

(1994) 01 CAL CK 0017
In the Calcutta High Court
Case No : Matter No. 2888 of 1993

East India Pharmaceutical Works Ltd. APPELLANT
Vs
Asstt. Collector of C. Ex. RESPONDENT

Date of Decision : 28-01-1994

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 3, 35, 5

Citation : (1994) 71 ELT 358

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : Bhaskar Gupta, Samir Chakraborty and Sanjay Baid, for the Appellant; N.C. Roy Chawdhury and Prantosh Mukherjee, for the Respondent

Judgement

Ajoy Nath Ray, J.—The petitioner challenges in this writ application the order of the Assistant Collector, Central Excise, dated 23-6-1993 wherein he disallowed the claim for exemption for the cough syrup "Kafbin" claimed by the petitioner to be an Ayurvedic medicine and thus coming within the scope of an exemption notification.

2. The claim for exemption made by the petitioner arises in this way.

3. Under Tariff Item 3003.10 of Chapter 30 of the Tariff Act of 1985 the following entry appears :-

"Heading Sub-heading Description of goods Rate of No. No. duty 1 2 3 4 30.03
3003.10 Patent or proprietary medicaments 15% other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic".

4. It will be seen from the above item that medicaments which are exclusively Ayurvedic are not within the said Tariff entry.

5. Furtheron there is Item 3003.30 which reads as follows in the said Tariff Act:-

3003.30 Medicaments, including those used in Ayurvedic, 15% Unani, Siddha, Homoeopathic or Bio-chemic systems 6. There is further a Notification No. 32/89-

C.E., dated 1-3-1989 which prescribes that the rate as against the said above sub-heading No. 3003.30 will be nil and not 15%.

7. Chapter note No. 2 of Chapter 30 runs as follows and the same is important for our purposes :-

* * * * * 8. To complete the list of extracts the following two definitions from the Drugs & Cosmetics Act, 1940 are also set out below :-

"3. Definitions. - In this Act, unless there is anything repugnant in the subject or context -

(a) Ayurvedic, Siddha or Unani Drug, includes all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of (disease or disorder in human beings or animals, and manufactured) exclusively in accordance with the formulae described in the authoritative books of (Ayurvedic, Siddha and Unani Tibb systems of medicine) specified in the First Schedule"

(i) in relation to Ayurvedic, Siddha or Unani Tibb systems of medicine all formulations containing only such ingredients mentioned in the formulae described in the authoritative books of Ayurveda, Siddha or Unani Tibb systems of medicine specified in the First Schedule, but does not include a medicine which is administered by parenteral route and also a formulation included in the authoritative books as specified in clause (a)

(ii) in relation to any other system of medicine, a drug which is a remedy or prescription presented in a form ready for internal or external administration of human being or any other Pharmacopoeia authorised in this behalf by the Central Government after consultation with the Drugs Technical Advisory Board constituted u/s 5".

9. The petitioner forwarded to the authorities a list of some twelve ingredients of their Syrup Kafbin and these are mentioned at page 31 of the writ petition. On this basis a licence to manufacture for sale of Ayurvedic drugs was issued to the writ petitioner and that is annexed to the writ petition at page 30.

10. The Superintendent of Central Excise thereafter by a letter dated 4th July 1992 complained that Kafbin contains inactive Allopathic ingredients and thus it is not an Ayurvedic medicine.

11. The petitioners replied by their letter of 16-7-1992 that there are three inactive allopathic additives in Kafbin which have no clinical or medicinal properties which are as follows :-

(1) Sodium Benzoate

(2) Propyl Paraben and

(3) Methyl Paraben.

12. Before the Asstt. Collector the petitioner produced at the hearing certificates of Kaviraj Shibaprosad Goswami and J.B. Roy State Ayurvedic Medical College and Hospital that in spite of the above three Allopathic constituents Kafbin remains wholly Ayurvedic since these negative allopathic constituents are mere preservatives and do not have any medicinal value.

13. The Assistant Collector has further proceeded on the basis that "even if one of the ingredients is of allopathic origin it should be classifiable as patent or proprietary medicament"; and again that "all its ingredients" have to be "mentioned in the authoritative books of Ayurvedic medicines".

14. If the Assistant Collector has not misdirected himself in law in applying the above tests then the petitioner's case must be rejected. This is because the allopathic ingredients are admittedly present in Kafbin even though these are claimed to be no part of the medicament and to be mere preservatives.

