Collector of Central Excise, Baroda

Vs

Ambalal Sarabhai Enterprises P. Ltd.

Civil Appeal No. 2215 of 1988

(Sabyasachi Mukharji, B. C. Ray JJ)

10.08.1989

JUDGMENT

SABYASACHI MUKHARJI J. –

This is an appeal under section 35L(b) of the Central Excises and Salt Act, 1944 (hereinafter refered to as "the Act"). The appeal is directed against the order dated November 2, 1987, passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal"). The respondent, viz., Ambalal Sarabhai Enterprises, manufacture sorbitol falling under item No. 68 of the erstwhile Central Excise Tariff. There was a visit to the factory premises of the respondent by the Central Excise Officers on February 26, 1985. It was alleged that it was found that the respondent manufactured and captively consumed starch hydrolysate but the respondent had failed to take out a licence with reference to the said manufacture of starch hydrolysate and has been removing the same without, according to the appellant, payment of duty and without observing the necessary central excise formalities. It was the view of the Revenue that starch hydrolysate was glucose and, therefore, fell under Item No. 1E of the Central Excise Tariff which covered glucose in whatever form including liquid glucose. Accordingly a show cause notice was issued to the respondent. A reply was filed on behalf of the respondent contending that starch hydrolysate was not "goods" since the same was not marketable and, therefore, no excise duty would be payable on the same. In those circumstances, it was submitted that the proposed adjudication by the Collector following the aforesaid notice was without jurisdiction in view of section 11A of the Act. It was urged that starch hydrolysate is not glucose and that even if the same was liable for duty, it would not be under item No. 1E. According to him, starch hydrolysate was an intermediate product in the manufacture of sorbitol and no duty could be demanded on the same. There were adjudication proceedings thereafter. In the said proceedings, affidavits were filed on behalf of the respondent, witnesses on behalf of the Revenue were cross- examined and the Collector also cross-examined the witnesses of the respondent. By an order dated December 6, 1985, the Collector of Central Excise, Baroda, rejected the contention of the respondent. It was held by him that starch hydrolysate was glucose and fell under item No. 1E of the Central Excise Tariff and that the respondent had suppressed the fact of manufacture thereof for consumption in the further manufacture of sorbitol. In the premises, he ordered the respondent to pay excise duty amounting to Rs. 34,92,559.55 and imposed a penalty of Rs. 10 lakhs. Aggrieved by the said order of the Collector, the respondent preferred an appeal before the Tribunal. The Tribunal, by its order dated November 2, 1987, being the order under appeal, held that starch hydrolysate manufactured by the respondent is "goods" on which excise duty could be charged. In the premises, the Tribunal allowed the appeal filed by the respondent and set aside the order of the Collector. Aggrieved thereby, the appellant has come up in appeal to this court under section 35L(b) of the Act.

On behalf of the appellant, Shri Ganguly contended that the Tribunal misdirected itself in applying the proper test for the determination of the question. He urged that the true test to determine, in a matter of this nature, was to consider not only whether starch hydrolysate was actually marketable but also to consider whether, conceptually, the said goods in question were capable of being marketable. It was urged by Shri Ganguly that the Tribunal had misdirected itself in not appreciating this aspect of the matter and did not as such examine or view the evidence on record in the proper perspective. He urged that, in the aforesaid light and in view of the findings made by the Collector, there was no ground for the Tribunal to interfere with the order of the Collector. He further submitted that, in any event, if the Tribunal was not fully satisfied with the evidence on record to determine whether starch hydrolysate was goods in the sense of being marketable, then the Tribunal should have, in the facts and circumstances of the case and in the interest of justice, remanded the matter for appraisement and examination in the light of the true principle or the Tribunal should have examined or called for fresh evidence to determine this question. The Tribunal not having done so, has failed to render justice and, as such, the order of the Tribunal is bad, according to Shri Ganguly. Shri Ganguly furthef submitted that, in starch hydrolysate, the percentage of dissolved solids present is 64. It was submitted that the criterion laid down in the Indian Standards Specification for liquid glucose or glucose syrup, the two terms are being used synonymously by the Indian Standards Institution, was not satisfied in this case. The Indian Standards Specification defines liquid glucose or glucose syrup as "a refined and concentrated non-crystallizable aqueous solution of D-glucose, maltose and other polymers of D-glucose, obtained by controlled hydrolysis of starch containing material". The United States Pharmacopoeia XlX describes liquid hydrolysis of starch, consisting chiefly of dextrose, dextrins, maltose and water and, in these circumstances and in view of the components and the dictionary meaning as discussed by the Tribunal in its order, it is urged that it cannot be said that the said goods is the same thing as glucose or glucose syrup. In the premises, it was contended that the Tribunal had not considered this aspect of the matter.

