Bombay High Court Gannon Dunkerley & Co. Ltd., K.L. ... vs Union Of India (Uoi), The ... on 20 December, 2002 Equivalent citations: 2003 (5) BomCR 445, 2003 (90) ECC 293, 2003 ECR 143 Bombay, 2003 (156) ELT 467 Bom, 2003 (3) MhLj 645, 2004 135 STC 168 Bom Author: H Gokhale Bench: H Gokhale, A Deshpande JUDGMENT H.L. Gokhale, J. 1. This Writ Petition under Article 226 of the Constitution of India seeks to challenge the order dated 26th October 1989 passed by then Collector of Central Excise & Customs, Division Aurangabad. The 1st petitioner herein is a Company Limited by shares and is a Civil Contractor engaged in civil construction works at sites of various party. The other petitioners are directors and/or shareholders of this Company. The respondent no. 2 is the Collector of Central Excise whose order is challenged. The respondent No. 1 is Union of India. The Attorney General of India was also joined and notice was issued to him since a declaration is sought in one of the prayers with respect to unconstitutionality of Heading No. 7308 of Schedule to the Central Excise Tariff Act, 1985. 2. Mr. Kanade, learned Counsel, has appeared for the petitioners and Mr. Godhamgaonkar, Standing Counsel, has appeared for respondent nos. 1 and 2. 3. The facts leading to this petition are as follows : (a) An industrial estate has been developed at Waluj in District Aurangabad over the years. At the time when the factories of various companies were set up in this industrial estate, the petitioner No. 1 was entrusted with the works contract of setting up the factory shed of number of such companies. In the present petition, the dispute is with respect to the work carried on by the 1st petitioner for four companies, namely, Bajaj Auto Ltd., Birla Erickson Tools Ltd., Anurang Engineering Pvt. Ltd. and Balkrishna Tyres Pvt. Ltd. The 1st petitioner erected the first factory shed for Bajaj Auto Ltd. from 1st January 1984 to 25th June 1988; for Birla Erickson from 1st April 1987 to 28th February 1988; for Anurang Engineering Pvt. Ltd., from 1st April 1985 to 28th February 1986 and for Balkrishna Tyres Pvt. Ltd., from 1st April 1987 to 28th February 1988. (b) It is the case of the petitioners that the 1st petitioner as per its constitution carries on only the work of setting up of such plant at the site of the concerned party. In the present case also, it is their case that these parties provided the site where the work was carried on in a sort of site workshop on the land of the concerned parties where water and electricity was freely made available by them. The raw material and the various components required for erecting the factory shed were also supplied by these parties. It is thereafter that the petitioner / Company executed the works contract as per the drawing, specifications and designs furnished by the customer. The raw material made available by the parties concerned was according dealt with. The Companys activities consisted in preparing and tailoring the structural items to fit in such items into a particular position. Inasmuch as, this was setting up of a plant fastened to the earth, it was the case of the 1st petition, that no excise duty would be attracted on this works contract. (c) As against that, a little later i.e. in January 1989, the Excise Department formed an opinion that the activities carried on by the 1st petitioner resulted into manufacture of excisable goods within the meaning of Section 3 of the Central Excise Act, 1944 and, therefore, a common show cause notice dated 20th January 1989 was given not merely

to the 1st petitioner but to these four parties, namely, Bajaj Auto Ltd., Birla Erickson Tools Ltd., Anurang Engineering Pvt. Ltd., and Balkrishna Tyres Pvt. Ltd. The notice alleged that the 1st petitioner had manufactured excisable goods, namely, Structural Steel items, such as, Purlins trusses, north-light, girders, gantry girders, windows, doors, glassers, etc., which were covered by Item No. 68 of the erstwhile Central Excise Tariff prior to 1st March 1986 and were covered by Chapter Sub-heading 7308.90 with effect from 1st March 1986 under the Central Excise Tariff Act, 1985. The notice, therefore, called upon the petitioner to pay a duty at the rate of 12 % upto 28th February 1986 and 15% from 1st March 1986 on various items and special excise duty on certain items. The notice alleged that the 1st petitioner had manufactured excisable goods without obtaining the Central Excise Licence, cleared them without payment of duty and without accounting them in the statutory record, without a cover of Central Excise gate pass and without filing classification list, price list and without determining the duty. The petitioner and these four Companies and their Directors were called upon to explain as to why penal action under Section 9AA of the Act should not be initiated for various violations. The notice enclosed therewith firstly a table giving the total claim on the aforesaid counts which came to Rs. 1,39,79,193.17 Paise. The notice enclosed therewith the break up of this amount into various annexures. The annexures are with respect to these various separate items allegedly manufactured and which were supposed to be excisable under Section 3 of the Central Excise Act, 1944, such as, trusses, Purlins, etc. It is, however, material to note that all these annexures specifically state that these items were manufactured and removed without payment of duty by the petitioner having their site at M/s. Bajaj Auto Ltd., Waluj, and at the site of other respective customers. The notice, thereafter, had imputation of charges in