

M/S. Indian Cable Company Ltd., ... vs Collector Of Central Excise, Calcutta ... on 20 September, 1994

Equivalent citations: AIR1995SC64, 1994(48)ECC121, 1994ECR20(SC), 1994(74)ELT22(SC), JT1994(6)SC243, 1994(4)SCALE260, (1994)6SCC610, [1994]SUPP3SCR678, [1995]97STC307(SC), AIR 1995 SUPREME COURT 64, 1994 (6) SCC 610, 1994 AIR SCW 4071, (1994) 74 ELT 22, (1994) 48 ECC 121, (1995) 97 STC 307, (1995) 1 SCJ 241, (1994) 6 JT 243 (SC)

Author: K.S. Paripoornan

Bench: B.P. Jeevan Reddy, Suhas C. Sen, K.S. Paripoornan

ORDER

K.S. Paripoornan, J.

1. This is an appeal filed by an assessee against the order passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, dated 11.11.1983, under Section 35L(b) of the Central Excises and Salt Act, 1944, (hereinafter referred to as 'the Act'). The respondents represent the revenue. The short question that arises for consideration in this appeal is whether a duty of excise was validly levied on "PVC compound" produced by the appellant from out of the duty paid PVC resin. The levy of duty relates to the period from 18.6.1977 to 28.6.1977. The Assistant Collector of Central Excise, by his order dated 28.7.1978, held that the PVC compound in the form of granules produced by the assessee were exigible to duty for the period from 18.6.1977 to 28.6.1977, under Rule 10 of Central Excise Rules, 1944. He allowed set off in respect of the duty paid on PVC resins and used in the production of PVC compound. In appeal, the Appellate Collector of Central Excise, by his order dated 28.8.1979, held that the appellant manufactured PVC compound (granule) for insulation of their products, electric wires and cables, and the resultant PVC compound is a new product having different use than that of PVC resins and the processes undertaken by the appellant amount to manufacture within the meaning of Section 2(f) of the Act. He held that PVC compound would fall under sub-item (ii) of item 15A(1) and excise duty is accordingly leviable. In Second Appeal, filed by the assessee, the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi, by a majority held that the appellant purchased PVC compound or moulding granules, and though, no polymerisation or co-polymerisation results nor any changes in the structural identity of the polymer molecules, the conversion of PVC resins into PVC compound by the process employed by the appellant amounts to "manufacture" within the meaning of Section 2(f) of the Act. It was further held that goods so manufactured by the appellant will fall for classification under item 15A(1)(ii) of

the Act. The Judicial Member in his dissenting order took the view that the change in from PVC resins to PVC compound or moulding granules, does not amount to "manufacture" and the process employed is of no significance, and there is no legislative intent to bring to levy the product every time when there is a change in form. The appeal filed by the assessee was dismissed in view of the majority decision. It is from the aforesaid order passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, the assessee has filed this appeal to this Court.

2. We heard Sri A.K. Ganguli, Senior Counsel who appeared for the appellant (assessee) and also Sri Joseph Vellapalli, Senior Counsel who appeared for the respondents-revenue. The arguments advanced before us covered a wide field. Sri A.K. Ganguli argued that the appellants are manufacturers of electric wires and cables and they produce among other things a substance known as PVC compound (granule) out of duty paid PVC resins. During the material time, namely, 13.6.1977 to 28.6.1977, they manufactured 31 M.Ts. of PVC compound and removed the same for captive consumption within the factory. The PVC compound or granules produced out of duty paid PVC resins is only a modified form of PVC resins and the same cannot be called different goods commercially. The PVC compound in the form of granules, is not a marketable commodity, and that there is no finding of any statutory authority that it is otherwise. Even if the finding of the statutory authorities to the effect that the PVC compound in the form of granules produced by the appellants is a distinct and different commodity and the process employed by the assessee amounts to "manufacture" within the meaning of Section 2(f) of the Act is justified, it will not attract "excise duty" unless it is further found that the commodity namely, PVC compound in the form of granules, is a "marketable commodity". In the absence of such a finding, the statutory authorities were in error in holding that PVC compound in the form of granules produced out of duty paid PVC resins is exigible to excise duty. On the other hand, counsel for the revenue Sri Vellapally contended that the PVC compound in the form of granules produced from out of the duty paid PVC resins, is a distinct and different product in the commercial world and since it is a different commercial product, it is implicit therefrom that it is "marketable". It was further argued that the goods produced by the appellant, namely, PVC compound (granules) cannot be said to be the same goods as the PVC resins purchased by the assessee on which duty was paid. It is a distinct and different product in the commercial world and is exigible to excise duty as found by the statutory authorities.

