

CASE NO.:
Appeal (civil) 2360-2361 of 1999

PETITIONER:
Commissioner of Central Excise, Calcutta

RESPONDENT:
M/s. Emkay Investments (P) Ltd. & Anr,

DATE OF JUDGMENT: 08/12/2004

BENCH:
S.N. Variava , Dr. AR. Lakshmanan & S.H. Kapadia

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

Both the above appeals are filed against the common judgment passed by the Central Excise & Gold (Control) Appellate Tribunal, Calcutta in Appeal Nos. E-246/92, E-279/92 and Order No. A-593-594 CAL/98 dated 9.6.1998 reported in 2000(124)E.L.T.741. Both the appeals are against the same and common impugned judgment. Both the above appeals are being disposed of by this common judgment.

Briefly stated, the facts of the case are as under:

The respondents-M/s Emkay Investments Private Limited and M/s Plyking who are engaged in the manufacture of plywood classifiable under sub-Heading 4408.90 of the Schedule Act, 1985. The said factory was visited by the Central Excise Officers who found that the respondents are also using the brand/logo "MERINO" along with the brand name "Pelican" on the plywood being manufactured by them and the officers of the Department entertained a view that as the logo of "MERINO" is also being shown on the plywood being manufactured by them, apart from their own logo of "Pelican" and as the owner of the brand "MERINO" i.e. M/s. Merinoply and Chemicals Ltd., is a large scale manufacturer of plywood not entitled to the benefit of small scale exemption Notification No. 175/86-CE dated 1.3.1986, as amended, the respondents were also not entitled to the benefit of the said exemption Notification in view of clause 7 of the same. The second respondent M/s. Plyking is one of the traders from whose premises plywood was seized by the officers of the Central Excise.

On adjudication, the Commissioner of Central Excise, Calcutta vide his impugned order held that the logo indicating "MERINO" in a specific manner was the brand name used by M/s. Merinoply and Chemicals Ltd. who were not eligible for the grant of benefit of Notification No. 175/86-CE and as such denied the benefit to the first respondent firm and accordingly confiscated the seized plywood. The officers also confiscated 223 pieces of plywood from the business premises of M/s Plyking the second respondent herein. The respondents as appellants contended before the authorities that though the word "MERINO" is written in the same style as written on the plywood manufactured by M/s Merinoply and Chemicals Ltd., nevertheless the same will not imply any relation of goods by the respondents under the brand name of "MERINO". They also submitted that the brand name of M/s Merinoply and Chemicals Ltd. is "TUFFPLY" and "MERINO".

The Departmental representatives countered the arguments of the respondents by arguing that "MERINO" is the brand name and logo registered and owned by M/s Merinoply and the affixation of the same on the product would disentitle the respondents firms from the benefit of Notification in terms of clause 7 read with Explanation VIII as M/s Merinoply and Chemicals Ltd. being a large scale unit, are not entitled to the exemption Notification No. 175/86-CE, clause 7 would be attracted and the respondents firms would become ineligible for exemption.

The Commissioner of Central Excise by his order dated 31.3.1992 ordered confiscation of seized goods. The respondents herein filed appeals before the CEGAT against the order of the Commissioner. The CEGAT, by the impugned order, allowed the appeal filed by the respondents herein. Aggrieved by the said order, the appellants preferred these two appeals.

We heard Mr. G.E. Vahanvati, learned Solicitor General, appearing for the appellant and Mr. C. Hari Shankar, learned counsel, appearing for respondent No.1.

Respondent No.2 did not engage a lawyer to represent their case. They sent their counter affidavit by post.

The dispute, in the instant case, is as to whether the respondents who are manufacturers of plywood under their own brand name "Pelicon" have made themselves disentitled to the benefit of small scale exemption Notification No.175/86-CE by using a logo indicating "MERINO" on their products along with their brand name. The next question which arises is as to whether the markings or inscriptions should be considered as the brand name of M/s Merinoply and Chemicals Ltd. and will come within the mischief of Clause 7 read with Explanation VIII of the Notification, as contended by the Department. Clause 7 reads as follows:

"The exemption contained in this Notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this Notification."

Explanation VIII of Clause 7 reads as follows:

"'Brand name' or 'trade name' shall mean a brand name or trade name whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person."