annexure B and then the supporting documents were listed in annexure C. (d) In the aforesaid notice, principally reliance was placed on the statements of the officers of the 1st petitioner and those of their clients, such as, Bajaj Auto Ltd. and others. These officers had made statements on the enquiry of the Excise Department, that the items concerned were manufactured by the Company and that they were goods and were distinctly different than the raw materials. They were completely manufactured and moveable from manufacturing yard. Respondent No. 2 hence claimed that the excise duty will be leviable on these items. (e) The 1st petitioner filed an exhaustive reply to this notice. This reply categorically stated that the 1st petitioner / Company did not manufacture any goods. It was only a works contract. It was a civil construction Company. It was stated that all basic material like iron and steel angles, channels, beams, sections, etc. were purchased by the client and brought to the adjacent manufacturing yard set up at customers site. It is at that place, the fabrication activity took place, namely, cutting of sections to required lengths, drilling of holes, joinder of pieces or angles and then preparing the basic material as per the specifications and designs. It was submitted that no new product or article came to be manufactured as a result of all this. It was also pointed out that the work was carried out as per the tender notices and the quotations floated by the particular client. The 1st petitioner was only

executing the particular works contract as per the design submitted by their client. It was also stated in this reply that all the assembling effected by the 1st petitioner ultimately got embedded into soil, so that, finally the factory shed got erected. (f) After this reply was filed, the matter was heard by the respondent No. 2. Some additional statements and affidavits were filed on behalf of the 1st petitioner particularly of the officers concerned to explain as to what they meant in their statements which were recorded earlier during the course of investigation carried out by the Excise Department. The respondent No. 2 perused the reply, as also, the additional statement filed on behalf of the 1st petitioner. He heard the legal representatives appearing on behalf of the 1st petitioner and the other Companies. He also went through the authorities which were cited on their behalf. It was argued before the respondent No. 2 that if the tests of manufacture or of marketability as laid down by the Supreme Court as being necessary for being excisable goods in some of the relevant judgments were applied, the alleged goods manufactured by the 1st petitioner could not be said to be marketable and, in fact, they were not goods. The respondent No. 2 made a distinction between goods captively consumed and for export and thereafter observed that criteria of marketability may depend upon as to how the assessee intends to clear the goods. Then observing, that inasmuch as, final product was becoming immoveable, he observed as follows : "It is also not correct to say that because the final product is immoveable property and purlins, trusses, etc. coming into existence only when they are fixed to a particular case and becoming part of immoveable property they are not goods. Immoveable goods are also excisable goods but because of the taxing scheme the levy is deferred to the point of removal. What is to be seen in such cases is that before acquiring the immoveable nature whether the items had the character of movability to call them as goods and in this case I find that this criteria was satisfied." (g) The 2nd respondent also noted that as far as steel doors and wooden doors are concerned, they were purchased from outside, but no evidence was produced to substantiate this claim. (h) A plea was raised under Section 11A of the Central Excise Act by the 1st petitioner, that the notice itself was beyond the period of 6 months, as stipulated therein. This was turned down by the respondent No. 2. Lastly, the officer observed amongst other statements : "When the company is paying Sales Tax on the goods manufactured, they are supposed to know their obligations under Central Excise Law." This observation was on obtaining information from the officers of the 1st petitioner, that on the items manufactured by the 1st petitioner, sales tax has been paid prior to them being fitted to finally erect the factory shed. The 2nd respondent, therefore, concluded that there was a manufacture of excisable goods prior to the erection of the shed and, therefore, the 1st petitioner was liable to pay the excise duty. He, therefore, passed the order upholding the demand for Rs. 1,39,79,193.17 Paise. He also imposed a penalty of Rs. 10 Lakhs, as far as 1st petitioner is concerned and penalty of Rs. 2 Lakhs on each of the Directors of the 1st petitioner. Similar penalties were issued on the four contracting parties also. It is this order of the 2nd respondent which is under challenge in this petition. 4. This petition came up for consideration for admission way back on 9th February 1990. It

