Shree Agency vs S.K. Bhattacharjee on 15 December, 1971

Equivalent citations: AIR 1972 SUPREME COURT 780

Author: I.D. Dua

Bench: J.M. Shelat, I.D. Dua, H.R. Khanna

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           CASE NO.:
Appeal (civil)  1790 of 1966

PETITIONER:
SHREE AGENCY

RESPONDENT:
S.K. BHATTACHARJEE

DATE OF JUDGMENT: 15/12/1971

BENCH:
S.M. SIKRI (CJ) & J.M. SHELAT & I.D. DUA & H.R. KHANNA & G.K. MITTER

JUDGMENT:
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JUDGMENT 1972 AIR (SC) 780 = 1972(4) SCC 15 The Judgment was delivered by I.D. DUA J.

I.D. DUA J.- This is an appeal by special leave from the order of the Central Government, dated April 15, 1966 dismissing the appellant's revision against the order of the Collector of Central Excise, Poona, dated July 20, 1964, confirming on appeal the order of the Assistant Collector, Central Excise, Kolhapur, dated December 21, 1959, demanding excise duty amounting to Rs. 43,020.

2.The appellant, Messrs Shree Agency, is a firm registered under the Indian Partnership Act and carries on business as dealers in textile goods, cotton yarns and other allied products at Sangli and Ichalkaranji in the State of Maharashtra. The firm consists of four partners. It does not own any powerloom factory. On May 11, 1957 a demand was made upon the appellant firm by the Superintendent of Central Excise, Jayasinghpur (Rural) for a sum of Rs. 2,32,614.12 P. as excise duty payable on the cotton fabrics stated to have been manufactured on behalf of the appellant firm in the factories situated at Ichalkaranji, mentioned in the annexure to the notice of demand, at normal rates in respect of the production for the period from July 1, 1956 to April 30, 1957. The appellant represented to the Assistant Collector, Central Excise, Kolhapur against this demand notice. But the same was confirmed by him on September 30, 1957. An appeal was then taken by the appellant to the Collector of Central Excise, Bombay. But the same was not entertained on account of non-compliance with the condition precedent of depositing the duty demanded. Prayer for waiver of this condition precedent was declined by the Collector. The appellant thereupon approached the Central Board of Revenue, which, as a special case, agreed to convert the demand on the basis of compounded levy if the appellant undertook to honour the same. The appellant gave written

undertaking as desired and a revised demand for Rs. 52,290 was then served upon the appellant by Superintendent, Central Excise, Ichalkaranji. This demand was also objected to and the matter went up to the Assistant Collector, Central Excise, Kolhapur, who, on December 19, 1959 gave to the appellant some relief. This order was made after hearing the appellant pursuant to this order the Deputy Superintendent Central Excise, made a demand on the appellant for a sum of Rs. 43,020 on January 13, 1960. Against the order of the Assistant Collector an appeal was preferred under Section 35 of the Central Excises and Salt Act, 1944 (Act No. 1 of 1944) (hereinafter called the Act) to the Collector of Central Excise, Poona. But since the appellant had not honoured the demand which was a condition precedent to the hearing of the appeal under the then Section 189 of the Sea Customs Act, 1878 as applicable to Central Excise, the Collector rejected the appeal without going into the merits. The appellant thereupon filed a writ petition in the Bombay High Court under Art. 226 of the Constitution but the same was dismissed on July 12, 1961 both on the ground of inordinate delay in approaching the High Court and on the merits. The appellant thereafter filed revision petition with the Government of India requesting that the appeal preferred against the order of the Assistant Collector be heard by the Collector of Central Excise, Poona, on the merits, at the same time offering to pay a part of the demand. After certain correspondence between the appellant and the Government, the latter directed the appellant to deposit a sum of Rs. 10,000 and to furnish a security bond for the balance of the duty. On compliance by the appellant with this condition, the Government directed the appeal to be considered on merits after hearing the appellant. The Collector, after hearing the parties at length, accepted the case of the department according to which the appellant used to get its cloth manufactured by 16 weavers and made up its accounts in such a manner that those weavers ultimately did not get anything more than 2-1/2 to 23/4 annum per yard of the cloth woven by them. The appellant's contention that it used to sell yarn to the weavers and buy cloth from them was not accepted and it was found by the Collector that the so-called proprietor weavers had no interest in the production of cloth and did not even maintain proper accounts of consumption of raw material and production of cloth. In the opinion of the Collector, there was no actual sale of cloth at all by the weavers to the appellant. On this finding the Collector, by his order dated July 20, 1964, declined to interfere with the order of the Assistant Collector.3. On further revision the Central Government made the following order on April 15, 1966, affirming the order of the Collector :

