

Binny Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-10-1986

Reported in : (1986)LC440Tri(Delhi)

Appellant : Binny Ltd.

Respondent : Collector of Central Excise

Judgement :

1. It is alleged in the present matter that the appellant company used to receive proofed coloured canvas from various proofers, which was given by them to tailoring, contractors, who used to fabricate such proofed canvas into tarpaulin with the aid of power operated sewing machines. The company's agency division, in this manner, was allegedly fabricating tarpaulin for more than 25 years but this fact was not reported to the Department. The process of fabrication of tarpaulin adopted by the company and other details regarding employment of contract labour, use of power operated sewing machines, etc. were also not intimated to the Department; nor was a sample of completed tarpaulin furnished to the Department to enable it to examine it for purposes of correct classification. At one stage, a clarification was sought by the company from the Department but on a hypothetical note stating that they were planning the manufacture of tarpaulin in their mills and not that they were already engaged in such manufacture. It is alleged that the appellant company had failed to pay appropriate excise duty on the tarpaulins manufactured in their Agencies Division from the period June 1980 to February 1985, thus evading duty amounting to Rs. 2. Shri P.K. Kurien,

Advocate appears on behalf of the appellant company and states that the tarpaulin on which the duty has been demanded from the appellant company is manufactured out of proofed canvas by cutting into sizes, stitching and fixing eyelets. The proofed canvas is cotton fabric falling under Item 19 of the Central Excise Tariff. It is stated that the grey canvas had already paid duty and, therefore, tarpaulin could not be subjected to any further duty. It is urged that tarpaulin is, in fact, a proofed canvas which is specifically covered under Item 19 of the Central Excise Tariff, Therefore, the question of its attracting Item 68 of the Central Excise Tariff does not arise.

3. The appellants stand is that proofed canvas itself is tarpaulin. In support of this, it is stated that a reference had been made before the lower authority to the 'Handbook of Industrial Textile by Earnest R.Kasseli. Also, an affidavit was furnished by Mr. R. Singh, Regional Manager of a transport company. In addition, it is stated that appellant had furnished an affidavit of Dr. V. Subramaniam, Head of the Department of Textiles.

4. It is further urged that a letter had been addressed by the appellant company "to the Department on 13th September, 1984 from the B&C Mills Division, seeking a clarification which was given to them on 26th September, 1984. The reply given by the Asstt. Collector was as follows:- "If the, base fabric is cotton, tarpaulin finish will fall under Tariff Item 19 only." In view of the foregoing clarification, the appellant company rightly concluded that the product is cotton fabric and nothing else, and it cannot be stated that there was any suppression or mis-statement of facts by the appellant company warranting demand of duty beyond the normal period.

5. Shri P.K. Kurien, learned advocate has submitted that the Order-in-Appeal wrongly and illegally relied on the decision of the Madras High Court in M. Jeevajee & Co. v. The State of Tamil Nadu 34 STC 4, as this judgment was overruled by the Supreme Court in Porritts & Spencer (Asia) Ltd. v. State of Haryana 42 STC 433. It is further submitted that the Madras High Court itself did not follow its earlier judgment in deciding three cases later on viz., Narasimha Agencies v.State of Tamil Nadu 40 STC 217 and The Deputy Commissioner (C.T.)

Coimbatore Division v. South India Traders, and the State of Tamil Nadu v. Navinchandra Co. STC 423.

6. Shri Kurien further urged on behalf of the appellant that the respondent has completely misinterpreted the decision of the Gujarat High Court in the case of Pokandas and Bros. v. State of Gujarat 51 STC 88. He has further referred to the judgment of the Bombay High Court in the case of Satyavijaya Commercial Co. v. Commissioner of Sales Tax, Maharashtra State 55 STC 186, in his favour.

7. Appellants have specially emphasised that cutting of proofed fabric to sizes, stitching and make eyelets does not amount to manufacture in the sense of bringing into existence a new product known to the market.

In this connection, appellants have cited the following case of law in their favour. Union of India and Others v. Delhi Cloth and. General Mills Co.

Ltd. and Ors. - 1977 ELT (J-199).

