A.P. State Electricity Board vs Collector Of Central Excise, Hyderabad on 1 February, 1994

Equivalent citations: 1994(1)ALT27(SC), 1994(48)ECC59, 1994ECR349(SC), 1994(70)ELT3(SC), JT1994(1)SC545, 1994(1)SCALE281, (1994)2SCC428, [1994]1SCR499, [1994]95STC595(SC), AIRONLINE 1994 SC 633

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Bench: B.P. Jeevan Reddy, B.L. Hansaria

JUDGMENT

B.P. Jeevan Reddy, J.

1. The question raised in this batch of appeals is whether the prestressed cement concrete poles manufactured by the appellant, Andhra Pradesh State Electricity Board, are "goods" within the meaning of Section 3 of the Central Excise and Salt Act, 1944. Section 3 levies duties of excise "on all excisable goods ... which are produced or manufactured in India". The expression "excisable goods" is defined in Clause (b) of Section 2. At the relevant time, the definition ran thus: "excisable goods means goods specified in the Schedule to this Act as being subject to a duty of excise and includes sale". The expression "goods" is not defined. According to the learned Counsel for the appellant, goods contemplated by Section 3 and Section 2(d) are those goods which are "marketable" and inasmuch as the poles manufactured by the appellant are not marketable, they are not goods. It is the correctness of the said submission which we have to examine.

2. The Appellant-Electricity Board requires poles of different sizes, strength and dimensions for distributing electricity generated by it. The manufacture of these poles is actually done by the contractors under the direct supervision of the Board. It is the Board which supplies the requisite material like, cement, concrete and steel. In fact, one of the main contentions raised by the appellant before the Customs, Excise and Gold (Control) Appellate Tribunal (C.E.G.A.T.), besides the one urged in these appeals, was that the manufacture of the said poles is undertaken by independent contractors and that the Board merely purchased the same from them. On this basis, it was contended that the duties of excise must be levied upon the contractors and not upon the appellant-Board. This plea is, however, not urged by the appellant's counsel before us. The only contention of Sri Shanti Bhushan, learned Counsel for the appellant is this: the poles manufactured by the appellant are of various sizes, strength and dimensions. There are about 100 types of poles. All the poles manufactured by the Board are utilised for its own purposes. They are not sold in the market. In fact, they have no market and are not known to the market. The excise authorities have

not pointed out any instance where these poles were sold by the Board. They are, therefore, not marketable and hence, not 'goods' within the meaning of and for the purposes of Central Excise Act.

3. Sri Joseph Vellapally, learned Counsel for the Revenue, on the other hand, submitted that the very plea taken by the appellant at an earlier stage that these poles were manufactured by the independent contractors from whom the appellant-Board purchased them itself shows that these goods are marketable. Learned Counsel relied upon an order of this Court in Collector of Central Excise v. Kerala State Electricity Board (Civil Appeal No. 140 of 1989 disposed of on March 12, 1990) wherein this Court accepted the finding recorded by the C.E.G.A.T. that the manufacture of poles in that case was done by independent contractors from whom the Kerala State Electricity Board purchased them. Counsel pointed out that just as the appellant-Board requires poles of different sizes, strength and dimensions, so does Kerala Board. The fact that Kerala Board purchases these poles from contractors clearly establishes the marketability of these poles. The fact that the appellant does not sell these poles does not affect the marketability of the said goods. The counsel also pointed out that, besides Electricity Board, there are other establishments engaged in the manufacture of electricity like Tatas in Bombay. They too require poles of different sizes which may either be manufactured by them or purchased from independent contractOrs.

4. Since the requirement of 'marketability' has been evolved by a process of judicial interpretation, it would be appropriate to notice the relevant decisions, upon which strong reliance is placed by Sri Shanti Bhushan.

