Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2650 OF 2016
[Arising out of SLP(C) No. 22191 OF 2013]

Commissioner of Commercial Tax, U.P. ... Appellant

Versus

M/s. A.R. Thermosets (Pvt.) Ltd. ... Respondent

J U D G M E N T

Dipak Misra, J.

In this appeal, by special leave, the Revenue has called in question the legal sustainability of the judgment and order passed by the High Court of Judicature at Allahabad in Commercial Tax Revision no. 1156 of 2009 preferred by the assessee-respondent under Section 11 of the U.P. Trade Tax Act, 1948 (for brevity, 'the 1948 Act') read with Sections 81 and 58 of the VAT Act, 2008 (for short, 'the VAT Act') whereby the learned Single Judge has allowed the revision negativing the stand put forth in opposition by the State to the stance highlighted

by the assessee.

2. The facts on which the controversy rests is in a narrow compass. The respondent manufactures "bitumen emulsion". It filed an application before the Commissioner, Commercial Taxes, Lucknow, U.P. under Section 59 of the VAT Act seeking a clarification about the rate of tax applicable to the sales of bitumen emulsion. The Commissioner of Commercial Taxes, vide order dated 23.1.1999 opined that bitumen emulsion is an unclassified commodity and, therefore, is excisable to tax at the rate of 12.5% as it would fall under the residuary Entry.

3. Being aggrieved by the order dated 23.1.1999, the respondent preferred Appeal No. 6 of 2009 under the VAT Act before the Tribunal Commercial Taxes, U.P., Lucknow (for short 'the tribunal') which was heard by the Full Bench. It was contended before the tribunal by the assessee-appellant therein that bitumen as a commodity is taxed at 4% under Serial no. 22 Part A of Schedule II to the VAT Act and bitumen is found in solid state and to bring it in the liquid form, water is added to it and very little quantity is used in the process. Elaborating the said submission, it was urged that when bitumen is available in the liquid form, it is known as bitumen emulsion and is commonly known as bitumen when it is available in the solid form;

and both the commodities are understood in the same manner in the commercial world and the end use is the same and, therefore, the rate of tax to be determined has to be the same as prescribed for bitumen.

4. Be it stated, as per Notification No. 100 dated 15.1.2000 issued under the erstwhile U.P. Trade Tax Act, 1948, bitumen was taxed at 20%. Under the VAT Act, bitumen has been classified under Part A of Schedule II and the tax leviable is 4%. Before the tribunal, the assessee-appellant produced reports from Harcourt Butler Technical Institute, Kanpur to bolster the stand that there is no difference between the two commodities and they are to be categorised as one item, if common parlance test is applied. To buttress the submissions, the assessee relied upon ***CST v. Ashok Grah Udyog Kendra Private Ltd.***[1], ***CST v. Bechu Ram Kishori Lal***[2], and ***M/s Indodan Milk Products v. Commissioner Sales Tax***[3]. The tribunal referred to one of its earlier decisions in appeal no. 17 of 2000 decided on 3.4.2009 and on the basis of reasons ascribed therein dismissed the revision.

5. The dissatisfaction caused by the said adjudication, constrained the assessee to approach the High Court in Commercial Tax Revision no. 1156 of 2009. The High Court formulated the point in issue which reads as follows:-

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1 (2004) UPTC 1827
2 (1976) 36 STC 236
3 (1974) 33 STC 381

> "Whether the Bitumen and Bitumen Emulsion are one and the same commodity for the purposes of interpretation of Entry No. 22 Schedule II Part A of the U.P. Value Added Tax Act, 2002 as was originaly enacted i.e. upto enforcement of notification no. 2758 dated 29.9.2008?

