(1994) 12 BOM CK 0051

In the Bombay High Court

Case No : Writ Petition No. 84 of 1992

Colfax Laboratories (India) Limited and Another — APPELLANT

Vs

The State of Goa and Others — RESPONDENT

Date of Decision : 22-12-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Drugs and Cosmetics Act, 1940 — Section 16(1)
Drugs and Cosmetics Rules, 1945 — Rule 71
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 3
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 12, 44, 68, 68(2), 72

Citation : (1996) 5 BomCR 191

Hon'ble Judges : E.S. Da Silva, J;A.P. Shah, J

Bench : Division Bench

Advocate : A.H. Hidayatulla, V.B. Nadkarni, Vikram Nadkarni, Singbal, P. Kamat and T. Nasnodkar, for the Appellant; T.R. Andhyarujina, A.G., M.S. Usgaonkar, K.J. Presswala, C.M. Mehta and S.S. Usgaonkar, for the Respondent

Judgement

A.P. Shah, J.—The 1st petitioner is a company registered under the Companies Act, 1956 (''the Company'' for short). The Company is having a factory at Curti, Ponda, Goa, where it manufactures After Shave Lotions, which are liable to excise duty under the Medical and Toilet Preparations (Excise Duty) Act, 1955 (''the Act'' for short). Until around 1984 the Company classified the After Shave Lotions manufactured by it as toilet preparations under Item 4 of the Schedule to the Act. By a letter dated January 14, 1985, the Company applied to the Commissioner of State Excise, Government of Goa for re-classification of its product "Old Spice After Shave Lotion" as medicinal preparation under the Act. The said application was entertained by the then Commissioner of State Excise who vide her order dated March 23, 1985 re-classified Old Spice After Shave Lotion as medicinal preparation for levy of excise duty under the Act. By another order dated June 12, 1985, the Commissioner of State Excise further classified Old Spice After Shave Lotion under Item 1(i)(b) of the Schedule to the Act.

2. In 1989 another company by name M/s. PJM Pharmaceuticals Private Limited (''M/s. PJM'', for short) made an application to the Commissioner of State Excise dated February 2, 1989 to manufacture, inter alia, its product "Blue Stratos After Shave Lotion" under Loan Licence of the company. The said M/s. PJM intimated to the Commissioner of State Excise that the duty payable shall be under Item 1(i)(b) of the Schedule.

3. By a demand dated March 13, 1991, issued under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1965 (''the Rules'' for short), the company was called upon to make payment of an alleged short levy of Rs. 92,43,684.08 in respect of Blue Stratos After Shave Lotion cleared between April 1989 to March 11, 1991. Similarly, by a demand dated May 15, 1991, the company was called upon to pay Rs. 17,73,18,361.20 ps. in respect of Old Spice After Shave Lotion cleared between April 1, 1985 to May 15, 1991. The said demand notices appear to have been issued on the basis that After Shave Lotions are toilet preparations and as such duty payable is 100% ad valorem and not under Item 1(i)(b) of the Schedule. However, these were ex parte demands without prior show cause notices or an opportunity of hearing. The company challenged the said demand notices by two separate Writ Petitions bearing Nos. 101 of 1991 and 351 of 1991 in this Court. By orders dated August 22, 1991 and September 23, 1991, this Court, inter alia, directed the Excise Commissioner to treat the said demand notices dated March 13, 1991 and May 15, 1991, as show cause notices and to supplement the same by any additional ground or materials if he chose to do so and to thereafter serve a supplementary memorandum and also to take final decision in the matter after giving an opportunity of hearing to the company.