2. South Bihar Sugar Mills Ltd. and Anr. Etc. v. Union of India and' Another Etc., and Tata Chemicals Ltd., Bombay v. R.M. Desai, Inspector, Central Excise, Mithapur and Ors. - 1978 ELT (J-336). Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. PIO Food Packers Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon v. Travancore Rubber & Tea Co.

8. Shri Vineet Ohri, SDR appears on behalf of the Department. He reiterates the views expressed in the Order-in-Original. He emphasises that the goods on which duty has been demanded viz., tarpaulin, do not find place in Items 1 to 67 of the then Central Excise Tariff and, therefore, it is rightly concluded that they would fall under Tariff Item 68 of the Central Excise Tariff. It is stated that there is no dispute, that bought out grey cotton canvas was processed by water proofing and this proofed canvas was cut and stitched into different sizes and then eyelets fixed thereon according to the requirements of various types of customers. In this process, the Department has rightly held that the raw material viz., grey cotton canvas gets completely transformed into ready-to-use tarpaulin having distinct name, character and use. It is further stated that the Collector rightly rejected the

contention in the affidavit submitted that it is not necessary for the proofed canvas to be cut to a particular size and be fixed with eyelets in order to be known as tarpaulins when the same user who has furnished the affidavit indents tarpaulin of a particular size with eyelets fixed as per specification to cover different trucks. Learned SDR strongly relies on the decision of the Supreme Court in *Empire Industries Ltd. v. Union of India* in 1985(20) ELT 179.

9. The learned SDR submits that the Agencies Division of the company were manufacturing and clearing excisable goods i.e., tarpaulin, for the past several years. Even when they addressed a letter on 13th September, 1984, they did not disclose the fact but stated that they were requiring a clarification to plan the manufacture of tarpaulin.

This, it was stated, amounted to both wilful mis-statement as well as suppression of facts.

10. Referring to the reply given by the Assistant Collector of Central Excise on 26th September, 1984 to the clarification sought by the appellant company on 13th September, 1984 to the effect that "if the base fabric is cotton, the tarpaulin finish will fall under Tariff Item 19 only." The learned SDR states that the Collector has rightly dismissed this clarification as meaningless and vague reply which cannot be considered as any categorical advice or assurance to the appellant company.

11. We have carefully considered the facts of the case and the submissions made before us. The essential issue before us is whether fabrication of proofed canvas into tarpaulin with the aid of power results in production of a new product classifiable under Item 68 of the Central Excise Tariff. There is already a wealth of case law on the subject and in view of the fact that this matter has been considered at length not only by the High Courts but in broader perspective also by the Supreme Court, the issue may well be examined in the light of the available case law.

12. The appellants have relied strongly on the Supreme Court decision in *Porritts & Spencer (Asia) Ltd.* (supra) and Madras High Court judgment in *Navinchandra & Co.* (supra). It is further stated that the respondent has wrongly and illegally relied

on Madras High Court decision in the case of M. Jeevaje & Co. (supra), when the Madras High Court itself did not follow its earlier decision in two later cases, Narsimha Agencies (supra) and South India Traders (supra).

13. We have carefully considered the above case law cited by the appellant in their favour. In the case of Porritts & Spencer (Asia) Ltd. (supra), the Supreme Court held that dryer felts manufactured by the assessee are a variety of textiles. It was held that they would satisfy the common parlance test. It was further observed that the concept of textile is not a static concept and newly developing materials, methods, techniques and processes are continuously evolving and new kinds of fabric invented which could legitimately be regarded as textiles without doing any violence to the language. It was further held that textiles may have diverse uses and it is not use which determines their character as textiles. The Supreme Court observed.

"It is, therefore, no argument against the assessee that dryer felts are used only as absorbents of moisture in the process of manufacture in a paper manufacturing unit. That cannot militate against 'dryer felts' falling within the category of 'textiles', if otherwise they satisfy the description of 'textiles'.

14. It is on the basis of the above decision of the Supreme Court that appellants have observed that what is being sought to be classified as a new product under Item 68 of the Central Excise Tariff i.e., tarpaulin, is nothing more than cotton fabrics classifiable under Item 19 of the Central Excise Tariff and that, therefore, no further duty is payable.