3. We were referred to a few standard books to highlight what is meant and understood by "plastics" and "resins" in the commercial world and whether the PVC compound (granules) in the instant case, after having undergone the process as found by the Appellate Tribunal, is or is not a distinct and different product in the commercial world attracting levy of excise duty though removed for captive consumption. Our attention was invited to the New Encyclopaedia Britannica Vol. 21, pp. 290-292 and McGraw-Hill Encyclopaedia of Science & Technology, 7th Edn., PP. 182-184, to understand the nature, quality, uses and characteristics of "plastics" and "resins" in general, the various components of the said products, and the technology employed in them. The Appellate Tribunal in its order has referred to Hawley's Condensed Chemical Dictionary to illustrate what is meant by "modification" (10th Edn. P.699), to ascertain whether "PVC compound" is a chemically modified PVC resin. We do not think that we should go into technical aspects in detail in the light of the conclusion reached by us on another vital aspect in this case, which requires further probe. In this case, the Appellate Tribunal after adverting to the facts that the appellants produced PVC compound (granules) from

duty paid PVC resins and that they were not polymerisation and co-polymerisation products, referred to the detailed tour note of chemical Examiner, in para 11 of its order, wherein it was concluded to the following effect:

It may be seen that the manufacture process adopted for the production of PVC compound from PVC resin-powder does not involve any polymerisation and co-polymerisation reaction of the initial resin molecules. By compounding PVC resins with various ingredients like plasticizers, stabilizer filler & lubricants, some of the physical & mechanical properties of the initial polymer/resin are greatly modified, the PVC compound or. modified form of PVC resin is obtained without bringing a change in the structural identity of the polymer molecules.

In the light of the above, the majority members of the appellate Tribunal came to the conclusion that the conversion of PVC resin into PVC compound by the processes employed by the assessee, amounts to "manufacture" within the meaning of Section 2(f) of the Act. The Tribunal stated thus in paragraphs 12 & 13 of its Order:

It is clear that a good deal of processing is involved and what emerges is a homogeneously mixed material which is first formed into a sheet and then broken into granules or chips. Evidently, it is not a case of simple loose mixture such as sand and pebble capable of being separated by simple physical means. It is also clear that the processing results in some of the physical and mechanical properties of the original PVC polymer or resin being modified through the structural identity of the polymer molecules does not undergo change. We are of the opinion that there is a definite process of manufacture involved in the subject process.... It is not disputed that PVC resin and PVC compound or moulding granules are not one and the same thing. We have seen that the conversion of PVC resin into PVC compound involves the addition of fillers, plasticizers, stabilizer and lubricant, the ingredients being intimately and homogeneously mixed with the aid of heat and machines into a sheet which is then broken upto into granules or chips. Again, the two products are known by different names. What the appellants purchase is PVC resin and what they manufacture is PVC compound or moulding granules. It is in evidence, as seen from the Chemical Examiner's Notes, which have been referred to by the appellants, that some of the physical and mechanical properties of PVC resin are greatly modified by its conversion to PVC compound though, admittedly, no polymerisation or co-polymerisation results nor any changes in the structural identity of the polymer molecules.

It is on the basis of the aforesaid finding the Tribunal held that the PVC compound produced by the appellants, out of the duty paid PVC resin, was liable to be charged with excise duty under item No. 68, from 18.6.1977 to 28.6.1977.

