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C.A.No. 1535-1540 OF 2000

ITEM No.101 Court No.5

SECTION III

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

Civil Appeal Nos.1535-1540/2000

M/S PRIMELLA SANITARY PRODTS. PVT. L. & ANR.Appellant (s)

VERSUS

COLLECTOR OF CENTRAL EXCISE, GOA Respondent (s)

(With office report)

With C.A. No.3758/2001 (with office report)

Date : 20/04/2005 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.N. VARIAVA
HON'BLE DR. JUSTICE AR. LAKSHMANAN
HON'BLE MR. JUSTICE S.H. KAPADIA

For Appellant (s)Mr. V. Lakshmikumaran, Adv.

in CA 1535-40/00, Mr. Alok Yadav, Adv.

CA 3758/01Mr. R.K. Hasija, Adv.

Mr. R.N. Keshwani, Adv.

For Respondent (s)

in CA 1535-40/00, Mr. T.S. Doabia, Sr. Adv.

CA 3758/01Mr. Ravinder Aggarwal, Adv.

Mr. P. Parmeswaran, Adv.

UPON hearing counsel the Court made the following

O R D E R

The Appeals stand disposed of in terms of the signed order. There will be no order as to costs.

(K.K. Chawla)
Court Master

(Jasbir Singh)
Court Master

[Signed order is placed on the file]

ITEM No.101 Court No.5

SECTION III

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.4365/2003

COMMISSIONER OF CENTRAL EXCISE, GOAAppellant (s)

VERSUS

M/S PRIMELLA SANITARY PRODUCTS Respondent (s)

(With office report)

Date : 20/04/2005 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.N. VARIAVA
HON'BLE DR. JUSTICE AR. LAKSHMANAN
HON'BLE MR. JUSTICE S.H. KAPADIA

For Appellant (s)

Mr. T.S. Doabia, Sr. Adv.
Mr. Ravinder Aggarwal, Adv.
Mr. P. Parmeswaran, Adv.

For Respondent (s)

Mr. V. Lakshmikumaran, Adv.
Mr. Alok Yadav, Adv.
Mr. R.K. Hasija, Adv.
Mr. Rajesh Kumar, Adv.

UPON hearing counsel the Court made the following

O R D E R

The Appeal stands dismissed in terms of the signed order. There will be no order as to costs.

(K.K. Chawla)
Court Master

(Jasbir Singh)
Court Master

Signed order is placed on the file]
IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.1535-1540 OF 2000

M/S PRIMELLA SANITARY PRODTs. PVT. L. & ANR.Appellant (s)

VERSUS

COLLECTOR OF CENTRAL EXCISE, GOA Respondent (s)

WITH

CIVIL APPEAL NO.3758 OF 2001

O R D E R

These Appeals can be disposed of by this common order.

In Civil Appeal Nos.1535-1540 of 2000, there are two Appellants viz. (i) M/s. Primella Sanitary Products Pvt. Ltd. and (ii) M/s. Christine Hodein (I) Pvt. Ltd. In Civil Appeal No.3758 of 2001 there is only one Appellant namely, M/s. Primella Sanitary Products Pvt. Ltd.

Briefly stated the facts are as follows:-

These Appellants manufacture sanitary towels. For a number of years they were filing classification list classifying their products under Tariff Item No.56.01. The classification lists had been approved by the Department. In 1991 these two parties filed classification lists again in classifying their products under Tariff Item No.56.01. These classification lists were also approved. However, the Collector of Customs by his order dated 24th January, 1992 directed filing of an Appeal against the approval of the classification list. Thus, the Department filed an Appeal to the Collector (Appeals). The Collector (Appeals) by his order dated 22nd April, 1993 held that the products are classifiable under Tariff Item No.48.18.

