C.C.E., Bhubaneswar-1 vs M/S. Champdany Industries Ltd on 8 September, 2009

Bench: Asok Kumar Ganguly, D.K. Jain

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7075-7076 OF 2005

The Commissioner of Central Excise, ...Appellant(s)
Bhubaneswar-I

- Versus -

M/s. Champdany Industries Limited ...Respondent(s)

J U D G M E N T

GANGULY, J.

1. Along with this appeal other appeals were heard together. There are some common questions but factually this case is different from other cases. So this judgment will govern these two appeals.

2. The respondent in these two appeals are manufacturers of carpets by interlacing yarns of three different types, namely, jute, cotton and polypropylene. It is the case of the respondent-company that in the carpets which it manufactures jute always predominates by weight over each of the other single textile material.

3. In the case of M/s. Champdany Industries Limited, at an earlier stage of the proceedings an order was passed by the Commissioner (Appeals) on 27.06.1995, whereby the Commissioner (Appeals) remanded the matter to the original adjudicating authority to decide whether the carpets manufactured by M/s. Champdany Industries Limited have separate base fabric. The Commissioner found that the said question is technical in nature and in order to remove any doubt, matter was referred to an expert body like Jute Commissioner Office for its opinion.

4. Pursuant to the said remand order, the Department drew samples of the carpets manufactured by the respondent and sent the same to the Jute Commissioner's office. The Jute Commissioner got

these samples tested by the expert body of the Jute Industry, namely, Indian Jute Industries Research Association and the report of the said association shows that jute predominates by weight over each other single textile material in the said carpets and the said carpets did not have any base fabric.

5. In the show-cause notice, which has been issued in this case, these facts are admitted. In the adjudication order passed in this case by Assistant Commissioner of Central Excise and Customs, Bhubaneswar, this fact has also been noted and from the said adjudication it will appear that the jute content in those carpets is 51.45% in B.L. and 52% in S.M. Those B.L. and S.M. are the varieties of carpets manufactured by the respondent- company and in these two Civil Appeals, namely C.A No. 7075-7076 of 2005 we are concerned with those two varieties of carpets.

6. Despite the said report, the Revenue's case is that the surface of the carpet being entirely of polypropylene, the same cannot be classified as jute carpet.

7. Apart from the aforesaid opinion of the expert, the Deputy Commissioner of Central Excise as well as Department's Chemical Examiner also visited the respondent's factory and examined its process of manufacture and tested the samples drawn on the spot. The Department's Chemical Examiner also found that those carpets do not have any base fabric and the jute predominates by weight over each other single textile material and the percentage of jute was more than 50%. This also appears from the adjudication order of the Assistant Commissioner of Central Excise and Customs, Bhubaneswar.

8. The Revenue even after accepting those reports issued a show-cause notice, inter alia, on the ground that the surface of the jute carpets was entirely of polypropylene and therefore, as per Note 1 of Chapter 57 of the First Schedule to the Central Excise Tariff Act, 1985 those carpets cannot be classified as jute carpets but are classifiable as polypropylene carpets. The said notice related to the period from December 1991 to May 1999.

9. Respondent-company, however, disputed the said contention of the Revenue and an adjudication order was passed on 26.11.1999 by the Assistant Commissioner. In the said order, the Assistant Commissioner accepted the reports referred to hereinabove and also accepted the position that in those carpets jute predominates by weight over each other single textile material and those carpets do not have any base fabric. In spite of the aforesaid position, the Assistant Commissioner relying on Chapter Note 1 of Chapter 57 held that those carpets cannot be classified as jute carpets but they are polypropylene carpets.

