(1987) 06 BOM CK 0041

Bombay High Court

Case No: Appeal No. 356 of 1982 from Miscellaneous Petition No. 520 of 1976

Union of India and others		APPELLANT
	Vs	
Piramal Spinning and Weaving Mills Ltd.		RESPONDENT

Date of Decision: June 18, 1987

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 2

Citation: (1990) 27 ECC 331 : (1989) 23 ECR 469 : (1987) 31 ELT 618

Hon'ble Judges: S.P. Bharucha, J; S.M. Daud, J

Bench: Division Bench

Judgement

Bharucha, J.
This appeal assails the judgment and order of Pendse J. making absolute the writ petition filed by the respondents (orig. petitioners).

2. The respondents are a textile mill and manufacture fabrics. Amongst such fabrics are what are knows as Quality No. 1410 and Quality No. 1435. These particular fabrics are composed of, in the weft yarn, 82% cotton yarn and 18% twinkle nylong yarn. The respondents pay excise duty on the cotton yarn as well as the on fabric which is the end-product. The twinkle nylon yarn is purchased by the respondents from the open market, excise duty having been paid thereon.

3. In classification lists dated 14th August, 1973 and 17th January, 1975 submitted by the respondents to the Excise authorities, the process by which they made the weft yarn was stated. They applied on 28th September, 1971 for permission to avail of the special procedure set out under Rules 96A, 96L and 96V of the Central Excise Rules and permission was granted.

4. On 17th March, 1972 Tariff Item 18E was introduced in the First Schedule to the Central Excise Act. It levied duty on "yarns of all sorts not elsewhere specified". After the introduction of this Tariff Items, the respondents filed a classification list on 14th August, 1973 and once again set out the procedure by which the weft yarn was made. It was approved by the Excise authorities. Thereafter, on 3rd September, 1974, a circular was issued by the Central Board of Excise and Customs which said that weft yarn was a new product excisable under Tariff Item 18E. A trade notice to this effect was issued on 4th September, 1974. In pursuance of the trade notice, the respondents were informed by the Excise authorities on 2nd September, 1975 not to clear goods until further instructions as the weft yarn was excisable under Tariff Item 18E. On 3rd September, 1975 the Assistant Collector, Enforcement Branch, effected a seizure of the concerned fabrics. The respondents were thereafter required to file under protest a fresh classification list classifying the weft yarn under Tariff Item 18E.

5. On 10th February, 1976 the Assistant Collector of Central Excise, Bombay, served upon the respondents a show cause notice. It claimed that the respondents had contravened various provisions of the Central Excise Rules and had manufactured and removed 50,671 kgs. and 44,506 kgs. of yarn falling under Tariff Item 18E involving duty amounting to Rs. 5,06,710/-. The show cause notice further claimed that the respondents had removed 62,142 kgs. of such yarn without determining duty amounting to Rs. 9,94,272/-. The respondents were called upon to explain why duty in the said amounts should be recovered, the fabrics relevant thereto not be confiscated and penalty not be imposed.

6. The respondents filed the writ petition impugning the show cause notice on 29th March, 1976. At the interim stage the Excise authorities were directed to adjudicate upon the show cause notice. At the hearing given thereon to the respondents, the Excise authorities informed the respondents that they would rely only upon the material that was set out in the show cause notice. For the hearing the respondents filed eight affidavits averring that the weft yarn was not a new product and they informed the Excise authorities that the dependents of the affidavits were available for cross-examination.

7. The order on the show cause notice was made on 30th May, 1980. The respondents'' contentions were rejected and the show cause notice was made absolute. The writ petition was amended to challenge the order dated 30th May, 1980. When the petition reached hearing on 20th August, 1980, the learned Judge hearing the petition set aside the order dated 30th May, 1980 and directed that a fresh hearing should be given upon the show cause notice by an officer other than the one who had passed the order dated 30th May, 1980.

8. In pursuance of this direction, another adjudicating officer was appointed. At the hearing before him, the respondents filed two further affidavits in support of their contentions. By the order dated 26th May, 1981 the adjudicating officer rejected the respondents'' contentions and made the show cause notice absolute. Once again the

petition was amended to impugn the order dated 26th May, 1981.

9. Remarkably, the appellants have not made the order dated 26th May, 1981 a part of the record in this appeal, and we have to rely upon what the learned Judge has set out in regard to that order in the judgment under appeal. The adjudicating officer came to the conclusion in that order that the weft yarn was produced by a process of manufacture and it was identifiable as having a different use, characteristic and utility. It was "goods" distinct from the cotton yarn and nylon yarn. It was manufactured by the respondents through a process of inter-twinning nylon yarn around cotton yarn and was, therefore, covered by Tariff Item 18E which dealt with yarn not elsewhere specified. The order rejected the respondents" contention that, as the weft yarn was wholly consumed in the respondents" mill in the production of the end-product, the fabrics, no excise duty was leviable thereon. It also rejected the respondents" contention that Rule 9(2) of the Central Excise Rules was not attracted because there had been no clandestine removal.

