

Nirlon Synthetic Fibres & Chemicals Ltd.

Vs

Collector of Central Excise

Civil Appeals Nos. 4173-74 of 1984

(S. P. Bharucha, S. B. Majmudar JJ)

13.08.1996

JUDGMENT

BHARUCHA, J. -

1. The appellants manufacture nylon yarn using a raw material known as caprolactam. The raw material is subjected to polymerisation. This is a reversible process. After polymerisation the resultant polycaprolactam is spun to obtain nylon yarn. Waste in solid form containing polycaprolactam is obtained at various stages of the process of manufacture. To fully use caprolactam, which is expensive and duty-paid, the appellants have installed equipment by which caprolactam is recovered from the aforementioned waste and recycled into the process. The Excise authorities sought to treat the process of separation of caprolactam from the waste as an independent manufacturing process, and subjected it to duty. The claim of the appellants for refund of such duty was rejected. The Collector (Appeals) upheld the rejection, as did the Customs, Excise and Gold (Control) Appellate Tribunal. Hence this appeal.

2. Caprolactam in flakes is used as the original raw material. The caprolactam that is recovered from the waste as aforesaid is in molten form and, according to the appellants, not a saleable commodity. The Tribunal in the principal judgment (in CAs Nos. 4173-74 of 1984) came to the conclusion that caprolactam was manufactured when recovered from waste. It observed that the contention that "the recovered caprolactam is not bought and sold, even if true, cannot negate manufacture. When the tariff itself had specified 'caprolactam' as an assessable product, it cannot be of any consequence that once it is manufactured it is not bought and sold in the market." In the subsequent matters under appeal, the Tribunal followed this judgment.

3. The learned counsel for the appellant drew our attention to the subsequent judgment of the Tribunal in Jagatjit Cotton Textile Mills Ltd. v. CCE [(1990) 50 ELT 379 (Tribunal)] and L.M.L. Ltd. v. CCE. [(1992) 59 ELT 82 (Tribunal)] In both cases the Tribunal was concerned with facts identical to those involved in the appeals before us and, very rightly, recognised the importance of the marketability of the product for the purpose of levy of excise duty. The order of the Collector which was in appeal before the Tribunal in the case of Jagatjit Cotton Textile Mills Ltd. [(1990) 50 ELT 379 (Tribunal)] had followed the Tribunal's decision which is in appeal before us. In the case of L.M.L. Ltd. [(1992) 59 ELT 82 (Tribunal)] counsel on behalf of the Excise authorities had cited to the Tribunal its decision which is in appeal before us.

4. In the case of Jagatjit Cotton Textile Mills Ltd. [(1990) 50 ELT 379 (Tribunal)] the Tribunal said.

"We gave our anxious consideration to the arguments advanced on both sides and

perused the records. It is evident from the record that both the authorities below have proceeded to determine the excitability of the product based on process of manufacturing activity, without considering the important point about marketability of the product in determining the goods for the purpose of levy of excise duty. The material which is sufficient for the purpose of holding that there is manufacturing activity and emergence of a separate product are not sufficient for the purpose of coming to the conclusion about the marketability of the product. The Department has not brought on record any evidence to show that these goods were either soil or marketable as such. On the other hand the appellants have taken this stand from the beginning and in support of their contention they have produced certificate from the Gujarat State Fertiliser Corporation who is sole manufacturer of caprolactam to show that caprolactam in molten form is not marketable. The important piece of evidence was neither considered by the Department nor rebutted. Supreme Court has categorically held that marketability of the product is an essential ingredient in order to be dutiable under the Excise law, in *Bhor Industries Ltd. [Bhor Industries Ltd. v. CCE (1989) 1 SCC 602 : 1989 SCC (Tax) 98 : (1989) 40 ELT 280]* and further same view was reaffirmed by the Supreme Court in the case of *CCE v. Ambalal Sarabhai Enterprises (P) Ltd. [(1989) 4 SCC 112 : 1989 SCC (Tax) 584 : (1989) 43 ELT 214]* wherein it was observed that test of marketability should be satisfied even in respect of transient item which is captively consumed in the manufacture of other finished product and in particular it held that marketability is an essential ingredient in order to be dutiable under the Schedule to the Central Excise Tariff Act. Simply because certain articles fall within the Schedule it would not be dutiable under the Excise law if the said article is not 'goods' known to the market. It has also been held that though actual sale is not necessary, the evidence must be produced by the Department that the goods in fact are capable of being marketed. The Department has not adduced any such evidence in this case. Under these circumstances, following the ratio of the decision of the Apex Court, we have no other alternative except to hold that the goods in question are not liable to excise duty."

5. In the case of *L.M.L. Ltd. [(1992) 59 ELT 82 (Tribunal)]* the Tribunal followed its order in the case of *Jagatjit. [(1990) 50 ELT 379 (Tribunal)]* In both cases it was held that the caprolactam that was recovered from waste was not liable to excise duty.
6. The learned counsel for the appellants submitted that the respondents had rested content on the aspect of manufacture of the recovered caprolactam and had led no evidence on the aspect of its saleability. It was not enough that there should be manufacture and the manufactured product should find mention in the excise tariff. It was necessary also to establish marketability and this not having been done, no excise duty could be levied upon the recovered caprolactam.
7. The learned counsel for the Excise authorities submitted that since the product was mentioned in the Schedule and it was used as raw material, it should be assumed that it was marketable and the onus to rebut such assumption should rest on the appellants. In his submission, the onus had not been discharged. He submitted that the appellants used the recovered caprolactam as a raw material in the manufacture of nylon yarn, as did *Jagatjit [(1990) 50 ELT 379 (Tribunal)]* and *L.M.L. [(1992) 59 ELT 82 (Tribunal)]* and there was no reason shown why one manufacturer could not transfer the recovered caprolactam to the other. In his submission therefore, the matter should be remanded for ascertaining the factual position.

8. The learned counsel for the respondents had not been instructed about the Tribunal's decisions in the Jagatjit [(1990) 50 ELT 379 (Tribunal)] and L.M.L. [(1992) 59 ELT 82 (Tribunal)] cases and could not refute the submissions that they had been accepted by the Excise authorities.

9. The Tribunal in the two subsequent decisions in Jagatjit [(1990) 50 ELT 379 (Tribunal)] and L.M.L. [(1992) 59 ELT 82 (Tribunal)] found as a fact that the recovered caprolactam was not a saleable commodity upon the basis of the assessee's evidence and the failure of the Excise authorities to prove the contrary. The Excise authorities having made no attempt to disprove the evidence led by the assesseees in those matters and this and establish by evidence of their own that the recovered caprolactam was marketable, there is no reason why they should now be given a second opportunity to do so by an order of remand.

10. For these reasons, the appeals are allowed. The judgments and orders of the Tribunal under appeal are set aside and it is held that the recovered caprolactam is not excisable to excise duty.

11. There shall be no order as to costs.