

BOMBAY HIGH COURT

Carona Sahu Co. Ltd

Vs

Superintendent, Central Excise

(M Pendse, J.)

16.09.1981

JUDGMENT

M Pendse, J.

1. By this petition filed under Article 226 of the Constitution of India, the petitioners are challenging the legality of the show cause notice dated October 20, 1977 issued by the Superintendent, Morvi Central Excise, Agra, and the copy of the notice is annexed as Exh. G to the petition.

2. Only few facts are required to be stated to appreciate the grievance of the petitioners. The petitioner No. 1 is a public limited Company registered under the provisions of the Companies Act and have their registered office is Bombay. The petitioners inter alia carry on business of manufacture, sales and purchase of various types of footwears and parts thereof. The petitioners own factories in Maharashtra and in the course of business also purchase foot wears from other manufacturers and dealers and re-sell the same to the public at its retail shops located throughout India. The petitioners claim that they have no connection whatsoever with the manufacture of footwears or manufacturing activities of their suppliers.

3. An excise duty is levied on footwear and parts thereof at the rates set out in the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred as the Act). The Government of India, in exercise of the powers conferred by Rule 8(1) of the Central Excise Rules, 1944 issued a notification dated May 26, 1967 exempting footwear falling under sub-item (1) of Item No. 36 of the First Schedule of the Act from the whole of the duty of excise leviable thereon if such footwears were not being produced in any factory including the precincts thereof, wherein 50 or more workers were working or had been working on any during the preceding twelve months or where the total equivalent of power used in the process of manufacturing footwear does not exceed two Horse Power. The Government of India issued another Notification dated May 9, 1977 in exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules,

and in supersession of the earlier notifications dated May 26, 1967 and March 16, 1976. The said notification reads as under :

"Notification - Central Excise G.S.R. ... - In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India in the Department of Revenue and Banking No. 103/76-Central Excises, dated the 16th March, 1976, the Central Government hereby exempts footwear falling under sub-item (1) of Item No. 36 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from the whole of the duty of excise leviable thereon :

Provided that -

- (i) such footwear is produced by or on behalf of a manufacturer in one or more factories, including the precincts thereof, wherein not more than 49 workers are working, or were working on any day of the preceding 12 months; and
- (ii) the total equivalent of power used in the manufacture of such footwear by or on behalf of a manufacturer in one or more factories does not exceed 2 Horse Power.

Explanation. - Where footwear manufactured by a manufacturer is affixed with the brand or trade name, registered or not, of another manufacturer or is purchased by another manufacturer, it shall be deemed to have been manufactured by or on behalf of such other manufacturer.

(88/77) Sd/-

A. S. Sidhu Under Secretary to the Government of India.

Notification No. 88/77-CE, dated 9-5-77"

The explanation in this Notification was substituted by another notification dated August 9, 1977 and the substituted explanation reads as under : "Explanation. - For the purposes of this Notification, where footwear, manufactured by a manufacturer, is affixed with the brand or trade name, registered or not, of another manufacturer or trader, it shall not, merely by reason of the fact be deemed to have been manufactured by or on behalf of such other manufacturer or trader."

4. The impugned show cause notice was served by the Superintendent, Central Excise, Agra on the petitioners at their Bombay address. The show cause notice sets out that the petitioners had contravened the provisions of Rules 9(1) and 52-A of the Central Excise Rules inasmuch as they removed, carried/transported 85,848 pairs of footwear of value of Rs. 20,15,499.25 branded with

their brand name and falling under Tariff Item No. 36 from the factories appended in the list without payment of duty and without gate pass. The show cause notice further states that in pursuance of Notification No. 88 of 1977, dated May 9, 1977 read with definition under section 2(f) of the Act, footwear manufactured by the manufacturer, affixed with the brand name and/or the trade name, registered or not, if purchased, shall be deemed to have been manufactured by and on behalf of such manufacturer. The notice further states that the petitioners have got manufactured and purchased footwear from the factories appended in the list, but removed them without payment of duty. The footwear alleged to have been removed without payment of duty was during the period from May 9, 1977 to August 9, 1977. The petitioners sent reply on November 7, 1977 and a further reply on January 13, 1978. The petitioners pointed out that the show cause notice was issued on the strength of explanation to the Notification dated May 9, 1977 and the explanation was struck down by judgment of the Patna High Court reported in 1978 Excise Law Times page 211 in the case of Bata Co. Ltd. v. Union of India. The petitioners pointed out that the show cause notice was not valid and the action of the Superintendent, Central Excise was without any authority of law. The Superintendent of Central Excise did not give any effective answer to the notice dated April 4, 1978, but the Assistant Collector threatened to attach the plant and building of the petitioners in regard to the claim of duty payable in respect of removal of the goods. The petitioners have thereafter approached this Court by filing the present petition on April 19, 1978.