15. We have also observed that appellants relied on Madras High Court decision in the case of the State of Tamil Nadu v. Navinchandra & Co.

In this case also it was held that "anything fabricated out of cotton can be called cotton fabric." In taking this view, the Madras High Court referred to the Kerala High Court decision in P. Kesavan and Co.

v. The Assistant ' Commissioner of Sales Tax (Assessment), Special Circle, Ernakulam 37 STC 221. In the case of Kesavan & Co. the product to be classified

was caristrap rayon cord strapping fabricated out of yarn. The process of making strapping was said to be sophisticated one of recent origin and involved the pasting together of the cords by strong glue, which was resilient and elastic to some extent. The result was a tape-like structure with certain elasticity if the strapping was stretched breadthwise and with no such elasticity for stretching lengthwise. The question was whether such strapping was classifiable as a rayon fabric under Item 22 of the Central Excise Tariff. It was held in the case of Kesavan & Co. that rayon fabric is something made out of rayon. The common parlance theory cannot apply and all articles produced and manufactured by the use of rayon would be rayon fabric.

16. The appellants have also referred to the decision of the Madras High Court in the case of Deputy Commissioner (C.T.) Coimbatore Division v. The South India Traders (supra) in which it was held that the expression fabric is of sufficient amplitude to cover both handkerchief woven as a fabric in its own size and handkerchief made out of a bigger dimension of fabric. The Government's objection to treat handkerchiefs of cotton fabrics was there due to the fact that the kerchief was not woven to size as a fabric in itself, but cut to size by hand or mechanical process.

17. Again a reference is made to the Madras High Court decision in the case of the State of Tamil Nadu v. Venus Trading Company 55 STC 345, in which it was held that stove wicks having been fabricated out of cotton would fall within the expression 'cotton fabric'. It was held that Entry 19 of the first Schedule to the Central Excises and Salt Act, 1944 is an inclusive entry and though it may be that some of the articles included therein under 'cotton fabrics' may not be in common parlance be so known or called, nevertheless Entry 19 is so defined as to take within its sweep cotton fabrics popularly known and recognised as such as well as other kinds of fabric. It was held that the bonding together of cotton fabrics in the shape of a wick by a process of braiding leads to a pattern and a product of utility and even if the end-product is not obtained by resorting to weaving as commonly understood, nevertheless, it would be a fabric resulting from the bonding of cotton fibres by a process of braiding. Therefore, cotton stove wicks would squarely fall within 'cotton fabrics' in Entry 19 of the First Schedule to the Central Excises and

Salt Act.

18. In the case of Narsimha Agencies v. The State of Tamil Nadu decided by the Madras High Court 40 STC 217, it was held that collar stiffening material, which was in the nature of buckram cloth would fall within the category of cotton fabrics. It was observed that the word fabric means a thing put together woven material. In the instant case, there could be no dispute about the fact that the stiffening material was prepared out of cotton and put together by a process of manufacture. In this view of the matter, it was felt that the product was just a piece of cut cotton fabric with some processing added to it and that since cotton fabric means all varieties of fabric manufactured wholly or partly from cotton as defined in Item No. 19 of the Central Excise Tariff, this product would be covered by it.

19. The learned Advocate Shri Kurien also invited especially our attention to the decision of the Supreme Court in the case of Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan and Ors.

383. In this decision it was held that Item 22 of the Central Excise Tariff which speaks of all varieties of fabrics is wide enough to include rayon tyre cord fabric. Therefore, it can be said that by and large tyre cord fabric is a textile fabric. It was further held that the fact that when the tyre cord fabric is in the hands of tyre manufacturer and undergoes the process of rubberising, the significance of weft thread is of no significance, so far as classification of the tyre cord fabric as a fabric is concerned.

20. It has also been argued at length on behalf of the appellants that as a matter of fact, the cutting of waterproof canvas to size, stitching and the providing of eyelets does not constitute a process of manufacture. Appellants have cited decision of the Supreme Court in the case of South Bihar Sugar Mills Ltd. and Another Etc. v. Union of India and Anr. Etc., and Tata Chemicals Ltd., Bombay v. R.M. Desai, Inspector, Central Excise, Mithapur and Ors. (supra) in which it held that in order to constitute manufacture for attracting excise duty,, there ought to be a change in the raw material but that 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 and use.