4. The wordings of Item 15A in the Act prior to 18.6.77, and on and from 18.6.77, is extracted in paragraph 15 of the Tribunal's order to the following effect:

Prior to 18.6.77:

15 A. ARTIFICIAL OR SYNTHETIC RESINS AND PLASTIC MATERIALS AND ARTICLES THEREOF.

(1) Artificial or synthetic resins and plastic materials in any form whether solid, liquid or pasty, or as powder granules or flakes, or in the form of moulding powders, the following namely:

(i) Condensation, Poly condensation and poly addition products, whether or not modified or polymerised, including phenoplasts, Aminoplasts, Alkyds, Polyamides, Polyurethane, Polyallyl, Esters and other unsaturated polysters;

(ii) polymerisation and co-polymerisation products including polyethylene and Polytetrahaloethylene Polyisobutylene, Polystyrene Polyvinyl Chloride, Polyvinylacetate, Polyvinyl Chloroacetate and other Polyvinyl derivatives, Poly acrylic and Polymethacrylic derivatives and coumarone-Indene resin; and....

On and from 18.6.77:

ARTIFICIAL OR SYNTHETIC RESINS AND PLASTIC MATERIALS AND CELLULOSE ESTERS AND ETHERS, AND ARTICLES THERE OF -

(1) The following artificial or synthetic resins and plastic materials, and cellulose esters and ethers, in any form, whether solid, liquid or pasty, or as powder, granules or flakes, or in the form of moulding powders, namely:

(i) Condensation, Poly-condensation and poly addition products, whether or not modified or polymerised, and whether or not linear such as Phenoplasts, Amino lasts Alkyds, Polyamides, Super Polyamides, Polyesters, Polyallyl esters, Polycarbonates Polyethers, Polyethylene mines Polyurethanes, Epoxies resin and Silicones;

(ii) Polymerisation and co-polymerisation products such as polyethylene, Polytertra-haloethylenes, Poly isobutylene Polystyrene, Polyvinyl Chloroacetate and other Polyvinyl derivatives, Poly acrylic and Polymethacrylic derivatives, Poly acrylic and Polymethacrylic derivatives and Coumarone-Indene Resins; and....

Though the majority of the members of the Appellate Tribunal held that the process employed by the appellants amounts to "manufacture" within the meaning of Section 2(f) of the Act, the dissenting Judicial Member held that it was not. We do not wish to pronounce finally, at this stage, regarding the correctness or otherwise of the rival views so expressed by the members of the Tribunal since the matter requires a remit, for other reasons. But we would like to point out that in construing the relevant item or entry, in fiscal statutes, if it is one of everyday use, the concerned authority must normally, construe it, as to how it is understood in common parlance or in the

commercial world or trade circles. It must be given its popular meaning. The meaning given in the dictionary must not prevail. Nor should the entry be understood in any technical or botanical or scientific, sense. In the case of technical words, it may call for a different approach. The approach to be made in such cases has stated by Lord Esher in *Unwin v. Hanson* [1891] 2 QB 115, at 119 thus :

If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.

We would only add that there should be material to enter appropriate finding in the case. The materials may be either oral or documentary evidence. For the purpose of this appeal, we will proceed on the basis that there is "manufacture" of the product or goods; but the question is, even so, is the duty of excise exigible herein?

5. In this connection it is only proper to quote the definition of "excisable goods" and "manufacturer" as contained in Section 2(d) and 2(f) of the Act.

2(d) 'Excisable goods' means goods specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;

2(f) 'manufacture' includes any process, -

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, and the word "manufacture" shall be construed accordingly and 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;

As to what constitutes "manufacture" generally has been explained in innumerable decisions of this Court. In one of the early decisions, in *Union of India v. Delhi Cloth and General Mill Co. Ltd.* , a Constitution Bench of this Court, in paragraph 14 of the Judgment quoted the following passage occurring in *Permanent Edn. of Words and Phrases*, Vol. 26, with approval.

'Manufacture' implies a change, but every change is not manufactured and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use.

Again at para 18, the Court observed thus:

'manufacture' which is liable to excise duty under the Central Excises and Salt Act, 1944 must be the bringing into existence of a new substance known to the market.