10. Against the said order dated 26.11.1999 the respondent-company filed an appeal before the Commissioner (Appeals) and the Commissioner (Appeals) by an order dated 13.03.2000 allowed the appeal. In the said order, the Commissioner (Appeals) held that the interpretation of the Assistant Commissioner of Chapter Note I of Chapter 57 was not correct and the Commissioner (Appeals) came to a conclusion that as per the Section Notes any product which contains two or more textile materials are to be classified as consisting of that textile material which predominates by weight over similar textile materials. It may be noted that following the classification order dated

26.11.1999 the Assistant Commissioner passed a quantification order dated 30.03.2000, but since the appeal of the respondent-company in respect of the classification order of Assistant Commissioner dated 26.11.1999 was allowed, the appeal against the quantification order was also allowed by the Commissioner (Appeals) on 25.08.2000 by following order dated 13.03.2000 in the classification proceedings.

11. Against those orders dated 13.03.2000 and 25.08.2000 the Revenue filed two appeals before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"). Thereafter, the Tribunal by an order dated 26.09.2000 dismissed both the appeals filed by the Revenue.

12. It may be noted in this connection that before the Hon'ble Andhra Pradesh High Court petitions were filed in relation to classification at the stage of show-cause notice. The High Court of Andhra Pradesh interfered in those show-cause proceedings. As the Revenue filed their appeal against those show-cause proceedings, this Hon'ble Court held by a judgment and order dated 05.05.2004 that the High Court ought not to interfere in matters of classification at the show- cause stage. Thus, the judgment of the High Court was set aside and the matter was remanded to the authority for adjudication. Thereafter, the Tribunal heard the matter afresh and dismissed the appeal of the Revenue by an order dated 05.04.2005. Against the said order of the Tribunal this appeal has been filed by the Revenue.

13. The order of the Tribunal which has been impugned herein has been reported in 2006 (193) ELT 295. In paragraph 9 at page 299 of the report, the Tribunal held that in the carpets manufactured by the respondent-company jute predominates by weight over each of the other single textile material. The Tribunal found that this has been admitted by the Assistant Commissioner in its order dated 26.11.1999 in view of the tests done by the Departmental Chemical Examiner on the spot and during the visit to the factory of the respondent-company which has also been admitted from the reports of Indian Jute Industries Research Association. Therefore, this factual position is admitted by the Revenue.

14. In view of such admitted factual position, the Tribunal held that such carpets were clearly classifiable as jute carpets as the test of predominance of jute over other single textile material is the deciding factor for classification purposes.

15. Admittedly, the case of the Revenue is that the product falls under Chapter 57 and it contains two or more textile materials. In fact that is the case of the Revenue in the Show-cause notice and in the order of the Assistant Commissioner.

16. The necessary corollary from the aforesaid stand of the Revenue is that once the goods are falling under Chapter 57, Chapter Note 1 to Chapter 57 becomes relevant. The said Chapter Note is set out below:

> "For the purposes of this Chapter, the term `carpets and other textile floor coverings' means floor coverings in which textile materials serve as the exposed surface of the

article when in use and includes article having the characteristics of textile floor coverings but intended for use for other purposes."

17. The Revenue also placed reliance on the said Chapter Note. In fact the Revenue wanted to classify the said carpets as otherwise than jute carpets by relying on the said Chapter note.

18. In our view the said stand of the Revenue is not correct. A perusal of the said Chapter note makes it clear that the same merely defines the term carpet and other floor coverings "for the purposes of this Chapter", namely, Chapter 57.

19. Here we must be conscious of the limited role played by Chapter Note. It is only to decide whether the goods in question are carpets and other textile floor coverings for the purposes of Chapter 57 or not. Once the goods are carpets and falling under Chapter 57, the role of Chapter Note 1 comes to an end. It is also the case of the Revenue that the Chapter Note 1 cannot be pressed into service for the purpose of classification.

20. Reference in this connection may be made to the relevant statutory provisions laid down in Section 2(A) and 14(A) of Section XI of the Central Excise Tariff Act, 1985. Those provisions are set out below:-

> "2(A) Articles classifiable in Chapters 50 to 55 or in Heading No. 58.06 or 59.02 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over any other single textile material."
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> "14(A) Products of Chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under Note 2 above for the classification of a product of Chapters 50 to 55 consisting of the same textile materials.
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> (B) For the application of this rule:
>
> (i) In the case of textile products consisting of a base fabric and a pile or looped surface, no account shall be taken of the base fabric;
>
> (ii) In the case of embroidery, only the base fabric shall be taken into account."
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> 21. The classification thereafter has to be covered under one heading or sub-heading of Chapter
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> 57. The question of classification of such carpets under one or other heading or sub-heading of Chapter 57 has to be decided on the basis of description of such heading/sub-heading read with the relevant Section Notes and Chapter Notes. This also flows from Rule 1 of the "General Rules for the Interpretation of the said

Schedule" and these Rules are part of the Central Excise Tariff Act, 1985.