15. If on the other hand the law is that the exemption notification will be equally applicable to Ayurvedic medicines even if the same contain a non-Ayurvedic preservative or some such other negative allopathic ingredient then the Writ Court might well have to interfere because of the error apparent on the face of the order of the Asstt. Collector.

16. Before I go on to the authorities it is important to analyse the applicability of the above statutory provisions, in relation to Kafbin.

17. Kafbin is no doubt a proprietary medicament because the petitioner sells the same under their mark "Kafbin" and would be entitled to maintain an action for infringement or passing off depending on whether they are registered or not if competing traders sold goods of the same description under the same or a similar name or tried to pass off their goods as the goods of the petitioner. The petitioner must therefore come under the exclusion of "those medicaments" mentioned in Item 3003.10, so that they can claim total exemption.

18. From the definition of "medicament" given in Chapter note 2 quoted above, it is quite clear that these have to be products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses. Unmixed pure Ayurvedic products are obviously exempted.

19. It is well known that "therapeutic" refers to curative medicine or a curative use of medicine and "prophylactic" medicines or prophylactic use refer to disease preventive ones.

20. Unless the products are "mixed or compounded for their therapeutic or prophylactic uses", the products do not come within the meaning of "medicaments" under Chapter 30 Note 2 at all. In my opinion, a simple reading of these words shows that addition of preservatives or non-medicinal products which are mixed neither for therapeutic nor for prophylactic uses can not at all change the nature of the medicament already created for such therapeutic prophylactic uses by the mixing of pure Ayurvedic products. They remain an

Ayurvedic medicament within the definition, notwithstanding the non-Ayurvedic addition for non-therapeutic and non-prophylactic purposes.

21. Kafbin, therefore, in so far as it is composed of the 12 admittedly Ayurvedic items, is an Ayurvedic medicament by reason of the compounding of the said 12 items and it does not change its nature because of the addition of the three allopathic items which are added neither for therapeutic nor for prophylactic uses.

22. One of the cases relied upon by Mr. Bhaskar P. Gupta is the case of Panama Chemical Works Vs. Union of India (UOI), which is a Division Bench decision of the Indore Bench of the Madhya Pradesh High Court. There the question was whether the petitioner's product named SWAD is to be treated as confectionery or as an Ayurvedic medicine since the medicinal element referable to Ayurvedic components was only 3% of the product, the balance 97% consisting of sugar. The issue was whether the item is confectionery or an Ayurvedic medicine. In deciding the said case the Division Bench did go upon the issue of inactive ingredients present in an Ayurvedic medicine. They said as follows at paragraph 35 of the judgment :-

* * * * * 23. Mr. Gupta, therefore, submitted that in a similar manner the presence of inactive components in Kafbin should not any more take the said preparation out of the ambit of the exemption notification than did the presence of 97% sugar in the product SWAD. 24. Mr. N.C. Roy Chowdhury appearing for the respondents sought to distinguish this case by saying that sugar, in any event, is an Ayurvedic element and it is found in the Ayurvedic texts. Thus the whole case could have been decided on the simpler basis of the entire ingredients of SWAD being in accordance with recognized Ayurvedic components. He said that paragraph 35 above was, therefore, obiter. In my opinion, the case was not decided in the manner Mr. Roy Chowdhury submitted it could have been decided. The learned Judges did consider sugar as some item other than an Ayurvedic item although it might be that they need not have done so. It is quite clear that their Lordships' opinion was that the presence of an inactive ingredient even to the extent of 97% does not make an Ayurvedic medicine any the less an exclusive Ayurvedic medicine so long as the other elements are inactive and not included for medicinal purposes.

25. I have come to the same conclusion that the presence of such ingredients will not render an Ayurvedic medicine any the less Ayurvedic provided the ingredients have not been mixed or compounded for therapeutic or prophylactic use. The mixing for the purpose of preservation is not one such use.

26. Mr. Roy Chowdhury relied heavily upon the decision of the Tribunal given in the case of 1988 (16) ECC 145 . In that case the Tribunal considered Tariff Heading 3003.30 and came to a conclusion favourable to the assessee. The Tribunal passed a remand order in that case. The argument before the Tribunal was that although the two Vicks compounds contained Ayurvedic elements and medicines yet the extraction of those elements was not in accordance with the

Ayurvedic methods. Thus, the argument went, according to the definition contained in Section 3(a) of the 1940 Act, the preparation ceased to be Ayurvedic. According to the argument the manufacture of the Ayurvedic items had to be exclusively in accordance with the textual formulae.