was admitted on that date and interim relief was granted in terms of prayer clause (e) of the petition whereby the operation of the impugned order dated 26th October 1989 passed by the 2nd respondent was stayed. That was, however, on condition that the petitioners deposit Rs. 20 Lakhs and furnish Bank Guarantee of Rs. 40 Lakhs within eight weeks. Those conditions are already fulfilled. Thereafter, the matter has reached for final hearing before this Bench. 5. Mr. Kanade, learned Counsel appearing for the petitioners, submitted that it has been well established in catena of judgments of the Apex Court, as well as, of this Court and of the C.E.G.A.T., that when it comes to works contract and when the resultant activity is to erect something embedded in the soil, it does not amount to manufacture of excisable goods within the meaning of Section 3 of the Central Excise Act. Mr. Kanade submitted that as far as the factual aspect is concerned, there is no controversy whatsoever. It is only the inference which is drawn by the 2nd respondent, which is erroneous and by which the petitioners are aggrieved, that is why instead of preferring an appeal, which is otherwise provided under Section 35 of the Act, this petition has been filed by invoking Article 226 of the Constitution of India. 6. Mr. Kanade firstly drew our attention to the judgment of the Apex Court in the case of Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P. . The question of law that arose for consideration in that appeal was whether the tube mill and welding head erected and installed by the appellant for manufacture of tubes and pipes out of duty paid raw material was assessable to duty under residuary Tariff Item No. 68 of the Schedule being excisable goods within the meaning of Central Excises & Salt Act, 1944. The Apex Court held that from the facts it was clear that the appellant had erected the concerned mill by purchasing certain items and machinery from market and erected to earth and installed them to form a part of the tube mill. The Court held that the basic test for levying duty was twofold. One that any article must be a goods and second, that it should be marketable or capable of being brought to the market. At the end of para 5 of the judgment, the Apex Court observed as follows : “Goods which are attached to the earth and thus become immoveable do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold.” In para 6 of the judgment, the Apex Court observed as follows : “Learned counsel for the revenue urged that even if the goods were capable of being brought to the market it would attract levy. True, but erection and installation of a plant cannot be held to be excisable goods. If such wide meaning is assigned it would result in bringing in its ambit structures, erections and installations. That surely would not be in consonance with accepted meaning of excisable goods and its exigibility to duty.” 7. He thereafter relied upon another judgment of the Apex Court in the case of Union of India and others Vs. J.G. Glass Industries Ltd. and others . In that matter, the Court laid down the test for deciding as to what amounts to a manufacturing process for the purposes of this Act. The Court examined some of its judgments rendered earlier and then observed in para 16 as follows : “On an analysis of the aforesaid rulings, a twofold test emerges for deciding whether the process is that of”manufacture“. First, whether by the said process

a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process." 8. The third judgment relied upon by Mr. Kanade is a Division Bench judgment of this Court in the case of Tata Engineering & Locomotive Co. Ltd. Vs. Union of India (1997(89) E.L.T. 463 (Bom.). That was a judgment wherein the Division Bench approved a similar approach of C.E.G.A.T. in the case of Aruna Industries, Vishakhapatnam and others Vs. Collector of Central Excise, Guntur and others, reported in 1986(25) E.L.T. 580 (Tribunal). In para 12 of that judgment, the Court dealt with the submission of not exhausting the alternative remedy. The Court observed that in the case before it four items were in question and came to the conclusion that without any further evidence or fact finding being necessary ex facie they were not excisable to the excise duty. If that was the position, the Court held that after the petition having been admitted, there was no question of throwing out the petitioners at final hearing on the ground of alternative remedy. Mr. Kanade also drew our attention to an order of the Apex Court in the case of Commissioner, Central Excise, Nagpur Vs. Wainganga Sahkari S. Karkhana Ltd. . This was only for a limited purpose to submit that a similar approach on erection of fix structures, in the case of Aruna Industries, Vishakhapatnam and others (supra), was approved by the Apex Court. The Court held therein that fabrication at site cannot be taken as fabrication in a factory. 9. Mr. Kanade, therefore, submitted that from the facts of the case and from the record and from the show cause notice and its exhibits, it was clear that the 1st petitioner was permitted to set up a processing yard on the property of the concerned party where water and electricity was provided free and all necessary raw materials were brought by the party concerned. It is at that stage, that necessary fabrication, joining and processing of various inputs took place and at times those processed components were moved from that processing yard to the adjacent place where the factory was to be finally erected. The factories of the concerned parties, such as, Bajaj Auto Ltd., were to be set up on very large areas and obviously transportation was necessary and the transporters had to be paid. As far as the grievance that sales tax was paid of these products, Mr. Kanade, drew our attention to the fact that the sales tax was payable to the State Government under an Act known as Maharashtra Sales Tax on the Transfer of Property in goods involved in the Execution of Works Contracts Act, 1985. This Act has been subsequently repealed and replaced by the Maharashtra Sales Tax on the Transfer of property in goods involved in the Execution of Works Contracts (Re-enacted Act, 1989. He submitted that the payment of this sales tax on the goods involved in the execution of the works contract cannot lead to the inference that there was a manufacture of excisable good for the purposes of Section 3 of the Central Excise Act. Under this Section, duty of excise is leviable on excisable goods which are produced or manufactured. Here, as laid down by the Apex Court in the judgments referred to above, what is material is that the goods manufactured ought to be freely marketable. It implies a mobility in the goods