> "The Government of India have carefully considered all the points made in the revision application as well as at the time of the personal hearing given to them at Bombay on 4-4-1966. They are convinced that the applicants acted as master weaver during the material time and therefore, their duty liability under the Central Excise Rules was correctly determined. They, however, observe that the duty paid by M/s. Kallashwar Mill at compounded rate was not adjusted while determining the applicant's duty liability. The Government of India, therefore, directed that the demand for duty made in this case shall be reduced to the extent of the duty paid by Messrs. Kalleshwar Mill at compounded rate. Subject to this modification of the order in appeal, the revision application is rejected."

4.It is this order which is challenged before us in the present appeal.

5.In this Court the appellant's learned counsel Mr. P.R. Mirdul, contended that the departmental authorities have gone wrong in law in holding that the appellant is a manufacturer within the contemplation of Section 2(f) of the Act, and, therefore, liable to pay excise duty. The duty imposed on the appellant is, according to the submission, is illegal impost. It was further contended that the demand under Rule 9 (2) of the Excise Rules is invalid. The second point, having not been raised before the Central Government or the Collector, was not allowed to be raised for the first time in this appeal under Art. 136 of the Constitution.

6.In order to understand the real core of the controversy and to appreciate the arguments addressed in this Court we may briefly refer to the relevant statutory provisions. The words "manufacture" and "manufacturer" are defined in Section 2(f) of the Act as follows :-"(f)" manufacture' includes any process incidental or ancillary to the completion of a manufactured product; and

(i) in relation to tobacco, includes preparation of cigarettes, cigars cheroots, biris, cigarette or pipe or hookah, tobacco chewing tobacco or snuff; and

(ii) in relation to salt, includes collection, removal, preparation, steeping, evaporation boiling or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre these separation of salt from earth or other substance so as to produce elementary salt, and the excavation or removal or natural saline deposits or efflorescence.

(iii) in relation to patent or proprietary medicines as defined in Item No. 14B of the First Schedule and in relation to cosmetics and toilet preparations as defined in item No. 14F of that Schedule includes the conversion of powder into tablets or capsules, the labelling or relabelling of containers intended for consumers and re-packing from bulk packs to retain packs or the adoption of any other treatment to render the product marketable to the consumer.

(iv) in relation to goods comprised in Item No. 18A of the First Schedule, includes sizing, beaming, warping, wrapping, winding or ceeling or any one or more of these processes, or the conversion of any form of the said goods into another form of such goods, and the work manufacturer, 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 :'

7.The expression "excisable goods" defined in clause (d) of this section means "goods specified in the First Schedule as being subject to a duty of excise and includes salt"." Cotton fabrics"

> is one of the items specified in the said Schedule. Section 3 of the Act provides for the levy on all excisable goods other than salt manufactured or all excisable goods other than salt manufactured in or imported into any part of India at the rates set forth in the First Schedule. The Central Government framed the Central Excise Rules, 1944, in exercise of the powers conferred on it by Sections 6, 12 and 37 of the Act. Under Rule 8(1) the Central Government is empowered by notification in the Official Gazette to exempt, subject to such conditions as may be specified, any excisable

> goods from the whole or part of duty leviable on such goods. On March 1, 1956, the Central Government under this power issued Notification No. CRE-8 (10) 56 which modified its earlier notification and which so far as relevent for our present purpose, reads :-
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> "In exercise of the powers conferred by rule 8 of the Central Excise Rules, 1944, as in force in India and as applied to the State of Pondicherry, the Central Government hereby directs that the following amendment shall be made in the notification of the Government of India, Ministry of Finance (Revenue Division) No. 5, Central Excises dated the 1st March, 1955, namely :-
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> For item (1) of said notification, the following item shall be substituted, namely :-
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> (10) Cotton fabrics manufactured by or on behalf of the same person in one or more factories commonly known as powerloom (without spinning plants), in which less than 5 powerlooms in all are installed.'

8.By virtue of the notification, dated March 1, 1958 the Central Government has exempted cotton fabrics described therein from the whole of the duty leviable thereon under the Act. Item (10) in that notification reads :-"

> Cotton fabrics produced in factories known as powerlooms (without spinning plants) ".

