

(1986) 06 KAR CK 0018
In the Karnataka High Court
Case No : Writ Appeal No. 993 of 1981

Commissioner for Excise, Karnataka and Others

APPELLANT

Vs

J.L. Morison

RESPONDENT

Date of Decision : 03-06-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 12, 9

Citation : (1986) 10 ECC 262 : (1986) 25 ELT 660

Hon'ble Judges : M. Ramakrishna, J;M. Rama Jois, J

Bench : Division Bench

Advocate : M.R. Achar, for the Appellant; K.P. Kumar, of King and Patridge, for the Respondent

Judgement

1. This writ appeal is by the Commissioner of Excise in Karnataka and two other officers of the Department against the order of the learned Single Judge quashing the demand made against the respondent for payment of an excise duty of Rs. 1,97,128.40, for the period commencing from 1.4.1975 to 15.3.1976.

2. The facts of the case, in brief, are as under : The respondent is a company engaged in the manufacture and sale of medicines. Prior to April, 1975, one of the medicinal preparations manufactured by the respondent was local anaesthetic with alcohol as one of the ingredients. The medicinal preparations containing alcohol was one of the items on which the excise duty was leviable under the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, ("the Act" for short). Accordingly, the respondent was paying excise duty on local an aesthetics manufacture by it. On and after 25.11.1974, the respondent began to manufactured local anaesthetic without using alcohol. This fact was also intimated by the respondent to the appellants. In view of the omission of alcohol as one the ingredients in the manufacture of local an aesthetics by the respondent, no excise duty was paid/levied on local anaesthetic manufactured by the respondent on and after 25.11.1974. However, by letter dated 11.10.1977 (Exhibit-E), the third respondent demanded payment of excise

duty amounting to Rs. 1,97,128.00 on the ground that the respondent had failed to pay excise duty payable under the provisions of the Act for the period commencing from 1.4.1975 to 15.3.1976. Aggrieved by the said demand, the respondent presented the writ petition.

3. The main contention of the respondent in the writ petition was that in the local anaesthetic manufactured by the respondent on and after 25.11.1974, the alcohol was not being used and therefore, no excise duty was leviable and further that the local anaesthetic manufactured by the respondent did not also contain any narcotic drug or narcotic and therefore, the local anaesthetic manufactured by the respondent was not liable to excise duty under the Act. In the writ petition the respondent had set out the basis for urging the above contention

4. No statement of objection was filed on behalf of the appellants. However, the contention urged on behalf of the appellants before the learned Single Judge was that the local anaesthetic product manufactured by the respondent was itself a narcotic drug or narcotic, as the definition stood at the point of time and therefore, it squarely fell within sub-item (iii) of Item No. 1 of the Schedule to the Act, and therefore, excise duty was leviable on the local anaesthetic products manufactured by the respondent. The said entry at that point of time read as under :

"Item Description of Rate of No. dutiable goods Duty. xxx xxx xxx (iii) Medicinal preparations not containing Ten per cent alcohol but containing opium, Indian ad valorem." hemp or other narcotic drug or narcotic The above contention of the appellants was negated by the learned Single Judge. In doing so, the learned Single Judge relied on a judgment of the Gujarat High Court in the case of *Suhrid Giegy Ltd. v. Union of India* [1980 E LT 538]. The learned Single Judge held that the local Anaesthetic manufactured by the respondent on and after 25.11.74 was not subject to excise duty under the Act on the ground that it did not contain narcotic drug or narcotic as an ingredient. On that view of the matter, the learned Single Judge did not consider the other contentions urged for the respondent. Aggrieved by the said order, the appellants have presented this appeal.

5. Sri M.R. Achar, learned Government Advocate, in support of the appeal submitted as follows : Under the provisions of the Act vide Item 1(iii) every medicinal preparation not containing alcohol but containing opium, Indian hemp or other narcotic drug or narcotic, was liable to excise duty at ten per cent ad valorem. The very fact that the excise duty demanded by the notice dated 11.10.1977 was in respect of local anaesthetic manufactured by the respondent itself would establish that the ingredient used was narcotic drug or narcotic in view of the definition of the "narcotic drug" or "narcotic" in clause (h) of Section 2 of the Act. The definition reads :

"2(h) "narcotic drug" or "narcotic" means a substance which is coca leaf or coca

derivative or opium or derivative of opium, or Indian hemp and shall include any other substance capable of causing or producing in human beings dependence, tolerance and withdrawal syndromes and which the Central Government, may by notification in the Official Gazette declare to be a narcotic drug or narcotic."

As admittedly local anaesthetic is intended to be used for producing insensibility in human beings, the ingredient of the medicinal preparation must be held to contain a narcotic drug or narcotic for, without any such ingredient, it would be no anaesthetic at all. Therefore, the respondent was clearly liable to pay excise duty even though the respondent not using alcohol in manufacturing the local anaesthetic on and after 25.11.1974. Hence the demand for payment of excise duty made by the third appellant was in accordance with law.

6. As against the above submission, learned counsel for the respondent submitted as follows :

(i) Item No. 1(iii) in the schedule to the Act and Entry 14E of The Central Excises and Salt Act, 1944, are mutually exclusive. Entry 14E in the schedule to the Central Excises and Salt Act, 1944, at the relevant point of time read as under :

-----						"Item
Description	of	Rate	of	No.	Goods	Duty
-----						14E. Patent or
proprietary medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics other than those medicines Ten per cent which are exclusively Ayurvedic, Unani, ad valorem. Sidha or Homeopathic.						
Explanation II - "Alcohol", "Opium", "Indian Hemp", "Narcotic Drug" and "Narcotics" have the meaning respectively assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955."						