21. Again a reference has been made to the decision of the Supreme Court in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. PIO Food Packers (supra). In this case it was held by the Supreme Court that when a pine apple fruit was processed into pine apple slices for purpose of being sold in sealed cans, it did not involve a process of manufacture. It was held that where there was no essential difference in identity between the original commodity and the processed article, it was not possible to say that one commodity had been consumed in the manufacture of another.

Although, it had undergone a processing, it must be regarded still as retaining its original identity.

22. Appellants have also referred to the decision of the Supreme Court in the case of Union of India and Ors. v. Delhi Cloth & General Mills Co. Ltd. and Ors. 1977 ELT (3199). In this matter it was decided by the Supreme Court that mere processing of goods is not manufacture, attracting further duty. It was held that every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation and a new and different article must emerge having a distinctive name, character or use.

23. As against the above case law cited by the appellants, the learned SDR has relied essentially on the decision of the Madras High Court in the case of M. Jeevjee & Co., v. State of Tamil Nadu (Supra), which in fact, is also the main stay of the order appealed against, and he has also referred to the decision of the Supreme Court in the case of Empire Industries Ltd., and Ors. v. Union of India and Ors. 1985 (20) ELT 179. Pronounced on the 10th July, 1973, it was held in the judgement in the case of M. Jeevjee & Co., (Supra) that tarpaulin sold as a finished product cannot at all be treated as a textile. Further it was held the tarpaulin as a finished product is a different marketable commodity and it cannot be said that it is either sold as a textile or that it continues to have the properties and characteristics of cloth.

24. The learned SDR relies on the Supreme Court decision in the case of Empire Industries Ltd., (Supra) in submitting that the transformation of a product to the extent that it becomes commercially a different commodity is sufficient to attract

levy of excise duty. It is in this light that it was held that the process of bleaching, mercerising, dyeing, printing water proofing, etc. conducted in respect of cotton fabrics, wollen fabrics and man-made fabrics would amount to manufacture attracting excise levy.

25. It would be seen from the foregoing discussion that the Madras High Court judgement in the case of M. Jeevaje & Co., categorically held that tarpaulin sold as a finished product cannot be treated as a textile. The product in that case was the same as in the present matter i.e., processed canvas cloth which had been cut to size, stitched at the ends and provided with eyelets as required. It had been submitted on behalf of the appellants in that case that the work involved in stitching, eyeletting, etc., was negligible and, therefore, the tarpaulin should be considered as only the processed canvas cloth. But this contention was rejected on the ground that tarpaulin as a finished product was a different marketable commodity and it could not be said that it was either sold as a textile or that it continued to have the properties and characteristics of cloth. In another order of the same date in the case of the State of Tamil Nadu v. East India Rubber Works, Madras 33 STC 399, the Madras High Court held again that water proof cloth such as rexine, PVC cloth, rubberised or synthetic water proof fabrics, etc. made with cloth as a base, are not textiles, inasmuch as the processed article had different properties and characteristics and are intended for different use and in commercial circle they are treated as entirely different from cloth or textile. It was held that the proper test would be to find out whether after the application of rubber or PVC solution, the base cloth continues to be cloth or whether it has become a different product intended for a different use. *Porritts & Spencer (Asia) Ltd. v. State of Haryana*, the Supreme Court of India, however, held that the word 'textiles' must be interpreted according to its popular sense and the use to which it is put is immaterial and does not bear on its character as a textile.

Holding that the concept of textile is not static concept. It was further added that having regard to the newly developing material, methods, techniques and processes, new kinds of fabric may be invented which, without doing any violence to the language may be regarded as textiles. It is in this context that it was decided by the Supreme Court that dryer felts made out of cotton or wollen yarn by the

process of weaving according to the wharf or woof pattern and only used as absorbents, of moisture in the process of manufacture in paper manufacturing units would be classifiable as textile.

