
(1992) 09 GUJ CK 0020
In the Gujarat High Court
Case No : Sales Tax Reference No. 11 of 1989

Dandwala

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-09-1992

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 62, 62(2), 69

Citation : (1992) 09 GUJ CK 0020

Hon'ble Judges : S.D. Dave, J;G.T. Nanavati, J

Bench : Division Bench

Judgement

S.D. Dave, J.—The Gujarat Sales Tax Tribunal has referred the undermentioned questions to this Court for the opinion and reply while exercising the jurisdiction u/s 69 of the Gujarat Sales Tax Act, 1969.

2. Whether, in the facts and circumstances of the case, the Tribunal was justified in holding that the sales of "Dandwala Keshkalpa" made by the applicant in terms of its sale bill No. 135, dated June 11, 1981, is covered under entry 7 of Schedule III appended to the Gujarat Sales Tax Act, 1969, and not under entry 26(1) of Schedule II, Part A appended thereto ?

3. If the answer to the above question is in the affirmative, that is against the applicant, whether in the facts and circumstances of the case, the Tribunal was justified in not exercising its discretion in giving prospective effect to the order of the Deputy Commissioner of Sales Tax, i.e., from the date of communication thereof to the applicant ?

4. The assessee is manufacturing a product in the trade name of "Dandwala Keshkalpa" since 1978 and according to the assessee the said product is an ayurvedic medicine. The applicant-assessee had effected a sale of the abovesaid product to M/s. Kantilal Jesingbhai as per bill No. 135 dated June 11, 1981. The applicant-assessee had presented necessary application to the Deputy Commissioner of Sales Tax u/s 62 of the Act for determination of the rate of tax

payable on the abovesaid sale. The case of the assessee before the Deputy Commissioner was that the said sale was covered under entry No. 26(1) of Schedule II, Part A to the Act, which relates to drugs and medicines. The applicant had tried to show that to the abovesaid sale in respect of which the bill was produced before the Deputy Commissioner, the entry applicable would be the said entry which relates to the drugs and medicines. It was the case of the applicant/assessee that the product sold under the said bill or invoice was a purely an ayurvedic medicine for treatment of various diseases of hair like premature baldness, premature hair loss and their premature whitening. It was also claimed that the said product was used for checking dandruff and indralupta and that the product was able to produce sound sleep also. According to the applicant, the abovesaid product is being manufactured out of certain herbs having medicinal properties. It was urged that the components of the product were til oil, coconut oil, castor oil and cow milk and that certain other herbs having high quality of medicinal value like brahmi, bhangra, amala, rose petals, sandalwood powder, etc., were also utilised for the manufacture of the abovesaid keshkalp. On the basis of the abovesaid, it was sought to be urged before the Deputy Commissioner that the product cannot be said to be a hair-oil but would be the medicinal preparation which would fall within the said entry as a medicine. It was also pointed out before the Deputy Commissioner, that various persons holding important positions, in all walks of life, have certified regarding the effectiveness of the abovesaid preparation, which would also go to show that the product has got medicinal value and therefore, it cannot be simply described as a hair-oil. The Deputy Commissioner, Sales Tax, had taken the view that the case of the applicant-assessee as urged by them could not be accepted, and that, the product is not exigible to sales tax under Schedule II, Part A to the Act but the relevant entry under which the product was required to be taxed was entry 7, Schedule III to the Act, which is in respect of hair-oils. Later on the matter was carried before the Gujarat Sales Tax Tribunal, which also after the careful examination of factual and legal aspects, came to the conclusion that the case of the assessee in this respect has rightly been not accepted by the authority, who has decided the question by way of determination. The abovesaid orders of the Tribunal dated August 31, 1984, could not satisfy the applicant-assessee and therefore, the necessary application was moved for a reference to this Court, and ultimately at the instance of the assessee the abovesaid two questions have been referred to us for reply and answer.