9.To complete the picture, this item was amended on May 18, 1955, the new substituted item being :"

> (10) Cotton fabrics produced in factories commonly known as powerlooms without spinning plants, provided that the number of powerlooms producing cotton fabrics in such factories does not exceed four ".

Thereafter came the notification of March 1, 1956. On January 5, 1957 another notification under Rule 8 (1) was issued by the Central Government in supersession of the notifications of March 1, 1955, and August 10, 1956 whereby several items of cotton fabrics were exempted from the whole of the duty leviable thereon under the Act and item (7) reads :-"

> Cotton fabrics produced in factories commonly known as powerlooms (without spinning wheel) provided that the number of powerlooms producing cotton fabrics in such factories do not exceed four ".10.The argument raised on behalf of the appellant is that the cotton fabrics in question were really manufactured by the 16 weavers, whose details were given by the appellant, the case of 15 of whom are covered by cl. (10) of the notification dated March 1, 1956 and the appellant used merely to purchase the same from them. It was not denied that the appellant used to supply yarn to those weavers but that too, according to the appellant's Counsel, only by way

of sale to them. It was further admitted by the Counsel that the appellant also used both to buy yarn from, and sell cloth to, third parties on behalf of the said weavers. This submission being essentially one of fact requires examination of the evidence on the record. Since this is a special leave appeal under Art. 136 of the Constitution we have to see what are the conclusions of the departmental authorities, on this point, for, if there is evidence on the record on which those conclusions can be based, then, adequacy or sufficiency of that evidence would not be open to debate in this Court. In the absence of serious legal infirmity vitiating these conclusions they must be accepted as final. The Assistant Collector in his order dated September 30, 1957 dealt with this question at considerable length and observed :

Enquiries have revealed that in the past, before entering into business with M/s. Shree Agency, these powerloom factory owners were purchasing yarn from the local dealers and sometimes from Bombay merchants, and were getting credits not exceeding Rs. 5,000 to 6,000 at any time and that too on definite understanding of interest to be paid on yarn received on credit. All the factory owners during those transactions were very particular about the rate of yarn, rate of interest to be paid and maintenance of their accounts. From the nature of transaction between the factory owners and M/s. Shree Agency, it is seen that the factory owners were being supplied with yarns on credit of the value of Rs. 40,000 to 50,000 within a period of 3 to 4 months without any consideration of interest whatsoever to be charged from the factory owners. During the personal hearing, it was pointed out to Shri A.G. Kulkarni, that there are instances where yarn worth several thousand rupees has been issued on credit to the factory owners having 2 or 3 powerlooms, and still weekly payments were continued to them by M/s. Shree Agency. Shri Kulkarni was asked to state as to how much amount Messers Shree Agency could afford to give on credit to the small factory owners without settling the accounts at any stage, to which he replied that he has been doing business on moral hazard only. I am unable to believe that any genuine trader will enter into such a transaction on moral hazard unless he has got definite interest on the goods produced at these factories. It was very interesting to note that even upto the date of personal hearing Messrs Shree Agency was not in a position to know what amount was recoverable from the powerloom factories to whom they say they have supplied yarn on credit and advanced money every week during the period.11.Investigations were undertaken by the Superintendent, Central Excise, Jaisinghpur (Rural) with the owners of all the powerloom factories separately to ascertain if they know the amount of transaction and if they had any account to show the amount payable by them to Messrs Shree Agency on account of yarn and cash payments received by them. The enquiry conclusively revealed that none of the owners of the powerloom factories were in a position to know the amount due to Messrs Shree Agency.

12.From the nature of transaction, it appeared to me that the yarns were issued to the powerloom weavers not on credit, but for getting the same back duly woven by them into cloth. The weekly payments made by Messrs Shree Agency to the powerloom

> weavers cannot be anything also than the weaving charges for the yarn supplied to them.
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> 13.In course of inquiry by the Superintendent, Central Excise, Jaisingpur (Rural) on 29-8-1957 and 30-8-1957 Shri K. Abdulkhan of Hanuman Weaving Mills and Shri Pathak of Jai Shree Mills also admitted that Messrs Shree Agency had assured them that the accounts of sale of yarn to them and purchase of cloth from them will be adjusted by Messrs Shree Agency in such a way that they would get Ans. 2/6 to Ans. 2/9 per yard of cloth woven.