5. The first decision is in Union of India v. Delhi Cloth & General mills 1963 Suppl. (1) S.C.R. 586. The respondent-mills was engaged in the manufacture of vegetable product known as "Vanaspati". Vanaspati was subject to duty. It was the common case of both the parties that for the purpose of manufacturing vanaspati, the respondent-mills purchased groundnut and "til' oil from the market and subjected them to different processes before applying hydrogenation to produce vanaspati. The stand of the Union of India was that in the course of manufacture of vanaspati, the respondent-mills produced at an intermediate stage what is known as "refined oil' in the market and although the respondent may not sell it as such, still it being a marketable product, it was liable to excise duty under Tariff Item 23 of the Schedule which levied duty on "Vegetable, non-essential oils, all sorts, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". This stand was negatived by this Court holding that there could be no refined oil as known to the market without deodorisation. In other words, non-deodorized refined oil is not known to market whereas the "refined oil' obtained by the respondent at an intermediate stage of production of vanaspati is not deodorised. The respondent, it was held, applied the process of deodorisation only after hydrogenation. The court relied upon the specification by the Indian Standards Institution to hold that "without deodorisation, the oil is not "refined oil" as is known to the consumers and the commercial community". Accordingly, it held that the "refined oil" which was obtained by the respondent at an intermediate stage of production/manufacture of vanaspati was not liable to duty. The ratio of this judgment is that inasmuch as the "refined oil" obtained by the respondent at an intermediate stage of production of vanaspati cannot be treated as "refined oil" known to the market and consumers because no refined oil is ever marketed unless it is deodorised, it is not "goods" for the purpose of the Act. It was found as a fact that the respondent did not deodorise the "refined oil"

at any stage; it applied the said process only after hydrogenation.

6. The second decision relied upon is in South Bihar Sugar Mills Ltd, v. Union of India . The appellants were engaged in the manufacture of sugar by carbonation process. They paid excise duty on the sugar manufactured by them. The appellants employed a process of burning limestone with coke in a lime kiln with a regulated amount of air whereby a mixture of gas was generated consisting of carbon dioxide, nitrogen, oxygen and a small quantity of carbon monoxide. The content of carbon dioxide in this mixture of gases ranged from 27 to 36.5%. The said mixture of gases was compressed so as to achieve pressure exceeding atmospheric pressure and then passed through a tank containing sugarcane juice so as to remove impurities from it and refine the juice. Actually, for the purpose of refining, only carbon dioxide in the gas was used. The remaining gases escaped into the atmosphere by a vent provided for the purpose. The Revenue sought to treat the respondent-mills and other similar mills as manufacturers of "compressed carbon dioxide" and sought to levy duty on it under Tariff Item 14H. The respondent's case was that they maintained lime kiln to generate a mixture of gases and not carbon dioxide and that at no stage in the process of generating this mixture and passing it through the sugarcane juice was carbon dioxide - which formed a part of this mixture of gases - either compressed, liquefied or solidified. They contended that the mixture of gases generated by them was not carbon dioxide, as known to the market, since carbon dioxide as known to market, as per specification laid down by Indian Standards Institution, meant gas with 99% content of carbon dioxide. This Court rejected the Revenue's stand holding that the mixture of gases (referred to as 'kiln gas') was not carbon dioxide. Carbon dioxide was only a component of it, the content whereof ranged from 27 to 36.5%. According to the specifications laid down by the Indian Standards Institution, the carbon dioxide known to the market was a gas having a component of 99% carbon dioxide. The kiln gas cannot, therefore, be subjected to duty as carbon dioxide. The court observed that compressed carbon dioxide as known to market is wholly different from the kiln gas generated by the respondents. It does not mean, the court clarified, that if the content of carbon dioxide is less than 99%, it would not be carbon dioxide, for there can be sub-standard products as well. But what is produced and marketed must be carbon dioxide. The kiln gas generated by the respondents, the court observed, can never be understood as carbon dioxide, nor is it ever liquified or solidified. It cannot, therefore, be called "carbon dioxide as understood in the market among those who deal in compressed carbon dioxide". The court clarified further: "at the same time the duty being on manufacture and not on sale, the mere fact that kiln gas generated by these concerns is not actually sold would not make any difference if what they generated and use in their manufacturing processes is carbon dioxide". It may be noticed that, at the relevant time, Tariff Item 68 was not in force, which Item was added only in the year 1975. The Revenue sought to tax it under Tariff Item 14H which spoke of "compressed, liquefied or solidified gases" including carbon acid (carbon dioxide)". The court found that kiln gas was not "carbon dioxide' nor was it ever compressed, liquified or solidified by the respondents.

7. The next decision relied upon is in Union Carbide India Ltd, v. Union of India . The appellant-company was engaged in the manufacture and sale of flashlights (torches). For that purpose, it used to purchase aluminium slugs and produced aluminium cans or torch bodies at its factory by a process of extrusion. The Superintendent of Central Excise called upon the appellant-company to submit a price list in respect of the aluminium cans for the purposes of levying excise duty thereon.