5. Mr. Pathak, the learned Advocate who appears on behalf of the assessee, has urged that the product which is known as "Dandwala Keshkalp" is having medicinal properties and medicinal value and that the manufacturer brands it as a medicine and not as hair-oil, and that the hair-oil simpliciter would not be containing certain herbs and medicinal properties which are being utilised for the preparation of the product in question. It is also the contention raised by Mr. Pathak that because of the use of certain medicinal properties and the herbs, the product has assumed the character of medicine which is within the abovesaid

entry No. 26(1) of Schedule II, Part A to the Act which relates to drugs and medicines. Mr. Pathak has also urged that various persons belonging to different walks of life have certified regarding the true effect of the abovesaid product or preparation and that, relying upon the same, it will have to be accepted that the product in question is a drug or medicine rather than a hair-oil. In view of the abovesaid submissions, Mr. Pathak has urged that the questions referred to us are required to be answered in favour of the assessee and against the Revenue. Any how, Ms. Doshit, the learned Advocate who appears on behalf of the Revenue has urged that, merely because some herbs are being used for the manufacture of the product in question and merely because those herbs have some medicinal qualities which may cure certain diseases or complaints relating to hair growth, it cannot be said that the product loses its character as a hair-oil and becomes medicine which would be taxable under entry 26(1), Schedule II, Part A to the Act. Ms. Doshit has urged that merely because a manufacturer or producer brands his own product as a medicine such branding would not make it a medicine, if in substance and in reality it is not a medicine and would not fall under entry 26(1) of Schedule II, Part A to the Act. Ms. Doshit therefore, has urged that the questions referred to us require to be replied and answered in the negative and in favour of the Revenue and against the assessee.

6. Entry 26(1) of Schedule II, Part A as far as it is relevant for our purpose reads thus :

"26(1). Drugs and medicines (other than those specified in entry 12 in Schedule I and entry 96 in this Schedule)."

Entry 7 of Schedule III to the Act, so far as it is material, runs thus.

"7. Hair-oils."

7. A combined reading of the abovesaid two entries would go to show that the previous entry relates to drugs and medicines, while the latter entry, relates to hair-oils. It is also clear that the rate of tax in respect of latter entry, namely, hair-oils is higher than the rate which is applicable to the previous entry.

8. The Deputy Commissioner of Sales Tax and the Tribunal were conscious of the fact that the product, namely, "Dandwala Keshkalp" has got certain medicinal properties used at the time of manufacturing. It is pointed out that the product under dispute contains 82 per cent oil which would include til oil, coconut oil and castor oil. It was also noted that brahmi, bhagara, amal, rose petals, anant mool, sandalwood powder and hathidant are also being used for the manufacture of the abovesaid product. It was also found that the cow milk is being used in the preparation because of the protein qualities which the cow milk possesses, which would ensure healthy growth of the hair. Considering all these aspects, the Tribunal has taken the view that the product in question has got some medicinal value, and therefore, it can be said that the keshkalpa or the oil manufactured by the applicant/assessee is an oil having medicinal qualities. It appears to us that the abovesaid conclusion of the Deputy Commissioner, duly endorsed by the

Sales Tax Tribunal cannot be disputed. The fact remains that the product in question is prepared out of the abovesaid herbs having medicinal qualities. Any how it must be incidentally noticed that the herbs which are being used in manufacture of the product, namely, brahmi, amala, bhagara, anant mool, rose flowers, sandalwood powder, "hathidant" and cow milk are known to have certain qualities which would help the healthy growth of the hair and they also cure and prevent certain common diseases relating to the hair and the scalp.

9. Mr. Pathak has invited our attention to the number of certificates in this respect, with a view to urge that the product in question is not an oil or oil simpliciter but it is a medicine. We have a detailed look at those certificates on which Mr. Pathak has placed reliance for buttressing his submission before us. It must be accepted that various people, belonging to different walks of life were impressed by the product manufactured by the applicant-assessee. It appears that these people have issued certificates and opinion in praise of the quality of the product. They have definitely stated in those certificates and opinions that the product prepared by the applicant-assessee was proved to be of a great assistance in curing and preventing certain complaints and diseases of the hair and the scalp. They have also said that they would like other people to use the said product for such complaints. A reading of the abovesaid certificates and opinions to which a much detailed reference is not called for, would go to show that various persons have found the product as having some qualities which would be able to prevent and cure certain diseases of hair and scalp. It is also made clear, that a continuous use of the product has been recommended with a view to have healthy hair growth and lustrous hair. But merely because of these certificates and opinions, it cannot be said that those people who have used it have accepted the product as a medicine. It requires to be appreciated that the general impression in the minds of those people who have issued certificate and who have given opinions is that the product in question is a hair-oil which is required to be used for the prevention and curing of various diseases relating to hair and scalp. Therefore, the view sought to be canvassed by Mr. Pathak, namely, that because of such certificates and opinions the product becomes medicine, which would again fall under the abovesaid entry relating to drugs and medicines, cannot be accepted.