5. Shri Bhat, the learned counsel appearing in support of the petition, submitted that the show cause notice issued on the strength of explanation to the notification cannot stand as the explanation was struck down on October 14, 1977 by the Patna High Court by judgment reported in 1978 Excise Law Times 211 (supra). The learned counsel submitted that it is now well settled that the mere fact that the footwears affixed with the brand or trade name of the petitioners is not sufficient to treat it is being manufactured by the petitioners when the petitioners have purchased it from another independent manufacturer, and in support of the submission the learned counsel placed reliance upon the decision of this Court reported in 1981 Excise Law Times 358 in the case of Ceramics and Chemicals Ltd. v. Union of India and Others. The submission of the learned counsel is correct and deserves acceptance.

6. Shri Dhanuka, the learned counsel appearing on behalf of the Department, resisted the relief sought in the petition on two counts. The learned counsel submitted that the petition filed on the original side of this court is not maintainable as the dispute involved in the petition is not one which substantially arise within the limits of Greater Bombay. The learned counsel placed reliance upon Rule 636 framed by this Court and submitted that the petition ought to have been filed on the Appellate Side of this Court. It was urged that the show cause notice was issued by the Excise Officer posted at Agra and the dispute was in respect of purchase made by the

petitioners from the factories situated within the limits of Agra. It was urged that as the entire dispute arose within the limits of Agra, the mere fact that the registered office of the petitioners is situated in Bombay is not sufficient to hold that the substantive part of the dispute had taken place within Greater Bombay. I am not inclined to accept the submission of the learned counsel for more than one reason. In the first instance, it cannot be debated that the registered office of the petitioners as well as their buildings and plant are situated in Bombay. It is true the show cause notice was in respect of purchase made from factories situated at Agra, but that itself is not conclusive to hold that the substantive dispute has not arisen within the limits of Greater Bombay. The second aspect of it is that the petition was filed on the Original Side of this Court on April 19, 1978 and it is pending for more than three years. It would be futile at this stage to direct the petitioners to file it on the Appellate Side. The entertainment of the petition either by a single judge on the original side or Division Bench on the Appellate Side would not make any substantial difference as far as the merits of the case are concerned. In these circumstances, I am not inclined to entertain the objection of Shri Dhanuka that the petition is not maintainable on the original side of this Court.

7. The second challenge urged by Shri Dhanuka is that the show cause notice is not based purely on the explanation to the Notification dated May 9, 1977 but in substance has been issued for removal of goods without payment of duty. It was urged by the learned counsel that though the explanation to the Notification was struck down by Patna High Court, it is permissible for the Department to take steps independently of the explanation. The learned counsel relied upon the contents of the show cause notice and submitted that all the relevant material was pointed out in the show cause notice itself and there is no bar for the Department to proceed for recovery of escaped duty against the petitioners. It is not possible to accept this submission. In the first instance it is not permissible to split up the show cause notice in the manner suggested by Shri Dhanuka, but even assuming that it can be done so, I find that in the present case it is not the claim of the respondents that they desired to proceed only in exercise of the powers to recover escaped duty. In answer to the petition Shri Krishna Pal Singh, the Assistant Collector of Central Excise, Agra, has filed return sworn on January 25, 1979. The contents of paragraphs 21 and 22 of this return unmistakably indicate that the respondents desired to proceed with the show cause notice on the strength of explanation to the notification. Though Shri Dhanuka, at the stage of arguments, tried to contend that the hearing under the show cause notice would be restricted to the exercise of powers for recovery of escaped duty, the return mentions something more. The respondents have claimed that they are entitled to rely upon the explanation to the Notification which has been struck down by the Patna High Court. In face of this return, it is not possible to accept the submission of Shri Dhanuka that the proceedings should be directed to proceed in respect of inquiry for escapement of duty. In these circumstances the impugned show cause

notice is required to be struck down.

8. In the result, the petition succeeds and the rule is made absolute and the show cause notice dated October 20, 1977, being Exh. G and show cause notice dated April 4, 1978, being Exh. I to the petition, are struck down. It is not necessary to give relief in respect of quashing of Explanation to Notification dated May 9, 1977 as the said explanation has already been struck down.

9. In the circumstances of the case, there will be no order as to costs.