Even before the Collector had passed his order, show cause notices had been issued to both the

parties classifying their products under Tariff Item No.48.18 and demanding duty and penalty

In these Appeals, we are not concerned with the show cause notices which are within the limitation period. We are concerned with only two show cause notices, one dated 11th November, 1992 issued to M/s. Primella Sanitary Products Pvt. Ltd. and another dated 17th September, 1992 issued to M/s. Christine Hodein (I) Pvt. Ltd. wherein duty was demanded for the period from April 1988 to March, 1991 and September 1987 to March, 1991 respectively. By the adjudicating order the Appellants were directed to pay duty and penalty on the footing that their products were classifiable under Tariff Item No.48.18.

Against the order dated 22nd April, 1993 passed by the Collector (Appeals) classifying the product under Tariff Item No.48.18, the Appellants filed an Appeal before the Customs, Excise & Gold (Control) Appellate Tribunal (in short "CEGAT").

Thereafter, they filed another Appeal before CEGAT against the adjudicating order claiming dem and and duty.

In the Appeal filed against the order of the Collector (Appeals) dated 22nd April, 1993 the counsel appearing for the Appellants made a concession that their products were similar to one M/s Patsan Hygiene Industries Pvt. Ltd. and that as in the case of M/s Patsan Hygiene Industries Pvt. Ltd. it has already been held by the Tribunal that the product was classifiable under Tariff Item No.48.18, he had instructions not to press the Appeal. On such concession, the Appeals were dismissed by the Tribunal.

Similarly, when the Appeal against the order of adjudication came up for hearing, counsel again made a concession that he was only challenging the demand beyond the period of six months and that the demand for duty on the basis of classification under Tariff Item No.48.18 during the period six months prior to the issue of show cause notices were not being challenged. The Tribunal recorded this and then held by its order dated 11th May, 1999 that the extended period of limitation was available.

It appears that the Appellants moved an application for setting aside the orders dated 22nd April, 1999 and 11th May, 1999, on the ground that they had not authorized their counsel to make any concession. That application came to be dismissed by an order dated 27th September, 1999. Civil Appeal Nos.1535-1540 of 2000 are against these three orders.

Civil Appeal No.3758 of 2001 arises out of adjudication pursuant to a show cause notice dated 29th June, 1993. The demand herein is within the period of limitation. That the product is classifiable under Tariff Item No.48.18 has been confirmed by the CEGAT by its order dated 22nd February, 2001. It is against this portion of the order that the Appellant M/s. Primella Sanitary Products Pvt. Limited has filed this Appeal.

We have heard parties. The first question which arises is whether the product is classifiable under Tariff Item No.48.18 or under Tariff Item No.56.01. We find that before the Tribunal it has been conceded that the product would be classifiable under Tariff Item No.48.18. It was so conceded not only in the Appeal filed against the order of the Collector (Appeals) but also in the Appeal filed against the adjudicating Orders confirming the demand under show cause notices. Thus, these concessions were made at two stages. We are unable to accept Mr. V. Lakshmikumaran's submission that the concession is in respect of a matter of law and that therefore he should be allowed to argue to the contrary. Alternatively it was submitted that the matter be referred back to the Tribunal for a decision on merits. In our view, this is not a case where the concession is a question of law. The concession is on facts. The Collector (Appeals) holds as follows:-

"I have considered the submissions. In both the cases the issue is common. This involves classification of sanitary towels/napkins, manufactured by both the respondents. Admittedly, the said products are manufactured out of raw materials in which rayon grade wood pulp predominates in weight over other ingredients. So it is now for my consideration whether the rayon grade pulp can be considered as a textile material to fall under heading 56.01 or as the department claims whether it is a mere paper pulp or wood pulp and not a textile material meriting classification under heading 48.18.

The textile material covered by Sec. XI, is a fibre or yarn from which fabrics and articles of textile are manufactured. It is because the fibres and yarn are to be considered as starting material in the manufacture of textile/textile articles thereof. The rayon grade pulp only indicates that fibres can be manufactured out of it for the purpose of manufacture of textile and textile article thereof. But, the pulp itself cannot be considered as textile material. In the respondents' case the pulp is used as such without converting it into fibres in the manufacture of napkins/towels. The subject product is therefore clearly made out of wood pulp. The rayon grade pulp is used to get quality product. It has nothing to do with the textiles.

