Barnagore Jute Factory Co. And Ors. vs Inspector Of Central Excise And Ors. on 3 December, 1991

Equivalent citations: 1992(38)ECC57, 1991ECR1(SC), 1992(57)ELT3(SC), JT1991(4)SC475, 1991(2)SCALE1163, (1992)1SCC401, [1991]SUPP3SCR95, 1992(1)UJ298(SC), 1991 AIR SCW 3009, 1992 (1) SCC 401, (1992) 107 TAXATION 276, 1992 UJ(SC) 1 298, (1992) 57 ELT 3, (1992) 1 SCJ 281, (1991) 4 JT 475 (SC)

Author: B.P. Jeevan Reddy

Bench: P.B. Sawant, B.P. Jeevan Reddy

JUDGMENT

JUDGMENT

B.P. Jeevan Reddy, J.

1. Common questions arise in this batch of Civil Appeals and the Writ Petition. All the appeals except one arise from the judgment of Calcutta High Court dismissing the Writ Petitions filed by the appellants. Civil Appeal 4823/91 (Special Leave Petition No. 5466 of 1980) is preferred by the Inspector of Customs and Central Excise (State) against the judgment of the Patna High Court allowing the Writ Petition filed by the respondent, Rameshwar Jute Mills Limited. Writ Petition No. 9701 of 1982 is filed under Article 32 of the Constitution by a Jute Mill questioning the notifications and notices issued by the respondents where under it was called upon to pay cess on jute yarn and twine. So are the other Writ Petitions. For the sake of convenience, we shall refer to the facts in Civil Appeal No. 2439 of 1979 and to the facts in Civil Appeal arising from Special Leave Petition No. 5466 of 1980. During the arguments before us, facts of these two cases alone were referred.

2. The appellant in Civil Appeal No. 2439 of 1979, New Central Jute Mills Company Ltd., is a company engaged in manufacture of jute products like jute twine, yarn, sacking, carpet backing etc. Jute Twine and Jute Yarn, manufactured by them is used in their own establishment for manufacturing other (finished) products. In other words, jute twine and jute yarn are intermediate products which are captively consumed in the same unit for manufacturing the end products which fall within the expression 'jute textiles'.

3. Jute Textile Industry is one of the Industries specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as the 'Act'). The Act, as is well known, was enacted in 1951 to provide for the development and regulation of certain industries. Section 2 of the Act contains a declaration to the effect "that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule". Heading No. 23 in the First Schedule reads as follows:

> 23. TEXTILES (INCLUDING THOSE DYED, PRINTED OR OTHERWISE PROCESSED):
>
> (1) Made wholly or in part of cotton, including cotton yarn, hosiery and rope.
>
> (2) Made wholly or in part of Jute, including jute twine and rope.
>
> (3) Made wholly or in part of wool, including wool tops, woollen yarn, hosiery, carpals and druggets;
>
> (4) Made wholly or in part of silk, including silk yam and hosiery;
>
> (5) Made wholly or in part of synthetic, artificial (man-made) fibres, including yarn and hosiery of such fibres.

(emphasis added) Section 3 of the Act defines certain expressions. For our purpose, it is sufficient to notice the definitions of "Industrial undertaking" in Clause (d) and of "Scheduled Industry" in Clause (i). They read as follows:

> (d) "industrial undertaking" means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government;
>
> (i) "scheduled industry" means any of the industries specified in the First Schedule.

The Act contains several provisions designed to promote and regulate the scheduled industries and their products. Section 6 provides for establishment and Constitution of Development Councils and their functions. It empowers the Central Government to establish a Development Council for any scheduled industry or group of scheduled industries. Such Development Council has to perform such functions of a kind specified in the second schedule as may be assigned to it by the Central Government. Section 9 provides for levy of a cess which, after collection, is made over to the Development Council established under Section 6. The Development Council has to utilise the said fund for promoting scientific and industrial research with reference to such industry and take measures for promoting the interests of such industry. It will be appropriate to set out Section 9 in its entirety:

9. Imposition of cess on scheduled industries in certain cases-(1) There may be levied and collected as a cess for the purposes of this Act on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by the Central Government by notified order a duty of excise at such rate as may be specified in the notified order, and different rales may be specified for different classes of goods:

Provided that no such rate shall in any case exceed two annas per cent of the value of the goods.