6. The learned Single Judge took note of the various technical materials from the Government approved laboratory which had been brought before the tribunal, and opined that the controversy had not been appositely appreciated by the tribunal, for the materials clearly establish that bitumen and bitumen emulsion is the same thing. The High Court analysed the concept of end use, i.e. the end result of bitumen emulsion and came to hold that bitumen emulsion makes the bitumen easily usable in its emulsified form and both the items are used in the construction of road, etc. It further opined that the identity, commercial character and use of both the things are the same, though the tribunal, despite having the material before it, proceeded to record findings otherwise. That apart, the High Court took note of the decision of this Court in ***Commissioner of Central Excise, Bangalore v. Osnar Chemical Private Limited***[4] and ultimately ruled that it could not be said that mixing of some material would amount to manufacture unless it results in a change when the commodity concerned cannot be recognised as an original commodity but rather new and distinct article emerges having different commercial use and identity. On the basis of the aforesaid analysis,

4 (2012) 2 SCC 282

the High Court allowed the revision and set aside the orders of the forums below.

7. We have heard Mr. Pawan Shree Agarwal, learned counsel for the appellant and Mr. Kavin Gulati, learned senior counsel along with Mr. Avi Tandon, learned counsel for the respondents.

8. Criticising the view of the High Court, it is submitted by Mr. Agarwal that it has erred in opining that bitumen in its emulsified form also remains bitumen. He has drawn inspiration from the language used in Section 2(t) of the VAT Act to structure the submission that in the process of conversion, manufacturing takes place. It is his further argument that the decision in ***Osnar Chemical Private Limited*** (supra) is not applicable to the present controversy as the said decision was rendered in the context of the Central Excise Act, 1944 whereas the *lis* herein hinges on the definition of manufacturing. For the said purpose, he has relied upon the authority in ***Sonebhadra Fuels v. Commissioner, Trade Tax, U.P., Lucknow***[5]. Learned counsel for the Revenue contends that when the view expressed by the lower authorities is neither perverse nor arbitrary, the High Court in exercise of its revisional jurisdiction should not have interfered with the findings and for the said purpose he has commended us to the authority in ***N. Eswari v. K. Swarajya***

5 (2006) 7 SCC 322

Lakshmi[6]. Mr. Agarwal has canvassed that the intention of the legislature, as is manifest, is to charge a particular rate of tax on bitumen and it remotely does not conceive of bitumen emulsion and the Court should not enlarge the scope of legislation or the intention of it by adding a word to the term in the statute, which is not permissible, for a taxing statute has to be understood what is clearly stated therein and not what is intended to be said.

9. Mr. Gulati, learned senior counsel appearing for the assessee in support of the view expressed by the High Court would contend that four principles relating to interpretation of entries and taxing statute are required to be considered in the present case. According to Mr. Gulati, they are (a) plain meaning to be given to the taxing provision; (b) burden to prove classification in a particular Entry is always on the Revenue; (c) any ambiguity has to be resolved in favour of the assessee; and (d) resort to residuary Entry is to be taken as a last measure. He would put forth that in the instant case, the Revenue, prior to taxing the respondent under the residuary Entry, did not place any evidence before the Commissioner or the tribunal to show that the emulsified bitumen is not covered by the expression bitumen as found in Entry 22 of Part A of Schedule II to the VAT Act. It is urged by him, whether the activity of mixing water with bitumen

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6 (2009) 9 SCC 678

amounts to manufacture under Section 2(t) of the VAT Act is wholly irrelevant for deciding the issue at hand. It is, according to Mr. Gulati, where goods are purchased on paying tax and process thereafter is undertaken, a question often arises as to whether such process amounts to manufacture or not, and if it amounts to manufacture, then it would enable the department to levy tax again as the commodity in different, a new one, for the purposes of this Act and the tax can be imposed as a single point levy again, but in the case at hand, that is not the situation. Learned senior counsel further submits that every process involved in the manufacture of a commodity does not relate to manufacture of a new product as the end product continues to retain the character of the original product. According to him, solely because some process has been carried out, it cannot be held that a new product has come into existence. Expatriating the said submission, it is put forth that the process of heating on high degree temperature and then adding water to it to obtain emulsified bitumen does not alter the basic nature of bitumen but only brings a change in physical appearance of the product. He has heavily relied on ***Osnar Chemical Private Limited*** (supra) to highlight that bitumen would include bitumen emulsion.