Calculations show that generally the amounts paid to the powerloom factories and the quantity of cloth received from them has certain relation. The amounts paid generally vary from 2.1 to 3.0 annas per yard of cloth received. Taking all the above facts together I have no doubt that Messrs Shree Agency had actually engaged themselves in production of cotton fabrics in question at the different factories and paid them weaving charges on weekly basis for the cloth received from them. Their main consideration was to supply yarn to the powerloom factories and receive the cloth woven from them and pay manufacturing charges to the factory owners.14.Later, in his order the Assistant Collector observed :-"

> From the above facts, I am convinced that the plea of a commission agency is not at all genuine, I have no doubt that actually Messrs Shree Agency continued to engage themselves in production of the cotton fabrics on their own account, but in order to evade the excise levy, the bills were prepared in the individual names of the factories, and the payments were shown to have been made against the hundies issued by the Mills Messrs Shree Agency. In all the cases I have also noticed that even the hundies have been written by the people of Messrs Shree Agency ".

15.In support of their contention that the entire production of the different Mills was not received by Messrs Shree Agency, they have shown in the statement attached with their application the quantity of yarn issued and the cloth received by them from July, 1956 to December, 1956. Since in these accounts Messrs Shree Agency has not taken into consideration the cloth received by them after December, 1956 on the plea that the cloth was sold by the factory owners direct in Bombay, the quantity of cloth shown in the enclosures to their application will definitely be less than the quantity that would be calculated from the yarn supplied. Surely the yarn supplied towards the later part of December, 1956 was manufactured in January, 1957. As I have already shown above, the transaction in respect of the period from January to April, 1957 has remained the same as it was during the year 1956.

16.This conclusion was never disturbed by the higher authorities. In order to check up if these conclusions are based on material on the record we went into the statements of K. Abdulkhan of Hanuman Weaving Mills on which reliance was placed by the Assistant Collector. That statement, in our view, fully supports the conclusion of the Assistant Collector and indeed it is impossible to read that statement to make out a case of K. Abdulkhan being an independent manufacturer who used to buy yarn from the applicant and sell cloth to them also to transact through the appellant as

commission agent purchases of yarn from others and sale of cloth to others.17.Now it may be recalled that an appeal against this order was not entertained because of commission to deposit duty and finally pursuant to the order of the Central Board of Revenue a revised demand of Rs. 52,290 was served on the appellant. This demand was objected to and the Assistant Collector dealt with the matter at great length after hearing the appellant and also considering the fresh evidence adduced in support of the objections. The Assistant Collector in his order dated December 21, 1956 while dealing with the case, including its background, observed :"

> I have very carefully considered the various points raised by you in your representation dated 28-11-1959 against the present demand. I have also given due thought to the points raised during the course of personal hearing granted to you on 28-11-1959'.
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> 18.During the personal hearing you contended that you would not press for the points raised in paragraphs 5 to 10 of your representation if the contentions in the first 4 paragraphs were conceded by the Department. In other words you have undertaken by pay duty on the basis of compounded levy provided the demand is restricted to the period ending December, 1956. It has been contended by you that you have not purchased a single yard of cloth from any of the 16 powerloom factories after December, 1956 and that the looms employed and the cloth manufactured in these factories from December, 1956 to April, 1957 should be excluded from the calculation of compounded levy demanded from you.
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> 19.In this connection your attention is invited to last para on page 5 of my predecessor's order dated 28/30 September, 1957 in which he has elaborately dealt with this issue and has concluded that the looms in these 16 factories continued to be employed on your behalf after December, 1956. I am precluded from re-examining an issue on which a judgment has already been pronounced after giving you adequate opportunity of defending your case by a predecessor of mine. In view, however, of the fact that you produced a number of affidavits from the owners of the powerloom factories specifying the precise quantity of cloth supplied to you by each individual unit, I have taken up a re-examination of this issue while deciding the present case.20.The affidavits produced to proclaim the supply of the cloth to your firm upto the end of December, 1956, only. The quantities have also been mentioned. In this regard the main question for consideration is whether your firm continued to employ the looms in the factories after December, 1956 when direct purchases by you of the manufactured cloth were suspended. For this purchase an examination of the factors which will categories the dealings of a particular firm or an individual as these of a master weaver have to be examined. It is necessary for a master weaver that the cloth manufactured should necessarily be purchased or supplied directly to them? In my opinion the employment of looms is the vital factor for consideration in such case. The question is whether you continued to employ the looms from the 16 factories for manufacture of cloth on your behalf or not after December, 1956. This is an issue of facts and has to be examined from the nature of your dealings with these factories

during the period under review.