Mr. G.E. Vahanvati, learned Solicitor General, submitted that the impugned goods admittedly contained the registered logo "MERINO" belonging to and owned by M/s Merinoply and Chemicals Ltd. Thus it was a clear case where the impugned goods were admittedly affixed with registered logo/trade mark of the other person not eligible to S.S.I. exemption. According to the learned Solicitor General, the CEGAT erred in not appreciating that to attract provision of clause 7 of Notification No.175/86-CE, it is sufficient that product contained a trade mark/logo of another ineligible person which was fully satisfied in the present case and whether the product also contained a brand name/trade name/ logo of the manufacturer would not and cannot alter such position. Arguing further, learned Solicitor General, contended that the interpretation of Explanation VIII as advanced by the Tribunal does not appear correct in law and fact. It was imperative that by using the registered logo "MERINO" belonging to M/s Merinoply and Chemicals Ltd. on their own products, the first respondent herein, M/s Emkay Investments Ltd. fulfilled the purpose of indicating a relation between the said products and the logo owner so as to influence the trade and, therefore, the provision of Explanation VIII were fully satisfied so far as the present case was concerned. Learned Solicitor General also submitted that the exception or exempting provision in taxing statute should be construed strictly and does not open to the Court or to the Tribunal to ignore conditions prescribed in the exemption Notification. In support of his submissions, learned Solicitor General, relied on the following judgments:

1. B.H.E.L. Ancillary Association vs. Collector of Central Excise, 1990(49) E.L.T. 33 (Mad.)
2. Commissioner of Central Excise, Trichy vs. Rukmani Pakkwell Traders, 2004(165) E.L.T. 481(S.C.)
3. Commissioner of Central Excise, Chandigarh-I vs. Mahaan Dairies, 2004(166) E.L.T. 23(S.C.)
4. Commissioner of Central Excise, Chandigarh-II vs. Bhalla Enterprises, 2004(173) E.L.T. 225 (S.C.)

Mr. Hari Shankar, learned counsel appearing for respondent No.1 submitted that clause 7 read with Explanation VIII of the Notification does not make a registration or otherwise of the brand name or trade name, a relevant factor and that it is not sufficient to find a portion of the symbol or monogram of the other person on the product to oust them from the benefit of Notification or to bring the goods within the ambit of Explanation VIII. He would further argue that the Tribunal by a comparison of the markings found that the same are entirely different except the use of the word "MERINO" in between the respondents' own brand name and that the respondents' brand name "Pelican" has been clearly marked and their logo in the shape and style 'encircled Bird' has been put on the product and comparing the same with the markings put on their plywood by M/s Merinoply and Chemicals Ltd.. It is found that

apart from writing the word, "MERINO" in a style, the said marking also uses the word, "TUFFPLY" which is the brand name of M/s Merinoply and Chemicals Ltd. Below the same, pictures of Boiling Water and Termite working on wood and sun, have been placed to indicate that the ply in question is boiling water-proof, termite-proof and weather-proof and that such markings are not found on the products manufactured by the respondents firms. Submitting further, learned counsel appearing for respondent No.1 contended that the brand name as defined in Explanation VIII of the Notification will not create an impression in the mind of the purchaser that the product is that of M/s Merinoply and Chemicals Ltd. and that the use of markings as indicated above by the respondents cannot be said to indicate any connection in the course of trade between such specified goods and M/s Merinoply and Chemicals Ltd.

Learned counsel appearing for respondent No.1 further submitted that the "Pelican" brand and "Pelican" logo had no visual or phonetic similarity with "MERINO" logo in style and the said mark also uses the word "TUFFPLY" which is the brand name of M/s Merinoply and Chemicals Ltd. The same contention was made in the counter affidavit filed by M/s plyking, respondent No.2 herein.

Learned counsel appearing for respondent No.1, in support of his contentions, placed reliance on the judgments in Commissioner of Central Excise, Chandigarh-II vs. Bhalla Enterprises (Supra) and in Astra Pharmaceuticals (P) Ltd. vs. Collector of Central Excise, Chandigarh, 1995(75) E.L.T. 214(S.C.).

We have carefully considered the rival submissions made by counsel appearing on either side.

The impugned goods admittedly contained a registered logo "MERINO" belonging to and owned by M/s Merinoply and Chemicals Ltd. Thus it was a clear case where the impugned goods were admittedly affixed with registered logo/trade mark of other person not eligible to S.S.I. exemption.

