(1989) 05 CAL CK 0037

Calcutta High Court

Case No: C.R. No. 3481 (W) of 1982

Anglo-India Jute Mills Co. Ltd.	APPELLANT
Vs	
Collector of C. Ex.	RESPONDENT

Date of Decision: May 18, 1989

Acts Referred:

- Central Excise (Valuation) Rules, 1975 - Rule 173Q, 9(2)
- Central Excises and Salt Act, 1944 - Section 11A, 11A(1), 2, 4
- Constitution of India, 1950 - Article 226

Citation: (1990) 26 ECR 382 : (1989) 43 ELT 11

Hon'ble Judges: Susanta Chatterji, J

Bench: Single Bench

Advocate: R.N. Bajoria, S.K. Bagaria and A.N. Mukherjee, for the Appellant;R.N. Das and N. Mitra, for the Respondent

Judgement

Susanta Chatterji. J.

1. The present Rule was issued at the instance of the writ petitioner Anglo-India Jute Mills Co. Ltd., praying, inter alia, for issuance of a Writ of Mandamus commanding the respondents to withdraw, cancel and/or rescind the notice to show cause dated 16-3-1982 and all proceedings relating thereto and not to levy and/or demand any Central Excise duty from the petitioner on the making of polythene films by the manufacturers out of granules supplied by the petitioner and for other consequential reliefs by way of retaining the respondents from giving any effect to and/or taking step whatsoever pursuant thereto and/or in furtherance of the said notice to show cause and the proceeding relating thereto and/or from levying and/or demanding any duty from the petitioner.

2. It is stated that the petitioner company carries on business of manufacturing and dealing in jute products. It is further stated that one of the items of jute manufactures manufactured by the petitioner at its factory is "laminated jute bags".

During the process of manufacture of the said laminated jute bags some bitumen is picked up by the cloth and thereafter the cloth is passed through another roller under pressure and polythene films is pasted on the bituminous side of the cloth. The laminated cloth is then cut to sizes as per- the buyer''s specifications and sewn into bags. According to the petitioner company various manufacturers who used to manufacture and/or are manufacturing polythene films out of, inter alia, the granules supplied by the petitioner are small manufacturers and the petitioner has been given to understand by them that they are entitled to the various exemptions granted under the various provisions of law to small-scale units. In or about March 1982 the petitioner was allegedly surprised to receive a purported notice to show cause as if the petitioner had manufactured and cleared a quantity of 436776.300 kgs. of polythene films falling under Item No. 15A of the First Schedule to the Central Excises and Salt Act, 1944 without payment of Central Excise duty leviable thereon and without observance of Central Excise formalities and without obtaining any Central Excise Licence. It was further alleged that the petitioner supplied raw materials to the various parties and got the finished polythene films manufactured out of such materials on payment of job charges and thus petitioner engaged itself in the manufacture of the said goods within the meaning of Section 2(f) of the said Act. By the said notice the respondent No. 1, the Collector of Central Excise, Calcutta, required the petitioner to show cause as to why Central Excise duty should not be demanded from and paid by the petitioner under Rule 9(2) of the said Rules read with Section 11A of the said Act and as to why the penalty should not be imposed upon the petitioner under Rule 173Q of the said Rules. The petitioner, however, replied to the show, cause notice, stating inter alia, that the polythene films were manufactured by the manufacturers and that the petitioner company was not and could not be regarded as the manufacturers thereof. It was further stated that the responsibility of procuring the materials required for making the films other than granules was entirely of the manufacturers and the petitioner was not in any way concerned with the same. There was no control or supervision of any nature whatsoever by the petitioner company on the manufacturing activities of the other manufacturers. The aforesaid manufacturers carried on the manufacturing activities on their own machinery and with their own employees and that the employees of the manufacturers were not connected with the petitioner in any way and they worked under the control and supervision of the said manufacturers. Elaborating in details the petitioner company asserted that in any event the petitioner company cannot be regarded as the manufacturers in respect of the said manufacturing activities; while Section 2(f) of the Central Excises and Salt Act provides that the word "manufacturer" shall include not only a person who employs hired labour in the production or manufacture of excisable goods but also any person who engages in their production or manufacture on his own account. Under the provisions of Section 2(f) of the said Act, the petitioner does not come within the mischief of that section. Stating all these facts in details the petitioner has moved this Court and obtained a Rule on 14-5-1982 on the ground that assuming though not admitting