Explanation. -In this Sub-section, the expression "value" in relation to any goods shall be deemed to be the wholesale cash price for which such goods of the like kind and quality arc sold or are capable of being sold for delivery at the place of manufacture and at the time of their removal there from, without any abatement or deduction whatever except trade discount and the amount of duty then payable.

(2) The cess shall be payable at such intervals, within such time and in such manner as may be prescribed, and any rules made in this behalf may provide for the grant of a rebate for prompt payment of the cess.

(3) The said cess may be recovered in the same manner as an arrear of land revenue.

(4) The Central Government may hand over the proceeds of the cess collected under this section in respect of the goods manufactured or produced by any scheduled industry or group of scheduled industries to the Development Council established for that industry or group of industries, and where it docs so, the Development Council shall utilise the said proceeds--

(a) to promote scientific and industrial research with reference to the scheduled industry or group of scheduled industries in respect of which the Development Council is established;

(b) to promote improvements in design and quality with reference to the products of such industry or group of industries;

(c) to provide for the training of technicians and labour in such industry or group of industries;

(d) to meet such expenses in the exercise of its functions and its administrative expenses as may be prescribed.

4. Sub-section (1) is immediately relevant for the purpose of these cases. The main features of the Sub-section are:

(a) The Central Government is empowered to levy and collect as a cess a duty of excise for the purposes of the Act,

(b) Such levy shall be on all goods manufactured or produced in such scheduled industry as is specified in the notification.

(c) The rate of cess shall be such as may be specified in the notified order.

(d) Different rates may be specified for different goods or different classes of goods.

(e) However, no such rate prescribed by the notified order shall in any case exceed two annas per cent of the value of the goods.

(f) The value shall be determined in the manner provided in the explanation to Sub-section (1).

5. Section 30 confers the rule-making power upon the Central Government. Sub-section (1) empowers the Central Government to make rules made for carrying out the purposes of the Act. Sub-section (2) particularises the matters in respect of which rules can be mode. Clause (c) of Sub-section (2) empowers the Central Government to provide by rules:

the intervals at which, the time within which, and the manner in which the cess leviable under Section 9 shall be payable and the rebate for the prompt payment of such cess.

6. By notification dated 18th February, 1976 (Published in the Gazette of India extra-ordinary on the same day) the Central Government made rules called "The Jute Manufactures Cess Rule, 1976". The rules have been made after prior publication i.e., after inviting objections and suggestions from affected persons and after duly considering the same. Rule 2 defines certain expressions occurring in the Rules. We need notice only one of them, namely the definition of 'Jute Manufactures' in Clause (f) of Rule 2 which read thus:

f.-'Jute manufactures' means manufactures of jute, or Bimlipatam Jute or of Mesta fibre of all sorts including:

(1) twist, yarn, thread, rope and twine, all sorts, containing more than 50 percent by weight of jute (including Bimlipatam jute or Mesta fibre) calculated on the total fibre content in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power;

(2) other, but excluding any such manufacture,

(i) which contain 40 per cent or more by weight of wool, or

> (ii) which contains no wool on less than 40 percent by weight of wool and less than 50 per cent by weight of jute (including Bimlipatam jute or Mesta fibre);

7. It may be noticed that this definition is not only inclusive but also specifically includes jute, yam, thread, rope and twine, all sorts.

8. Rule 3 applies the provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder in the matter of levy and collection of the cess from the jute manufacturers. It reads as follows:

> 3. -Application of Central Excise and Salt Act and the Rules made there under--Save as otherwise provided in these rules, the provisions of the Central Excise and Salt Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refund of duty, shall, so far as may be, apply in relation to the levy and collection of the cess as they apply in relation to the levy and collection of the duty of excise on jute manufactures under that Act.