27. The Tribunal repelled the contention. The Tribunal held that the rigours of the definition of another Act cannot be imported to the Tariff Act so as to affect the interest of the assessee. They quoted a decision extracting therein the following passage from the "House of Lords" case *Macbeth v. Chislet* (10 A.C. 220 at page 224) :-

"It would be a new terror in construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act, not incorporated or referred to, such an interpretation is given to it for the purposes of that Act alone".

In that context the remand order of the Tribunal was that "If it is found that in the common parlance it is known as an Ayurvedic medicine and all its ingredients are mentioned in the authoritative books on Ayurvedic Medicines" then the assessee is entitled to have relief.

28. Mr. Roy Chowdhury stressed upon the form of the remand order wherein the Tribunal asked for a consideration whether all the ingredients are mentioned in the Ayurvedic Text.

29. Mr. Roy Chowdhury said that that approach of the Tribunal has found favour even with the Supreme Court which approved of the said decision of the Tribunal. He referred to me 1990 (30) ECR 607 where the judgment of the Supreme Court in *Richardson's* case is mentioned as follows :-

"Hon"ble Mr. Justice Sabyasachi Mukharji and Hon"ble Mr. Justice S. Ranganathan of the Supreme Court has on 10-1-1989 dismissed Civil Appeal No. 2127 of 1988 (16) ECC 145 and observed that "having regard to the facts and the circumstances of the case and in view of the findings made by the Tribunal and the points upon which it has remanded the matter to the Assistant Collector, we are of the opinion that the Tribunal has proceeded in the facts of this case on a correct basis and the order of the Tribunal does not call for any interference".

30. In my opinion, the issue in the Vicks case before the Tribunal was not whether all the ingredients have to be Ayurvedic ones irrespective of their therapeutic or prophylactic purpose. But the issue was whether the extraction of the said elements must be in accordance with the rigorous definition of another Act. In my opinion, the said case and the decision of the Supreme Court are only authority for the proposition that, the Ayurvedic elements need not necessarily have to be extracted according to Ayurvedic formulae to be Ayurvedic for the purposes of the Tariff Act.

31. Indeed stretching the argument of the respondents too far would lead to absurdities. A preservative is added to keep the medicine intact against the

spoiling element of time or contamination with outside agents. Were one to push the argument of Mr. Roy Chowdhury far enough, one would come ultimately even to contending that the glass phials in which the medicines are sold render the medicines non-Ayurvedic because glass is not an Ayurvedic item. For the phials protect the medicine only, as do the non-Ayurvedic elemerits. A little less absurd, but still quite far fetched would be the argument that a small colouring material, introduced only for marketing attraction, would change the Ayurvedic medicine into a non-Ayurvedic one. Mr. Roy Chowdhury in his arguments indeed did not go this far, but to examine the soundness of his contention I have to put his arguments to their logical extreme forms, and then test for their accuracy.

32. I am quite convinced, therefore, that the Assistant Collector misdirected himself in law in proceeding upon the basis that any element of the mixture Kafbin, for whatever reason present, will render the same non-Ayurvedic and thus dutiable as a proprietary medicine, irrespective of the purpose that the non-Ayurvedic element is intended to serve in the compound or mixture.

33. Mr. Roy Chowdhury relied upon the case V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another, . It was inter alia held there, in the manner I respectfully venture to read the judgment, that if two interpretations are possible in the department then the High Court in its writ jurisdiction will not sit in appeal if one of the two interpretations has been accepted. The correctness of the Tribunal is not in issue. Unless the decision is perverse or mala fide interference in the writ jurisdiction is not permitted.

34. For a similar purpose Mr. Roy Chowdhury relied upon a more recent Supreme Court case being Collector of Customs, Bombay Vs. Swastic Woollens (P) Ltd. and Others, . The two head-notes in the said case quoting from paragraphs 4 and 9 of the judgment of Sabyasachi Mukharji, J (as his Lordship then was) are as follows :-

* * * * * 35. Mr. Roy Chowdhury submitted, in my opinion, correctly, that even in the matter of entertaining appeals from the Tribunal the Supreme Court narrowed the limits of its own intervention like it has narrowed the supervisory jurisdiction exercised by the High Court or by itself in writ matters.