27. Undeniably the other decisions cited by the appellants in their favour viz., State of Tamil Nadu v. Navinchandra & Co., (supra), Deputy Commissioner (C.T.) Coimbatore Division v. The South India Traders (supra), The State of Tamil Nadu v. Venus Trading Company (supra), Narasimha Trading Agencies v. State of Tamil Nadu (supra), and the Delhi Cloth and General Mills Co., Ltd. v. State of Rajasthan and Ors.

followed the ratio in the case of Porritts and Spencer (Asia) Ltd. However, there is nothing in any of these decisions, which can be interpreted as repudiating the categorical finding of the Madras High Court in the case of M. Jeevaje & Co. v. State of Tamil Nadu (supra) on the specific issue of whether tarpaulin can be considered as textiles or not.

28. There are two judgements in which the issue of classification of tarpaulin has been decided by two other High Courts. One is the case of Pokardas & Bros. v. State of Gujarat decided by the High Court of Gujarat at Ahmedabad (supra) and the other is the decision of the Bombay High Court in the case of Satyavijaya Commercial Co. v. Commissioner of Sales Tax, Maharashtra State (supra). In both these decisions, it has been held that tarpaulins are classifiable as cotton fabric within the meaning of Item 19 of 'the Central Excise Tariff. In fact, in the Satyavijaya Commercial Co. decision, the Bombay High Court relies on the judgement of the Gujarat High Court in the case of Pokardas & Bros (supra).

29. The decision of the Gujarat High Court in the case of Pokardas & Bros, was pronounced on September 15/16, 1981 having regard to the enlarged definition of cotton fabrics in Item 19 of the Central Excise Tariff as effected by the Finance Act 1969 as well as the Central Excises & Salt and Additional Duties of Excise (Amendment) Act, 1980.

It is the Pokardas & Bros, judgement which discusses in detail the change that resulted in the scope of Item 19 of the Central Excise Tariff as a result of enlarged

definition inserted in the said Item by the Amending Ordinance 1979 (No. 12 of 1979) promulgated on 24th November, 1979 and the Central Excises & Salt and Additional Duties of Excise (Amendment) Act, 1980 (being Act No. 6 of 1980) which came into force on and from 24th November, 1979. Prior to the amendment, Item No.19 of the Central Excise Tariff read as follows:- "Cotton fabrics" means all varieties of fabrics manufactured either wholly or partly from cotton and includes dhoties, sarees, chadders, bed-sheets, bed-spreads, counter-panes, table cloths, embroidery in the piece, in strips or in motifs and fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials, if (i) in such fabrics cotton predominates in weight, or (ii) such fabrics contain more than 40%, by weight of cotton and 50% or more by weight of non cellulose-fibres or yarn or both; Provided that in the case of embroidery in the piece, in strips or in motifs and fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials, such predominance or percentages, as the case may be, shall be in relation to the base fabrics which are embroidered or impregnated, coated or laminated as the case may be.

I. Cotton fabrics other than (i) embroidery in the piece, in strips or in motifs and (ii) fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials.

II. Embroidery, in the piece, -in strips or in motifs, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power.

III. Cotton fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials. Explanation I; 'Base fabrics' means fabrics falling under Sub item 1 of this item which are subjected to the process of embroidery or which are impregnated, coated or laminated with preparations of cellulose derivatives or of other plastic materials.

Explanation II: Where two or more of the following fibres, that is to say - in any fabric are equal in weight, then, such one of those fibres the predominance of which would render such fabric fall under that item (hereafter in this explanation referred to as the applicable item) among the item Nos. 19, 20, 21, 22, 22-A and

22-AA, which read with the relevant notification, if any, for the time being in force, issued under the Central Excise Rules, 1944, involves the highest amount of duty, shall be deemed to be predominant in such fabric and accordingly such fabric shall be deemed to fall under the applicable item." 30. As a result of the amendment, Sub-Item 1 of. Item No. 19 was substituted as under: 1. Cotton fabrics, other than (i) embroidery in the piece, in strips or in motifs, and (ii) fabrics impregnated, coated or laminated with preparations of cellulose derivatives, or of other artificial plastic materials -(a) cotton fabrics, not subjected to any Twenty per cent process.

ad valorem.(b) cotton fabrics, subjected to the Twenty per cent process of bleaching, mercerising, ad valorem, dyeing, printing, water-proofing, Similarly by Section 4 of the amending Act, First Schedule to the Additional Duties of Excise Act was amended in the following terms.