4. Pursuant to the orders passed by this Court, the Excise Commissioner issued supplemental memoranda dated September 6, 1991 and September 30, 1991. The company filed replies to both the supplemental memoranda taking a stand, inter alia, that their After Shave Lotion had to be classified as medicinal preparations. By two separate orders both dated November 7, 1991, the Commissioner held that under the Act he has no powers to decide the issue of classification of goods and that the said issue of classification i.e., whether the said goods are to be treated and continued to be treated as genuine medicinal or toilet preparations for the purposes of the Act needs to be referred to the Central Government for its decision under sub-rule (2) of Rule 68 after taking advice from the Standing Committee constituted under sub-rule (1) of the said Rules. The Commissioner further held that the notices issued under Rule 12 in respect of "Old Spice" were unreasonably delayed as issued after six years of the clearances being made and therefore barred by limitation. In respect of "Blue Stratos", the Commissioner held that the demand, if any, (after the question of classification was decided by the Central Government) would be only raised as it was a case of inadvertence and/or misdescription within the meaning of Rule 11, for a period of six months prior to the issue of the notice.

5. Against the said order dated November 7, 1991, the Secretary (Finance) has filed appeals under Rule 127 of the Rules to the Government of Goa, being Appeal Nos. 1 of 1991 and 2 of 1991. The said Appeals are pending before the Government of Goa.

6. The company has filed this petition under Article 226 of the Constitution questioning the legality and validity of the orders of the Commissioner dated November 7, 1991 insofar as they purport not to decide the correct classification of After Shave Lotions manufactured by the company and to refer the issue of classification of the goods to the Central Government for taking the advice of the Standing Committee under Rule 68 of the Rules. The company has also questioned the action of the State Government in filing the appeals under Rule 127 mainly on the ground that such appeals are not maintainable. The company has also challenged the competence of the State Government to hear the appeals on the ground of bias mainly on the basis of certain debates which took place on the floor of the Legislative Assembly of Goa.

7. At the outset, it is required to be noted that in their statutory appeals through the Secretary (Finance), the respondents have also challenged that part of the order of the Excise Commissioner holding that the issue of classification of goods needs to be referred to the Central Government in accordance with Rule 68 of the Rules. In the counter affidavit filed by the respondents, it has been reiterated that the reference to the Central Government was completely illegal and unwarranted. Thus, both the parties are interested in challenging that part of the impugned order so far as it makes a reference to the Central Government, since it was pointed out by the learned Counsel for both the sides that Rule 68 has no application to the facts of the present case.

8. Although there was virtual agreement between the learned Counsel for the parties as far as interpretation of Rule 68 is concerned, there is serious dispute about the jurisdiction of the authorities under the Act to classify a preparation either as medicinal preparation or toilet preparation. But before we advert to the jurisdictional issue, it is necessary to decide whether the Excise Commissioner was right in holding that the issue of classification has to be referred to the Central Government for taking advice of the Standing Committee under Rule 68 of the Rules. In order to appreciate the submissions of the learned Counsel, it will be necessary to make a brief reference to section ''C'' of the Rules under the title "Classification of Medicinal and Toilet Preparations containing Alcohol". Rule 60 under the said section C provides for maintenance of restricted list of preparations, which are considered as capable of being misused as ordinary alcoholic beverage. Then Rule 68 provides for constitution of Standing Committee and its functions and the said Rule reads as follows :

"68. Standing Committee and its functions :

(1) The Standing Committee referred to in Rule 60 shall consist of the following as its members:

(i) The Drugs Controller of the Government of India;

(ii) the Chief Chemist Central Revenues Control Laboratory;

(iii) one pharmacologist to be nominated by the Central Government;

(iv) the Adviser in Indigenous systems of Medicine, Ministry of Health, Family Planning and Urban Development :

(Provided that the Drugs Controller, the Chief Chemist or the Adviser may, for reasons to be recorded by him in writing, depute the Deputy Drugs Controller, the Deputy Adviser in Indigenous System of Medicines, as the case may be, to attend any meeting of the Committee on his behalf.)

The Committee shall advise the Central Government on all matters connected with the technical aspects of the administration of the Act and their rules and, in particular, on the question whether ---

(i) a particular preparation is entitled to be treated, or to continue to be treated, as a genuine medicinal or toilet preparation for the purposes of the Act;

(ii) and if so, whether it should be treated, or continue to be treated, as a restricted or an unrestricted preparation.

(2) The Committee may tender such advice, on the motion of the Central Government and may make such investigation as it or the Central Government considers necessary, and the Central Government may take, on such advice, such decision as that Government thinks fit.