We are concerned in this appeal with starch hydrolysate and, therefore, if the process or activity of the assessee brings into existence an article different and distinct from what it was before the process and a new identifiable article known in the market as such comes into being, then the use of such starch hydrolysate captively would attract duty on the part of the assessee even in captive consumption. It is not in dispute as the Tribunal noted in the instant case that starch is hydrolysed by the respondent. The operation of hydrolysis, it is contended, results in bringing into being starch hydrolysate which is utilised in the manufacture of sorbitol. The question is - whether starch hydrolysate is "goods". The case of the respondent was that starch hydrolysate being wholly unstable and quickly fragmented and losing its character in a couple of days, the same could, therefore, neither be stored nor marketed. In the premises, it was the case of the respondent that starch hydrolysate was not a marketable product and would not, therefore, be "goods" on the manufacture of which excise duty could have been demanded or would have been payable and, therefore, for non-payment of duty, there has been no negligence or failure on the part of the respondent and as such section 11A of the Act was not applicable. In this connection, it would be instructive to refer to, and it would be necessary to rely on, the principles laid down by this court in South Bihar Sugar Mills Ltd. v. Union of India [1968] 3 SCR 21. There, the appellant companies manufactured sugar by carbonation process and paid excise duty on sugar manufactured by them under item No. 1 of Schedule I of the Act. According to one affidavit filed on behalf of the respondents filed in those proceedings, these manufacturers employed a process of burning lime-stone with coke in a lime kiln with a regulated amount of air whereby a mixture of gases was generated consisting of carbon dioxide, nitrogen, oxygen and a small quantity of carbon monoxide. The gas thus produced was thereafter compressed so as to achieve pressure exceeding atmospheric

pressure and then passed through a tank containing sugar- cane juice so as to remove impurities from it and to refine the juice. For that process of refining it was only the carbon dioxide in the gas which was used and the other gases, i.e., nitrogen, oxygen and carbon monoxide escaped into the atmosphere by a vent provided for the purpose. The carbon dioxide content in this mixture of gases ranged from 27 to 36,5%. Similarly, another company manufactured soda ash by the Solvay ammonia soda process for which also carbon dioxide was required and this was produced by the petitioner therein by burning lime-stone with coke in a kiln in the same manner as the appellant sugar manufacturing companies employing the carbonation process. The respondents therein regarded all the companies as manufacturers of compressed carbon dioxide and levied excise duty on them under item No, 14H in Schedule I to the Act. Writ petitions were filed to the High Court challenging the validity of the excise duty but the petitions were dismissed. It was contended, inter alia, on behalf of the appellants therein, that the lime kiln was maintained to generate a mixture of gases and not carbon dioxide and at no stage in the process of generating this mixture and passing it through the sugarcane juice was carbon dioxide - which formed one of the contents of the mixture - either compressed, liquefied or solidified. The mixture of gases so generated was not carbon dioxide as known to the market nor was it according to the specifications laid down by the Indian Standards Institutions which required the carbon dioxide content to be at least 99%. It was, therefore, contended that the excise duty sought to be recovered on the content of carbon dioxide in the mixture of gases could not fall under item No. 14H. It was further contended that the duty being on goods, it could be charged only on goods known as carbon dioxide in the trade and marketable as such. As is evident from the said narration of facts, the contentions urged were more or less similar to the contentions involved in the instant appeal before us. It was held by this court that the gas generated by the appellant companies was kiln gas and not carbon dioxide as known to the trade, i.e., to those who dealt in it or who used it. The kiln gas in question, therefore, was neither carbon dioxide nor compressed carbon dioxide known as such to the commercial community and, therefore, could not attract item No. 14H in the First Schedule. This court reiterated at page 31 of the report that the Act in question charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinct name, character or use. Duty is levied on "goods". As the Act does not define "goods", the Legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning of the expression is that to become goods, it must be something which can be ordinarily come to the market to be bought and sold and is known to the market. It would be such an article which would attract duty under the Act. This court referred to the previous decision in the case of Union of India v. Delhi Cloth and General Mills Co. Ltd., [1963] Suppl. 1 SCR 586. Therefore, in this instant appeal, in order to determine whether starch hydrolysate was "goods" or not, it is necessary to determine whether there was application of any process to the raw materials and whether as a result of that application, there emerged a new and different article having a distinctive name, character or use and the resultant product being goods in the sense of being marketable or marketed. In this connection, Shri Soli Sorabjee referred us to the observations of this court in the Union Carbide India Ltd. v. Union of India [1987] 165 ITR 1. There, this court reiterated that, in order to attract excise duty, the article manufactured must be capable of being sold to a consumer. Entry 84 of List I of Schedule VII to the Constitution specifically speaks of "duty of excise on tobacco and other goods manufactured or produced in India...", and it is now well-accepted that excise duty is an indirect tax in which the burden of the imposition is passed on to the ultimate consumer. This court held in that context that the expression "goods manufactured or produced" must refer to

