradistinction with retail price and that that price is relieved of the loading represented by post-manufacture expenses unless they form part of the profits of the manufacturer himself.

30. The matter went in appeal to the Supreme Court and the Supreme Court affirmed the judgment of this Court and held that Section 4 of the Act of 1944 provides that the value should be found after deducting the selling cost and the selling profit and that the real value can include only the manufacturing cost and the manufacturing profit.

31. This is what the Supreme Court observed in *A.K. Roy and Another Vs. Voltas Limited*, :

"Excise is a tax on the production and manufacture of goods (see *Union of India (UOI) Vs. Delhi Cloth and General Mills*, . . . Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profits and that the real value can include only the manufacturing cost

and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely, selling profit. The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octroi and other charges involved in the transport of the article...."

32. This state of the law clearly shows that only the value of the excisable product itself is to be taken into consideration at the point where manufacture of the excisable product is complete.

33. In the case before us we have noticed that the product which can be made subject to excise duty under Item No. 13 of the First Schedule to the Act of 1944 is the hydrogenated vegetable oil itself. Item No. 13 does not contemplate the container in which the hydrogenated vegetable oil may be put as being part of the product. It was sought to be contended by the appellants that the tin container should be treated as a part of the product and the manufacture of the vegetable product is not complete until it is packed in a tin container. We find no warrant for such a construction.

34. First of all, it can never be stated with any show of reason that manufacture of hydrogenated vegetable oil is incomplete until it is packed in tin-containers. It cannot be forgotten that hydrogenated vegetable oil is also sold and transported in bulk containers, in tankers and it may be indeed sold by a manufacturer to a wholesale buyer who brings his own container for receiving the product.

35. In fact, our attention has been drawn by Mr. Nain, the learned Advocate for the respondents, to certain items of the 1st Sch. to the Act of 1944 itself which go to shew that where it was the intention of the Legislature to include the packaging in the definition of excisable goods it has said so. For instance, Item No. 3 of the First Schedule which deals with "Tea", specifically provides that tea may be sold in bulk and would be assessed to excise duty at a particular rate. But sub-clause (2) of Item No. 3 refers to "Package tea, that is to say, tea packed in any kind of container not more than 27 kgs. net of tea" as being excisable goods within the meaning of Section 2(d). Thus, in the case of loose tea there is one rate per kilogram and in the case of package tea there is a different rate.

36. Now, Item No. 13, which deals with vegetable product, does not mention any packaging at all and it follows that the only article on which duty can be levied is the vegetable product or the hydrogenated vegetable oil which constitutes excisable goods and not the container.

37. Mr. Nain has also referred to Section 2(f) of the Act of 1944 which define "manufacture" and has shown to us that where it was intended that packaging

should be included as a process of manufacturing, the Legislature has said so. In Sub-clause (iii) to Section 2(f) there is a provision that in relation to patent or proprietary medicines as defined in Item No. 14-E as also in relation to cosmetics and toilet preparations as defined in Item No. 14-F of the First Schedule to the Act of 1944 manufacture would include labelling or relabelling of containers intended for consumers and re-packaging from bulk packs to retail packs, or the adoption of any other treatment to render the product marketable to the consumers. This shows that in the case of medicines, the packaging thereof is by statute considered to be a part of the manufacturing process. It is a matter of common knowledge that patent and proprietary medicines are sold in bottles, tins and foil packing and cosmetics like beauty creams or talcum powders or lotions are also sold in some kind of containers.

38. It is to be noticed that the duty on items comprised in Items Nos. 14-E and 14-F is also ad valorem and it was, therefore, the specific intention of the Legislature that the value of the container should be included in the value of excisable goods. It is also significant that by the amended Section 4 of the Act of 1944, it has been provided in terms that value in relation to any excisable goods is to include the cost of packing except the cost of such packing which is of a durable nature and is returnable by the buyer to the assessee.

39. The argument of Mr. Kamat, the learned Asstt. Government Pleader, that packaging of vanaspati in tin-container was an integral part of the manufacture of hydrogenated vegetable product even before the amendment of Section 4 is untenable and cannot be accepted.

40. If this is the correct position, then the cost of the tin-container must be treated as post-manufacturing cost and in the words of the Supreme Court in Voltas case (1977 E.L.T 177) it must be excluded from the value of the excisable product on which duty of excise is to be levied.

41. Now, as regards the freight is concerned, it cannot be contended, with any shew of reason that item of expenditure could be anything but a post-manufacturing expense.

42. It is to be noticed that the cost of freight has nowhere in the Act of 1944 been taken as part of the value of the excisable product.

43. The view taken by the learned trial Judge that packaging in a tin-container and incurring of freight charges for transporting of the relevant excisable goods could not form part of the value for the purpose of assessment of excise duty is, therefore, correct and we affirm the same.