(3) ....

(4) ....

(5) ...."

9. On plain reading of the provisions of Rule 68, it is seen that the Standing Committee cannot assume jurisdiction to decide the classification of the product unless the product is as such capable of being misused or consumed as an alcoholic beverage. On closer examination of Rule 68 in the context of Rule 60, it is clear that the object of constituting the Standing Committee is to decide the classification of a product provided the product is as such capable of being misused or consumed as an alcoholic beverage. Thus the scope of Rule 68 is confined only to the question whether the medicinal preparation is either restricted preparation or non-restricted medicinal preparation. As far as the present case is concerned, admittedly, all the After Shave Lotions are denatured and so are incapable of being consumed as alcoholic beverages and the Standing Committee could, therefore, not decide the issue of classification. Moreover, the jurisdiction of the Standing Committee is purely advisory and it gives its advice only on a motion by the Central Government. In other words, unless such motion is made by the Central Government, the classification cannot be decided by the Standing Committee. It is also evident from Rule 68 that even after the Standing

Committee gives such advice, it is left to the Central Government to make such decision in respect thereof as it thinks fit. We have, therefore, no hesitation to accept the submission that the Excise Commissioner was in error in referring the issue of classification of the company''s product to the Central Government for decision as per Rule 68 of the Rules.

10. After having held that the reference to the Central Government under Rule 68 was erroneous, the next question which naturally falls for our consideration and which is extensively argued before us with equal vehemence from both sides is whether the authorities under the Act have power to classify the preparation as either medicinal preparation or toilet preparation. Mr. Hidayatulla, learned Counsel for the petitioners says that having regard to the objects and definition of charging section 3 and the machinery provided thereunder for levy, assessment and collection of the excise duty as well as for licence, the Excise Commissioner has an independent power of levy and assessment as well as issue licences, which would include classification of goods. According to Mr. Hidayatulla, the Act and the Rules provide for a complete machinery of levy, assessment and recovery of the excise duty on medicinal and toilet preparations and also for issue, grant, renewal, alteration, suspension and cancellation of a licence to manufacture dutiable goods. Thus, according to Mr. Hidayatulla, the Excise Officer appointed under the Act is competent to determine the classification of the goods for the purpose of levy of duty under the Act and the Rules as well as to grant appropriate licence in accordance with the definition given in the Act. Mr. Andhyarujina, learned Counsel for the respondents, on the other hand, contends that on a true and correct construction of the Rules and particularly Rule 94 of the Rules, the Excise Commissioner is bound to classify the goods for the purpose of levy of excise duty under the Act and the Rules as per and in accordance with the licence issued under the Drugs & Cosmetics Act, 1940 (''the Drugs Act'', for short). Mr. Andhyarujina further contends that the nature of the Act is essentially a revenue gathering statute whereas the Drugs Act is the proper statute for controlling a drug or cosmetic and hence the scheme of the Act is to rely upon the requisite licence obtained by the manufacturer under the Drugs Act in accordance with Rule 94 of the Rules and there is no scope for any independent classification of the goods either under the Act or the Rules. Mr. Andhyarujina submits that since admittedly the licence issued to the company under the Drugs Act is a licence to manufacture cosmetics and not drugs, it is not open for the Excise Commissioner to classify the goods as medicinal preparations.

11. With a view to appreciate these rival submissions made at the bar, it would be necessary to examine the scheme of the Act and the Rules framed thereunder. The Act is enacted by the Parliament under Entry 84 of List I of Schedule VII to the Constitution. On bare perusal of long title and the preamble of the Act, it is seen that it is enacted to provide for levy and collection of the duty of excise on medicinal and toilet preparation containing alcohol, opium, Indian hemp or other narcotic drug or narcotic. Section 2(g) and section 2(k)

contain the definitions of "medicinal preparations" and "toilet preparations" respectively and they read as follows :

"2(g) "medicinal preparation" includes all drugs which are a remedy or prescription" prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals;

2(k) "toilet preparation" means any preparation which is intended for use in the toilet of the human body or in perfuming apparel of any description, or any substance intended to cleanse, improve or alter the complexion, skin, hair or teeth, and includes deodorants and perfumes."