We have gone through the common order passed by the Tribunal. In our view, the Tribunal has erred in not appreciating that to attract provision of clause 7 of Notification No. 175/86-CE, it is sufficient that product contained a trade mark/logo of another ineligible person which was fully satisfied in the instant case and whether the product also contained the brand name/trade name/logo of the manufacturer would not and cannot alter such position. Likewise, the interpretation of Explanation VIII as advanced by the Tribunal does not appear to be correct in law and in fact. It was imperative that by using the registered logo "MERINO" belonging to M/s Merinoply and Chemicals Ltd. on their own product M/s Emkay Investment Ltd. fulfilled the purpose of indicating a relation between the said products and the logo owner so as to influence the trade and therefore, the provision of Explanation VIII were fully satisfied so far as the case on hand was concerned. The finding of the Tribunal to the contrary, in our opinion, is wrong and liable to be set aside.

The first respondent M/s Emkay Investment Pvt. Ltd., a manufacturer of plywood in the brand name of "MERINO" classifiable under sub-Heading 4408.90 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1985) have contravened the provisions of Rules 9(1), 173B, 173C read with Section 4 of the Central Excise and Salt Act, 1944 and Rules 173F, 173G(2) read with Rules 52A and 226 of the Central Excise Rules, 1944, by way of suppressing the material fact of use of "MERINO" brand/logo on their said goods which is actually owned by M/s Merinoply and Chemicals Ltd., a large scale manufacturer of plywood, having annual clearance value of more than Rs.2 crores and thereby becoming ineligible for the benefit of exemption granted under Government of India, Notification No. 175/86-CE dated 1.8.1986, as could be seen from the notice of show cause issued to the respondents on 4.9.1991. We, therefore, hold that M/s Merinoply and Chemicals Ltd., owns the said "MERINO" brand/logo and, therefore, the plywood containing the imprint of such registered "MERINO" brand/logo were not eligible for grant of benefit as per terms and conditions of the said Notification No. 175/86-CE dated 1.3.1986 during the material period. The said Company never disputed the fact that "MERINO" brand/logo belonged to the said M/s Merinoply and Chemicals Ltd., a large scale manufacturer of plywood who are not entitled to the grant of exemption benefit as per the above Notification. In reply to the show cause notice and at the time of personal hearing, the respondents never disputed the fact of using the word "MERINO" on their said goods in addition to other particulars. They contended that the same was used only to indicate that the quality was similar to a particular type of plywood.

We also hold that the goods so available in the market with "MERINO" brand/logo established a connection between the said goods and the brand name holder in the course of raids without indicating the identity of that person i.e. the said Assam Company which conforms to Explanation VIII of the said Notification.

In our opinion, the judgment of the Tribunal is wrong and against the ratio laid down in the cases referred to infra. In the case of Commissioner of Central Excise, Trichy vs. Rukmani Pakkwell Traders (supra), the respondents purchased the scented supari in bulk from M/s ARR Nutcon Products. The scented supari is marked under the brand name of "ARR" with a photograph of Shri A.R. Ramaswamy, the founder of ARR group of Companies. The respondents claimed benefit of Notification No.1/93-C.E., dated 28.2.1993. The said Notification grants exemption, amongst others, to scented supari. Clause 4 of the Notification provides that the exemption contained in the Notification shall not apply to specified goods bearing a brand name or trade name of another person. The respondents were issued show cause notice that their goods are not exempted under the said Notification. The Assistant Collector confirmed the demand on the ground that they were not eligible to get exemption under the Notification. The appeal filed by the respondent was also dismissed by the Commissioner(Appeals). However, the Tribunal allowed the appeal of the respondents. The Commissioner of Central Excise preferred civil appeal to this Court which was allowed by this Court. S.N. Variava, J. speaking for the Bench held as under: "In our view, this Circular has no application to the facts of the present case. What the Circular clarifies is that if there are more than one registered owners in respect of the same trade mark then merely because the other person has the same registered mark in some other goods would not preclude the owner of the trade mark from getting the benefits of the circular. In this case, admittedly, the respondents are not owners of the trade mark "ARR". They do not claim to have any rights in the photograph of the founder of the group. Therefore, reliance by the Tribunal on this circular is entirely erroneous.

