

PETITIONER:
M/S. MOTI LAMINATES PVT. LTD. ETC.

Vs.

RESPONDENT:
THE COLLECTOR OF CENTRAL EXCISE, AHMEDABAD

DATE OF JUDGMENT 14/02/1995

BENCH:
SAHAI, R.M. (J)
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SAHAI, R.M. (J)
SINGH N.P. (J)
PARIPOORNAN, K.S. (J)

CITATION:
1995 SCC (3) 23 JT 1995 (2) 324
1995 SCALE (1) 713

ACT:

HEADNOTE:

JUDGMENT:

1. The question of law, the adjudication of which ultimately shall be decisive of the issues arising in these appeals filed under Section 35-L of the Central Excises & Salt Act, 1944 (in brief 'the Act'), is whether various goods mentioned in the Schedule of Excise Tariff are dutiable as such or they would be, 'excisable goods' as defined in the Act, only when they are marketable or capable of being marketed.

2. Law on this issue appears to be fairly settled. Recently a Three Judge bench of this Court speaking through one of us (Hon'ble K.S. Paripoornan, J.) in *Indian Cable Co. Ltd. vs. Collector of Central Excise, Calcutta*, 1994 (74) ELT 22 while reversing the order of the Tribunal that "the conversion of PVC resin' into PVC compound by the processes employed by the assessee, amounts to "manufacture" within the meaning of Section 2(f) of the Act", therefore, it "was to be charged with excise duty" held, "the provisions of the Act mandate that a finding that the goods are marketable is a pre-requisite or "sine qua non" for the levy of duty".

3. But prior to adverting to it and notice in brief how the law on this aspect has developed, it is but appropriate to mention that the precise dispute before the Tribunal was whether the appellants who are manufacturers and sellers of laminated sheets which fell under tariff item no. 68 of the tariff schedule prior to 28th February 1986 were liable to pay duty on such intermediate products produced by them, as were solutions of resin and water which were not stable, merely, because they were captively consumed. Since the question of law is common and has arisen in more or less similar circumstances in all the appeals, it is not necessary to give facts of each case.

4. The appellants manufactured laminated sheets out of various raw materials including paper and other chemicals,
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namely,, phenol, formaldehyde, hexamine etc., purchased from the open market after paying duty. In the process of manufacturing laminated sheets the appellants used the raw material by processing them with each other and with other materials like caustic soda, methanol and hydro-chloric acid. In this process Phenol Formaldehyde was produced out of Melamine, Formaldehyde, phenol, methanol, caustic soda, hexamine and hydrochloric acid. The process of manufacture of phenol, formaldehyde as found by the Tribunal is described thus:'

"Formaldehyde is pumped into a reaction vessel and thereafter Me is added. These two material are stirred and thereafter Hydro-Chloric Acid is added, in required quantity to accelerate the reaction. The temperature is thereafter increase upto 80 degree Centigrade and is thereafter brought down to 60 degree Centigrade. At this time Caustic Soda or Methanol in prescribed quantity are added. At times water is separated from Formaldehyde. The solution which so emerges is under constant and continuing reaction at this stage. However, this solution is removed from the reaction vessel and is used in its semi-processed condition in Manufacture Of laminated sheets."

From the process of manufacture, narrated above, it is apparent that what emerged was solution as a result of continuous reaction and was taken out from the vessel in its semi-processed condition and was used without further processing in manufacture of laminated sheets. Since it was not marketed or sold by the appellants and the solution was captively consumed only the Department did not levy any duty on it. In 1979, Rules 9, 49 and 173(1) of the Central Excise Rules 1944 were amended the result of which was that even captively consumed goods produced or manufactured became dutiable. Consequently the Superintendent of Central Excise issued Notice that in view of the amendments in Rules phenol, formaldehyde and melamine formaldehyde were liable to duty. The appellants contested the notice. It was claimed that the reacting mixtures were not only unstable having short life but they were not marketable in the form they were obtained in intermediate stage in a continuous process, The appellants claimed that the reacting mixture in manufacture went on and it was complete on formation of laminated sheets by application of heat and pressure to these goods. The Assistant Collector found that the mixture, namely, solution of the resin and water was not stable. But he did not agree that merely because solutions were not stable it did not mean that the resins produced by the appellants were not goods as if some, stabiliser was used to lower down continuous reaction the same could be put in the market for the purpose of sale. The Collector (Appeals) agreeing with the finding that solutions were not stable allowed the appeals and held that an intermediate product in order to be excisable must be a product known to the market or commercial community. In other words the intermediate product which came into existence should have been a complete product known as such to the market. But if something more was to be done on the product to bring it into a form known to the commercial community then it could not be treated as excisable goods. The Collector (Appeals) held that even though it was not disputed that Ox products used for the manufacture of plastic laminated sheets and synthetic resin was formed as an in intermediate product

