(1973) 01 BOM CK 0005

In the Bombay High Court

Case No : Appeal No. 12 of 1967 in Miscellaneous No. 465 of 1966

Chimanlal Beliram Mehta APPELLANT

Vs

M.G. Vaidya RESPONDENT

Date of Decision : 24-01-1973

Acts Referred:
Finance Act, 1961 — Section 13

Citation : (1973) 01 BOM CK 0005

Hon'ble Judges : Tulzapurkar, J

Bench : Single Bench

Judgement

Tulzapurkar, J.—This appeal has been preferred by the two appellants whose Misc. Petition No. 465 of 1966 for the issue of a Writ of Certiorari or a Writ of Mandamus was summarily dismissed by Justice K. K. Desai, as he then was, on 26th October, 1966.

2. The few facts giving rise to the filing of the Petition may be stated : The two petitioners are carrying on business in the name and style of ''The Popular Drugs Coy'' which firm manufactures a product known as "Ensola Conc". It appears that prior to 6th September, 1964 it was a sole proprietary-business of the 1st petitioner Chimanlal Beliram Mehta but on 6th September, 1964 the 2nd Petitioner joined him as a partner and since then the said product has been put in the market as of the partnership firm. It may also be stated that The Popular Drugs Coy. put this product ''Ensola Conc'' in the market for the first time in September, 1961. The product is manufactured in the form of two liquids - ''Ensola Conc 1'' ''Ensola Conc 2'' - which are to be mixed in equal quantities and the mixture is applied to the hair externally to give the hair a black colour. The composition of each is as follows : "Ensola Conc 1" is in the form of clear yellow coloured liquid and is an aqueous solution of lead salts, glycerine and perfumery material while ''Ensola Conc 2'' is colourless clear liquid and is an aqueous solution of Sodium Thiosulphate, glycerine and perfumery materials and the same is undoubtedly a hair darkener. Since the commencement of its production

the petitioners have been selling the said product as hair darkener, the literature supplied along with the same indicating the same to be a hair dye.

3. Under the Finance Act, 1961 (Act No. 14 of 1961) by Section 13 thereof the First Schedule to the Central Excises and Salt Act, 1944 was amended and Item No. 14F was added in the First Schedule. The said Item No. 14F reads as follows :-

''COSMETICS & TOILET PREPARATIONS NOT CONTAINING ALCOHOL OR OPIUM, INDIAN HEMP, OR OTHER NARCOTIC DRUGS OR NARCOTICS NAMELY :-

(i) Face Cream and snow.

(ii) Face Powder.

(iii) Talcum Powder.

(iv) Hair Lotion, Cream and Pomade."

4. After this amendment the Collector of Central Excise, Bombay issued a Trade Notice bearing No. 21(MP)/General 1961, dated 6th March, 1961 containing instructions providing for the supplemental matters and by that trade notice it was published and made known to all the traders by the Collector of Central Excises, Bombay that with the introduction of the Finance Bill in Parliament on 28-2-1961 certain articles including the articles mentioned in Item No. 14F had been subjected to Central Excise Duty from the Midnight of 28th February/1st March, 1961 at the rate mentioned against each. Paragraph 2 of that Trade Notice contained certain exemptions to new excisable commodities granted by Government of India by issue of notification and certain clarifications regarding assessment of new commodities were also given and amongst clarifications so given one pertained to the item of Cosmetics and Toilet Preparations and the clarification read thus :

"Cosmetics and Toilet Preparations :

Under the Tariff, only Face Cream and snow, Face Powder, Talcum Powder, Hair Lotions, - Creams and Pomades are liable to duty. The other products coming under Cosmetics and Toilet preparations will not be liable to duty."