21.During the course of personal hearing I had an occasion to examine in detail your dealings with a powerloom factory of M/s. Chintamani Wvg. Mills, Ichalkaranji. It was admitted by you that your dealings with this factory were typical of your dealings with other firms also. The record of the case shows that the factory submitted a statement of the total supplies of cloth made to you between July, 1956 to April, 1957 as per which 63,880 yds. cloth were supplied. As against this the affidavit now submitted by the same unit shows a quantity of 35,473 yds. up to December, 1956. Subsequently to this date it is stated that no supplies were made directly to you. The question is whether the manufacture of 28,047 yds. i.e. 63,880

- 35,473 of cloth after December, 1956 was done on your behalf or not.22.From your account books it was seen by me during the course of personal hearing that you supplied yarn on various dates between July, 1956 to April, 1957 (even after December 1956) of the total value of Rs. 54,776-2-9 to M/s. Chintamani Wvg. Mills. In addition cash advances were made on different occasions between these dates amounting to Rs. 12,875,00. The total payments made by the factory to your firm amount to Rs. 60,211-3-6. It will be seen that there was always an excess balance advanced to the factory. This was avowedly done to finance the manufacture of cloth. The nature of transactions from December, 1956 onwards are not different from those of the prior dates. The difference is only that the cloth was not purchased back directly by your firm but it was sold to other firms. As against the financial advances made by you, a very ingenious method had been devised to appropriate the bulk of the profits, from the various manufacturing units. Your accounts reveal that there was a two-way traffic to absorb the profits from employing these looms. In the first place the price of yarn supplied to the manufacturing units was adjusted at a rate higher by 8 as per 11b. than the prevailing market rates. In the record, the price of each dhoti of 10 yards, was adjusted at a rate lower by Re. 1 to Rs. 1-4-0. Thus on each dhoti produced on these powerlooms factories the bulk of the profit was absorbed by your concern leaving only the manufacturing charges to the individual factory owners. Moreover, on interrogation at the time of investigations none of the factory owners knew where the cloth was being sold and how it was being done. Evidence on record shows that all the cloth was being taken over by you that the baling and the transport were arranged by you. There are no accounts to indicate that the individual factory owners were charged for any expenditure on account of baling or for transport. It passes comprehension why a commercial concern engaged with profit taking motive should first advance large sum of monies to the individual factory owners, receive their entire production supply sized beams of yarn, get the cloth processed at Bombay, make sales and charge no forwarding commission, on baling expenses and no transport charges.Under these circumstances, I am unable to agree with your contention that you ceased to employ looms from the individual factories after December, 1956.

23.The Assistant Collector, after coming to this conclusion agreed that one out of the 16 units of factories manufacturing cloth on behalf of the appellant was a licensed one. On this point and on the point of units of number of yards as production one loom per shift, the appellant's grievance was upheld and the Superintendent was directed to revise the demand. The revised demand, as already noticed, was for Rs. 43,020. Against the order of the Assistant Collector, as already noticed earlier, an appeal was presented to the Collector which was finally directed by the Central Government to be heard, though in the meantime the appellant had also unsuccessfully approached the High Court by means of a writ petition. The Collector affirmed the order on appeal and in revision the Central Government made the impugned order upholding the order of the Collector. On the conclusion of the Assistant Collector and of the Collector it is crystal clear that the appellant used to supply yarn to the various weavers described to be factory owners for weaving cloth and an attempt was made to give to this simple business deal a complicated shape so as to make it look like two independent and unconnected transactions of sale of yarn by the appellant to the weavers and purchase of cloth from them. The conclusions of the Assistant Collector and of the Collector which are identical are amply supported by evidence on the record and have not been shown to be vitiated by any legal error nor has any grave injustice been shown to have resulted thereby to the appellant. On these conclusions there can be no doubt that appellant is a manufacturer within the contemplation of the Act and the exemption under item (10) of the notification dated March 1, 1956 or under item (7) of the notification dated Januray 5, 1957 is not available to the appellant. On this view it is not possible for this Court to interfere with the impugned order. The Departmental authorities having been invested with jurisdiction to decide this question their conclusions are not open to review by this Court by way of re-valuation of the material on the record. This appeal accordingly fails and is dismissed with costs.