articles which are capable of being sold to a consumer. To become"goods", an article must be

something which can ordinarily come to the market to be bought and sold. The court found in that case aluminium cans prepared by the appellants therein were employed entirely by it in the manufacture of flash lights and were not sold as aluminium cans in the market. It also appeared from the records that aluminium cans, at the point of levy of excise duty, existed in a crude and elementary form which were incapable of being employed as a component in a flashlight. These cans had sharp uneven edges and, in order to use them as a component in making flashlight cans, these cans had to undergo various processes such as trimming, threading and redrawing. After that, these were reeded, beaded and anodized or painted and it was at that point only that these became a distinct and complete component capable of being used as flashlight cans for housing battery cells and having a bulb fitted to the can. This court noted that it was difficult to believe that the elementary and unfurnished form in which these existed immediately after extrusion sufficed to attract a market. The assertion of the appellant on affidavit that aluminium cans were unknown in that form in the market and had not been proved to the contrary by any satisfactory material by the respondents therein. This court further found that not a single instance had been provided by the respondents demonstrating that such aluminium cans had a market. The conduct of the appellants in the past, having regard to the circumstances of the case, would not serve as evidence of the marketability of the aluminium cans. It was in that case. This court noted that the record disclosed that whatever aluminium cans were produced by the appellants were subsequently developed by it into a completed and perfected component for being employed as flashlight cans. In those circumstances, the aluminium cans produced by the appellants were not liable to excise duty under section 3 of the Act read with item No. 27 of the Central Excise Tariff.

In the case of Bhor Industries Ltd. v. Collector of Central Excise [1990] 184 ITR 129, this court had to deal with the liability duty on intermediate products and it was reiterated that liability to excise duty arises only when there is manufacture of goods which are marketable or capable of being marketed. It was held that excise is a duty on goods as specified in the Schedule. The taxable event in the case of excise duty is the manufacture of goods. Under the Act, in order to be goods as specified in the entry, it was essential that, as a result of manufacture, goods must come into existence. For articles to be goods, these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale is not necessary. User in captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods. It is, therefore, necessary to find out whether these are goods, that is to say, articles as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to the Central Excise Tariff Act, 1985. In that case the court found that crude PVC films as produced by the appellant were not known in the market and could not be sold in the market and were not capable of being marketable. The court further reiterated that it was the duty of the Revenue to adduce evidence or proof that the articles in question were goods. The Tribunal went wrong, it was held, in not applying the test of marketability. There being no contrary evidence found by the Tribunal in that case, it was held that, in those circumstances, no excise duty should be charged.

It is in this light, that the evidence discussed by the Tribunal in this case, had to be viewed in order to test the validity of the order impungned. The case of the respondent had always been that the starch hydrolysate was not being marketed and is not capable of being marketed in view of its highly unstable character resulting in fermentation even if kept for a day or two. Shri Ganguly, appearing for the Revenue, sought to urge that the Tribunal was wrong in approaching the problem in that light. The test was not whether the starch hydrolysate was of a highly unstable character and resulted in fermentation even in a day or two, but whether it was capable of being marketable.He