10. The principal controversy, as we perceive, is "whether "bitumen emulsion" is covered within Entry 22 of Schedule II of the VAT Act

which only refers to "bitumen"". According to Academic Press Dictionary of Science and Technology, "bitumen" means:-

> "Bitumen Geology and naturally occurring flammable substance mainly of a mixture of hydrocarbons such as petroleum or asphalt.
>
> Materials 1. Originally, a type of asphalt occurring naturally in Asia Minor. 2. Any similar black, sticky mixture of hydrocarbons occurring naturally or pyrolytically in the atmosphere and completely soluble in carbon disulfide: obtained mainly from natural oxidized petroleum products or from a petroleum distillation process."

11. The McGraw-Hill Concise Encyclopedia of Science & Technology (Third Edition) defines "bitumen" as under:-

> "Bitumen A term used to designate naturally occurring or pyrolytically obtained substances of dark to black color consisting almost entirely of carbon and hydrogen with very little oxygen, nitrogen, and sulphur. Bitumen may be of variable hardness and volatility, ranging from crude oil to asphaltites and is largely soluble in carbon disulfifde."

12. The above definitions when appreciated clearly show that they expressively define the word "bitumen" as a commodity and explain its chemical composition, colour or appearance and qualities and the process by which it comes into existence.

13. Bitumen emulsion, as per Indian standards ICS 293.08.0.20 published by the Bureau of Indian Standards is a destruction of very fine particles in an aqueous medium. Harcourt Butler Technological Institute, Kanpur, in its report dated 11.4.2008 states that:-

> "The components derived from fractional distillation of petroleum, at various temperature levies, are (I) Gas (II) Naphtha, (III) Kerosene, (IV) Diesel and lubricating oil, (V) Bitumen and furnace oil, and (VI) residue. This bitumen is known as penetration grade bitumen because the specification, by which it is designated, is obtained from the penetration test. There could be two other forms of Bitumen: Namely (I) Emulsion and (II) Cutback. In the emulsion, bitumen is in the suspension from as small globules in water, whereas in cutback, the bitumen is dissolved in suitable solvent. In bituminous construction, the choice between penetration grade bitumen and the bitumen emulsion is made depending upon the factors like, weather conditions, availability, economy and available construction time."

14. The said report discussing about its composition explicates:-

> "Bitumen is basically a hydrocarbon with 10% by weight of atoms of sulphur, nitrogen and oxygen, attached to hydrocarbon molecules. The carbon content in bitumen is 80-87%. Three basic components of bitumen are (I) asphaltene, (II) maltene and (III) carbine. The chemical bonds in bitumen are weak and break when heat is applied. When it is cooled, it comes back to its original structure, but not necessarily the same as before."

15. The said report has further proceeded to state that emulsion is a two phase system consisting of two immiscible liquids, one being dispersed as finite globules in the other. In bitumen emulsion, bitumen globules are suspended as emulsion in water with the help of emulsifiers, which are used to stabilize the emulsion. Emulsifiers break into ions and charge the bitumen particles. Charged particles repel each other and the suspension remains stable and this stability remains as long as water does not evaporate, freeze or emulsifier does

not break.

16. About the characterization of the bitumen, report states:-

> "Bitumen materials have certain characteristics such as (I) waterproofing (II) durability, (III) resistance to strong acids and (IV) cementing properties. At normal temperature, bitumen is semi-solid and takes time to flow. At higher temperatures, it behaves like a viscous liquid, whereas at very low temperature, is brittle as glass. Bitumen is believed to behave 'viscoelastically' at the standard operating temperature at highways."