12. Section 3 of the Act is charging section which provides that there shall be levied duties of excise at the rates specified in the schedule of "suitable goods" manufactured in India. Section 2(c) of the Act defines "dutiable goods" as medicinal and toilet preparations specified in the Schedule as being subject to the duties of excise levied under the Act. The Schedule to the Act contains 4 Items. Item Nos. 1, 2 and 3 cover "medicinal preparations" and Item No. 4 is for "toilet preparations". Item No. 1, which covers Allopathic medicinal preparations is further divided into medicinal preparations containing alcohol which are not capable of being consumed as ordinary alcoholic beverages and those capable of being consumed as alcoholic beverages. These subheadings are further divided for duty purposes and the rate of duty is specified separately for patent or proprietary medicine falling under Item No. 1(i)(a) and "others" falling under Item Nos. (i)(b). Similarly the rate of duty is specified against each sub-heading of the other Items listed in the Schedule. Section 5 of the Act deals with recovery of sums due to Government and provides that the Excise Officer, empowered by the Rules to levy duty of excise or required the payment thereof, may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or are due. Then section 6 of the Act provides that no person shall engage in the production or manufacture of any dutiable goods or any specific component parts or ingredients thereof or of specified container of such goods or lables of such containers except under and in accordance with the terms and conditions of the licence granted under the Act. Section 19 empowers the Central Government to make rules to carry out the purposes of the Act.

13. Turning then to the Rules framed by the Central Government, section A of Chapter IV of the Rules deals with the manufacture in bond of dutiable goods. Rule 44 of the Rules provides that the officer incharge shall be responsible for collection of duty and penalty, if any, at the prescribed rate before any dutiable goods are allowed to be removed from the premises. Rule 72 provides that all goods brought for warehousing shall be produced to the officer incharge together with relevant documents and shall be assessed to duty prior to entry into warehouse and details thereof shall be noted in the warehouse register maintained in Form RG 5. Rule 81 provides that no goods shall be removed from any warehouse except that when the licensee desires to remove the goods on

payment of duty he shall make an application in Form AR-2 to the proper officer who shall, thereupon, assess the amount of duty leviable on the goods and on production of evidence that the same has been paid shall allow the goods to be cleared. Form AR-2 as prescribed under the Rules is composite form which in one part contains the declaration of the manufacturer/assesses and in the second part contains Memorandum of Assessment which enables the proper officer to assess the goods thereon based on the declaration of the assessee.

14. Chapter VI of the Rules contains the provisions relating to the licensee. Rule 82 provides for procedure for obtaining licence. Rule 83 provides that every application for a licence shall be made in the prescribed form. Rule 84 provides that on receipt of the application, the Licensing Authority may make such enquiries for verification of the details stated in the application and also such other enquiries and if the Authority is satisfied that the conditions required for the licence have been complied with, he shall grant the applicant an appropriate licence. Rule 85 provides that every licence granted or renewed shall be for a period not exceeding one year. Rule 86 provides that the licensing authority may at any time call for any licence and may amend or alter, or may tender to the licensee a new licence in accordance with any further conditions which may be prescribed. Rule 91 provides for additional rules specially applicable for applying for a licence to manufacture medicinal and toilet preparations in a bonded/non-bonded manufactory. Under the said Rule 91, a person desiring to obtain a licence is required to furnish certain particulars including the kind and number of a licence held by him under the Drugs Act. Rule 94 of the Rules, which is of considerable significance in this case, provides that no licence for the manufacture of medicinal or toilet preparations or renewal of such licence thereof shall be granted to an applicant unless he holds requisite licence under that Act (i.e. Drugs Act) for the manufacture of the said medicinal preparations. We shall deal with Rules 91 and 94 in more detail at a later stage. Then provisions of section 2(d) and Rule 2(XV) define the term "Excise Officer", "Proper Officer" respectively, whereas Rule 2(VIII) defines the term "Excise Commissioner". Rule 5 provides that the Commissioner may perform all or any of the duties or exercise all or any of the powers assigned under the Rules.