10. Mr. Pathak has placed heavy reliance upon the certificate or opinion expressed by Vaidya Madhavprasad Acharya dated 11th November, 1978. In his opinion the known ayurvedic scholar of the State has stated he had used the product in question for a period of about one year and had experienced that it prevents and cures various complaints relating to the hair and the scalp. It is also further certified that he has not seen a better hair-oil than the product in question. A careful reading of the abovesaid opinion or the certificate would go to show that even this ayurvedic expert does not say that the product in question is a medicinal preparation and that he prescribes this product as a medicine or a drug for his patients. Therefore, from the abovesaid certificate also, the view sought to be canvassed by Mr. Pathak cannot be accepted.

11. Even if it is accepted that the product in question is having the above-said properties referred to by us earlier, which in their turn have medicinal value, which help growth of the hair and are also helpful in curing and preventing certain diseases of hair and scalp, it cannot be said that the product in question is a medicine within the meaning of the abovesaid entry 26(1) of Schedule II, Part A to the Act. Mr. Pathak while placing reliance upon certain literature produced along with the determination application, has urged that, the manufacturer has described the product in the literature not as an oil but as an ayurvedic medicinal on. We have verified and have seen the literature saying product in question should be treated as an ayurvedic medicine only. But it requires to be appreciated that the true character of a preparation cannot be ascertained from the description of the product in the literature or label as an ayurvedic medicinal preparation. To decide this, one shall have to look to the character of the constituents and the use of the product in question. Therefore, in a given case if the dealer or the manufacturer says in the literature that the product in question is not to be treated as a hair-oil but is to be treated as ayurvedic medicine only the same in our view is not of much real significance, while deciding the prime question as to whether such a product is a medicine or drug or not.

12. Mr. Pathak has also urged that there are two entries referred to by us earlier, out of which one is in respect of medicines and drugs, while the other one is in respect of hair-oil and if it is accepted that the product in question is having certain medicinal properties then the same should fall within the abovesaid entry, relating to medicines and drugs. In substance, Mr. Pathak wanted to urge that there is a general entry along with a special entry and that the product in question would fall within the former entry, which is a special entry. We are unable to accept the abovesaid contention raised before us. On the contrary, it appears that entry No. 26(1) of Schedule II, Part A, to the Act deals with medicines and drugs, while entry No. 7 of Schedule III of the Act deals with hair-oils. In view of this position it cannot be said that the previous entry is a special entry within which the product in question would fall.

13. Ms. Doshit, the learned Advocate for the Revenue, has placed reliance upon the M. P. High Court decision in Commissioner of Sales Tax v. Sadhna Aushadhalaya [1963] 14 STC 813. The facts of the case before the M.P. High Court appear to be almost similar to the facts of the reference under consideration. The question before the M.P. High Court was whether the product known as Maha Bhringraj hair oil manufactured by the assessee was an ayurvedic preparation or not. After examining various aspects, including the constituents of the product in question, it has been held that the product, namely, Maha Bhringraj hair oil would not fall within the entry relating to medicinal preparation under the C.P. and Berar Sales Tax Act, 1947. It was also pointed out that the oil in that case was prepared and manufactured according to certain formula given in ayurvedic medicinal books and that it had a bad odour, and that it is a specific for headache, burning of eyes, and for preventing falling

hair. It was also pointed out that the hair-oil may cool the brain or improve the system and induce sound sleep. But it is held that nonetheless it does not because of these qualities become a medicinal preparation. It has further been made clear that, the object of all hair-oils is to tidy the hair, to promote luxuriant growth of hair and to prevent dandruff and the falling hair and it cannot be denied that if a hair-oil produces the effects proclaimed and claimed in regard to it, then the appearance of the person using it, is undoubtedly improved. But at the same time it has been pointed out that the product would not fall within the meaning of relevant entry of medicinal preparation under the C.P. and Berar Sales Tax Act. The Deputy Commissioner and the Sales Tax Tribunal in our considered view were perfectly justified in placing reliance upon the abovesaid decision while coming to the conclusion that the product in question would be a hair-oil and not a medicine, even though it contains certain herbs which have got a very good effect on the common complaints of the hair and the scalp.