17. According to the report when a state of liquefaction is achieved and the same is constant for a longer period, it can be used under diverse moisturic conditions and has a very wide range of applications such as surface dressing of low volume roads, curing purposes base for high volume roads, surface dressing, tack coat, premix carpets, soil stabilization, etc. The report has clearly stated that the use of bitumen is because of its characteristics which includes cementing properties. Be it noted, the use of both bitumen and bitumen emulsion is similar, that is, surface dressing, tack coat, premix carpets, soil stabilization, etc. The concluding remarks of the report is extracted below:-

> "Bitumen and Emulsion are two forms of bituminous binders which serve some common purposes in road construction and maintenance. Bitumen and emulsion are selected for various applications depending upon some parameters like weather conditions, availability of material, economic aspects and availability of construction time. Bitumen needs preheating whereas emulsion is ready to use. It has been observed from previous studies that the

> physical properties of the emulsion after natural sun drying are almost similar to that of bitumen as the water present. In the binder evaporates and makes the matrix harder as obtained with the bitumen. It may, therefore, be concluded that bitumen and emulsion may be treated at par as far as their significance for application. In their respective area is concerned."

18. A reading of the aforesaid definitions and the scientific text clearly reveal that bitumen in its original form is solid but melts when heated, for it is used in molten stage. There is no difficulty to appreciate that bitumen emulsion comes into existence when bitumen is treated with emulsifiers and other chemicals to attain a liquid form. It has a huge advantage and add benefit because it is not to be heated and detained in its liquid form and has better stability and thus, saves time and cost components. That apart, it ensures its use at the stage of application. Needless to say it is comparatively less hazardous. Bitumen consists of four forms of variants, namely, solid bitumen, polymer bitumen, crumbler rubber modified bitumen and bitumen emulsion. The stand of the Revenue is that the word "bitumen" must be conferred a narrow meaning for the reason that the legislature has not thought it appropriate to use the prefix or suffix like "all", in all forms or of all kinds. It may be immediately clarified that bitumen is a generic expression which would include different types of bitumen. Revenue, however, as stated earlier, intends to apply it restrictively. The said submission has a fundamental fallacy. Entry 22 does not

exclude or specify that it would not include bitumen of all types and varieties. This is not the principle or precept applied to interpret the entries under the Schedule of the Act. We will be deliberating in detail on the said aspect at a later stage. Prior to that, we would like to advert to certain other aspects.

19. At the very inception, we think it absolutely seemly to state that the nature and composition of the product or the good and the particular entity in the classification table is important. Matching of the good with the Entry or Entries in the Schedules is tested on the basis of identity of the goods in question with the Entry or the contesting entries and by applying the common parlance test, i.e., whether the goods as understood in commercial or business parlance are identical or similar to the description of the Entry. Where such similarity in popular sense of meaning exists, the generic entity would be construed as including the goods in question. Sometimes on certain circumstances the end use test, i.e., use of the good and its comparison with the Entry is applied.

20. The Entry in question uses the word “bitumen” without any further stipulation or qualification. Therefore, it would, in our opinion, include any product which shares the composition identity, and in common and commercial parlance is treated as bitumen and can be used as bitumen. When we apply the three tests, namely,

identity, common parlance and end use to the goods and the Entry in question, bitumen emulsion would be covered by the Entry bitumen. It is worthy to note that bitumen emulsion matches the Entry as it is only one of the varieties of bitumen. Bitumen emulsion is processed bitumen, but the process has not changed its composition, commercial identity or its use. Bitumen emulsion is regarded and performs the same function as bitumen. As a result of processing, neither the primary character nor the composition is lost. Emulsification only eases and provides proficiency to the use of application of bitumen. Hence, in popular and commercial sense, bitumen emulsion is nothing but bitumen, which is in liquid form and is user friendly.