but it being unstable in a non-marketable condition the resin mixture could not be considered as

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excisable under tariff item ISA(1) of Central Excise Tariff. In further appeal filed by the Department the Tribunal held that even though it was not claimed by the Department before the subordinate authorities that the intermediate goods produced by the appellants were 'resols' but resins which occurred in three stages was nothing but resol at 'A' stage and resol being mentioned in item 15-A of the Tariff Schedule it was covered by the 'chemical nomenclature'. And once the product answered the chemical description in the entry, it was eligible to duty. The claim of the appellants that it was not goods was thus rejected. The Tribunal further held that since, "the products manufactured by" appellants, fell under 15-A (1) the fact that these were not marketed or sold did not make any difference. The claim that the goods were incapable of being marketed was rejected as there was no evidence, 'that the product resol' was, 'unstable and not capable of storage even for a short time'. The Tribunal held, "that in the case of resins there were so many varieties and these have wide-ranging shelf lives ranging from a few days to a couple of months or even more". Since it was not made out, "that the product" was required to be taken into immediate use or otherwise it would have been rendered useless or it would cease to be a resin" it was held that the product even though capable of, "further condensation or polymerization" had reached, a definite stage of manufacture for a definite end-use and, therefore, "had to be held to be goods". Reason for this finding was concession of the appellants counsel that the resins obtained by the appellants could, "be kept for as long as 15 days".

5. What arises for determination, therefore, in the first instance, is whether resin or resol produced by the appellants can be considered to be goods for purposes of levy under the Act. Even though the Department did not claim either in the notice issued to the appellants or at any stage before the appeals were heard by the Tribunal that resins produced by the appellants were nothing else than what is chemically known as 'resols' but the necessity to examine its correctness is obviated as Sri Dave, the learned counsel for the appellants fairly did not assail the findings rather accepted it. Resols is specifically mentioned as one of the items in entry no. 15A of the tariff schedule. 'The main entry and Explanation II of it are extracted below.

"Item No. 15A - PLASTICS

Item No. Tariff		Rate of duty
15A. Artificial or Synthetic resins and plastics and Other materials and articles specified below:		Fifty per cent ad valorem.
(1)		
(2)		
(3)		
Explanation 1:		

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Explanation II.- In sub-item (1), "condensation polycondensation polyaddition, polymerisation and co-polymerisation products" are to be taken to apply only to goods of a kind produced by chemical synthesis answering

to one of the following descriptions:-

- (a) artificial plastics, including artificial resins;
- (b) silicones;
- (c) resols, liquid polyisobutylene, and similar artificial polycondensation or polynkerisation products."

Resols, according to Tribunal, is chemical name of resin at 'A' stage. It was held that phenol resin in course of manufacture due to reaction of mixture occurred at three stages:

1. Resol or A-Stage (beginning of Condensation); the resin as fluid soluble and still contains much water.
2. Resitol or B-Stage (continued condensation, slight cross-linking(insoluble, rubber.
3. Resite or C-Stage (final condition of the cured product); infusible and insoluble."

In the Glossary of Chemical Terms: Second Edition: Clifford A. Hampel, Consulting Chemical Engineer and Gessner G.Hawley, Editor: Condensed Chemical Dictionary 'Phenol formaldehyde resin' are described as under:-

"Polymerization occurs in three steps or states. The first (A-Stage) is an alcohol-soluble liquid, the second (B-Stage) is semi-solid and less soluble; the third (C-stage) is hard, cross-linked solid. The A-Stage form is called a resol.