15. On examination of the provisions of the Act and the Rules, it is clearly seen that the Act is a specific Act dealing with levy of excise duty on medicinal and toilet preparations, inter alia, containing alcohol. The Act is a taxing statute, which contains charging section and provides machinery for collection of duty. Section 3 of the Act read with Rules 44, 72, 74 and 81 provides for levy of excise duty on dutiable goods at the rates specified in the Schedule. It is well settled that the term "levy" is wider in its import than the term "assessment". In Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., , the Supreme Court observed :---

"The term "levy" is wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment, the term ''imposition'' is

generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount."

16. It is also not disputed before us that the Excise Officer appointed under the Act, which term also includes Excise Commissioner, is duty bound to assess the dutiable goods under the Act so as to determine the appropriate rate of duty as per the charging section 3 read with the Schedule. The Act and the Rules also provide for a complete machinery for issue, grant, renewal, alteration, suspension and cancellation of the licence to manufacture dutiable goods. It cannot be gainsaid that for assessment of dutiable goods under the Act and in order to determine the appropriate rate of duty as per the charging section, it is necessary for the Excise Officer to determine the classification of the dutiable goods. We, therefore, find considerable substance in the submission of Mr. Hidayatulla that the Excise Officer is competent to determine the classification of the goods for the purpose of levy of duty under the Act and the Rules.

17. Mr. Andhyarujina, however, heavily relied upon Rule 94 in order to contend that as far as medicinal preparation is concerned, it is necessary for the applicant to possess the requisite drug licence under the Drugs Act for the manufacture of medicinal preparation and, therefore, it is not open for the authority under the Act to classify any preparation as medicinal preparation unless the applicant holds such licence under the Drugs Act. According to Mr. Andhyarujina, the power of classification is not vested in the authority under the Act and it is only authority under the Drugs Act, who is empowered to classify a preparation either as a drug i.e. medicinal preparation or a cosmetic i.e. toilet preparation. In other words, according to Mr. Andhyarujina, a preparation will be regarded as medicinal preparation only if the person holds drug licence under the Drugs Act. If it is a licence for cosmetic, the authority under the Act is duty bound to levy the duty as payable on toilet preparation. Mr. Andhyarujina says that it will be absurd for an applicant to apply for licence for medicinal preparation under the Act when the requisite licence held by him under the Drugs Act is of cosmetic. In short, according to Mr. Andhyarujina, the authorities under the Act have no independent jurisdiction to classify the goods because the authorities are duty bound to classify the goods as per the licence issued under the Drugs Act.

18. We are afraid that the contentions raised by Mr. Andhyarujina are liable to be rejected for more than one reason. In the first place, we are unable to accept the interpretation put by Mr. Andhyarujina on Rule 94 of he rules. But before we advert to the said Rule 94, we would like to demonstrate that the assumption of Mr. Andhyarujina that there is independent machinery under the Drugs Act for classification of the goods is not well founded. On the other hand, on a careful scrutiny of the Drugs Act, we find, in fact, there is no machinery provided for

classification of the goods under the Drugs Act. The object of the Drugs Act is to regulate the import, manufacture, description and sale of drugs and cosmetics. The Drugs Act mainly deals with the standards of quality of drugs and cosmetics. It will be useful to make a reference to some important provisions of the Drugs Act. Section 3(b) defines a "drug" while section 3(aaa) defines "cosmetic". Though the definition of "drug" is similar to the definition of "medicinal preparation" under the Act, it is seen that the definition of "toilet preparation" is much narrower than the definition of "cosmetic" under the Drugs Act.