10. In the impugned judgment, the learned Judge noted the contentions raised on behalf of the respondents but based his conclusion only upon the first of these. He observed, very properly, that the main question which fell for determination was whether the weft yarn was a product which came into existence by reason of the process of manufacture as contemplated by Section 2(f) of the Central Excise Act. Having noted the authorities in this regard, the learned Judge described the process by which the weft yarn came into existence. It is necessary to bear the process, as set out by him, in mind :

"The cotton yarn manufactured by the petitioners is taken to a machine called "Doubler Winder Machine". In the said machine, one strand of the cotton yarn is fed with one strand of the nylon yarn to form into a "Cheese" which is subsequently fed to a Doubling Machine where a few turns are given to the parallel yarn (cotton and nylon) and would on a wooden pirn. The pirn in its turn is fed on the loom as weft yarn by inserting the pirn in the shuttle on the loom. The process starts with the Doubler Winder Machine and ends with the emergence of the cloth".

The learned Judge referred to the affidavits filed on behalf of the respondents before the adjudicating officer in support of their contention that the weft yarn was not the result of a process of manufacture. The learned Judge noted that from the process of manufacture so described, "in respect of which there was not dispute", it was obvious that by the mere inter-twinning of strands of cotton yarn and nylon yarn no new product came into existence and the process of doing so could not be treated as one of manufacture. It was nothing but a combination of two duty paid yarns. The adjudicating officer had found that the weft yarn was closely twisted and the nylon yarn constituted in the twist had become an integral part thereof so that any attempt to separate one from the other was rendered difficult and could not be done without damaging the weft yarn. This was contrary to the affidavits which had been filed. The learned Judge, referring to the affidavits, also found that the weft yarn was not a product known to the trade nor was it available in the market. It could not, therefore, be considered a distinct or separate product and the conclusion of

the adjudicating officer that a new product had emerged was not correct. For these reasons, the petition was made absolute.

11. The affidavits filed on behalf of the respondents before the adjudicating officer include those of Shantaram Govindrao Vinzanekar, Professor and Head of the Textile Manufacture Department of the Victoria Jubilee Technical Institute, Bombay, and of K. J. Thomas, Quality Control Manager of Morarjee Mills Bombay.

12. Vinzanekar stated in his affidavit that by reason of accepted conventions in textile technology, a double or twisted yarn, which the weft yarn was said to be, was normally produced out of two years of the same or similar characteristics. The purpose of the twisting of the yarns was to achieve enchanced physical proportions, like strength and thickness. To achieve this end, the number of twists or turns to be given had to be high. Having examined the weft yarn, Vinzanekar found that only four to five turns were given to the yarn per inch, whereas to produce double or twisted yarn the turns per inch would, normally, be about thirty-two. He concluded that no new product as conventionally known to technology came into existence upon the inter-twinning of the cotton and nylon yarn.

13. Thomas averred in his affidavit that yarn as available in the market was always wound upon a cone. The weft yarn produced would be impossible to so wind because it was likely to snap and dis-integrate. He also averred that the cotton and nylon element therein had a tendency to separate because of the small number of the twists used.

14. The deponents of these affidavits were, as afore-stated, available to the Excise authorities for the purpose of cross-examination. They were not cross-examined. There was not an iota of evidence placed on the record before the adjudicating officer by the Excise authorities that in any manner countered the evidence led by the respondents. There was, therefore, no option open to the learned Single Judge but to accept the evidence led by the respondents and strike down the order of adjudication impugned in the petition. For the same reasons, we must uphold the judgment of the learned Single Judge. It is clear from the evidence, to which we have referred that by the inter-twinning of the cotton and nylon yarn, with twists of only four to five per inch, no essential difference in identity had been brought about. No yarn had been consumed in the making of the weft yarn. Therefore, no new product came into existence and the process of giving these twists was not a process of manufacture. [See Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, .

15. The respondents also placed before the adjudicating officer the affidavits of traders in textiles and yarns which stated that the weft yarn was not a product known to trade and was not available in the market. There is, again, no material on the record to suggest the contrary. If the weft yarn is not known to trade and is not available in the market it is not a new product and no process of manufacture is involved in its production. The test, in this behalf, also laid down in the case of Pio Food Packers, is not satisfied.

16. In the result, the appeal is dismissed. No order as to costs.