that any Central Excise duty was payable on the making of polythene films out of duty paid granules by the manufacturers, the petitioner cannot be regarded as the manufacturer in respect of the said manufacturing activities of the manufacturers as per definition given in Section 2(f) of the said Act and the respondent No. 1 and the Central Excise authorities while issuing notices upon some of the manufacturers requiring them to show cause as to why Central Excise duty should not be paid by them on the making of polythene films by them out of granules supplied by their customers including the petitioner cannot proceed against the petitioner also on the same footing by treating the petitioner company as a manufacturer. The allegation of the petitioner is that the notice dated 16-3-1982 has been issued by the respondent No. 1 after the expiry of the period of limitation and the same is wholly illegal, invalid and without jurisdiction. u/s 11A of the said Act, such notice is required to be issued within a period of six months from the relevant date. The expression "relevant date" has been defined in the said Section 11A to mean, inter alia, in the case of excisable goods on which duty has not been levied or paid or on which duty has been short levied or has not been paid in full, the date on which the duty was required to be paid under the said Act or the said Rules. It is placed on record that the provisions of Section 11A(1) of the said Act does not and cannot have any application in the instant case. All necessary and relevant facts were fully disclosed to and/or were known to the Central Excise Authorities, and in spite of being aware of such facts proceedings have been initiated with mala fide motive and the acts done and/or caused to have been done by the respondents are unwarranted and uncalled for. The procedure laid down in Rule 56A was not and could not be followed in view of the accepted position that no Central Excise duty was payable on the making of the said films by the manufacturers out of the duty paid granules. It has, however, been placed on record that the polythene films were covered by the Notification No. 71/71-C.E. and under the provisions of the said notification as it stood prior to its amendments on June 19,1980 the manufacturers of the said polythene films were fully entitled to claim and get set-off of the duty already paid on the granules used for making the said films. Since the respondents are going to give effect and/or taking steps pursuant to and/or the furtherance of the notice to show cause dated 16-3-1982 and to initiate proceeding relating thereto, the petitioner company has been compelled to move the Writ Court seeking reliefs as already indicated above.

3. The writ petition is contested by the respondents Central Excise Authorities, by filing an affidavit-in-opposition. It is disclosed therein that the petitioner company supplies raw materials to other parties and get finished goods i.e. rigid polythene films, falling under Central Excise Tariff Item 15(2) manufactured out of the said raw materials on behalf of them. It further disclosed that on payment of job charges only to other parties thereby they engaged themselves in the manufacture of the said goods within the meaning of Section 2(f) of the said Act. It is emphasised that as per Section 2(f) of the Central Excises and Salt Act, 1944 the word "manufacturer"

shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in the production or manufacture on his own account. The other allegations made by the petitioner have been controverted by placing on record that provisions of Section 11A(1) is applicable in the instant case and at no relevant time the petitioner company had disclosed the fact of manufacturing the polythene films and it was further submitted that the amount of duty payable by the petitioner company is a huge amount and the acts done and/or caused to have done by the respondents are justified in accordance with law.

4. Mr. Bajoria, learned Advocate appearing on behalf of the petitioner has strongly argued that there is no dispute that the said firms manufacture the films at their respective factories with the help of their own workers and staff and under their own supervision and control. There is no dispute that none of the said firms are in any way related to the petitioner. The petitioner is sought to be treated as a manufacturer simply because it supplied granules to the said films for the manufacture of the films. It is submitted that the petitioner cannot be regarded as the manufacturer of the said films manufactured by the said firms at their respective factories. In support of his contention, he has drawn the attention of the Court to the various decisions such as :-

(a) 1979 ELT 597 (Gangadhar Ram Chandra v. Collector of Central Excise) Allahabad High Court.

(b) 1979 ELT 600 (Re : Andhra Re-rolling Works and Ors.) A.P. High Court.

(c) P.M. Abdul Latif and Others Vs. Assistant Collector of Central Excise, Trichirapalli and Others, and Madras High Court.

(d) J.K. Cigarettes Ltd. Vs. Superintendent of Central Excise, .

According to him the issue, that it is the job worker who has to be treated as the manufacturer and not the supplier of raw materials, is now conclusively decided by the judgment of the Supreme Court reported in Ujagar Prints Vs. Union of India (UOI), . The attention of the Court has been drawn to the fact of the clarificatory order reported in 1989 (39) ELT 493. It was made clear as to how the assessable value of the goods manufactured by the job workers out of the raw materials supplied by the customers would have to be determined. In the said decision the Supreme Court proceeded on the basis that it is the job worker who is to be regarded as the manufacturer and not the supplier of the raw materials.

5. Mr. Bajoria has also argued at length on the question of limitation. He has also relied upon the decisions reported in Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, . - Collector of Central Excise, Guntur Vs. Andhra Sugar Ltd., Venkataraypurama, . By referring to these decisions he has submitted that for applying the longer period of limitation of 5 years as laid down in

the proviso to Section 11A(1) something positive on the part of the assessee or conscious or deliberate withholding of information etc., is required and that the said proviso cannot be invoked simply due to inaction etc. on the part of the assessee concerned.

6. Mr. Bajoria has also argued that even on the basis of the facts as stated in the said notice and the proposed proceeding pursuant to such notice are wholly without jurisdiction. It is well-settled that in such cases an assessee can file a writ petition under Article 226 of the Constitution of India at the show cause notice stage itself. He has also drawn the attention of the Court to the decisions reported in Statesman Ltd. Vs. Assistant-Collector of Central Excise and Others, and also Gonterman Peipers (India) Limited Vs. Additional Secretary to the Government of India, .