The Tribunal then proceeds on the basis that the exemption can be denied only if trade mark or brand name is used in respect of the same goods for which the trade mark is registered. In coming to this conclusion, we are afraid that the Tribunal has done something which is not permissible to be done in law. It is settled law that Exemption Notifications have to be strictly construed. They must be interpreted on their own wording. Wordings of some other Notification are of no benefit in construing a particular Notification. Clause 4 of this Notification and the explanation (set out hereinabove) make it clear that the exemption will not apply if the specified goods (i.e. scented supari) bears a brand or trade name of another person. Neither in Clause 4 of the Notification nor in Explanation IX is it provided that the specified goods must be the same or similar to the goods for which the brand name or trade name is registered. The Tribunal has in adopting the above reasoning effectively added to the Notification words to the effect "brand name or trade name in respect of the same goods". This is clearly impermissible. It is to be seen that there may be an unregistered brand name or an unregistered trade name. These might not be in respect of any particular goods. Even if an unregistered brand name or trade name is used the exemption is lost. This makes it very clear that the exemption would be lost so long as the brand name or trade name is used irrespective of whether the use is on same goods as those for which the mark is registered.

The Tribunal had also held that under the Notification the use must be of "such brand name". The Tribunal has held that the words "such brand name" shows that the very same brand name or trade name must be used. The Tribunal has held that if there are any differences then the exemption would not be lost. We are afraid that in coming to this conclusion the Tribunal has ignored Explanation IX. Explanation IX makes it clear that the brand name or trade name shall mean a brand name or trade name (whether registered or not) that is to say a name or a mark, code number, design number, drawing number, symbol, monogram, label, signature or invented word or writing. This makes it very clear that even a use of part of a brand name or trade name, so long as it indicates a connection in the course of trade would be sufficient to disentitle the person from getting exemption under the Notification. In this case admittedly the brand name or trade name is the words "ARR" with the photograph of the

founder of the group. Merely because the registered trade mark is not entirely reproduced does not take the respondents out of Clause 4 and make them eligible to the benefit of the Notification."

In the case of Commissioner of Central Excise, Chandigarh-I vs. Mahaan Dairies (supra), the appeal was filed before this Court by the Commissioner of Central Excise, Chandigarh. The question in this case before the Tribunal was whether the respondents are entitled to exemption of Notification No.8/98.C.E. dated 2.6.1998 under which certain goods were exempted from payment of excise duty. However, the exemption was not available if the goods bore a brand name or trade name (whether registered or not) of another person. S.N.Variava,J., speaking for the Bench, observed as under:

"However, the respondents also sell pickle with the name "Mahaan" written in exactly the same style as a registered trade mark of other Company. The question would be whether by adding the words "Taste maker" the respondents could get the benefit of the Notification.

We have today delivered a judgment in Commissioner of Central Excise, Trichy vs. Rukmani Pakkwell Traders 2004(165) E.L.T. 481 (S.C.) (Civil Appeal Nos. 3227-3228/1998) wherein we have held in respect of another Notification containing identical words that it makes no difference whether the goods on which the trade name or mark is used are the same in respect of which the trade mark is registered. Even if the goods are different so long as the trade name or brand name of some other Company is used the benefit of the Notification would not be available. Further, in our view, once a trade name or brand name is used then mere use of additional words would not enable the party to claim the benefit of the Notification.

Such a view has been taken by the Tribunal in the case of Festo Controls (P) Ltd. vs. CCE, Bangalore [1994(72) E.L.T. 919]. We approve that decision.

It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred. The Tribunal has based its decision on a decision delivered by it in Rukmani Pakkwell Traders vs CCE, Trichy [1999(109)E.L.T. 204]. We have already overruled the decision in that case. In this case also we hold the decision of the Tribunal is unsustainable. It is accordingly set aside."

Commissioner of Central Excise, Chandigarh-II vs. Bhalla Enterprises (supra): This case was relied on by both the parties. This is also a case of some brand name used by different persons. The Division Bench, in this case, have also followed the judgments of this Court in the case of Commissioner of Central Excise, Trichy vs. Rukmani Pakkwell Traders (supra) and Commissioner of Central Excise, Chandigarh-I vs. Mahaan Dairies and observed that clause 4 of the Notification read with Explanation IX, in that case, clearly debar those persons from the benefit of the exemption who use someone else's name in connection with their goods either with the intention of indicating or in a manner so as to indicate a connection between the assessee's goods and such other person. Paragraph 6 of the judgment will be useful for our purpose which is reproduced as under:

"The apprehension of the assessee that they may be denied the exemption merely because some other traders even in a remote area of the country had used the trade mark earlier is unfounded. The notification clearly indicates that the assessee will be debarred only if it uses on the goods in respect of which exemption is sought, the same/similar brand name with the intention of indicating a connection with the assessee's goods and such other person or uses the name in such a manner that it would indicate such connection. Therefore, if the assessee is able to satisfy the assessing authorities that there was no such intention or that the user of the brand name was entirely

fortuitous and could not on a fair appraisal of the marks indicate any such connection, it would be entitled to the benefit of exemption. An assessee would also be entitled to the benefit of the exemption if the brand name belongs to the assessee himself although someone else may be equally entitled to such name."