19. Section 16(1) of the Drugs Act provides that the expression "standard of quality" means (a) in relation to a drug, that the drug complies with the standard set out in the second schedule and (b) in relation to cosmetics, that the same complies with such standards as may be prescribed. Sections 17, 17-A, 17-B deal with the mis-branded, adulterated and spurious drugs respectively, while sections 17-C and 17-D deal with mis-branded and spurious cosmetics. Section 18, inter alia, provides that no person shall manufacture for sale or for distribution or sale or stock or exhibit or offer for sale or distribute any drug or cosmetic under or in accordance with the conditions of a licence issued for such purpose. Section 20 provides for appointment of Government Analyst and section 21 provides for appointment of inspectors. Section 22 contains powers of inspectors, which, inter alia, include inspection of premises, taking samples of any drug or cosmetic, power to search and seize, power to examine any record, register, document, etc., power to require any person to produce any record, register, document, etc. Section 23 contains the procedure to be followed by the inspectors taking any sample of a drug or cosmetic. Section 25 deals with the reports of Government Analysts. Section 27 contains the provisions for penalty for manufacture, sale, etc. of drugs or cosmetics in contravention of the provisions of Chapter IV. Rule XIV of the Drugs and Cosmetic Rules, 1945 ("the Drugs Rules", for short) contains provisions relating to manufacture of cosmetic for sale or for distribution. Rule 138 of the Drug Rules provides for an application for grant or renewal licence to manufacture cosmetic and Rule 139 contains conditions for grant or renewal of the licence. The basic scheme of the Act shows that the nature of inquiry in case of application of a licence and the conditions for grant of licence relate to inspection of factory premises, requisite medical qualifications of personnel employed and furnishing data to justify that the constituent ingredients are contained in therapeutic/prophylactic quantities etc.

20. After a careful scrutiny of the provisions of the Drugs Act and Rules framed thereunder, we do not find any provision providing machinery for an assessment of the product either as a drug or cosmetic. Mr. Andhyarujina was unable to show any specific provision in that behalf. However, the learned Counsel tried to draw some support from Rule 71(6) of the Rules. Rule 71 provides conditions for grant or renewal of a licence in Form 25 of Form 25-F and sub-rule (6) of the said Rule reads as follows :---

"The applicant shall, while applying for a licence to manufacture patent or

proprietary medicines, furnish to the licencing authority evidence and data justifying that the patent or proprietary medicines:

(i) contain the constituent ingredients in therapeutic/prophylactic quantities as determined in relation to the claims or conditions for which the medicines are recommended for use or claimed to be useful,

(ii) are safe for use in the context of the vehicles, excipients, additives and pharmaceuticals aids used in the formulation and under the conditions in which the formulation for administration and use are recommended,

(iii) are stable under the conditions of storage recommended, and,

(iv) contain such ingredients and in such quantities for which there is therapeutic justification."

On a bare reading of the said Rule, it is clearly seen that it has been enacted with a view to ensure that the patent or proprietary medicines contain constituent ingredients in therapeutic/prophylactic quantities and are safe and stable etc. and does not deal with classification of the product. A combined reading of Part VII of the Drugs and Cosmetics Rules reveals that the nature of inquiry mainly pertains to standards of quality of drugs. There is no provision for classification under the Drugs Act and the licence is granted based on the claim made by the applicant.

21. The view which we are taking relating to the nature and scope of the Drugs Act is well supported by a judgment of the Supreme Court in Indian Chemical and Pharmaceutical Works Vs. State of Andhra Pradesh and Others, . Briefly, the facts in that case were that the Hyderabad Act 4 of 1333-F was in the nature of an Excise Act and provided for licences and collection of duties of excise and made provisions incidental thereto. The Act applied to opium and the four intoxicating drugs mentioned therein and also to other substances notified thereunder. It continued in force in the Part B State of Hyderabad after the Constitution came into force in January 1950. The contention of the appellant before the Supreme Court was that the 1333-F Act had been repealed in toto on the introduction of the Drugs Act, 1940 by the Part B States (Laws) Act, No. III of 1951 and, therefore, there was no power in the Hyderabad Legislature to amend it by Act No. 22 of 1953. In consequence there was no law in force on the basis of which the Rules could be promulgated in 1962. The Supreme Court observed :--

"The Drugs Act, 1940, which mainly concerned with standard and quality of drugs manufactured in this country and, therefore, controls the manufacture, sale and distribution of drugs, has nothing to do with duties of excise and with their imposition on narcotics and narcotic drugs. The fact that the Drugs Act was introduced in the Part B State of Hyderabad in 1951 would not, therefore, affect in any way that part of the 1333-F Act which dealt with collection of duties of excise and provided for licences in respect of any drugs which are narcotics or

narcotic drugs. The 1333-F Act thus continued in existence so far as it dealt with collection of duties of excise on substances covered by it and could be amended by Hyderabad Act No. 22 of 1953."