9. By its order No. S.0.141 (2), the Central Government specified, for the purpose of Section 9(1) of the Act, the class of goods manufactured or produced in the scheduled Industry of textiles and also specified the rate of cess on each of the goods. The cess was levied initially for a period of one year commencing from 1st March, 1976. Later, it was extended for another year. Jute textile and jute yarn are both subjected to cess among other goods.

10. Notices were issued to all the jute manufacturers to pay the said cess at the specified rate on their products including jute twine and jute yarn, produced in their units. The cess was held payable even in respect of jute yarn and jute twine consumed within the same factory/unit in manufacturing jute textiles. Indeed the Collector of Central Excise and Custom West Bengal clarified by a trade notice dated 28th April, 1977, that jute twine and jute yarn when consumed within the factory of production for conversion into manufactures falling under Tariff item No. 22-A were subject to levy of cess. It said that jute twine and yarn captively consumed within the same factory, though exempt from payment of Central Excise Duty, is yet liable to pay the cess under Section 9 of the Act. Several jute manufacturers filed Writ Petitions in the Calcutta High Court challenging the levy of cess on several grounds all of which were rejected and Writ Petitions dismissed by a learned Single Judge. The petitioners thereupon carried the matters before a Division Bench by way of appeals under Clause 15 of Letters Patent. The Division Bench agreed with the learned Single Judge and dismissed the appeals whereupon they approached this Court and filed these appeals by leave.

11. Mr. Salve, appearing for the appellants urged two contentions namely: (1) Jute yarn is not one of the products mentioned in heading 23 of the First Schedule to the Act though jute twine and jute rope are expressly mentioned. Indeed, a reading of heading 23 shows that in all other Sub-headings, yarn is specifically mentioned but in the case of sub-heading (2), yarn is omitted. This omission is deliberate and meaningful which is evident from the fact that the corresponding entry in the original First Schedule expressly included jute yam but when the First Schedule was substituted in 1956, jute yarn was specifically omitted. This has some meaning. It shows that jute yarn is outside the purview

of the Act. In other words, an industry engaged in production of jute yarn is not within the purview of the Act. If so, cess under Section 9 cannot also be levied on such products. He submitted further that the cess cannot be levied on intermediate products but can be levied only on the final products.

(2) A reading of Section 9(1) shows that the levy of cess has to be with reference to the value of the product (ad valorem). The notification in question levies the cess by weight. Such a levy is not permissible and could not have been contemplated by Sub-section 1 of Section 9 which is evident from a reading of the proviso. As a matter of fact, such a levy (by weight) brings about an unequal and anomalous consequence. It is well known that finer the jute textile, the less weight it would have. Correspondingly, coarser the textile, more the weight, In this sense, course jute products having lower value are subjected to higher cess than the finer quality jute textiles.

12. Mr. Ganesan appearing for the appellant in Civil Appeal arising from Special Leave Petition No. 5466 of 1980 urged the following contentions on behalf of the respondent in the said appeal. We arc referring to his contentions at this stage itself because his contentions arc supportive of and elaborate the contentions urged by Mr. Salve. The contentions urged by Mr. Ganesan are:

> 1. The period for which the cess is demanded is from October, 1977 to December, 1977. Rule 3 of the Rules makes the provisions of the Central Excise Act and the rules made thereunder applicable in the matter of levy and collection of the said cess. Until the amendment of Rule 9 and 49 by Finance Act, 1982 (with retrospective effect from February, 1944, they provided for levy of excise duty only at the stage of removal. It meant that intermediate products which were captively consumed in the same factory could not be said to have been removed and, therefore, did not attract excise duty. This was the position when Rule 3 of the Cess Rules was made. (The rules as stated above,were made in February, 1976). This is a ease of legislation by reference. In such a case, it is well settled, subsequent amendments and alterations made in the other enactment or Rules do not ipso-facto get imported into these Rules. The imported provisions continue in the same form irrespective of any change that may have been effected in the Central Excise Act or the Rules made there under.
>
> 2. Under Rules 9 and 49, before their amendment, it was well settled that intermediate products captively consumed within the same factory/premises cannot be said to have been 'removed' and hence, could not be subjected to duty, It must accordingly be held that intermediate products captively consumed within the same factory cannot also be subjected to the cess under Section 9.
>
> 3. Section 30 of the Act does not confer upon the rule-making authority the power to make rules with retrospective effect. This is another reason for holding that the retrospective amendment of Rules 9 and 49 cannot be read into Cess Rules,

13. On the other hand, Sri V.R. Reddy, learned First Additional Solicitor General supported the levy. He submitted that Section 9 empowers the Central Government to levy cess "on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by

Central Government by notified order". Once jute textile industry is notified by Central Government, says he, all the goods manufactured or produced in such industry can be subjected to cess. He emphasises the fact that subheading 2 of heading 23 is inclusive in nature and must be deemed to take in jute yarn. According to him, the fact that jute yarn, which was specifically mentioned in the corresponding sub-heading before 1956 but is not found repeated in the present schedule is of little consequence. Learned Solicitor General did not concede that under Rules 9 and 49 Central Excise Rules, as they stood before they were amended in 1982, intermediate products captively consumed were not exigible to duty, In any event, he submitted, it is now well settled by decisions of this Court rendered under the provisions of Central Excise Act that duty can be levied on intermediate products as well even though captively consumed within the same factory or premises. The same principle applies to cess levied under Section 9 which is really a duty of excise, though levied and collected as a cess. According to him, Rule 3 of Jute Manufactures Rule is not a cess of legislation by reference but a case of mere reference and, therefore, the amendments and changes made in the Central Excise Act and the rules made thereunder arc equally applicable for the purpose of levy and collection of cess. Learned Additional Solicitor General also justified the levy of cess by weight. According to him, the Act does not prohibit such a levy. He brought to our notice that according to the schedule to the Central Excise Act, 1944 as well as the schedule to the Central Excise Tariff Act, 1985 excise duty is levied on jute and jute yarn only by weight. The same principle has been followed under the Act both for the sake of convenience and simplification. He submitted further that no material has been placed before the Court by the petitioners to show that the levy in question infringes the ceiling prescribed by the proviso to Sub-section 1 of Section 9.

14. By making the declaration contemplated by entry 52 of List 1 in the Seventh Schedule to the Constitution, the Parliament has placed the control of the industries specified in the First Schedule in the Union Government. The opening words of the First Schedule are "any industry engaged in the manufacture or production of any of the articles mentioned under each of the following heads or sub-heading namely...". Heading 23 in the Schedule reads, "Textiles (including those dyed, printed or otherwise processed)" There arc five sub-headings. They deal with cotton, jute, wool, silk and synthetic/artificial fibres respectively. Sub-heading 2 read along with the main heading would read as follows: "Textiles, made wholly or in part of Jute including jute twine and rope." This sub-heading must be read along with Section 9 of the Act which empowers the Central Government to levy cess" on all goods manufactured or produced in any such scheduled industry". Now, the petitioners arc manufacturers of jute textiles--broadly speaking--among other jute products. It is an indisputable fact that in the petitioners' factories, jute yarn is first produced and then it is consumed in manufacture of jute textiles. Jute yam is a product known to market. It is, thus, an intermediate product, which may be captively consumed in the petitioners' very factories. In such a situation, can it be said that jute yarn is not "goods manufactured or produced" in the petitioners' industries? We think not. In this situation, we are not prepared to attach any significance to omission of word 'yarn' in this sub-heading in 1956. In this context, we may recall the observations of this Court in Harakchand v. Union of India [1970] S.C. 1453 at [1461] to the effect that "there was no scientific or logical scheme in the classification of First Schedule of the Act 65 of 1951, but it is a mere enumeration and grouping of various items". Indeed, the Calcutta High Court has held, relying upon the said decision that the word "Textiles" in heading 23 does not qualify sub-heading 2 of heading 23.