5. Prior to 19th January, 1962 the Superintendent of Central Excise, Bombay, Division (IV), collected from the petitioners samples of ''Ensola Conc''. Since the samples so obtained were found to be inadequate, fresh samples of the product were obtained in April, 1962 and these samples were examined by the Deputy Chief Chemist, Bombay and on chemical analysis by the Deputy Chief Chemist it was found that the product - ''Ensola Conc'' Hair Darkener could be liable to excise duty under Tariff Item No. 14F(iv) and therefore the Superintendent of Central Excise by his letter dated 7th July, 1962 gave an intimation of the result of the said analysis to the Petitioners. Ultimately the Assistant Collector of Central Excise, Bombay by his order dated 27th July, 1962 informed the Petitioners that their product ''Ensola Conc'' Hair Darkener was liable to Central

Excise duty as falling under Tariff Item No. 14F(iv) and called upon the Petitioners to pay the Central Excise duty for all the past clearances. The petitioners preferred an appeal on 27th September, 1962 to the Collector of Central Excise, Bombay. After personal hearing was given to the Petitioners in that appeal the Collector passed an Order dated 3rd June, 1964 confirming the view of the Assistant Collector, Central Excise, Bombay and dismissed the appeal. The Collector gave a lengthy and reasoned order while dismissing the appeal. On 25th November, 1964 the Petitioners preferred a revision to the Central Government. By letter of the same date the petitioners also sought personal hearing, in as much as, complicated questions were involved and various texts by reference to which the questions had to be decided were required to be cited and discussed but it appears that the personal haring was refused. By their advocate''s letter dated 16th January, 1965 the petitioners put on record their disappointment at the Government''s decision not to grant personal hearing at the revisional stage and took an opportunity of pointing out to the Government that the Director of Drugs and Control Administration, Maharashtra State, had classified the product as a hair dye and as such the Collector''s decision that their product was a hair lotion and therefore chargeable to duty under Tariff Item No. 14F should be set aside. The Central Government by an order dated 10th January, 1966 dismissed the Revisional Application by observing as follows :

"The Government of India have carefully considered all the points made by the Applicants, but they regret that they do not find any justification for interfering with the Order-in-appeal, which is correct in law and based on facts. The revision application is accordingly rejected."

6. Against the said Decision of the Central Government dated 10th January, 1966 in which all the previous orders of the Assistant Collector of Central Excise and the Collector of Central Excise had merged, the petitioners preferred Misc. Petition No. 465 of 1966 to this Court whereby they prayed for a Writ of Certiorari or any other appropriate writ for quashing the orders dated 27-7-1962 (passed by the Assistant Collector), 3-6-1964 (passed by the Collector of Central Excise) and 10-1-1966 (passed by the Central Government in revision) and for a mandamus directing the Excise authorities and the Central Government to withdraw or cancel the said orders and to refund to the Petitioners the sum Rs. 79,758/52 illegally recovered from them as per particulars annexed as Exh. ''I'' to the Petition. This Petition was summarily rejected by Justice K. K. Desai on 26th October, 1966. The petitioners have come up in appeal.

7. Mr. Joshi appearing for the appellants - petitioners - urged two points in support of the appeal, though he did not seriously press the first point but wanted the Court to accept the Second point and he sought a decision of this Court on that point. He first contended that the order passed by the Central Government on 10th January, 1966 was not a speaking order, inasmuch as, it did not give any reasons nor did it set out the points that were sought to be considered nor the reasons why it had concurred with the order of the Lower

appellate authority and therefore the impugned order of the Central Government was liable to be set aside by this Court and this Court should send the matter back to the Government for decision on the main point involved in the case on merits afresh. Second he contended that on merits it was an erroneous view which has been taken not only by the Central Excise authorities but also by the Central Government on the question whether the petitioners'' product ''Ensola Conc'' was chargeable to duty under Tariff item No. 14F of the First Schedule to the Central Excises and Salt Act. According to him, the petitioners'' said product reason of its composition, ingredients and the use to which it put, could by no stretch of imagination be classified as a Hair Lotion and should have been classified as a Hair Dye not liable to excise duty at all and on this aspect all the authorities had gone wrong and therefore in view of the material that was available on record this Court should come to the conclusion that the product was not chargeable to excise duty. We must state here that when Mr. Joshi mentioned these two points at the commencement of his argument, we distinctly asked him as to whether he could like us to deal with the first point which he wanted to urge or whether he wants to press a decision on the second aspect of the matter on merits in which case the first point would not survive and Mr. Joshi categorically stated that he really wanted us to decide the second aspect which really goes to the root of the matter and wanted a decision of this Court on merits of the question rather than on the first point which would merely entail dragging on the proceedings further. In view of this position which Mr. Joshi clarified to us, we called upon Mr. Joshi to argue the matter on the merits of the question involved in the case.