36. In the manner I have looked at the provisions of law and the authorities I cannot help coming to the conclusion that the Assistant Collector applied wrong legal tests and thus misdirected himself. In my opinion, no two views are reasonably possible in the matter, but that Ayurvedic medicines cannot but be held to remain Ayurvedic even if there is mixed with it some non-medicinal non-prophylactic and non-therapeutic ingredient. I am compelled, therefore, to interfere in the interest of justice.

37. When arguing the case for the petitioner Mr. Gupta anticipated that the remedy by way of an alternative appeal and further departmental proceeding from the order of the Assistant Collector would be argued by the respondents. Thus he referred to me various cases showing that the presence of an alternative

remedy is not an absolute bar but is a mere factor in guiding the discretion of the writ court on the basis of self-imposed limitations.

38. Mr. Gupta cited the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, . He referred to me paragraph 12 of the said case. It was held there that if the writ is first entertained, and then dismissed, on the ground of existence of an alternative remedy a petitioner might be prejudiced for by that time the period for preferring an appeal might have elapsed. The time had elapsed in the case of Hirday Narain and time has elapsed here also because the period of three months u/s 35 for going to the Appellate Collector is long gone by.

39. Mr. Roy Chowdhury submitted that I can direct the respondents to entertain an appeal and thus save the petitioner from this jeopardy. I have doubts whether I can, as against express statute. For the reasons mentioned below, however, I am of the opinion that I should not in any event do so.

40. Mr. Gupta next relied upon a Division Bench decision of this Court reported in Collector of Central Excise and Others Vs. Madura Coats Ltd., (Collector of Central Excise, Calcutta v. Madura Coats Ltd., Serampore and placed paragraph 13 thereof. He said on this basis that a departmental appeal is not always effective because the same question will occur again and again in respect of two consignments or factory passes for the same type of case. There is no strict res judicata in the department and they are bound by their earlier decisions only on a matter of custom or on the basis of the applicability of Article 14 i.e., the duty not to discriminate between assessee and assessee or consignment and consignment. Thus Mr. Gupta argued a writ is the only efficacious remedy in the instant case and the department cannot grant an equally efficacious remedy. Mr. Gupta also referred me to the case reported in Singh Alloys and Steel Ltd. Vs. Assistant Collector of Central Excise, . He placed paragraph 11 from the judgment of Ruma Pal, J in the said case and the said paragraph is as follows :

* * * * * 41. Mr. Gupta thereafter relied upon two Supreme Court decisions being Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, (he placed paragraph 4) and at Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, (he placed paragraph 12). Mr. Gupta submitted that if the decision is a nullity then a direct approach to the Writ Court is possible without exhausting departmental remedies.

42. In my opinion, in the instant case the issue involved is one of law. The issue is whether an Ayurvedic medicine ceases to be one by reason of the presence of non-prophylactic and non-therapeutic allopathic ingredients. Even if the departmental remedies are exhausted, and even if the Appellate Collector and the Tribunal hold against the petitioner, the petitioner can still approach the Writ Court for determination of this issue and to examine whether the authorities have misdirected themselves in law on this point. Under these circumstances, no additional purpose is served by driving the petitioner to exhaust the departmental remedies because they have come to the Writ Court at the end,

and therefore they might as well be allowed to come to it in the beginning and get over with it.

43. Under the circumstances, the writ petition succeeds. It is declared that the product of the petitioner Kafbin prepared in the manner stated in the petition with the named ingredients is a medicament which is exclusively Ayurvedic notwithstanding the presence of the preservatives being allopathic ingredients mentioned above. It is further declared that they are entitled to the absolute exemption of excise duty in regard to Kafbin under Notification No. 32/89 mentioned above. The order of the Assistant Collector mentioned above is quashed and there shall be a writ of certiorari absolute issued in that regard. The respondents shall hereafter permit the petitioner to clear their entire consignments of Kafbin from their factory without let or hindrance and without any imposition of any excise duty until of course the time, if ever, the exemption is withdrawn, or the petitioner happens to change the constituents of Kafbin so as to render it non-Ayurvedic.

44. Rule be drawn up expeditiously.

45. All parties and all others concerned to act on a signed copy of this dictated order on the visual undertaking.