44. The next point to be considered is the challenge to the maintainability of the suit on the ground that such a suit is barred because the respondents have not availed of the remedies provided by the Act of 1944 itself in form of an appeal u/s 35 and revision u/s 36 of the Act of 1944 as well as by Section 40 of the Act of 1944, which, according to the learned Assistant Government Pleader, bars the

filing of a suit in matters arising under the Act of 1944.

45. Section 35 of the Act of 1944 provides that any person deeming himself aggrieved by any person deeming himself aggrieved by any decision or order passed by a Central Excise Officer under the Act may file an appeal as therein provided and that every such order passed in appeal u/s 35 shall, subject to the power of revision conferred by Section 36, be final.

46. Section 36, of course, provides for a revision by the Central Government. These two sections obviously come into play when an order has been passed under the Act and any person is aggrieved by any such decision or order.

47. Section 40 of the Act of 1944 as it stood before 1973 provided for "bar of suits and limitation of suits and other legal proceedings" and its specific phraseology may be noted. It reads as follows : -

"(1) No suit shall lie against the Central Government 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 proceedings 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 order complained of".

48. The learned Assistant Government Pleader has argued that by reason of these three sections, which we have referred to above, recourse to a Civil Court by a suit is denied to a manufacturer who is liable to pay excise duty on the products manufactured by such a person.

49. Now, Section 9 of the CPC provides that a Civil Court shall have jurisdiction to try all suits of a civil nature "excepting suits of a civil nature "excepting suits of which their cognizance is either expressly or impliedly barred". On the basis of Section 9 of the CPC and Section 40 of the Act of 1944 the learned Assistant Government pleader has contended that the suit as filed is barred.

50. Our attention has been invited to a decision of the Supreme Court of Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, where this question in relation to various enactments has been considered in depth and Hidayathullah, C.J., who spoke for the Court after analysing the several decisions of the Supreme Court and other Courts summarised the state of the law. The relevant portions of the summary are as follows : -

"(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has acted in conformity with fundamental principles of judicial procedure.

"(2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Court.

"(3) Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not."

* * * * "(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

* * * * "(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

51. Now, in the case before us we have held that imposition of central excise duty on the tin-container and on freight was not warranted by any of the provisions of the Act of 1944. Thus any levy of central excise duty on the value of the tin-container and the cost of freight was wholly outside the law and it could not be said to be a mere question of an error in the exercise of jurisdiction. The Central Excises and Salt Act of 1944 only provides for the duty of excise on excisable goods so that when an attempt is made to levy duty of excise on goods which are not excisable then such a levy falls outside the law and, therefore, would be illegal.

52. Even if Section 40 of the Act of 1944 were to be construed as the learned Assistant Government Pleader would have us do, that is to say, that it bars the jurisdiction of civil courts, the legal position as enunciated by the Supreme Court clearly shows that the jurisdiction of the Civil Courts would not be thereby excluded. But the question may be asked - Does Section 40 of Act of 1944 really bar a suit for recovery of an amount levied illegally as duty ? It is manifest from a plain reading of the section itself that it applies only to suits for damages and compensation in respect of acts said to be done under the Act of 1944- The section merely enacts immunity or protection against claims of damages against the Government itself or any of its officers for acts done in good faith under the Act, of 1944. Questions of collection of illegal duty and/or its recovery or refund are not questions dealt with by the said provision. There are a number of authorities on this proposition, but it is not necessary to refer to them in detail. See Bomidala v. Union of India AIR 1967 And 338, Union of India v. Ballabhadrha AIR 1961 And, 540 , Rohtas Industries Ltd. Vs. Union of India (UOI), and Mooljibhai v. Union of India, (1962) 3 Guj LR 762.

53. It requires to be noticed that in 1973 the Act of 1944 was amended and

among other amendments, Sections 4 and 40 have been substituted. Now reads as follows :-

"(1) No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer of the Central Government or a State Government for anything which is done or intended to be done, in faith, in pursuance of this Act or any rule made thereunder.

(2) No proceeding, other than a suit shall be commenced against the Central Government or any officer of the Central Government or any officer of the Central Government or a State Government for anything done or purported to have been" done in pursuance of this Act or any" rule made thereunder, without giving the Central Government or such officer a month"s previous notice in writing of the intended proceeding and of the cause thereof or after the expiration of three months from the accrual of such case."

54. It is significant that the new phraseology itself suggests that this provision like the former section was not. intended to bar a remedy by way of a suit. Indeed, the sub-heading has been changed from "Bar of suits" to "Protection of action under the Act."

55. The amendment is not only of a clarificatory nature but some further protection to the Government and its officers (who act in good faith and under the Act) is provided for, in the form of a previous notice in relation to the proposed prosecution or legal proceedings other than a suit and the period of limitation has been shortened.

56. It is, therefore, clear that Section 40 as it stood before the amendment and even as it stands now, does not bar the jurisdiction of Civil or Criminal Courts.

57. The contention of the Assistant Government Pleader that the Civil Court had no jurisdiction to try the suit, fails.

58. In the result the decree of the trial Court is affirmed and this appeal dismissed with costs throughout.