and a free marketability. He relied upon the definition of goods under Section 2 Sub-Section 7 of the Sale of Goods Act, 1930, also to submit that "goods" means every kind of moveable property other than the items excluded under that definition. Assuming that any manufacturing process had taken place on the site of the contracting party, the manufacturing process did not result into production of freely moveable and marketable goods. It resulted into erection of a factory shed embedded into the soil meant only for one party and as per its specifications. It was not a case of a Company manufacturing goods in its own factory and then bringing them outside and selling to somebody else. He, therefore, submitted that in a situation like this, there was no question of the 1st petitioner being required to file the list or to obtain Central Excise Gate Pass and clear the goods after paying excise duty in the manufacturing yard. He submitted that if the approach of the respondent No. 2 that prior to being fitted into the soil, the components were moveable, is to be accepted, it would go entirely against the law laid down by the Apex Court in the catena of judgments which we have seen earlier. He, therefore, submitted that the impugned order deserves to be interfered with and set aside. 10. Mr. Godhamgaonkar, learned Standing Counsel appearing for the respondent nos. 1 and 2, on the other hand, submitted that the marketability was not specifically provided either under Section 3 of the Central Excise Act or under Entry 84 of list 1 in Schedule VII of the Constitution of India. He also referred to the definition of goods obtaining in clause 12 of Article 366 of the Constitution which states that the goods includes all material commodities and articles. In his submission, bringing in idea of marketability was erroneous. 11. Mr. Godhamgaonkar thereafter relied upon another judgment of the Apex Court in the case of M/s. Indian Cable Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others , where the Apex Court has held that for an article being excisable, what is expected is that it must be capable of being sold but need not actually be marketed (Para 7 of the judgment). Mr. Godhamgaonkar submitted that the statements of the officers of the 1st petitioner / Company went against it. They were admissible under Section 14 of the Central Excise Act and from those statements itself, it was clear that what was manufactured was goods and they were chargeable to excise. Mr. Godhamgaonkar lastly relied upon a recent judgment of the Apex Court in the case of Triveni Engineering and Industries Ltd. and another Vs. Commissioner of Central Excise and another . That was a case of installation of turbo alternator and in para 11 of the judgment, the Apex Court has held that the process involved in fixing steam turbine and alternator and in coupling and aligning them in a specified manner to form a turbo alternator, a new commodity, is nothing but a manufacturing process. It is, however, material to note that even so, in the very judgment, in para 14, the Apex Court has held that what was manufactured was an immoveable property and it could not be termed as an excisable good. Then the Court observed at the end of that para, as follows : "Whether an article is permanently fastened to anything attached to the earth require determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case." The Apex Court allowed the

appeal of the appellant and held that the Tribunal was not correct in coming to the conclusion that the turbo alternator was an excisable good, and set aside the order. 12. Having noted the submissions of both the Counsel, in the facts and circumstances of the present case, it has clearly come on record and it is only for the sake of conclusion that it is repeated that the 1st petitioner was executing the works contract. The 1st petitioner was permitted to function on a part of the land of the concerned Company to carry out the processing of the various items of raw material submitted to the 1st petitioner. This work was as per the specifications of the concerned party. The 1st petitioner was expected to execute that work. Inasmuch as, a specific statute of the State Government required the 1st petitioner to pay the sales tax on the goods involved in this works contract, the 1st petitioner did pay that tax. Thereafter, since the factory shed was to be set up in a particular part of the huge land of the concerned party, the 1st petitioner was required to move these items from one part of the land to the place where the factory was to be set up by engaging transporters. This all resulted into the factory shed being set up. Now, amongst the various items which the 1st petitioner is alleged to have manufactured was one item known as "truss". A truss is a framework as defined in the Oxford Dictionary. Now, a truss of a factory is not something which one would manufacture for anybody. It is manufactured for