21. It is perceivable that the legislature has used the word "bitumen" and treated it as a separate entity. As we notice, it has not indicated that this was done with the intention and purpose to exclude some type or variety of bitumen. All bitumen products, which share and have common composition and commercial entity, and meet the popular parlance test, is, therefore, meant to be covered by the said Entry. In the instant case, even the end use test is satisfied. There is nothing in the Entry to suggest and show that the Entry is required to be given a restrictive and a narrow meaning.

22. In this regard, another aspect needs to be noted. The Revenue

does not rely upon another Entry under which bitumen emulsion can be taxed. The Revenue relies upon the residuary Entry which would only include goods, which cannot be covered under any other Entry in the schedule on application of the three-fold criteria. In the ***State of Maharashtra v. Bradma of India Limited***[7], the Court had observed that the general principle is that specific Entry would override a general Entry. Referring to the decisions in the case of ***Collector of Central Excise, Shillong v. Wood Craft Products Ltd.***[8], it has been ruled that resort can be made to a residuary heading only when by liberal construction the specific Entry cannot cover the goods in question. Referring to Entry No. 90 in the said case, which covered tabulating, calculating, cash registering, indexing and data processing, etc, other than computer machines, it was held that the words did not contain words of limitation and would cover every species of cash registering machines, irrespective of their mode of operation. In the absence of any limitation or qualification as to the different kind of cash registering machines, there was no reason for such qualification and limit the Entry to a particular kind of cash registering machine. However, computers had been specifically excluded and were separately dealt with in Entry 97(a). The assessee, who was manufacturing electronic cash registers would, therefore, be covered

7 (2005) 2 SCC 669
8 (1995) 3 SCC 454

by Entry 90 and not by the Entry relating to computers. A similar opinion has been expressed in ***Hindustan Poles Corpn. v. Commissioner of Central Excise, Calcutta***[9] stating that residuary Entry is made to cover only those category of goods which clearly fall outside the ambit of the main Entry. The opinion proceeds further to state that unless the Revenue can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be made to the residuary Entry.

23. In this context, reference to the authority in ***Commercial Taxes Officer v. Jalani Enterprises***[10] would be profitable. While dealing with the question of sales tax/VAT under the Rajasthan Sales Tax Act, it was held that if from records it was established that the product in question could be brought under a specific Entry, then there was no reason to take resort to the residuary Entry. Revenue cannot be permitted to travel to the residuary Entry when a product can be covered under a specific Entry.

24. In the present context, when the word "bitumen" has been used as a generic expression, it would be erroneous not to cover a product that is only a type or form of bitumen and retains all its essential characteristics, and treat it as covered by the residuary Entry by some kind of ingenuous reasoning. Taking it outside the purview of the

9 (2006) 4 SCC 85
10 (2011) 4 SCC 386

specific Entry is incorrect.

25. At this juncture, we may refer to certain pronouncements commended to us by the learned counsel for the appellant. In ***Collector of Customs and others v. Kumudam Publications (P) Limited and others***[11], while adverting to the issue of classification it has been held that it would not be correct to say that in no case can the end use or function of the goods be relevant in the question of classification, as was held in ***Indian Tool Manufacturers v. Asstt. Collector of Central Excise, Nasik and others***[12]**.** The decision in ***Commissioner of Central Excise, Cochin v. Mannampalakkal Rubber Latex Works***[13] emphasizes and holds that in the matters of classification, "composition test" is important test and the "end user test" would only apply if the Entry says so. We have referred to the aforesaid authorities for sake of completeness only because we have applied the "composition test" as well as the "commercial or common parlance" test in addition to the "end use test".