This and other subsequent decisions were surveyed in a later Constitution Bench decision in *Ujagar Prints and Ors. v. Union of India and Ors.* . At page 511, Venkatachaliah, J., as he then was, stated the law thus:

The prevalent and generally accepted test to ascertain that there is 'manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes. The principles are clear. But difficulties arise in their application in individual cases. There might be borderline cases where either conclusion with equal justification be reached. Insistence on any sharp or intrinsic distinction between 'processing' and 'manufacture', we are afraid, results in an oversimplification of both and tends to blur their interdependence in cases such as the present one.

We need not elaborate on this aspect of the case since, according to us, finding on another important aspect necessary to sustain the levy of excise duty, is totally absent in this case and the entire matter requires reconsideration by the Tribunal.

6. Counsel for the appellant Shri A.K. Ganguli very forcefully argued that a finding that the PVC compound (granules) is a marketable product, is essential to hold that the said product is exigible to excise duty. The plea is that there is no such finding herein. And so, the orders of the authorities holding that the excise duty is exigible in this is vitiated.

We perused the order of the Appellate Tribunal with care. We do not find any finding to the effect that the PVC compound (granules) is a "marketable" product. Indeed the counsel for the respondents Mr. Vellapalli fairly agreed that there is no such finding.

7. We are of the view that the provisions of the Act mandate that a finding that the goods are marketable is a prerequisite or "sine qua non" for the levy of duty. Section 3 of the Act is the charging section: Section 3. Duties, specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied - There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985....

Section 2(d) defines "excisable goods". We have quoted the definition in para 5 supra. The word "goods" is not defined in the Act.

After advertng to the aforesaid definition of "excisable goods" and the meaning of the word "goods", a Constitution Bench of the Supreme Court in Union Of India v. Delhi Cloth and General Mills , stated in paragraph 17 thus:

There definitions made it clear that to become 'goods' an article must be something which can ordinarily come to the market to be bought and sold In a series of decisions, this Court has held that "marketability" is an essential ingredient, to hold that an article is dutiable exigible to duty of excise. The important decisions of this Court which have laid down the law on this aspect, are the following:

- (1) Union of India v. Delhi Cloth and General Mills, Co. Ltd. .
- (2) South Bihar Sugar Mills v. Union of India .
- (3) Bhor Industries v. Collector .
- (4) Hindustan Polymers v. Collector .
- (5) Collector of Central Excise v. Ambala Sarabhai .
- (6) Union Carbide v. Union of India (7) A.P. Electricity Board v. Collector of Central Excise .

In the latest decision in A.P. State Electricity Board v. Collector of Central Excise, Hyderabad , one of us (B.P. Jeevan Reddy, J) speaking for the Bench succinctly stated the law thus at pages 549 & 550:

...Marketability is an essential ingredient in order to be dutiable under the Schedule to the Act.... The 'marketability' is thus essentially a question of fact to be decided in the facts of each case. There can be no generalisation. The fact that the goods are not in fact marketed is of no relevance. So long as the goods were marketable, they are goods for the purposes of Section 3. It is not also necessary that the goods in question should be generally available in the market. Even if the good are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers.... The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country.

"Marketability" is a decisive test for dutiability. In only means "saleable", or "suitable for sale". It need not be in fact, "marketed". The article should be, capable of being sold or being sold, to consumers in the market, as it is without anything more. The Appellate Tribunal has not adverted to the above vital aspects nor has it entered a finding that the PVC compound (Granules) is a "marketable product" as understood in law. The Appellate Tribunal was swayed by the fact that the conversion of PVC

resin into PVC compound by the process employed by the appellants amounts to "manufacture" within the meaning of Section 2(f) of the Act and that by itself will justify the levy of duty. In our view, this is a palpable error committed by the Tribunal. In the absence of a finding, that the goods are "marketable" i.e. saleable or suitable for sale, we hold that the order of the Appellate Tribunal is infirm. It should be set aside and we hereby do so. We order a remit of the matter to the Appellate Tribunal to consider the appeal afresh and dispose of the same in accordance with law. There shall be no order as to costs in this appeal.