8. The only issue which really arises for our consideration in this appeal is whether the petitioners'' product viz. ''Ensola Conc'' would properly fall under Tariff Item No. 14F(iv) in the First Schedule to the Central Excises and Salt Act, 1944 and the relevant item reads as follows :-

"14F : COSMETICS & TOILET PREPARATIONS NOT CONTAINING ALCOHOL OR OPIUM, INDIAN HEMP - OR OTHER NARCOTIC DRUGS OR NARCOTICS, NAMELY :-

(i) * * * (ii) * * * (iii) * * *

(iv) Hair Lotion, Cream and Pomade".

9. The Excise authorities have classified the Petitioners'' product as Hair Lotion falling within the aforesaid Tariff item and for coming to this conclusion it would be material to mention that the said authorities, particularly the Collector of Central Excise, had before him the report of the Deputy Chief Chemist, Bombay as well as the report of the Chief Chemist, Central Revenues, New Delhi and several books and treatises on which the petitioners had relied at the time of hearing of the appeal and it was on consideration of the entire material that was before him that the Collector of Central Excise had come to the conclusion that the petitioners'' product fell within the specification of Hair Lotion and in the ultimate analysis the reasoning of the Collector of Central Excise is to be found in

para 10 of his judgment which runs as follows :

"The point at issue is whether ''Ensola Conc'' hair Darkener is a hair lotion liable to duty or not. Lotion has been defined in volume I as a liquid preparation intended for external use usually with an aqueous menstrum except in those cases where a cooling effect is desired when alcohol is employed. Under the main head ''Lotions'' the author has given the formula of different lotions. A sub-heading under the main head is Hair Lotions, where they have given a number of formulas of Hair Lotions. It will be appreciated that the main definition of the lotion still continues to be the original definition. It does not matter whether the lotion is used for the hands, face, body or hair. It is true that Ensola darkens the hair but it is a mixture of different chemicals in water which is the media to hold different chemicals like glycerine and other inorganic salts like lead acetate and sodium thiosulphate. The usual contents of a hair lotion besides natural-organic substance are some metallic salts like lead, mercury and zinc etc. This particular product of the Appellants contains lead acetate and sodium thiosulphate. It also contains as much as 90% of water and the rest is medicaments. As such it is clear that Ensola which is nothing else but 90% of water and the rest other medicaments, is nothing else but a hair lotion although it serves the purpose of darkening the hair. As such I agree with the Chief Chemists findings that Ensola is a hair lotion and is correctly liable to duty under item 14-F(iv) of the Central Excise Tariff."

10. Mr. Joshi for the appellants-petitioners has challenged the above reasoning, principally on the ground that if we look at the composition and the ingredients of the petitioners'' product viz. ''Ensola Cone'' it would appear clear that apart from 90% of water and other perfumery materials, the main ingredients were Lead acetate and Sodium thiosulphate and it is these latter two ingredients which had the property of imparting colour to the hair when the product was applied to the human hair and therefore these two organic ingredients, viz. Lead acetate and Sodium thiosulphate have all along been regarded as dye or hair dyes which had the property of imparting such colour to the hair and it is the Chief ingredient which would go to distinguish the petitioners'' product as hair dye and not hair lotions which are ordinarily used for washing the hair or dressing the hair etc. He further pointed out that in his report the Deputy Chief Chemist, Bombay had compared the Petitioners'' product to another product of another manufacturer called ''Ronny for Grey Hair'' the latter of which had been considered as falling under the Tariff Item No. 14F and it was on account of similarity that the Deputy Chief Chemist had come to conclusion that the petitioners'' product should also be classified as hair lotion. According to Mr. Joshi, the reason why the product ''Ronny for Grey Hair'' was classified as hair lotion was that the manufacturers of the product themselves had advertised that product as a hair lotion and having advertised the product in this fashion it was not possible for them to contend otherwise. But simply because the product like ''Ronny for Grey Hair'' was classified as hair lotion it did not follow that the petitioners'' product viz. ''Ensola Conc'' should also be similarly classified. He also