26. Reliance placed by the Revenue on the decision in the case of ***Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh and another***[14], is of no assistance, for in the context of the particular notification it was held that aluminium ingots, billet, roll products,

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11 (1998) 9 SCC 339
12 (1994) Supp (3) SCC 632
13 (2007) 217 ELT 161 (SC)
14 (1981) 3 SCC 578

extrusion, etc. would not be covered by the exemption, which was granted to all kinds of minerals, ore, metals or alloys, including sheets and circles used in the manufacture of brasswares and scraps. In this context, referring to Section 3A of the U.P. Sales Tax Act and the notification as applicable, it was held that the earlier notifications issued from time to time would show that the expression "metal" had been employed with reference to metal in its primary sense. The principle laid down in the said authority is in the context in issue and is based upon the schematic arrangement indicated and specified in the notification under consideration therein. That apart, the said decision also emphasizes that a word describing a commodity in a sales tax statute should be interpreted according to its popular sense and words of everyday use must be construed not in their scientific or technical sense, but as understood in common parlance.

27. We have also been commended to a judgment of the Customs, Excise and Service Tax Appellate Tribunal in ***Allied Bitumen Complex (India) Private Limited v. Collector of Central Excise, Calcutta – 1***[15], which holds that conversion of bitumen into bitumen aqueous emulsion amounts to manufacture. *Per contra*, the respondent-assessee has relied on judgment of the Karnataka High Court in ***SR Projects Limited v. Commissioner of Commercial***

15 (1997) 90 ELT 374 (Tribunal)

Taxes[16]. However, it is not necessary to dilate on the said aspect for there is a distinction between what can be regarded as manufacture under the Excise Act and what is the sale or transfer of property in goods under the Sales Tax Act and the Value Added Tax Act. In ***M.P. Agencies v. State of Kerala***[17], it has been held that the decisions under the Excise Act may have some play and relevance, but the question of manufacture by itself would not be *per se* relevant under the Sales Tax or Value Added Tax Act. Thus, there is a distinction between what is exigible to tax under the excise law and the incidence of tax when the legislation relates to sales or value added tax. What is relevant is the classification. In this context, the verdict in ***Osnar Chemical Private Limited*** (supra) is significant. The said authority refers to two other variants of bitumen, namely, polymer modified bitumen and crumbled rubber modified bitumen which are created by the process of mixing of polymer and additive to bitumen. It has been held that the aforesaid processes result in improvement of the quality of bitumen and there is no change in the characteristics or identity of bitumen so as to transform bitumen into a new product having an identity, characteristic and use. It has been ruled therein that there is a fallacy in the argument raised by the Revenue that bitumen *per se* would only include its solid hard form which melts at high

16 (2013) 63 VST 49 (Kar)
17 (2015) 7 SCC 102

temperature and not bitumen emulsion. The two varieties and types carry the same composition, do not differ in character and have the same commercial identity i.e. bitumen. That apart, the use or end use test is also satisfied.

28. In view of the aforesaid analysis, we find the view expressed by the High Court to be absolutely flawless and, accordingly, we concur with it. Our concurrence with the view of the High Court entails dismissal of the appeal and, accordingly, it is so directed. There shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Prafulla C. Pant]

New Delhi
September 6, 2016

ITEM NO.1A COURT NO.4 SECTION III
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No.2650/2016

COMMISSIONER OF COMMERCIAL TAX U.P. Appellant(s)

VERSUS

M/S A.R. THERMOSETS (PVT.) LTD. Respondent(s)

Date : 06/09/2016 This appeal was called on for pronouncement of Judgment today.

For Appellant(s) Mr. Ashutosh Kumar Sharma, Adv.
Mr. Ravi Prakash Mehrotra, AOR

For Respondent(s) Mr. Kavin Gulati, Sr. Adv.
Mr. Avi Tandon, Adv.
Mr. Rohit Sthalekar, Adv.
Ms. Vasudha Zutshi, Adv.
Mr. T. Mahipal, AOR

Hon'ble Mr. Justice Dipak Misra pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Prafulla C. Pant.

The appeal is dismissed in terms of the signed reportable judgment.

(Chetan Kumar) (H.S. Parasher)
Court Master Court Master
(Signed reportable judgment is placed on the file)