15. It is then argued that if we arrive at the above conclusion on the basis of the language employed in Section 9, it would lead to an anomalous situation viz., while the jute yarn industry would not be within the purview of the Act (i.e., would not be subject to control and regulation provided by the Act) its products would be liable to pay cess under Section 9. This cannot be, says the learned Counsel. We arc not impressed. Firstly, it is not the case of any of the petitioners that any of them is engaged in the production of jute yarn alone. All of them arc engaged in manufacture of jute textile and are, therefore, scheduled industries. Jute yarn is an intermediate product for them. It is not even stated by the petitioners that there are any factories or industries engaged in production of jute yam alone. In the circumstances, this argument of Mr. Salve is hypothetical in nature and need not detain us. We cannot also accede to Mr. Salves argument that intermediate products of a scheduled industry cannot be subjected to cess on the ground that it would amount to multi-stage levy Section 9 speaks of levy on all goods manufactured or produced in a scheduled industry. Jute yarn is goods known to market. Therefore, they are goods manufactured in a scheduled industry. The fact that such yarn is captively consumed in the manufacture of jute textile is of no relevance. In fact, this question is concluded by the decision of this Court in J.K. Cotton Spinning & Weaving Mills v. Union of India , a decision rendered under the Central Excise and Salt Act. We think it convenient to deal with the contentions of Sri Ganesan at this stage, which we have set out herein before. His main contention is that Rule 3 of the Jute Cess Rules is a case of legislation by reference and that in such a case the provisions of the Central Excise Act and the rules made thereunder as they were obtaining on the date of making of Rule 3 continue in the same form, unaffected by subsequent amendments or changes in the Central Excise Act and Rules. He therefore, says that the amendment effected in 1982 in Rules 9 and 49 of Central Excise Rules is not available/or applicable to the levy and collected of cess under Section 9 of the Act. He also points out that the Act docs not confer upon the Central Government the power to make rules with retrospective effect. He relied upon the decision of this Court in Mahindra & Mahindra v. Union of India and Anr. . In our opinion, however, the very approach of the learned Counsel is based upon an incorrect premise. Firstly, it is not true to say that Rules 9 and 49 of the Central Excise Rules, as they stood before the 1982 amendment, did not permit levy of duty on captively consumed goods. A perusal of the decision of this Court in J.K. Cotton Spinning and Weaving Mills (supra) establishes the said fact. Different High Courts had taken different views. There was no decision by this Court. It is, therefore, wrong to assume that under the unamended rules, it was 'well settled' that duty could not be levied on captively consumed goods. The second and more important aspect is the nature of the cess in question. Though levied and collected as a cess, the imposition under Section 9 is a duty of excise. Section 9 says so in so many words. The explanation to Sub-section (1) of Section 9 defines the expression 'value' in practically the same terms as it is defined in the Central Excise Act. And Rule 3 of the Jute Cess Rules provides that except as otherwise provided in the said rules, the provisions of Central Excise Act, and the rules made thereunder "shall, so far as may be, apply in relation to the levy and collection of the cess as they apply in relation to the levy and collection of the duly of excise on Jute Manufactures under that Act". The language employed in this rule is significant. According to it, the provisions of the Central Excise Act and Rules arc applicable in the matter of levy and collection of the cess in the same manner they apply in relation to levy and collection of excise duty on Jute Manufactures. What do these words mean? Certainly they should mean something more than the words which fell for consideration in Mahindra and Mahindra. The facts of that case arc: Section 55 of Monopolies and Restrictive Trade Practices Act, 1969 provided that any person aggrieved by an

