Supreme Court of India
Hyderabad Industries Ltd. And Ani vs Union Of India And Ors on 21 July, 1995
Equivalent citations: 1995 SCC (5) 338, JT 1995 (5) 594
Author: B S.P.
Bench: Bharucha S.P. (J)

PETITIONER:
HYDERABAD INDUSTRIES LTD. AND ANI

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT21/07/1995

BENCH:
BHARUCHA S.P. (J)
BENCH:
BHARUCHA S.P. (J)
AHMADI A.M. (CJ)
PARIPOORNAN, K.S.(J)

CITATION:
1995 SCC (5) 338 JT 1995 (5) 594
1995 SCALE (4)516

ACT:

HEADNOTE:

JUDGMENT:

JUDGMENT BHARUCHA, J.

The appellants (original writ petitioners) import asbestos fibre and pay Custome duty thereon under entry 25.01.32, which reads:

> Mineral substances, not elsewhere specified .....:
>
> (1) xx xx xx (2) Asbestos raw including fibre 40% xx xx xx There is no dispute in regard to the levy of Customs duty.

The dispute is in regard to the levy on the imported asbestos fibre of additional duty under Section 3(1) of the Customs Tariff Act, 1975, which is qwaied hereinafter. The appellant in Civil Appeal No.

1354 of 1980 also mines asbestos in India and is made liable to pay excise duty thereon under Tariff item 22F. Which reads thus: "Item No. Description of goods Rate of Duty

---------- 22F Mineral Fibres and manufactures Fifteen percent therefrom in all in relation to ad valorem the manufacture of which any process is ordinarily carried on with the aid of power.

Explanation : "Mineral fibres and yarn, and manufactures therefrom" shall be deemed to include :

(i) glass fibre and yarn including glass tissues and glasswool;

(ii) asbestos fibre and yarn;

(iii) any other mineral fibre or yarn, whether continuous or otherwise such as slagwool and rock wool; and

(iv) manufactures containing other than asbestos cement products."

This levy is also disputed. By the common judgment under appeal, the Delhi High Court dismissed the writ petitions.

The constitutionality of the imposition of excise duty on asbestos fibre is not now disputed.

What asbestos is and how it is recovered is set out in the judgment under appeal, and it is not faulted on this account. This is what it says:

> Major producers of asbestos are Canada and U.S.S.R. Asbestos is defined as general name for the useful fibrous varieties of a number of rock forming minerals. The value of asbestos ensues from the incombustible nature of the products fabricated from the various grades of mineral fibres. (Vide Mc. Graw Hill Encyclopaedie of Science and Technology. Vol. 1 (1977) page 618). Most asbestos fibres occur in small cracks in massive rocks and are difficult to recover e.g. a large cubic open pit mine handles approximately 16 tons of ore. 8 tons of waste ore and 23 tons of over-burden to produce a single ton of asbestos. To mine chrysotile. the ore is first blasted loose. The larger asbestos seams i.e. those that are atleast 9.5 mm wide are picked from the ore after blasting and adhering rock is removed with a pick. The cesulting chunks of ore called crudes. Which may contain as much as 30% water, are then dried in preparation for the next stage
>
> - separation into fibres. Fibre separation is accomplished mainly by a series of shaking screens, special separators called cyclones, and additional crushers or fibrizers. At each shaking screen the liberated fibres are sucked off by an airstream and collected for grading and packaging. The larger pieces of ore, which are retained by the screen are recycled for further crushing. Smaller pieces, which pass through

the screen and are called throughs, are sent to the next crushing or fiberizing sequence. The extremely small pieces that fall through the screens following the final fiberizer are discarded. (Vide Encyclopaedia Americans Vol. 11 (1970) page 427, 428). Similarly the Encyclopaedia of Natural Chemical analysis, Vol. 11 gives the processing of asbestos fibre as follows:-

"Asbestos fibre is recovered by open pit or underground mining operations. In the open pit operation, the ore is taken from the top of the deposit and in underground method, the ore is removed from the bottom of the deposit. One imported method used in underground mining is known as block carving. In this method, a large block of ore is loosened in such a way that it breaks down from its own weight. The ore is extracted through a network of tunnels and carried to primary crushers which break up the large rock chunks into fragments. The crushed ore falls into bins and then undergoes further crushing and drying prior to processing at the mill. The milling operation are complicated but consist of separating the fibres from the rock. In the mill the rock is crushed more finely and passes ores through vibrating screans which roughly separate the loose fibre from the rock. Powerful hoods, which operate much like vaccum cleaners, lift the loose fibre leaving the heavier rock. This operation is repeated until the separation is complete and only waste rock remains. The separated fibres are then cleared and carefully graded according to length. Grading is done according to rigid industrial specifications.