22. Rule 1 of the said Rules provides that classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes.

23. In the instant case as per Section Notes 2(A) and 14A for the period between 1994-1995 and Section Note 2(A) read with sub-heading Note 2(A) thereafter, the inter-se classification has to be done under different headings and sub-headings.

24. Since the goods admittedly fall under Chapter 57 and consist of more than two or more textile materials, it has to be classified on the basis of that textile material which predominates by weight over any other single textile material. As in the goods in question jute admittedly predominates by weight over each other single textile material, the said Carpet could only be classified as jute carpets and nothing else.

25. This Court finds that this logic and reason is in consonance with the interpretation of the Chapter Note, Section Note and the sub- headings. The contrary interpretation given by the Revenue is not correct. In fact the Revenue wanted to classify the carpets under the residuary sub- heading 5702.90 of Heading 57.02. Both Headings 57.01 and 57.02 are set out below:

> "57.01 Carpets and other textile floor coverings, knitted, woven, tufted, or flocked, whether or not made up (excluding dari, sataranji, namdahs, jute carpets and coir carpets)
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> - In or in any relation to the manufacture of which any process is ordinarily carried on with the aid of machines:
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> 5701.11 - Not embossed 30%
> 5701.12 - Embossed 30%
> 5701.90 - Other Nil
>
> 57.02 Carpets and other textile floor coverings (other than those of
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> heading No.57.01) including floor coverings of felt, whether or not made up 5702.10 - Floor coverings of Coir Nil 5702.20 - Floor coverings of jute 10% 5702.90 - Other 30%"

26. The relevant entries from the Central Excise Tariff 1997-98 are extracted below:

> "57.02 Carpets and other textile floor coverings (other than those of heading No.57.01) knotted, woven, tufted or flocked, whether or not made up
>
> - In or in relation to the manufacture of which any process is ordinarily carried on

with the aid of machines:

5702.11 - Of coconut fibres (coir) Nil 5702.12 - Of jute Nil 5702.19 - Other 25% 5702.90 - Other Nil"

"57.03 Other Carpets and other textile floor coverings, whether or not made up 5703.10 - Of coconut fibres (coir) Nil 5703.20 - Of jute Nil 5703.90 - Other 25%"

27. The aforesaid tariff has come into effect on 23.07.1996.

28. In this connection we may refer to Notification No.50/90-CE dated 20.03.1990. From the aforesaid Notifications it would appear that the total exemption was granted in respect of jute blankets, jute felt, jute mats and mattings, jute carpets and bleached, dyed or printed jute fabrics falling under Chapter 53, 56, 57 or 63 of the Schedule to the Central Excise Tariff Act, 1985 with the condition that exemption shall not be available if the jute content is less than 50% in the aforesaid commodities.

29. Later on by a subsequent Notification No. 93/94-CE dated 25.4.1994, the said 50% has been lowered to 30%. By a subsequent Notification No.29/95-CE dated 16.03.1995, total exemption was granted in respect of floor coverings of jute.

30. On a conjoint reading of the aforesaid Tariff and the exemption Notifications issued by the Government, the stand of the Revenue cannot be sustained.

31. Apart from that the revenue's stand in this case is contrary to the decision of this Court in HPL Chemicals Ltd. Vs. Commissioner of Central Excise, Chandigarh - (2006) 5 SCC 208. Commenting on the reliance placed by the Revenue on the residuary item in Heading 38.23 (renumbered 38.24), this Court observed that the CEGAT erred in relying on the residuary article by reading the residuary heading as if it was specific heading. This Court observed as under:-

"31. ...In the present case since the goods were covered by a specific heading i.e. Heading 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down in Rule 3(a) of the Interpretative Rules set out above. As per the said Interpretative Rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description..."