"4. Amendment of First Schedule - In the Additional Duties of Excise (Goods of Special Importance) Act, 1957, in the First Schedule - (i) in item No. 19 for Sub-item 1-, the following sub-item shall be substituted, namely - "1. Cotton fabrics, other than (i) embroidery in the piece, in strips or in motifs, and (ii) fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials -(a) cotton fabrics not subjected to any Five per cent process.

ad valorem.(b) cotton fabrics, subjected to the Five per cent process of water-proofing, rubber- ad valorem." ising, bleaching, mercerising, dyeing, 31. Simultaneously, with the amendment of the Tariff, an amendment was made of Section 2 in the Central Excises and Salt Act, 1944. In Section 2, in Clause (f), after sub-clause of, the following sub-clause was inserted- "In relation to goods comprised in Item No. 19 - amendment of First Schedule includes bleaching, mercerising, dyeing, printing, water-proofing, rubberising, shrink-proofing, organdie processing or any other process or any one or more of these processes." 32. The result of the amendment made in Section 2 of the Central Excises and Salt Act was that it was provided that cotton fabrics falling under Item 19-1 of the Central Excise Tariff would include bleached, mercerised, dyed, printed, water-proof, rubberised, shrink-proof and organdie processed cotton fabrics. Clearly the

amendment of the Tariff and the Act with retrospective effect provided that processed goods will cover water-proof goods.

33. In the case of Pokardas & Bros. v. State of Gujarat, an argument was made on ground of what is called 'users test' stating that tarpaulin cannot be classified as cotton fabrics since tarpaulins cannot be put to use for preparing garments or furnishing fabrics, the uses to which fabrics are normally put. But this was negated by the Gujarat High Court stating that if the definition in Item 19 of Central Excise Tariff takes into its sweep tarpaulins, which have water-proofing quality, then there is no scope of invoking the principle of 'users test', it is in this context that the Gujarat High Court referred to the Supreme Court's observations in the case of Porritts & Spencer (Asia) Ltd. v. State of Haryana holding that a textile may have diverse uses but it is not the use which determines its character as textile. The Supreme Court held that in interpreting Item 19 of the Central Excise Tariff, we should not be conditioned by old and antiquated notions of what textiles are.

33. In the case of Satyavijaya Commercial Co. v. Commissioner of Sales Tax, Maharashtra State, the Bombay High Court pronouncing its decision on 28th January, 1983 and relying on the decision in the case of Pokardas & Bros. v. State of Gujarat came to the conclusion that tarpaulin was classifiable as cotton fabric.

35. It would be observed that the decision in Pokardas & Bros, was pronounced in September 1981, i.e., after the amendment made in the Central Excise Tariff and the Central Excises & Salt Act in 1979. As rightly pointed out in that decision, which discusses this aspect at great length, as a result of the amendment, the scope of Item 19 of the Central Excise Tariff was greatly enlarged. What is pertinent here is that water-proof fabrics were specifically brought within the purview of Item 19. This view of the Gujarat High Court is fully endorsed by the Maharashtra High Court in its decision in the case of Satyavijaya Commercial Co. decided in January, 1983. In the Order-in-Appeal, the Collector has chosen to rely on the decision of the Madras High Court in the case of M. Jeevajee & Co. The judgement in the case of M.Jeevajee & Co., was delivered in July 1973 i.e., much before the retrospective amendment effected in 1979. Quite obviously, therefore,

the ratio of decision in the case of M. Jeevjee & Co. would not remain valid after the amendment of 1979. For the same reason, the judgement in the case of State of Tamil Nadu v. East India Rubber Works, Madras delivered on the same date as the judgement in the case of M. Jeevjee & Co. (supra) cannot afford any guidance in the interpretation of Central Excise Tariff after the retrospective amendment of 1979.

36. The learned SDR has cited the decision of the Supreme Court in the case of Empire Industries Ltd. and Ors. v. Union of India and Ors..