14. The other decision on which Ms. Doshit has placed reliance is the Bombay High Court decision in *C.C. Mahajan and Co. Vs. The State of Bombay*, In the abovesaid decision the question was in respect of soap and powder which were being used as depilatories. The question was whether the abovesaid soap and powder would be toilet articles or not. Applying the similar test it has been pointed out in the aforementioned decision that, though the abovesaid products were also known as soap and powder, they were in fact being utilised as the toilet preparations and were not merely toilet soaps. We are therefore of the opinion that the Sales Tax Tribunal and Deputy Commissioner were also justified in placing reliance upon the abovesaid decision while coming to the conclusion that the product in question would not be a medicine or a drug but would be a hair-oil.

15. Mr. Pathak, the learned advocate for the applicant/assessee, has pressed in service the Bombay High Court decision in *Leukoplast (India) Ltd. v. State of Goa* [1988] 71 STC 180(Goa). In this decision the known principles regarding popular or commercial meaning have been pointed out by the Bombay High Court while deciding the question as to whether the commodity in question would fall within the entry which was attracting the sales tax at a lower rate. On the facts, it was held that the products manufactured by the petitioner were drugs and medicines within the provisions of the two Notifications dated October 28, 1981 and April 1, 1987. The facts and circumstances of the abovesaid case before the High Court of Bombay being entirely different, we do not find any difficulty in saying that it would not render any assistance to Mr. Pathak, while urging before us that the product in dispute would fall within the entry relating to medicines and drugs. The same is equally true in respect of the other two decisions on which Mr. Pathak has placed reliance, namely, *Siemens India Limited v. State of Gujarat* [1984] 57 STC 1 (Guj) [FB] and *State of Gujarat v. C. K. Gauze Bandage Manufacturing Company* [1992] 84 STC 571 (Guj). In the earlier decision the question in respect of water pumps and water pumping sets was as to whether they would be agricultural machinery exclusively used in agricultural operations.

The second decision on which Mr. Pathak has placed reliance is in respect of cotton rolled bandages, being used for the treatment of patients, as the bandages. On the facts of the case, it was pointed out that the product would fall within the definition of drugs and medicines under the Act. As pointed out by us earlier the facts and circumstances being eloquently different, the said two decisions would not be able to support the contentions raised by Mr. Pathak before us.

16. Thus, we see no difficulty in concluding and holding that the product, namely, "Dandwala Keshkalpa", though is being manufactured and prepared with the help of certain ayurvedic herbs, having and containing known properties and values for certain common diseases relating to the hair and the scalp and though its use is advised for luxuriant hair growth, and though the manufacturers insist that the same should be treated as medicine and never as a hair-oil, the product is, in reality, nothing but a hair-oil falling within the relevant entry pertaining to hair-oils and not a medicine or drug. We are therefore of the opinion that the Tribunal was justified in holding that the product in question is covered under entry 7 of Schedule III appended to the Gujarat Sales Tax Act, 1969 and not under entry 26(1), Schedule II, Part A appended thereto. We therefore answer and reply the abovesaid question No. 1 in the affirmative against the assessee and in favour of the Revenue.

17. With regard to question No. 2 : The question is as to whether the Tribunal was justified in not exercising its discretion in giving the prospective effect to the order of the Deputy Commissioner. Mr. Pathak has urged that the statutory provisions do enable the determining authority to say that the decision or determination order shall have the prospective effect. A reference to the provision contained in section 62(2) of the Act of 1969 makes it abundantly clear that the same is an enabling provision vesting the discretion in the Commissioner to order that the determination order shall have the prospective effect only. The determining authority can always say that the determination orders shall have prospective effect only and that those sales transactions which had taken place earlier before the orders of determination would not be affected by the determination orders. But this is a discretionary jurisdiction vested in the determining authority and that, it cannot be urged as of right that the determining authority should have given a prospective effect only. Mr. Pathak was not able to point out anything before us, on the basis of which it could have been urged that prospective effect was required to be given to determination order. On the contrary it appears very clear to us that the product in question was sold as a hair-oil by the company and that, there was no justifiable reason for accepting that the orders of determination should have the prospective effect only. Moreover, it requires to be pointed out as noticed by the Tribunal, that, even it was not urged at the time of determination proceedings that the orders of determination should be given the prospective effect only. We are therefore, of the opinion, that the Tribunal was justified in not exercising its jurisdiction to give prospective effect to the determination order. We, therefore answer and reply

this question also in the affirmative against the assessee and in favour of the Revenue.

18. We therefore answer and reply the abovesaid questions as indicated by us, with no order as to costs.

19. Reference answered in the affirmative.