We have, therefore, no hesitation to reject the argument of Mr. Andhyarujina that there is an independent machinery provided under the Drugs Act for classification of the goods and that the authorities under the Act are bound by such classification. In our opinion, such an interpretation will render the entire machinery for assessment of duty as well as licensing set up under the Act and the Rules completely redundant. It is well settled that the courts will not favour an interpretation, which has the effect of taking away the jurisdiction of the competent authority, unless the same in expressly provided for in law. Merely because there is some similarity in the definition of "drug" in the two enactments, the definition under the Drugs Act cannot be applied for the purpose of determining the nature of the product for the purposes of the Act, as, in our opinion, such function is required to be performed by the authorities under the Act in accordance with the Rules and the provisions framed thereunder.

22. Turning then to Rule 94 of the Rules, the title of the said Rule reads as "The applicant to be in possession of the requisite licence under the Drugs and Cosmetics Act, 1940". Rule 94 reads as follows :-

"No licence for the manufacture of medicinal and toilet preparations or renewal of such licence shall be granted to an applicant unless he holds the requisite licence under that Act for the manufacture of the said medicinal preparations."

On a plain reading of the Rule, it is seen that a licence under the Act shall not be granted unless the applicant holds a requisite licence under the Drugs Act. According to Mr. Andhyarujina, the said Rule contemplates that an applicant should possess a necessary licence, meaning thereby that if he is applying for a licence for medicinal preparation, he must hold a drug licence under the Drugs Act and if he is applying for a licence for toilet preparation, then he must hold a licence for cosmetic under the Drugs Act. It is not possible to accede to the argument of Mr. Andhyarujina. In the first place, we find that a literal interpretation of Rule 94 would lead to absurd consequences since an applicant for a licence to manufacture toilet preparation under the Act would also require to hold a licence for manufacture of medicinal preparation under the Drugs Act for the Rule refers to holding of a requisite licence for manufacture of medicinal preparation only and not to cosmetic or toilet preparation. Thus an applicant, who is desirous of obtaining a licence for toilet preparation, will have to hold a licence for drug although he intends to manufacture only toilet preparation. Mr. Andhyarujina wants us to read the word "requisite" to mean "appropriate" or "matching" or "corresponding", which does not appear to be an intention behind enacting Rule 94. The dictionary meaning of the word "requisite" as per The Shorter Oxford English Dictionary is "required by circumstances or the nature of things" and "something that is requisite". According to Webster''s New Twentieth Century Dictionary (2nd Edition), the meaning of the word "requisite" is "that

which is necessary; something indispensable". It is true that the word "requisite" suggests a meaning "properly required", but it does not and cannot mean "appropriate" or "matching" or "corresponding" or "analogous". In our opinion, Rule 94 cannot be considered in such manner as to make nugatory the entire machinery of the Act. To our mind, Rule 94 merely provides that an applicant desirous of obtaining a licence under the Act should also possess a licence under the Drugs Act, which is necessary to ensure the standard and quality of the product of the applicant. There is one more reason for not accepting the interpretation suggested by Mr. Andhyarujina, because if what Mr. Andhyarujina says is correct, then even if the product is a toilet preparation, the authority under the Act will be required to treat it as a medicinal preparation if the applicant has managed to acquire or obtain a drug licence under the Drugs Act. Such construction would thus completely defeat the object of the Act. Therefore, we have no hesitation to hold that the authorities under the Act are sufficiently empowered to classify the goods for the purpose of assessment and levy of the duty prescribed under the Act.