While complying with the said demand, the appellant protested that the said aluminium cans cannot be described as "goods" for the purpose of levying excise duty inasmuch as they are not marketable and that they are prepared only for the purpose of flashlights manufactured by the appellant. It was also submitted that preparation of aluminium cans out of aluminium slugs did not amount to manufacture and that aluminium cans are merely intermediate products in the manufacture of flash lights. The aluminium cans prepared by the appellant, it submitted, were manufactured by it entirely for its own purposes, viz. for the manufacture of flashlights. The aluminium cans at the point at which the excise duty was sought to be levied were in a crude and elementary form incapable of being employed in that state as components in a flashlights. The cans had sharp uneven edges and before they could be used as a component in making the flashlight, these cans had to undergo various processes such as trimming, threading and redrawing. After trimming, threading and redrawing, they were needed, beaded and anodised or painted. It is at that point that they became distinct and complete components capable of being used as flashlight cans for housing battery cells and for having a bulb fitted thereto. On the said facts, it was held by this Court that the aluminium cans in their aforesaid elementary and unfinished form were not capable of sale to a consumer and hence not marketable - nor were they ever marketed. This Court accepted the affidavit filed by the appellant that the aluminium cans in that state are not known to the market because the Revenue could not produce any material to the contrary. The ratio of this decision is that the aluminium cans, which were sought to be taxed, were, in that state not marketable. They were not capable of being sold to a consumer, nor were they ever sold in that state.

8. The next decision relied upon is in Bhor Industries Ltd. Bombay v. Collector of Central Excise, Bombay . The question in this case was whether the crude PVC films manufactured by the appellant therein were 'goods' within the meaning of Section 3. The crude PVC films represented an intermediate product used for captive consumption in manufacture of leather cloth, laminate jute mattings and PVC tapes. It was found by the appellate collector on the material produced by the appellants that crude PVC films were not marketable products. The Revenue could not produce any material establishing the contrary. On that basis, it was held by this Court that the crude PVC films are not marketable and not being 'goods' known to market, they cannot be treated as "goods" for the purposes of Section 3. It was observed that marketability is an essential ingredient in order to be dutiable under the Schedule to the Act.

9. Lastly, Sri Shanti Bhushan. relied upon Collector of Central Excise v. Ambalal Sarabhai Enterprises 1989 (3) S.C.R.784. During a visit to the factory premises of the respondent, the central excise officers found that the respondent also manufactured and actively consumed starch hydrolysis, which according to them was glucose and fell under Item 1(E) of the Central Excise Tariff. The respondent's case, however, was that the said starch hydrolysis was not "goods" since it was not marketable as such. It was found by the Tribunal that the said product manufactured by the respondent was not and never was a marketable commodity and, therefore, does not constitute goods subject to duty. The respondent produced evidence to show that starch hydrolysis was highly unstable, that it fragmented quickly losing its character in a couple of days. For this reasons, it could neither be stored nor marketed. There was no evidence to the contrary adduced by the Revenue. This Court observed that while even transient items of articles can also be goods, one has to take a practical approach and decide on the basis of material before the court whether the particulars

goods were marketable. After referring to the characteristics of the said product (starch hydrolysis), the court came to the "conclusion that it would be unlikely to be marketable as it was highly unstable". The test, therefore, is the "marketability"; this test has to be applied and the matter decided in a pragmatic and practical sense.

10. It would be evident from the facts and ratio of the above decisions that the goods in each case were found to be not marketable. Whether it is refined oil (non- deodorised) concerned in Delhi Cloth and General Mills, or kiln gas in South Bihar Sugar Mills, or aluminium cans with rough uneven surface in Union Carbide, or PVC films in Bhor Industries or hydrolysis in Ambalal Sarabhai, the finding in each case on the basis of the material before the court was that the articles in question were not marketable and were not known to the market as such. 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 are 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 goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Now, in the appeals before us, the fact that in Kerala these poles are manufactured by independent contractors who sell them to Kerala State Electricity Board itself shows that such poles do have a market. Even if there is only one purchaser of these articles, it must still be said that there is a market for these articles. The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country. The appellant's own case before the excise authorities and the C.E.G.A.T. was that these poles are manufactured by independent contractors from whom it purchased them. This plea itself- though not pressed before us - is adequate to demolish the case of the appellant. In our opinion, therefore, the conclusion arrived at by the Tribunal is unobjectionable.

11. Accordingly, these appeals fail and are dismissed. No costs.