32. In coming to the said conclusion, this Court relied on an earlier three-Judge Bench decision of this Court in Dunlop India Ltd. Vs. Union of India and others - (1976) 2 SCC 241, para

35. In the said paragraph this Court very elegantly clarified the position in the following words:-

"35. ...When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary

clause...."

33. That principle has also been upheld by another three-Judge Bench decision of this Court in M/s Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat - (1990) 1 SCC 532 (at page 534 para 4):-

> "4. The question before us is whether the department is right in claiming that the items in question are dutiable under tariff entry 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the department 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 had to the residuary item...."

34. It is, thus, clear that the aforesaid principle has virtually been hardened into a rule of law by reason of the consistent view taken by this Court. The Revenue's stand in this case in purporting to justify the classification of the goods manufactured by the respondent company under a residuary heading, therefore, cannot be appreciated.

35. Learned Counsel for the Revenue argued that in a case where there is some doubt relating to classification of the goods, the essential characteristic of the goods will have to be looked into. Relying on this concept of essentiality test the learned counsel argued as the exposed surface of the carpet is polypropylene fiber and not jute, these goods cannot be classified as jute carpets. It was also argued if these goods are to be classified as jute carpets, then the exposed surface of the carpets must be of jute.

36. This argument is contrary to the principle discussed above, namely, the predominance test. It is not disputed by the Revenue that by the predominance test the content of the jute in the carpet is highest and more than 50%. Polypropylene fiber has also been accepted by the Revenue as a textile material falling under Chapter 55.

37. Therefore, the mere fact that the surface of the carpet is polypropylene fiber, it does not cease to become jute carpet. So this Court is constrained to hold that this argument by the Revenue on the basis of surface or essentiality test is erroneous.

38. Learned counsel for the Revenue also argued that the common parlance test should be applied for classifying the carpets as the carpets to the common man would not appear to be jute carpet but polypropylene carpet.

39. In Collector of Central Excise, Hyderabad Vs. Fenoplast (P) Ltd. (II) - 1994 (72) ELT 513 (SC), a three-Judge Bench of this Court held that while interpreting statutes like the Excise Tax Acts or Sales Tax Acts where the primary object is to raise revenue and for such purpose the various products and goods are classified, the common parlance test can be accepted, if any term or expression is not properly defined in the Act "if any term or expression has been defined in the

enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted".

40. Going by the aforesaid principle, we cannot hold that common parlance test has any application here.

41. In laying down this preposition, the Court relied upon a decision of this Court in M/s Indo International Industries Vs. Commissioner of Sales Tax, Uttar Pradesh - (1981) 2 SCC 528.

42. Learned counsel for the Revenue argued that for the purpose of classification in this case Rule 3 of the `Rules for the Interpretation of the Schedule to the Act' should be applied and by applying the said Rule the goods manufactured by the respondent Company should be covered under the heading "others".

43. This Court is unable to accept the said submission for the following reasons.

44. In order to appreciate the said submission, the said Rule 3 (a) (b) and (c) is quoted below:-

> "3. (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration."

45. From a perusal of the said Rules it appears that the dominant intention in the said Rule, especially clause (a) thereof is that the heading which provides the most specific description shall be preferred to the heading providing a more general description.

46. In the case in hand, following the said interpretation, the goods manufactured by the respondent-company are to be classified as jute carpet or jute floor coverings.

47. Clause (b) and Clause(c) of the said Rule 3 will apply only in those cases which cannot be classified under clause (a). Since in the instant case following the dominant intention of clause

(a), the goods manufactured by the respondent- company can be classified, clause (b) and clause(c) of the said Rule need not be pressed into service.