In view of the above entry a medicinal preparation which did not contain narcotic drug or narcotic was liable to excise duty under the said entry. According to the view of the Central Government, the product manufactured by the respondent was liable to excise duty under Entry 14E. However, the Central Government considered expedient to grant exemption for all anaesthetics, and, accordingly issued a notification granting exemption. The issue of the said notification, which is not in dispute, itself proves that excise duty was leviable for medicinal preparations under Entry 14E of the Central Excises and Salt Act but for the exemption granted. That being the position, the local anaesthetic manufactured by the respondent cannot fall under item 1(iii) of the Schedule to the Act, obviously because the same preparation cannot be held to contain narcotic drug or narcotic as an ingredient and also containing such an ingredient.

(ii) Further, the action incited by the third appellant was barred by time and it was initiated after six months from the date on which, according to the appellant, the duty was payable, as it was a case of short recovery of duties by the appellants, even on the basis that the stand taken by the appellants was correct.

Learned counsel for the respondent also submitted that having regard to the nature of the duty, the same has got to be collected before the goods are removed and sold and therefore it was only in cases where on account of the misconduct by the manufacturer the excise duty payable was not paid, action could be taken against the manufacturer, but in all cases where the authorities themselves considered or conceded that no excise duty was leviable on any particular item of goods and they were allowed to be removed and sold, the authorities were subsequently prevented from levying the excise duty for the reason it would amount to an unreasonable exercise of power as the manufacturer would have no opportunity of passing on the liability to the consumers, which he would have done had the excise duty been levied before the goods were removed and sold to the public.

7. As regards the contention of the respondent that the action was time barred, learned counsel for the appellants submitted that if only a case fell under Rule 11 of the Rules, action had to be taken within six months. But if a case fell under sub-rule (2) of Rule 9 or Rule 12, there was no limitation and the present case did not fall within the purview of Rule 11.

8. Rule 11 of the Rules, on which learned counsel for the respondent relied and sub-rule (2) of Rule 9 and Rule 12, on which the learned counsel for the appellants relied, reads :

"11. Recovery of duties or charges short levied or erroneously refunded : When duties or charges have been short levied through inadvertence, error, collusion or miss-construction on the part of an excise officer or through misstatement as to the quantity or description of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded the person chargeable with the duty or charge, so short levied or to whom such refund has been erroneously made, shall pay the deficiency or repay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account current if any or from the date of making the refund.

xxx xxx xxx

9. Time and manner of payment of duty : (2) If any dutiable goods are, in contravention of sub-rule (1) deposited in or removed from, any place specified therein the manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him or is left at the manufactory or his dwelling house and he shall also be liable to a penalty to be determined by the Excise Commissioner which may extend to two thousand rupees and such goods shall also be liable to confiscation.

xxx xxx xxx 10. Residuary powers for recovery of sums due to Government : Where these rules do not make any specific provision for the collection of any

deficiency in duty if the duty has for any reason been short levied, or of any other sum of any kind payable to the collecting Government under the Act or these rules, such duty deficiency in duty or sum shall, on written demand made by the proper officer be paid to such person and at such time and place, as the proper officer may specify."

The question as to whether the present case falls within Rules 11 or the other Rule was not considered by the learned Single Judge as he decided the case on the first ground urged for the respondent, namely, that the local anaesthetic manufactured by the respondent did not contain narcotic drug or narcotic as an ingredient.

11. In our view the question as to whether the local anaesthetic manufactured by the respondent falls within item 1(iii) of the Schedule to the Act or under Item 14E of The Central Excises and Salt Act and therefore stood excluded from Item 1(iii) of the Act, is a technical question regarding the chemical ingredients actually used in the manufacture of local anaesthetic and could have been decided by the appellants only after due notice to the respondent. Apart from that, as the appellant has accepted the plea of the respondent that as the respondent had cease to use alcohol in the manufacture of local anaesthetic, the local an aesthetics manufactured by the respondent were not subject to excise duty under the Act, and as they were taking a different view and such administrative decision and consequent action on the part of the appellants was resulting in serious civil consequences to the respondent, in that, a liability to the tune of 2 lakhs of rupees was being cast on the respondent, a final notice for payment could not have been issued by the third respondent unless the grounds on which the said liability was sought to be fixed on the respondent, were made known to the respondent and the respondent was given an opportunity of having its say in support of its plea that it was not liable to pay excise duty and after consideration of such a plea, if such plea had been taken by the respondent.

12. In the circumstances, in our view the appropriate course for this Court is to set aside the demand order made by the appellant leaving liberty for the third appellant to fix the liability after complying with the rules of natural justice, as the technical question involved in the case could not have been decided either way without technical opinion and evidence.

13. In the result, we respectfully disagree with the order made by the learned Single Judge and make the following order :

(i) The writ appeal is partly allowed.

(ii) The finding recorded by the learned Single Judge that the local anaesthetic manufactured by the respondent on and after 25.11.1974 and in particular during the period commencing from 1.4.1975 to 15.3.1976 was not liable to excise duty under the Act, is set aside.

(iii) The order of the learned Single Judge is so far it set aside the demand made

by the third appellant calling upon the respondent to pay excise duty of Rs. 1,97,128.40, is confirmed leaving the issue open to be decided by the third appellant after giving an opportunity of hearing to the respondent.

(iv) The respondent shall be at liberty to urge all the contentions which it had taken in the writ petition and in this appeal as also other contentions which are open to it in law in contesting any fresh proposal to levy the excise duty during the period in question.

(v) No costs.