BRUSSELS' NOMENCLATURE defines asbestos as follows:

"25.23 - ASBESTOB :

Asbestos is a natural mineral substance produced by the decomposition of certain rocks. It has a very characteristic fibrous texture: It is sometimes, silky in appearance and the colour varies greatly, being usually white, but sometimes grey, greenish, blue or dark brown. Its main property is its resistance to fire and acida. The heading applies to crude asbestos in rock form, to raw, beaten or washed fibres, whether graded to length or not, to asbestos in flakes or powder and also to asbestos waste. The heading excludes fibre which has been further processed (carded, dyed etc.) and finished artioles of asbestos (heading 68.13)".

The process by which the asbestos fibre is obtained is more or less as follows:-

The petitioners extract asbestos rock from the mine which is in the shape of large boulders. This asbestos rock is put into jaw crushers and is made into small size of about 20-40 mm. These further rocks of 20-40 mm size are still subject to further reduction in a hammer mill, the purpose of which is to reduce the rock to a stage so that the fibre could be taken away from rock in which it is embedded. The asbestos fibre is found on the rocks which contain thin layer of the fibre of about an inch in length of a piece of rock about the size of a cricket ball. The petitioners have obtained

permission from the Collector of Central Excise. Patna as communicated by Assistant Collector dated December

14. 1977 to remove in bond semi finished goods under Rule 56 (b) from the mining place at Roro to the factory at Hyderabad for further processing after the pieces of rock are brought to Hyderabad they are crushed to smaller size with the aid of power and the resultant is subject to series of screening surfaces so that the asbestos fibre which is very much lighter is removed and seperated from the dust and the grit. The fibre however, still contains rock particles and spicules. The fibre is then pressed through a Hwrricane Hill where rapidly rotating rotors pulverise the stones and apicules without damaging the fibre. It is in this process that ultimately the asbestos fibre free of all dust and stone particles is produced."

In Minerals and Metals Trading Corporation of India Ltd. vs. Union of India and ors., 1973-1 S.C.R. 997, this Court was concerned with the exigibility of the mineral wolfram to excise duty. The relevant portion of the judgment is self-explanatory.

"The separating of wolfram ore from the rock to make it usable ore is a process of selective mining. It is not a manufacturing process. The important test is that the chemical structure of the ore should remain the same. Whether the ore imported is in powder or granule form is wholly immaterial, What has to be seen is what is meant in international trade and in the market by wolfram ore containing 60% ore more WO3. On that there is a preponderation weight of authority both of experts and books and of writings on the subject which show that wolfram ore when detached and taken out from the rock in which it is embedded either by crushing the rock and sorting out pieces of wolfram or by waening or magnetic separation and other similar and necessary process it becomes a concentrate but does not cease to be ore. Unless the ore is roasted or treated with any chemical it cannot be classed as processed."

We are satisfied upon the material placed before us, as indicated in the judgment under appeal quated above, that all that the appellants in Civil Appeal 1354 of 1980 do is to separate the asbestos fibre from the rock in which it is embedded by manuel and mechanical means. The asbestos fibre that is so removed from the parent rock is in every respect the esbestos that was embedded in it. No process of manufacture can be said to have been employed by the appellants nor is a new or a distinct commodity realised therefrom.

In Moti Laminates Pvt. Ltd. vs. Collector of Gentral Exoise, 1006 (70) E.L.T. 241 (S.C.), this Court said:

"6. The duty of excise is leviable under Entry 84 of List 1 of the Vllth Schedule on goods manufactured, or produced. That is why the charge under Section 3 of the Act is on all, 'Excisable goods','produced or manufactured'. The expression 'excisable goods' has been defined by clause (d) of Section 2 to mean, 'goods' specified in the Schedule. The scheme in the Schedule is to divide the goods in two broad categories -

one, for which rates are mentioned under different entry and other the, residuary. By this method all goods are excisable either under the specific or the residuary entry. The word 'goods' has not been defined in the Act. But it has to be understood in the sense it has been used in Entry 84 of the Schedule. That is why Section 3 levies duty on all excisable goods mentioned in the Schedule provided they are produced and manufactured. Therefore, where the goods are specified in the Schedule they are excisable coods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the person on whom duty is proposed to be levied. The expression 'produced or manufactured' has further been explained by this Court to mean that the goods so produced must satisfy the test of marketablity. Consequently it is always open to an assessee to prove that even though the goods in which he was carrying on business were exciseble goods being mentioned in the Schedule but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured they were not marketed or capable of being marketed." It also said:

"The tariff schedule by placing the goods in specific and general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category but it must further have been produced or manufactured and it is capable of being brought and sold."

Assuming that Tariff item 22F. When it refers to "asbestos fibre and yarn", covers asbestos fibre that has been separated from its parent rock in the manner aiopamentioned, such asbestos fibre is not the result of a process of manufacture, it is not a new and commercially identifiable article and it is, therefore, not liable to excise duty.

What all the appellants import is, it is not disputed, asbestos fibre that has been separated from its parent rock in the manner aforementioned.

The learned Additional Solicitor General submitted that the asbestos fibre imported by the appellants was exigible to additional duty regardless of the fact that it was not the result of manufacture and, therefore, not exigible to excise duty. He placed reliance in this behalf upon this court's judgment in Khandelwal Metal & Engineering Works and another etc. vs. Union of India and others. (1985) Suppl. 1 SCR 750. There is no doubt that this judgment, delivered by a bench of three learned Judges, is of great assistance to the case of the Revenue.

In the case of Khandelwal Metal & Engineering Works the appellants carried on the business of importing orsss scrap. They contended that the additional duty was in the nature of counter-vailing duty, and it could not be levied on brass scrap because the brass scrap, which consisted of damaged articles like taps and pipes, was not manuractured in India or elsewhere. The bench noticed that Beation O (15) of the Customs Act, 1982, defined "duty" to mean a duty of Customs leviable under the Act, Chapter V of the Customs Act contained provisions for the levy of, and exemption from. Customs duties. By Section 12(1), "except as otherwise provided in the Act or in any law for the time

being in force". duties of Customs were leviable at such rates as might be specified under the Customs Tariff Act, 1975, or under any other law for the time being in force, on goods imported into or exported from India. Section 2 of the Customs Tariff Act stated that the rates at which duties of Customs would be levied under the Customs Act were specified in the First and Second Schedule of the Tariff Act. Section 3 of the Tariff Act dealt with the levy of additional duty equal to excise duty.

Sub-section (1) of Section 3 and the Explanation to that section read thus! "Levy of additional duty equal to excise duty. (1) Any article which is imported into India shall, in addition be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation- In this section the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a live article if produced or manufactured in India or, if a like article is not so produced or manufactured which would be leviable on the class or description of article to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

The first question which the bench was required to examine related to the true nature of the duty mantioned in Section 3(1) of the Tariff Act. The bench said that it had to be appreciated at the threshold that the charging section was Section 12 of the Customs Act and not Section 3(1) of the Tariff Act. Section 12 of the Customs Act incorporated the different ingredients embodied in the concept of a fiscal imposition. It levied a charge, it indicated the taxable event, which was the import or export of goods, and it indicated the rate of the levy, which was such "as may be specified under the Customs Tariff Act, 1975." Section 2 of the Tariff Act laid down that "the rates at which the duties of Customs shall be levied under the Customs Act are specified in the First or Second Schedules". The levy specified in Section 3(1) of the Tariff Act was a suppiementary levy in enhancement of the levy charged by Section 12 of the Customs Act and with a different basis constituting the measure of the impost. In other words. the scheme embodied in Section 12 was amplified by what was provided in Section 3(1). The Customs duty charged under Section 12 was extended by an additional duty confined to imported articles in the measure set forth in Section 3(1). Thus, the additional duty which was mentioned in Section 3(1) of the Tariff Act was not in the nature of a countervailing duty. Counsel for the appellants relied strongly on the objects and Reasons of Section 3 of the Tariff Act in support of the contention that the said section was a charging section and imposed a countervailing duty. The Statement of Objects and Reasons read:

> "Clause 3 provides for the levy of additional duty on an imported article to counterbalance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to section 2-A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India."