23. We have already indicated that the Excise Commissioner has completely mis-applied his mind on the main issue of jurisdiction and, therefore, in our opinion, it is necessary to remand the entire matter to the Excise Commissioner for deciding the same in accordance with law. Mr. Hidayatulla, however, submitted that the issue of limitation has been decided on a demurrer that liability exists but cannot be enforced as it is time-barred, and, therefore, the issue of limitation is severable from the issue of classification on merits. Mr. Hidayatulla, therefore, says that the finding of the Excise Commissioner on the issue of limitation should not be disturbed and the remand should be made only on the issue of classification. Mr. Hidayatulla says that Rules 11 and 12 of the Rules constitute a complete Code for realisation of duties short levied or due to the Government. Mr. Hidayatulla points out that Rule 11 applies in case of short levy which means short assessment and since the goods of the petitioners after assessment were cleared by the Proper Officer on Form AR-2 in terms of Rule 11 of the Rules and on payment of duty as assessed, the assessment of the Company falls under Rule 11 and not Rule 12. Therefore, according to Mr. Hidayatulla, the Excise Commissioner has rightly held that the demand was completely time-barred as far as the petitioners'' product "Old Spice After Shave Lotion" is concerned and in respect of "Blue Stratos", the demand is required to be confined for the period of six months prior to the notice. Mr. Hidayatulla relies upon a judgment of the Division Bench of this Court in Zenith Tin Works Private Limited Vs. Union of India and others, . To our mind, the finding as regards the issue of limitation cannot be separated in the manner suggested by Mr. Hidayatulla. In our view, having regard to the facts and circumstances and the controversy raised by the parties, it is desirable to remand the whole case to the Commissioner for a fresh decision in accordance with law. Needless to say that the Commissioner will also be required to decide the question of classification, since we have already recorded that it is the Excise Commissioner, who has jurisdiction to decide the

question.

24. As we are setting aside the impugned orders and remitting the cases to the Excise Commissioner, the appeals filed by the respondents before the Government of Goa do not survive. However, we would like to record that the issue of maintainability of the appeals was not pressed by the learned Counsel for the petitioners, though he has made some submissions on the issue of bias. It was argued before us that the State Government is already committed to recover the amounts and, therefore, there is real apprehension of bias on the part of the State Government and on that ground, the power of the State Government to decide the appeals was questioned. Having regard to the order, which we propose to pass, these arguments have become academic and it is not necessary to express any opinion on this aspect. Before we conclude, we may also mention that the respondents have filed an interim application making a grievance that the petitioners are recovering the excise duty at the rate of 100% ad valorem although they are actually paying the duty at the rate of Rs. 10/- per proof liter on the basis that their product is medicinal preparation and on that basis, a direction is sought against the petitioners to deposit the amount in this Court. Mr. Hidayatulla has strongly refuted the allegations made by the respondents. According to Mr. Hidayatulla, this is only a notional break-up shown in the sales invoices and the petitioners are not recovering the excise duty at 100% ad valorem as alleged by the respondents. We do not wish to express any opinion on this controversy, since it is for the Excise Commissioner to decide this question. But we make it clear that the break-up shown by the petitioners is only a notional break-up as per their own contention and, therefore, in case the Excise Commissioner comes to the conclusion that the classification submitted by the petitioners is wrong and the petitioners'' product is liable to be taxed as an toilet preparation, the Excise Commissioner shall ignore this notional break-up and shall levy the duty in accordance with the provisions of the Act.

25. In the result, the petition succeeds. The impugned orders passed by the Excise Commissioner both dated November 7, 1991 (Exhibits ''G'' & ''H'' to the Writ Petition) are quashed and set aside and the Excise Commissioner is directed to decide the case afresh in the light of the observations made in this judgment. The Excise Commissioner shall decide all the issues including the issue of classification in accordance with law. Needless to say that the Excise Commissioner shall pass the final order only after giving an adequate opportunity of hearing to the petitioners.

Rule is accordingly made absolute. However, there shall be no order as to costs.