48. Reference in this connection may be made to a three-Judge Bench decision of this Court in Commissioner of Central Excise, Nagpur Vs. Simplex Mills Co. Ltd. - (2005) 3 SCC 51. In paragraph 11 of the said report, the purport of the said Rule has been discussed. While discussing the said Rule, this Court held that the Rule having been framed pursuant to the powers under Section 2 of the Central Excise Tariff Act, 1985 is statutory in nature. Learned Judges also made it clear that for the purposes of classification primacy should be attached to the section and chapter notes along with terms of the headings. If on application of Section and Chapter Notes, `no clear picture emerges' then only can one resort to those rules.

49. In the instant case from the above discussion, it is clear from a perusal of the Chapter and Section Note, that the goods manufactured by the respondent-company can be classified as jute carpets/jute floor coverings. Thus, the argument on behalf of the Revenue cannot be accepted.

50. Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show-cause notice. It is well settled that unless the foundation of the case is made out in the show- cause notice, Revenue cannot in Court argue a case not made out in its show-cause notice. {See: Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited - (2006) 7 SCC 592, para 16}.

51. Similar view was expressed by this Court in the case of Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd. - (2007) 8 SCC

89. In paragraph 27 of the said report, learned Judges made it clear that if there is no invocation of the concerned rules in the show-cause notice, it would not be open to the Commissioner to invoke the said Rule.

52. Learned counsel for the Revenue also relied on some judgments.

53. It relied on the case of Oswal Agro Mills Ltd. and Ors. Vs. Collector of Central Excise and Ors. - 1993 Supp. (3) SCC 716. In that case the Court allowed the appeal filed by the assessee and did not accept the interpretation of the Revenue on `Toilet Soap'. Learned judges relied on the age old principle that where the words of the statute are plain and clear, there is no room for applying any of the canons of interpretation which are merely presumption in cases of ambiguity in the statute.

54. Applying the said principle in the present case, we hold that the ratio in Oswal Agro (supra) does not at all advance the case of the Revenue. Apart from that the said decision was rendered under the old Tariff Act when there was nothing like Chapter Note and Section Note. Oswal Agro (supra) has no application here.

55. Learned counsel relied also on the decision of this Court in Novopan India Ltd, Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad - 1994 Supp. (3) SCC 606. In that case, the

Court interpreted the provision of Old Tariff Act with regard to exemption and held in paragraph 16 that a person invoking an exemption provision must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, the benefit of exemption cannot be claimed by the assessee.

56. In the present case, those questions are not at all relevant as we are concerned with the provisions of the new Central Excise Act of 1985 which came into force on 22.2.1986 with Section Notes, Chapter Notes, Headings and sub-headings. Therefore, the ratio in Novopan (supra) has no relevance in the facts of the present case.

57. Learned counsel also relied on the decision of this Court in Hindustan Poles Corporation Vs. Commissioner of Cental Excise, Calcutta - (2006) 4 SCC 85. In fact the judgment in that case does not at all advance the case of the respondent. In paragraph 39 of the judgment it has been held that the residuary entry is meant only for those categories of goods which clearly fall outside the ambit of specified entries and unless the Department 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 had to the residuary item.

58. Following the said principle, as we must, in the instant case, the goods manufactured by the respondent-company fall clearly under the specified items as discussed above.

59. Revenue also relied on another decision of this Court in Kemrock Industries & Exports Ltd. Vs. Commissioner of Central Excise, Vadodara - (2007) 9 SCC 52, for the purpose of essentiality test. As noted above, there is no whisper of the essentiality test in the show-cause notice. As no case of essentiality test has been made out in the show-cause notice, the same cannot be argued for the first time before this Court. As such the judgment in Kemrock (supra) on essentiality test is of no avail.

60. For the reasons aforesaid and in view of the consistent finding on fact and law by the Commissioner (Appeals) and the Tribunal, this Court does not find any reason to upset such concurrent findings which are neither perverse nor can they be said to be based on no evidence. Therefore, the appeals filed by the Revenue are dismissed as being devoid of merit. In the facts and circumstances of this case, there will be no order as to costs.

.....J.
(D.K. JAIN)

.....J.
New Delhi (ASOK KUMAR GANGULY)

September 8, 2009