In the result the subject products are rightly classifiable under heading 48.18. I accordingly set aside the approval of the above classification lists."

On admitted facts it has been concluded that the yarn/fibre used has nothing to do with textiles. It has on facts been held that the product is rightly classifiable under Tariff Heading No.48.18. It is these findings which had been challenged in the Appeal. No contrary evidence had been led by the party. In fact, M/s Primella Sanitary Products Pvt. Ltd. had not even filed a reply to the show cause notices. The concession made by counsel was that the Appellants' goods

ds were similar to the goods of M/s Patsan Hygiene Industries Pvt. Ltd. and that in view of Tribunal's earlier decision he had instructions not to press the Appeal. Appellants knew that their Appeal was dismissed on this concession. The Appeals against the adjudicating orders came up for hearing later. If the concessions were not under instructions the party would have now agitated. On the contrary the same counsel is again permitted to make the concession in the other Appeal. We, therefore, find it impossible to believe that the counsel made this concession without instructions from the client. In our view, it has been correctly recorded, in the order dated 22nd April, 1999, that the concession had been made under instructions. As the matter of classification has proceeded on a matter of concession of facts we do not allow the appellants to withdraw from that concession. They are now not permitted to argue on the question of classification. We, however, clarify that we have not considered the matter of classification on merits.

As regards the question of limitation, as has been stated earlier, the party filed classification list from 1986 onwards. Thus, classification list had been approved from time to time. It is only in 1991 that for the first time the classification was questioned. The only reason given for upholding the extended period of limitation is that the party had not disclosed the composition of their product and that they had not disclosed what material was used in their product. We, however, find that with each classification list a statement had been annexed showing the manufacturing process. In the manufacturing process it has been clearly mentioned that "rayon grade wood pulp" was being used. Thus, the material used was disclosed by the party.

It is on the basis of use of this material that the Collector (Appeals) holds that the product would be classifiable under Tariff Item No.48.18. Thus, all necessary material was available to the Department. There is no new material which has been discovered by the Department. In these circumstances, in our view, the adjudicating order as well as the order of CEGAT holding that the extended period is available cannot be sustained and are hereby set aside. The demands for duty and penalty for the extended period of limitation is therefore set aside.

We, however, clarify that the notices which are within time are upheld.

The Appeals stand disposed of accordingly. There will be no order as to costs.

.....J.
[S.N. VARIAVA]

.....J.
[Dr. AR. LAKSHMANAN]

.....J.
[S.H. KAPADIA]
New Delhi.
April 20, 2005.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.4365 OF 2003

COMMISSIONER OF CENTRAL EXCISE, GOA Appellant (s)

VERSUS

M/S PRIMELLA SANITARY PRODUCTS Respondent (s)

O R D E R

This Appeal is against the Judgment of the Customs, Excise and Gold (Control) Appellate Tribunal (in short "CEGAT") WZB at Mumbai dated 22nd February, 2001.

The short question for consideration is whether the Respondent was entitled to the benefit of

Notification No.175/86-CE dated 1st March, 1986 and Notification No.1/93 dated 28th February, 1993. The only ground on which the adjudicating authority had denied the benefit of the Notifications was that the Respondent was using on their products the words "Comfit Always" which was a registered trademark of one M/s Christine Hodein (I) Pvt. Ltd. The adjudicating authority held that the Assignment dated 28th June, 1987, for a consideration of Rs.100/-, was not a bona fide assignment.

CEGAT has held that in view of the Assignment it could not be said that the Respondent was not entitled to use the mark "Comfit Always". The Tribunal has held that so long as the Assignment stands, the Respondent is entitled to the benefit of these Notifications.

In our view, there is no infirmity in the order of the Tribunal. We see no reason to interfere. The Appeal stands dismissed. There will be no order as to costs.

.....J.
[S.N. VARIAVA]

.....J.
[Dr. AR. LAKSHMANAN]

.....J.
[S.H. KAPADIA]
New Delhi.
April 20, 2005.