Resol thus obtained in fluid state at 'A' stage was a solution which could be retained only by addition of some stabliser or retarder. The appellants used it for manufacturing laminated sheets in semi-finished stage without any processing or adding any stabliser or retarder. Even the Tribunal found that resin at 'A' stage was a solution obtained during process which by itself could not be used unless some stabiliser was added to it. It was not disputed that its life, according to appellants, was for two or three days. But even assuming what was stated by the counsel before the Tribunal that its life was for 15 days, it could survive only if regulated and controlled temperature was maintained. Otherwise, as has been observed by the Chemical Examiner it gets itself converted into a jelly which was incapable of any use. Therefore, it is very doubtful if on the facts found by the Assistant Collector, affirmed by the Collector and not differed by the Tribunal, the resin or resols obtained during the course of manufacture by the appellants could be held to be goods.

6. The duty of excise is leviable under Entry 84 of List I of the VIIth 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 pl64 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

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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 goods 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 marketability. Consequently it is always open to an assessee to prove that even though the goods in which he was carrying on business were excisable 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.

7. The duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, moveable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling. Since the solution that was produced could not be used as such without any further processing or application of heat or pressure, it could not be considered as goods on which any excise duty could be levied.

8. But the learned Additional Solicitor General urged that resin or solution which was produced by the appellant was technically known as resols. Reliance was placed on its meaning in the dictionary. The learned counsel submitted that the tariff schedule has divided the items into specific and general. Resols being one of the A) items mentioned under item 15A it was a specific item, therefore, once it was found that the intermediate goods produced by the appellants were resols then it was exigible to duty and it could not further be required to satisfy the common parlance test specially because this was a chemical and not a product which is commonly bought and sold in the market. The learned counsel urged that once it was found that it was manufactured or produced then it should be deemed to have, satisfied the test of marketability and consequently it was excisable goods within meaning of the Act and the Tribunal was justified in levying duty on it. The learned counsel submitted that marketing capability depends on nature of goods. The test of marketability and capable of being marketed could not be applied to such goods as resol and, therefore, the submission of the learned counsel for appellants that the resin or resol could be subjected to duty only if it was found that from raw materials some new substance was brought out and it was known as such was not correct as once the intermediate goods produced by the appellants was found to be resols and it having been mentioned in item no.15A the burden of the Department stood discharged.

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9. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. An article does not become goods in the common parlance unless by production or manufacture something new and different is brought out which can be bought and sold. In Union of India & Anr. vs. Delhi Cloth & General Mill Co. Ltd., AIR 1963 SC 791, a Constitution Bench of this Court while construing the word 'goods' held as under:-

"These definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold".

Therefore, any good to attract excise duty must satisfy the test of marketability. 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 bought and sold. In *South Bihar Sugar Mills Ltd. & Anr. etc. v. Union of India & Anr. etc.*, AIR 1968 SC 922 it was held by this Court:

"The Act 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 distinctive name, character or use. The 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 is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in *Union of India vs. Delhi Cloth and General Mills Ltd.*, 1963 Supp. (1) SCR 586 = AIR 1963 SC

In *A.P. State Electricity Board vs. Collector of Central Excise, Hyderabad*, JT 1994 (1) SC 545 this Court reiterated the same principle and observed that marketability was must irrespective of whether it was marketed or not. Reference has already been made to *Indian Cable (Supra)*. Thus any good mentioned in the tariff schedule does not attract duty unless it is marketable or capable of being marketed. The test of marketability was relaxed in *Union Carbide India Ltd. vs. Union of India & Ors.*, 1986 (24) ELT 169 and it was held that, "in order to attract 'excise duty the article manufactured must be capable of sale to a consumer'". The question that arose, was whether aluminium cans produced by the appellants for the flashlights manufactured by it were goods. It was held:

"The question here is whether the aluminium cans manufactured by the appellant are capable of sale to a consumer. It appears on the facts before us that there are only two manufacturers of flashlights in India, the appellant being one of them. It appears also that the aluminium cans prepared by the appellant are employed entirely by it in the manufacture of flashlights, and are not sold as aluminium cans in the market. The record discloses that the aluminium cans, at the point at which excise duty has been levied, exist in a crude and elementary form incapable of being employed at that stage as a component in a flashlight. The cans have sharp uneven edges and in order to use them as a component in making flashlight cases

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the cans have to undergo various processes

such as trimming, threading and redrawing. After the cans are trimmed, threaded and redrawn they are reeded, beaded and anodised or painted. It is at that point only that they become a distinct and complete component, capable of being used as a flashlight case for housing battery cells and having a bulb fitted to the case. We find it difficult to believe that the elementary and unfinished form in which they exist immediately after extrusion suffices to attract a market".