Astra Pharmaceuticals (P) Ltd. vs. Collector of Central Excise, Chandigarh (supra) : This judgment will not be of any assistance to the case on hand. It is distinguishable on facts and on law. Since it does not apply to the case on hand, we are not inclined to consider the same.

Learned Solicitor General argued that exception or exempting provision in taxing statute should be construed strictly. For the said proposition, we can safely and beneficially rely on the recent judgment pronounced on dated 17.11.2004 in C.A.No.7994 of 2003(State of Jharkhand & Ors. vs Ambay Cements & anr.) by a Bench of S.N.Variava, Dr. AR. Lakshmanan & S.H. Kapadia,JJ. It is useful to reproduce paragraphs 25,26 & 27 of the judgment which read as under:

"In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the Court to ignore the conditions prescribed in the Industrial Policy and the exemption Notifications.

In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance of the same must result in canceling the concession made in favour of the grantee-the respondent herein. "

B.H.E.L. Ancillary Association vs. Collector of Central Excise (supra) : This judgment was relied on by the learned Solicitor General in support of his contention. The very same Notification No. 175/86-CE dated 1.3.1986 was the subject matter of the said case which accords exemption to goods produced by small scale industrial undertakings. The units of which the petitioners are the Associations, and which Units are ancillary to Bharat Heavy Electricals Limited have fabricated certain components required by BHEL. In respect of such components manufactured by the Units, exemption was asked for as per the Notification. The exemption was not accorded to the Units, on the ground that clause 7 read with Explanation VIII of the Notification is attracted to the components manufactured by the Units. This contention was accepted by the learned single Judge, who opined that certain stencil marks on the components manufactured by the Units made by them would make the components, though manufactured by the Units, as having been affixed with a brand name or a trade name of BHEL which is not eligible for the grant of exemption under the Notification within the meaning of clause 7 read with Explanation VIII of the Notification. This construction of the learned single Judge was the subject matter of the challenge in the writ appeals. The Bench observed as follows:

"\005\005\005The name or mark is equated to symbol, monogram, label, signature or invented word or writing. But a mere finding of symbol, monogram etc., on the goods would not bring the matter within Explanation VIII, so as to fall within the exception to the exemption set out in clause 7 to the Notification. Something more is required by Explanation VIII and that is, the above markings must have been used in relation to the specified goods for the purpose of indicating or so as to indicate a connection in the course of trade between such specified goods and BHEL using such name or mark

with or without any indication of the identity of BHEL. Here, there is no symbol, no monogram, no label and no signature of any nature much less of BHEL found on the components manufactured by the Units.

The markings or inscriptions found on the components may amount to invented words or writings. But the markings or inscriptions have not been and are not being used by BHEL at all. They have been used and are being used by the Units and Units alone, may be pursuant to the contractual requirements between BHEL and the Units even as per the averments in the counter affidavit of respondents 1 to 3. The markings or inscriptions, individually or cumulatively do not go to constitute a name or a mark such as symbol, monogram etc. of BHEL, used by BHEL in relation to the components manufactured by the Units. They may have a purpose to serve. But certainly they do not by themselves constitute a name or mark used by BHEL. But the stress, which we could spell out cumulatively from the language used in Explanation VIII, is that the name or mark such as symbol, monogram etc. should have been used by BHEL for the purpose of indicating or so as to indicate a connection in the course of trade between the components and BHEL using such name or mark. It is true that by a bare looking at the inscriptions or markings or by a bare visual inspection, there need not be an indication of the identity of BHEL. But fundamentally these markings or inscriptions do not go to constitute a name or mark of BHEL; much less used by BHEL in relation to such components. There is a faltering with regard to the satisfaction of the primary ingredient required by Explanation VIII."

Accordingly the High Court allowed the appeals and set aside the order of the learned single Judge.

For the foregoing reasons, we allow the appeals and set aside the order dated 9.6.1998 passed by the CEGAT impugned in these appeals and answer the issues involved in favour of the appellant and hold that the respondents who are the manufacturers of plywood under their own brand name M/s Pelican are disentitled to the benefit of small scale exemption Notification No.175/86-CE dated 1.3.1986 by using logo indicating "MERINO" on their product along with their brand name. However, in the facts and circumstances of the case, there shall be no order as to costs.