The Statement of Objects and Reasons, the bench said, lent prima facle support to the contention of the appellants but, in the absence of any ambiguity in the wording of Section 3(1), the additional duty referred to therein could not be treated as countervalling duty not could Section 3 be regarded as a charging section merely because the Statement said that it "provides for the levy". Having concluded that Section 3(1) of the Tariff Act was not a charging section and that the additions duty which it spoke of was not a countervalling duty, the bench went on to consider the contention of the appellants that the brass scrap imported by them was not produced or manufactured in India because the damaged articles of brass which constituted brass scrap were not only incapable of being manufactured but were, in fact not manufactured. According to learned counsel for the appellants, the basic postulate underlying the levy of duty under Section 3(1) of the Tariff Act was that there were indigenous goods belonging to the class of goods which were imported which were chargeable to excise duty. The illustrations he gave were the import of live animals, live trees, burnt up cables, broken glass or fused bulbs. The argument was that there was and could be no additional duty on these goods, if imported, because they could not be and were not manufactured. To put it in one sentence, the argument was that if indigenous goods similar to those which were imported did not suffer excise duty for the reason that they were not manufactured, the charge leviable under Section 3(1). At the Tariff Act was not attracted. The bench rejected the argument. In the first place, it said. Sections 2 and 3(1) of the Tariff Act were not charging sections; the charging section was Section 12 of the Customs Act. The taxable event was not the manufacture of goods. Under Section 3(1) of the Tariff Act, "the excise duty for the time being leviable on a like article if produced or manufactured in India" was only the measure of the duty leviable on the imported article. Section 3(1) did not require that the imported article should be such as was capable of being produced or manufactured in India. The assumption had to be that an article imported into India could be produced of manufactured in India and, upon that basis, the duty had to be determined under Section 3(1). The bench said:

> "Any doubt on this point is resolved by the Explanation to section 3(1) of the Tariff Act. The Explanation furnishes a dictionary for the interpretation of section 3(1) and provides a clue to its understanding. The Explanation provides in so many words that the expression "excise duty for the time being leviable on a like article if produced of manufactured in India" means "the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India ".....The Explanation even goes further and provides that if a like article is not so produced or manufactured, then, the duty leviable means the duty which would be leviable on the class or description of articles to which the imported article belongs. These provisions leave no doubt that the duty referred to in Section 3(1) of the Tariff Act does not bear any nexue which (sic) the nature and quality of the goods imported into india."

The bench then considered the matter from a different point of view and found that the brass scrap imported by the appellants came into existence as waste or rejected artioles during the prooess of manufacture and, therefore, it was, in any event, liable to excise duty and, therefore, to additional duty under Section 3(1) of the Tariff Act.

We have some difficulty in construing the Explanation to Section 3(1) of the Tariff Act in the manner adopted in the case of Khandelwal Metal & Engineering Works. The difficulty arises when the article which is imported has not been produced or manufactured. The Explanation says that the expression "excise duty for the time being leviable on a like article if produced or manufactured in India" in Section 3(1) means the excise duty that "would be leviable on the class or description of article to which the imported article belongs". Excise duty is leviable on the class or description of article to which the imported article belongs if articles of that class or description are exigible to excise duty, having undergone production or manufacture. If they have not undergone production or manufacture they are not exigible to excise duty. Articles of that class or description of goods when imported are, then, not liable to additional duty. The assumption underlying the Explanation to Section 3(1) would appear to be that an imported article which is the result of production of manufacture can be produced or manufactured in India; the emphasis in the assumption is on the words "in India". In other words, if the imported article is the result of production of manufacture, it must be assumed that it can be produced or manufactured in India. In this context the Statement of Objects and Reasons is relevant. It says that the levy of additional duty on an imported article is provided for to counterbalance the excise duty leviable on the like article made indigenously.

It may also be reconsidered why, insofar as additional duty is concerned, Section 3 of the Tariff Act is not the charging section. It provides for the levy, namely, additional duty; it provides for the taxable event, which is the import of goods that have been produced or manufactured; and it sets out the measure of the duty, which is the excise duty on the indigenously produced or made equivalant article. The Statement of Objects and Reasons is meaningful in the context because it says that Section 3 "provides for the levy of additional duty.....".

We are, therefore, of the view that the decision in the case of Khandelwal Metal & Engineering Works requires the consideration of a larger bench. The papers and proceedings shall be placed before the Hon'ble the Chief Justice for appropriate administrative directions.