It was explained in *Bhor Industries Ltd. v. Collector of Central Excise* 1989(40) ELT 280 SC:

"It appears to us that under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry the first condition was 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 in the market is not necessary, user in the 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 was reiterated in *Hindustan Polymers v. Collector of Central Excise* 1989 (43) E.L.T. 165

"Excise duty, as has been reiterated and explained, is a duty on the act of manufacture. Manufacture under the excise law is the process or activity which brings into being articles which are known in the market as goods, and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or being sold in the market as such."

The submission of the learned counsel for the Department, therefore, that merely because the intermediate product manufactured by the appellants was resols and it is one of the items mentioned under item 15A it was exigible to duty ignores the basic and primary test for exigibility of duty. The precise argument advanced by the learned Solicitor General of India was rejected in *Bhor Industries* (supra) and the order of the Tribunal in that case was set aside as "the test of marketability or capable of being marketed", was not applied by the Tribunal.

10. Having traced the development of law that any goods produced or manufactured ipso facto do not attract duty unless they are marketable or capable of being marketed, we may now examine the dutiability of goods captively consumed. Prior to 1979 no duty was levied on such goods. But, as stated earlier, after amendment of rules 9 and 49 captively consumed goods become exigible to duty. The rationale for not treating such goods as excisable was same that since such goods were not brought to the market for buying and selling they could not be subjected to duty. But when the Rules were amended a fiction was created that any article produced or manufactured if captively consumed was

statutorily presumed to satisfy the test of marketability. But this presumption can be rebutted if it is established that the article produced and captively consumed was neither goods nor marketable nor capable of being marketed. The duty is attracted not by captive consumption of any article

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but it must be a good within the meaning of the Act which apart from having a distinctive name and known as such must be marketable or capable of being marketed. In *Bhor Industries (supra)* crude PVC films manufactured by the appellants as intermediate product used for captive consumption in manufacture of leather cloth, jute matting and PVC tapes were held not to be excisable goods on the test of marketability. In *Collector of Central Excise v. Amhalal Sarahhai Enterprises* 1989(43) ELT 214 the manufacturers produced starch hydrolysate which was captively consumed and fell under item 1-E of the Central Excise Tariff. It was held to be goods, no doubt, but it was observed that from a practical point of view it was apparent that the goods were not marketable consequently they were not exigible to duty.

11. It cannot thus be disputed that even if the resin produced by the appellants are resols as mentioned in item 15A it could not be subjected to duty. The purpose of specifying the goods in the Schedule is twofold, one, the rate on which the duty would be charged and other that if the goods satisfy the description and are covered in the Entry then they are liable to pay excise duty. But even in respect of specified goods it could be established that it was not marketable or capable of being marketed, therefore, no duty was leviable on it. The finding on this aspect has been extracted earlier. The Assistant Collector (Excise) found that unless some retarder or stabiliser was added the unstable solution was not marketable. Even assuming that such solution could last for 15 days as found by the Tribunal that would not help the Department unless it is further found that it was a produce which was marketable or capable of being marketed. The Collector had agreed with the finding of Assistant Collector that without any further process the solution was incapable of being used for any other purpose. It further cannot be disputed that even the life for 15 days depended on maintenance of particular temperature and heat. It cannot, therefore, be said that the goods were marketable or capable of being marketed. Since the test of marketability or capable of being marketable applies even to those goods which are mentioned in the tariff item the intermediate resin produced by the appellants which are mentioned as resols under tariff item no. 15A were not exigible to duty. The finding of the Tribunal that once the product manufactured by the appellants answered the chemical description of the product under tariff item 15A it was assessable to duty whether it was marketable or not was thus not well founded.

12. In the result, these appeals succeed and are allowed. The question of law raised by the appellants is decided by saying that resin at 'A' stage which are chemically known as 'resols' could not be subjected to duty. The appellants shall be entitled to their costs.

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