pointed out that even the Chief Chemist, Central Revenues, New Delhi, on whose report the Collector of Central Excise had relied, had merely relied upon several formulas given by Wooley and Forrester in their book entitled ''Pharmaceutical Formulas'' Vol I, 10th Edition on pages 349 to 364 in which Hair Lotion had been described as ''Transparent Restorer'' and that under the same Chapter Hair Lotion and Hair Dyes had also been mentioned and according to Mr. Joshi, simply because in this Volume I of Pharmaceutical Formulas by Wooley and Forrester such a classification was found it did not follow that hair dye should also be regarded as hair lotion and for this purpose he invited our attention to certain classifications which appear in Vol. II of the same book entitled ''Pharmaceutical Formulas'' by Wooley and Forrester where Hair Lotions, Hair Restorers and Hair Dyes had been separately treated. Mr. Joshi emphasized the fact that the petitioners'' product ''Ensola Conc'' does not contain any of the ingredients which are active ingredients in Hair Lotion and Hair Tonics but far from containing any such ingredients which are active in Hair Lotion and Hair Tonics it contains ingredients which are active in Hair Dyes lending colour to the Hair when applied. He, therefore, contended that having regard to the composition and the ingredients of the petitioners'' product it could never be classified as Hair Lotion and therefore the decision of the Central Excise authorities as well as the Central Government deserves to be quashed or set aside.

11. In our view, it is not possible to accept any of these submissions of Mr. Joshi for more than one reason. In the first place, it is well settled that when a Court is dealing with the entries appearing in the Statutes like Central Excise Act or Sales Tax Act etc. the entries appearing in such Statutes are to be understood not in their technical or scientific or laboratory sense but they are to be understood in commercial sense, that is, in the sense in which the persons dealing with those items in the market understand them and it must be stated very clearly at this stage that from this aspect of the matter no material whatsoever was placed by the Petitioners either before the Central Excise authorities or before the Central Government or before the trial Court when they preferred their petition for the desired writs. From the entire material on record it seems to us very clear that the petitioners themselves had recourse to special works of pharmaceutical formulas or on cosmetics; for instance, reliance was placed by the petitioners on book entitled ''Pharmaceutical Formulas'' Vol. I and Vol. II by Wooley and Forrester, which volumes are nothing but the Chemist and Druggist Book. The Cosmetics Science and Technology by Edward Sagarin deals with the science of cosmetics and the particular branch of Chemistry and Technological developments that had taken place in that branch. Reliance was also placed by them upon a well known author William A. Poucher, an authority on the subject of Perfumes, Cosmetics and Soaps and the Treatise written by him on that subject. In other words, no attempt was made to place before the concerned authorities the commercial sense in which the persons dealing with the subject understood the terms ''Hair Lotion'' but the petitioners themselves resorted to scientific or technological meaning of the term ''Hair Lotion''. And it is this very

material which was placed before the lower authorities that was pressed into service by Mr. Joshi in this appeal.

12. Secondly, even if the question is approached from the aspect from which Mr. Joshi wants us to approach, it seems to us rather difficult to accept this contention. It is true that the petitioners'' product ''Ensola Conc'' contained, apart from 90% water and perfumery material, ingredients like Lead Acetate and Sodium Thiosulphate, the ingredients which have the properties of giving colour to the hair. It is also true that the petitioners have not advertised their product as any Hair Lotion or Pomade or Cream or anything of the kind but the same has been advertised as Hair Darkener. In other words, the product is intended to be used solely for darkening hair or blackening grey hair. But the question is whether even such a product is commercially known as hair lotion or not, for it is in that sense that the relevant item under the tariff will have to be understood and in this context it would be relevant to refer to a couple of passages appearing in the standard books on which Mr. Joshi has relied which would go to show that the two expressions, viz., hair lotion and dyes are not used in contradistinction with one another but are and could be used interchangeably in the commercial world. In his book entitled ''Perfumes Cosmetics and Soaps'' the learned author William A. Poucher under Chapter ''Hair Preparations'' had described Hair Lotions and Tonics as follows :

"Hair Lotions and Tonics are frequently the subject of a jest, as they are expected to make hair grow on guaranteed specific, they undoubtedly have the baldest heads. While they may not be a stimulating effect upon the hair follicles, and the friction produced either by the fingers or by a fairly stiff brush is not by any means a negligible factor contributing to their efficacy."