order made by the Central Government or the Commission under Section 13 or under Section 37 may prefer an appeal to the Supreme Court on "one or more of the grounds specified in Section 100 of the CPC, 1908". On the date Monopolies & Restrictive Trade Practices Act_ was enacted, Section 100 CPC provided three grounds on which a second appeal lay, one of them being that the decision appealed against was contrary to law. However, by virtue of 1976 Amendment, Section 100 was substituted. Now, a second appeal lies only on one ground, namely in a case where the High Court is satisfied that the case involves a substantial question of law. The appellant filed an appeal under Section 55 on February 28, 1978, wherein the respondent raised an objection as to its maintainability on the ground that the appeal docs not involve a substantial question of law within the meaning of amended Section 100 CPC which was said to be applicable. The said objection was negatived by this Court holding that on a proper interpretation of Section 55, it must be held that the grounds specified in the then existing Section 1(x) CPC were incorporated therein and the substitution of the new Section 1(x) did not affect or restrict the grounds as incorporated in Section 55. This was so held on the basis of the well settled proposition that if a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all (Per Lord Esher, M.R. in In/re Wood's Estate (1886) 31 Ch. D. 607/615).

16. But the language of Rule 3 of Jute Cess Rules is altogether different. It indicates a continuing applicability of the provisions of the Central Excise Act and the Rules. What was levied was a 'duty of excise' and it was to be levied and collected in accordance with the provisions of the Central Excise Act and the Rules. The effect is as if the words "for the time being in force" were there after the words "the provisions of Central Excise and Salt Act, 1944 (1 of 1944) and the Rules made thereunder" in Rule 3, We are, therefore, of the opinion that the amendment of Rule 9 and 49 made in 1982 (with retrospective effect from 1944) is equally applicable in the matter of levy and collection of cess under the Act. The contentions urged by Sri Ganesan arc accordingly rejected. In this view of the matter, it is not necessary to dwell upon the difference between cases where the provisions of another Act are incorporated by reference and cases where a mere reference is made to another Act a distinction pointed out in a recent decision of this Court in Bhatinda Improvement Trust v. Balwant Singh .

17. Coming to the second contention urged by Sri Salve, we see no substance in it. Under the schedule to the Central Excise Act, jute was taxed with reference to weight. So also was jute yam; vide entry 22-A and 18-D of the Schedule. Even the 1985 Act taxes jute and jute yarn by weight alone. The nature of the cess impossible under Section 9 is really that of duty of Central Excise, as emphasised hereinbefore. Evidently, for that reason the principle obtaining under the Central Excise Act has been adopted by this Act in the matter of levy of cess. We cannot agree with Sri Salve that according to Section 9, the cess can be lieved on the basis of value alone and on no oilier basis. The main limb of Section 9(1) does not indicate any particular basis for levy of cess. It is only the proviso which says, "no such rate shall in any case exceed two annas per cent of the value of the goods." Sri Salve wants us to read the proviso into the main limb and on that basis, hold that Section 9(1) contemplates levy of cess only ad valorem. We see no warrant for doing so or for restricting the

amplitude of the words used in the main limb of Section 9(1). It is not necessary to do so for giving effect to the proviso. The proviso can be respected and given effect to even without reading such restriction into the main limb of Section 9(1). In our opinion, it is open to the Central Government to adopt such basis as they may think appropriate for levy of cess, so long as such levy does not violate the ceiling prescribed by the proviso. In this connection, it is well to remember that the Central Excise Act levies duties not only ad valorem but in several other ways.

18. So far as the infringement of the ceiling prescribed by the proviso is concerned, no material has been placed in support thereof before the Court. This aspect has also been emphasised by the High Court. We agree with it and reject the said contention as well.

19. For the above reasons, the Civil Appeals (except Civil Appeal 4823/1991 arising from Special Leave Petition No. 5466 of 1980) and the Writ Petitions are dismissed. Civil Appeal 4823/1991 (arising from Special Leave Petition No. 5466 of 1980) is allowed. No order as to costs.