submitted that the test applied was not the true test. He urged that even transient items or articles can be goods provided that these were known in the market as distinct and separate articles having distinctive and separate uses and these would still become goods if these were capable of being marketed even during a short period. From a conceptual and jurisprudential point of view, Shri Ganguly is right. But, we are concerned with the question whether actual goods in question were marketed or, in other words, if not, whether these are marketable or not. It is true that even goods with unstable character can be theoretically marketable if there was a market for such transtant type of articles which are goods. But one has to take a practicle approach. The assessee produced evidence in the form of an affidavit. One Shri Khandor who filed an affidavit in support of the case of the respondent had stated in his affidavit that completely hydrolysed starch would start fermenting and decomposing and, at higher concentration, it would start crystallizing within two or three days. This is evidence indicating the propensity of its not being marketed. It is good evidence to come to this conclusion that it would be unlikely to be marketable as it was highly unstable. There was evidence as noted by the Tribunal that it has not been marketed by anyone. There is also an admission of the Superintendent of the appellant that no enquiry whatsoever was conducted by the Department as to whether starch hydrolysate was ever marketed by anybody. It was pointed out by the Revenue that, even according to the respondent, it stored starch hydrolysate in tanks before transporting it through pipes but, according to the appellant, the storage of starch hydrolysate was only for a period of a few hours as a step in the process of transfer thereof to sorbitol. It, therefore appears to us that there was substantial evidence that having regard to the nature of the goods, it was unlikely that the goods in question were marketable. This should be judged in the background of the evidence that the goods have not been marketed in a pragmatic manner. All this again would have to be judged in the light of the fact that the Revenue has not adduced any evidence whatsoever, though asked to do so. It was pointed out that, if the Department was to charge any duty of excise on this starch hydrolysate as one form of glucose, it would be a burden of the Department to establish that starch hydrolysate was not merely marketable but was being marketed as glucose in some form. This would be so since what is liable for duty under item No. 1E is glucose in any form and, therefore, in order to demand duty under that section, the Department must establish that the product on which the duty was demanded was known in the market as glucose in one form or the other. There is no such evidence as observed by the Tribunal. The Tribunal noted and, in our opinion, rightly that the Revenue cannot be said to have discharged its burden of establishing that, by appling the process of hydrolysis to starch for production of starch hydrolysate, the respondent manufactures any excisable goods in the sense of being goods known in the market and being marketed or marketable. Our attention was drawn to the affidavit of Shri P D Khandor, chemist, who was a food technologist and was holding a degree of B. Sc. (Chemistry). He was carrying on a business of dealing in glucose. He stated in his affidavit as follows :

> "14. I have seen the starch hydrolysate made by Sarabhai M Chemicals. It is completely hydrolysed starch. It appears as an aqueous syrup containing about 66-71% reducing sugars expressed as dextrose. It is neither glucose or dextrose in any form nor glucose in liquid stage nor liquid glucose. In order to find out the market for completely hydrolysed starch as is made in Sarabhai M. Chemicals, at their instance, I had made trade inquiries. However, there is no market for such substance. Since it can act only as an intermediate product for the manufacture of sorbitol, dextrose or glucose and fructose and every manufacturer of glucose, dextrose, sorbitol and fructose would have his own plant for hydrolysing starch, it is commercially not a viable proposition both for manufacturers of glucose, dextrose, sorbitol or fructose or persons undertaking the process of hydrolysing starch either to

> purchase completely hydrolysed starch from the market or sell or undertake the process of hydrolysing starch for the purpose of sale in the market, because at lower concentration, starch which is completely hydrolysed would start fermenting and decomposing. At higher concentrations, it would start crystallising within two or three days."

This affidavit evidence remains uncontradicted. Shri Ganguly, however, drew our attention to an order of the Tribunal in Anil Starch Products l v. Collector of Central Excise, being Appeal No. ED(SB)(T) 1534/81D arising out of Revision Order No. 820 of 1981. He referred to the observations at page 117 of the paper book which dealt with the evidence of one Shri Khabholja, where, according to Shri Ganguly, the Tribunal came to a different conclusion. But, the Tribunal in that case relied on the decision of the Allahabad High Court in the case of Union of India v. Union Carbide India l [1978] ELT 1. There, the Allahabad High Court held that things would be nevertheless goods even if these did not have a general market where they can be easily bought and sold. The High Court held that the facts that products might not be known to the general public or to the traders in general would not change the position and, therefore, the test did not appear to be sound. This decision of the Allahabad High Court which was relied upon by the Tribunal was set aside by this court in appeal in the case of Union Carbide India Ltd. v. Union of India [1987] 165 ITR 1. In view of the test laid down and in view of the evidence discussed, it is difficult to sustain the order of the Tribunal. In this connection, it appears that there was no market enquiry by the Revenue. Reference may be made to the cross-examination of Shri Shukla, Superintendent (Central Excise), by Shri Nanavati as appears at pages 235-237 of the present paper book. In view of the fact that there was positive evidence that starch hydrolysate was never marketed and in view of the further fact that, in the light of the nature of the goods being highly unstable, it is highly improbable that the goods were capable of being marketed and there being, in spite of opportunities, no evidence produced at all that the goods, in fact, were capable of being marketed, in our opinion, it must be held as did the Tribunal that the starch hydrolysate was not dutiable under the Act.

In the premises, the Revenue has failed to discharge its onus to prove that starch hydrolysate was dutiable. In the premises, the Tribunal cannot be said to have committed any error. The appeal must, therefore, fail and is, accordingly, dismissed. In the facts and the circumstances of the case, there will, however, be no orders as to cost.

Appeal dismissed.

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