13. Then follows the list of ingredients of various types. The above passage makes it very clear that hair lotion and tonics are normally expected to make hair grow on the baldest heads. In other words, they could be regarded as hair restorer or hair grower and for the preparation of which the ingredients have been detailed by him in the list which follows the above quoted passage. Under the chapter ''Hair Dyes'' at page 94 of the Book the same learned author has described Hair Dyes as follows :

"The modern method of applying lead to the hair is a little more scientific and free from the risk of plumbism. The success of the application depends upon the fresh preparation of lead sulphide in clear solution. This is effected as follows :

14. In other words, for preparation of hair dyes the ingredients like lead acetate and sodium thiosulphate are prominent and they serve as hair darkener. In another standard book called ''Hair Dyes and Hair Dyeing Chemistry and Technique'', on which also reliance has been placed by the Petitioners in their petition, on page 33 of Chapter IV Lead Dyes as being the ingredients of hair dyes are described as under :

"LEAD DYES

Most if not all of the Hair Restorers on the market are actually not restorers but simply dyes, usually with lead basis.

Innumerable formula for the lead dyes have been published the chief ingredients being lead acetate and precipitated sulphur or less frequently lead acetate and sodium thiosulphate."

15. In other words, while describing the ingredients of several formulas for lead dyes the learned author himself has clearly stated that most if not all of the Hair Restorers on the market are actually not restorers but simply dyes, usually with lead basis. It seems to us very clear from this observation of the learned author that several such products which are nothing but dyes usually with lead basis have been known as Hair Restorers, an achievement which hair lotions and Hair tonics are expected to achieve. This, to our mind, clearly suggests that it is not possible to make a clear cut distinction between hair lotion and hair dye for the purpose of classifying the two differently so that only the former would fall under the tariff and the latter would not. In fact, in the book entitled ''Pharmaceutical Formulas'' Vol. I by Wooley and Forrester, on which the Chief Chemist of Delhi has relied and on which also the Collector of Central Excise has relied clearly bring out the fact that even the formulas which go to make hair dyes have been included in the general chapter headed as ''Lotion'' as also the sub-chapter ''Hair Lotion''. In Vol. I of this book at page 349 the general chapter ''Lotion'' commences and it runs up to pages 364. Between pages 349 and 364 several formulas pertaining to various lotions, hair dyes, hair restorers, etc. have been indicated and set out fully. In fact the sub-chapter ''Hair Lotions'' commences at page 357 and in this sub-chapter dealing with ''Hair Lotions'' we find at page 362 a sub-head ''Sulphur Hair Restorers'' and under the sub-heading formulas which have lead acetate and sodium thiosulphate as their ingredients have also been mentioned and what is more under formula IV under the sub-head sulphur is mentioned as Lotion Plumbiet Sulphuris. In view of the above, it seems to us clear that even in the scientific text books and technological books like Pharmaceutical Formulas, Formulas which have lead acetate and sodium thiosulphate as their ingredients have been considered under the general heading ''Lotion'' and sub-heading ''Hair Lotion''. It is true, as Mr. Joshi has pointed out, in Vol. II of Pharmaceutical Formulas the formulas have been considered a little differently. But as has been pointed out by the Collector of Central Excise, in the preface to the 11th Edition it has been stated that the Pharmaceutical Formulas have been divided into two volumes, the first comprising formulas official and non-official of essentially pharmaceutical character and the second the numerous classes of domestic architectural photographic and other recipes associated with the business of a chemist and druggist and it has been further stated that these details have been explained in the preface to the 10th Edition. The Collector has further pointed out that the scrutiny of the two volumes revealed to him clearly that there was a considerable amount of duplication in the two volumes and as such it would be difficult to draw an inference one way or the other from the mere fact that in the second

volume some sort of distinction is made and formulas are treated in a different manner. We find no reason to take a different view from the one taken by the Collector of Central Excise in the matter. From the point of view of composition and the ingredients of the product of the Petitioners, therefore, it will not be possible to accept Mr. Joshi''s contention, that the Petitioners'' product should not be regarded as hair lotion. In our view, the use of the product as hair Darkener though a relevant factor, would not be determinative of the matter.

16. In the circumstances we feel that the order passed by the Excise authorities and which have been confirmed by Central Government by its order dated 10th January, 1966 seems to be justified and there is no reason for us to interfere with the order passed by Justice K. K. Desai who dismissed the Petitioners'' Petition for writ. In the result, the appeal fails and the same is dismissed with costs.

17. Liberty to the respondents'' Attorneys to withdraw Rs. 500 deposited by the appellants towards the cost of the petition.