7. He tried to emphasise upon the point in the instant case that the issues involved are as to the very jurisdiction of the authorities to claim the duty by holding the petitioner as a manufacturer of the said films. The respondents cannot assume jurisdiction by wrongly deciding the jurisdictional fact. The issues are of recurring in nature and regard being had to the facts and circumstances of the case and the provisions of law settled by different High Courts as well as by the Supreme Court, the respondents cannot be permitted to initiate further proceeding on the basis of admitted facts.

8. Mr. Das, learned Advocate appearing for the respondents, has strongly submitted that this Writ Court cannot be converted into a forum of fact finding organ. All the disputed questions of fact cannot be brought to the purview of the Writ Court to determine as to whether the petitioner company is a manufacturer or not. Various evidence are required to be admitted and their probative value have got to be considered at their proper perspective. Since there is a notice to show cause and the petitioner has replied, the appropriate authority should be allowed to consider the case of the petitioner and it is for the petitioner company to satisfy the appropriate authorities as to their claim that they are not manufacturer and they are not answerable as such.

9. Having heard the learned Advocates of the respective parties, this Court finds that the scope of the writ petition is three-fold. First, it has to be asserted as to whether the nature of the business carried on by the petitioner covers the petitioner as manufacturer within the definition of Section 2(f) of the said Act. Secondly, the facts as disclosed in the notice to show cause are required to be adjudicated by the authorities concerned or that on the facts as disclosed already, the issuance of the notice to show cause is absolutely prohibitory in law and the respondents lack initial jurisdiction to issue notice to show cause and to initiate proceeding pursuant to such notice. Thirdly, whether the actions initiated by the respondents are hopelessly barred by the law of limitation and the proceedings are mala fide and there will be manifest injustice unless there is interference by the Writ Court.

10. Looking at the entire case from these three dimensions, this Court finds that the facts so disclosed before this Court clearly convinces the conscience of the Court that a customer cannot be treated as manufacturer merely because he has supplied raw materials to the actual manufacturer. It has got to be proved that such manufacturers manufacture only on account of the petitioner company. Looking at the decision reported in 1979 ELT (600) (Andhra Re-Rolling Works, Hyderabad and Ors.) the Division Bench has found that the definition has to be looked into whether the definition is comprehensive enough to include the activity of the petitioner and he cannot avoid the consequence of law. In the instant case, it has to be clearly found that the petitioner is not a job worker and it has to be found that other manufacturers who manufacture the items are exclusively on account of the petitioner and looking at the decisions cited from the Bar, this Court is of the view that the petitioner company cannot be admitted to a manufacturer to come within the purview of Section 2(f) of the said Act, if such facts are properly proved.

11. It has clearly been found by the Supreme Court in the case of Ujagar Prints Vs. Union of India (UOI), that in the case of job workers/processing houses, they become liable to pay excise duty not because they are the owners of the goods but because they cause the "manufacture" of the goods. In view of Section 4 and the Central Excise (Valuation) Rules, it cannot be said that the assessable value of the processed fabric should comprise only of the processing charges, because while in one class, of grey-fabric processed by the same processor on bailment, the assessable value would have to be determined differently depending upon the consideration that the processing-house had carried out the processing operations on job-work basis, in the other class of cases, as it not unoften happens, the goods would have to be valued differently only for the reason the same processing house has itself purchased the grey-fabric and carried out the processing operations on its own. It was also found that excise duty is imposed on production on manufacture of goods. This is quite independent of the ownership of goods. Therefore, the value and goods produced on job-work basis, for the assessment u/s 4 of the Excise Act will not be the processing charge alone but the intrinsic value of processed fabrics are sold for the first time in the wholesale market.

12. After scrutinising all the averments made in the writ petition and also looking to the provisions of law, it appears to this Court that the concept of manufacture should be construed not in an artificial sense but in its recognised legal sense and so construed there cannot be any conclusion that actually in the instant case the petitioner company is not a manufacturer. Really such a fact has got to be adjudicated by giving an opportunity to the petitioner to adduce proper evidence. Mr. Das has rightly pointed out that this Writ Court is not the proper forum to entertain such dispute and to adjudicate accordingly. Once this question is answered, the claim of the petitioner that they are not manufacturer, is left open to be decided, the answer to other questions become all the more academic in nature. Since the petitioner has already replied to the show cause, the respondents should

not be restrained from proceedings thereafter in accordance with law. If the petitioner is aggrieved, sufficient opportunities be given to ventilate their grievance in accordance with law. Considering this aspect of the matter, this Court does not think that there should be interference by this Court to grant relief in the manner as prayed for. It is however, made clear that this Court has left the issue quite open and nothing observed by this Court will either prejudice the petitioner or the respondents authorities to proceed in accordance with law pursuant to the notice to show cause.

13. Upon such observation the writ petition is disposed of and the Rule is also disposed of. All interim orders are vacated.

14. There will be stay of operation of this order for a period of two weeks after the Summer Holidays.

There will be no order as to costs.