There is nothing in this decision which is contrary to the view taken in the cases of Pokardas & Bros. v. State of Gujarat, and Satyavijaya Commercial Co. v. State of Maharashtra (supra). In fact, the Supreme Court in the case of Empire Industries Ltd. upheld the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980 and held that the process of bleaching, mercerising, dyeing, printing, water-proofing etc. conducted in respect of cotton fabrics, woolen fabrics and man-made fabrics would amount to manufacture subject to excise levy. It is not understood how this decision could be cited by the Department for holding that water-proof fabric would not fall for classification under Item 19 of the Central Excise Tariff but under Item 68 *ibid*.

37. We have considered the arguments as well as the case law cited on behalf of the appellants on the point that cutting to size, stitching and eyeletting of tarpaulin does not constitute a process of manufacture bringing into existence a new commercial product known to the market. In view of the fact that in both Pokardas & Bros, and Satyavijaya Commercial Co. cases, the impugned product was precisely the same and it was held to be classifiable under Item 19 of the Central Excise Tariff, and we propose in this judgement to rely on these two decisions, we do not consider it necessary to go into the question whether the process of cutting, stitching and eyeletting brings into existence a new commercial product meriting its classification under Item 68 of the Central Excise Tariff.

38. Respectfully concurring in the decision of the Hon'ble Gujarat High Court in the case of Pokardas & Bros. v. State of Gujarat (supra) and in the decision of the Bombay High Court in the case of Satyavijaya Commercial Co. v. Commissioner

of Sales Tax, Maharashtra State (supra), we hold that the impugned product i.e., finished tarpaulin was classifiable as cotton fabric falling under Item No. 19 of the Central Excise Tariff.

39. In view of our foregoing finding, the demand for duty and the penalty which has been related to this demand of duty are set aside.

Appropriation of security amounts towards value of goods seized is also set aside.

40. I have perused carefully the order prepared by brother Shri Prakash Anand. I agree with his conclusions on the question at issue and the nature of disposal of the appeal following the same. I wish to add a few lines only for purposes of elaboration.

41. There are three decisions of High Courts on the subject goods (tarpaulin). The judgment of the Madras High Court in the case of M.Jeevaji & Co., is to the effect that tarpaulin (the cut-to-size, stitched and eyeletted product) is a marketable commodity different from the fabric out of which it had been made. It further held that this product is not sold as a textile and does not continue to have the properties and characteristics of cloth. The decision of the Gujarat High Court in the case of Pokardas & Brothers also deals with the same product (tarpaulin). The judgment of the Madras High Court above cited was taken into consideration by the Gujarat High Court but not followed for the reason that the Madras High Court decision was based, inter alia, on the user test, but that the Supreme Court had in the case of Porrits & Spencers (Asia) Ltd. disapproved the application of the user test in case of determination of the question as to what goods can rightly be classified as textiles. This decision of the Gujarat High Court had been later referred to with approval, and followed, by the Bombay High Court in the case of Satya Vijay Commercial Co. v. Commissioner of Sales Tax (55 STC 186). It had been held therein that tarpaulin manufactured out of cotton fabric fell under Entry No. 15 of Bombay Sales Tax Act, which read "Cotton fabrics as defined in the first schedule to the Central Excises & Salt Act, 19W. The entry considered in the Pokardass case was Entry 37 of First Schedule to the Gujarat Sales Tax Act which also referred to item 19 of the First Schedule to the Central Excises & Salt Act for a definition of cotton fabrics.

42. Thus, as against the decision of the Madras High Court which held that the goods now in issue before us (tarpaulin) would not be a textile, the Bombay and Gujarat High Courts have held that the same would be cotton fabric only, specifically referring to the definition thereof as in Item 19 of the First Schedule to the Central Excises & Salt Act. Further, the basis of the Madras High Court judgment was the user test but the Supreme Court has, as earlier noted, disapproved of the said test for purposes of classification. In the circumstances, I am of opinion that as between the differing judgments of the High Courts on this question, it is the judgments of the Bombay and Gujarat High Courts that are to be followed in the present instance.

43. Following the said judgments, I agree with the conclusions of brother Shri Prakash Anand in the order prepared by him and therefore concur with him that the appeal is to be allowed.

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