particular party. It is not freely marketable. Now, it was submitted that under Section 3 of the Central Excise Act, there is no concept of marketability. However, what is material to note is that though the Section talks of levy of excise duty on excisable goods which are produced or manufactured, the Apex Court has read into this Section marketability and the moveability of the items which are manufactured. This has been seen in the catena of judgments which we have referred to above. That being the position, in the present case, all these requirements are absent. There is no free marketability and what is finally produced is embedded into soil and loses the character of being excisable goods for the purpose of Section 3 of the Act. 13. As stated above, merely because the 1st petitioner paid the sale tax under the above stated Act, that itself cannot lead to an inference as is read by the 2nd respondent, that the good becomes excisable. Similarly, reliance on the statements of the officers of the 1st petitioner is totally erroneous. It is true that they are admissible under Section 14 of the Central Excise Act. But all that they have stated is that the Company did manufacture certain items in a shed on the land belonging to the party concerned and thereafter those items were shifted from that particular place to the place where the factory shed was put up and also that this sales tax was paid. Now, these are statements of fact. Nothing can be inferred beyond what is stated therein. The question is as to whether this activity and resultant product is an excisable good. That inference one has to draw after looking into the totality of the factors. In our view, the officer undoubtedly erred in taking out these statements of the officers of the 1st petitioner and concluding that on their statements alone it can be inferred that the items manufactured were excisable goods. The entire approach is erroneous. 14. Before we conclude, we would like to refer recent judgment of this High Court in the case of Sunflag Iron & Steel Company Limited, Nagpur Vs. Ad-

ditional Collector of Central Excise, Nagpur and others (2001(3) Mh.L.J. 532). Speaking for the Division Bench, B.N. Shrikrishna, J. (as He then was in this Court), has taken a complete over view of various judgments which we have, as well, noted. He has referred to the judgments in the case of Quality Steel Tubes (P) Ltd. (supra); Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut ; Triveni Engineering and Industries Ltd. Vs. Commissioner of Central Excise (2000(120) ELT 273(SC); Aruna Industries, Vishakhapatnam and others (supra); etc., and as to how it is preferred over another judgment of C.E.G.A.T. in the case of Structurals and Machineries (BOKARO) Pvt. Ltd. Vs. Collector of Central Excise, Patna (1984 (17) ELT 127. This judgment of the Division Bench is a common judgment in two Writ Petitions. The first one was concerning set up of an integrated Steel Plant and the second one was concerning construction of a factory building. As stated above, after taking overall view, the Division Bench in para 28 of the judgment observed as follows : "We are, therefore, of the view that in both the cases, fabrication of structurals at the site of the principal by using raw materials supplied by the principal did not amount to"manufacture", nor was it done at"factory", nor were the goods saleable or capable of being brought to the market for being bought or sold. We further notice that in both the cases the fabrication was with the immediate purpose of using in the factory shed or steel cold rolling mill which were being constructed and there was never an intention to sell it in the market. These facts, in our judgment, make it amply clear that the materials fabricated at the site by the contractors in both the cases were not exigible to excise duty under section 3 of the Act. Hence, the orders in both the cases need to be set aside in exercise of writ jurisdiction." 15. As stated above, in the facts of the present case, we cannot take any view contrary to the one which is taken by the Apex Court and also by two Division Benches of this Court. We are also of the view that since there is no factual controversy involved, it will not be proper to direct the petitioners to file an appeal to the appellate authority after a long period of twelve years. 16. As far as plea of the notice being beyond 6 months under Section 11A of the Central Excise Act is concerned, we do not think that it is necessary to go into that aspect inasmuch as we are deciding the matter on merits itself. 17. For the reasons stated above, we allow this petition and make the rule absolute in terms of prayer clause (c), by quashing and setting aside the order dated 26th October 1989. The 1st petitioner will be at liberty to withdraw the deposit that it has made in this Court. The petitioners also will be relieved of the Bank Guarantee that they have furnished. 18. Mr. Godhamgaonkar, learned Standing Counsel appearing for the respondent nos.1 and 2, applies for stay of this order for a period of eight weeks. Mr. Kanade, learned Counsel appearing for the petitioner, submits that the law is well laid down and this judgment is in consonance therewith. He, however, leaves it to the Court to pass appropriate order. In the circumstances, this judgment and order will remain stayed for a period of eight weeks from today, where after subject to any orders to be obtained by the respondents, the deposit will be returned and the Bank Guarantees will be released. 19. In the circumstances of the case, there shall be no order as to costs.