(1981) 03 KAR CK 0001

In the Karnataka High Court

Case No : WP 10424/77

J.L. Morison, Son and Jones (India) Ltd. APPELLANT

Vs

Commissioner for Excise in Karnataka. RESPONDENT

Date of Decision : 13-03-1981

Acts Referred:

Citation : (1981) 2 KarLJ 62

Hon'ble Judges : M. P. Chandrakantaraj Urs, J

Judgement

1. The petitioner J.L. Morison, Sons and Jones (India) Limited, is a Company duly incorporated under the Indian companies Act, 1956, having its registered office at Bangalore. It carries on the business of manufacture and sale of medicines.

It was originally manufacturing local anaesthetics with the use of alcohol and therefore had obtained a Form L-1 licence under the Medicinal and Toilet Preparation, (Excise Duties) Act, 1955, (hereinafter referred to as the Act). Under the licence so obtained, it was manufacturing patent or proprietary medicines containing alcohol and the local aneasthesia products containing alcohol before 25-11-1974. Thereafter, the petitioner developed three products namely, xylotox range, Lignotox range and Novutox range which were products used as local anaesthetics without containing alcohol as one of the ingredients. The Drugs Controller in Karnataka State granted permission to eliminate alcohol by his letter dated 11-9-74. A True Copy of the said letter is annexed to petition as Exhibit-A. Immediately thereafter on 25-11-74 the petitioner Company intimated to the 1st respondent-Commissioner for Excise in Karnataka that he would be discontinuing the use of alcohol as an ingredient from the aforementioned range of local anaesthetic products. A copy of that letter is produced at Exhibit-B to the petition. At the relevant time i.e., in 1974 before its amendment in 1976 sub-sec. (h) of Sec. 2 of the Act read as follows:

"(H) narcotic drug" or ''narcotic'' means a substance (other than alcohol) which when swallowed or inhaled by, or injected into, a a human being induces drowsiness, sleep, stupefaction or insensibility in the human being (and includes all alkaloids of opium)."

2. After the letter of 25-11-74 the petitioner-Company was not subjected to excise duty under the Act by the respondents as it had ceased to use alcohol as one of the ingredients in the aforementioned local anaesthetic products. The petitioner has asserted that even under the Central Excise and Salt Act, the said products were not exigible to excise duty under that Act in as much as by notification No. 16/1962 dated 7-4-62 local anaesthetics generally were exempted from the levy of excise duty under item 14E of the schedule to the Central Excise and Salts Act.

3. In this position, the 3rd respondent-Inspector of Excise, Nelamangala Range, Bangalore, District, within whose jurisdiction the factory of the petitioner is situate, forwarded an audit report to the Accountant General in the State of Karnataka bringing to his notice that for the period from 1-4-75 to 15-3-76 the petitioner had not paid the excise duty in respect of the; local anaesthetic products manufactured by him and that he was due in that behalf to pay excise duty in the sum of Rs. 1,97,128-40.

4. In the meanwhile in the Finance Act, 1976, (Act No. 66/76) the term ''narcotic drug'' or ''narcotic'' was redefined in the Act to read as follows:

"narcotic drug" or ''narcotic'' means a substance which is coca leaf, 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."

5. It was contended by the petitioner then that even the new redefinition excluded local anaesthetics from the purview of the definition of ''narcotic drug'' or ''narcotic''. This was accepted by the 3rd respondent as is apparent from the extracts annexed to his letter dated 6-9-76 addressed to the petitioner-Company, the true copies of which are produced as Exhibit-C and Exhibit-C1 However, the 3rd respondent demanded by his letter dated 11-10-77 payment of Rs. 1,97,128-40 towards Government duties pursuant to the directions of the 2nd respondent-Deputy Commissioner of (Excise) Bangalore District. Aggrieved by this endorsement demanding the payment of money the petitioner-Company has questioned the legality of the endorsement which is produced at Exhibit-E to the petition.

6. The petitioner-Company contends that the endorsement is without jurisdiction, the demand containing therein is without the authority of law as there was no assessment order whatsoever and the same is based on an audit report obtained behind his back and the report being made available only after deciding to make the demand as per Exhibit-E., in violation of the rules of natural justice. Therefore, the petitioner contends that the demand notice at Exhibit-E is liable to be quashed by a writ of Certiorari and further that respondent must be directed by a mandamus to forbear from levying and collecting the excise duty in respect

of local anesthetics manufactured by the petitioner-Company between 1-4-75 and 15-3-76.

7. Unfortunately, though the petition is pending for nearly 4 years in this Court, no return as such has been filed by the respondents. Smt. Vanaja, learned Government Pleader appearing for the respondents, today prayed for a short adjournment so that the respondents could file their return. The prayer is rejected. The respondents had ample time to file their return. In these circumstances, the facts alleged in the petition are deemed to have been admitted by the respondent. In fact, I do not see how they can deny the same.

8. On the facts mentioned above, the short question that falls for consideration is whether local anesthetics without alcohol as one of the ingredients produced by the Company, are exibible to levy of excise duty under item-1(iii) in the Schedule to the Act.

9. Sec. 3 which is the charging section in the Act and read as follows:

3. Duties of excise to be levied and collected on certain goods.-(1)

There shall be levied duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India.

(2) The Duties aforesaid shall be leviable- (a) where dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded ware house for home consumption, whether such State is the State of manufacture or not;

(b) where the dutiable goods are not manufactured in bond, in the State in which such goods are, manufactured.

(3) Subject to the other provisions contained in this Act, the duties aforesaid shall be collected in such manner as may be prescribed.

Explanation.-Dutiable goods are said to be manufactured in bond within the meaning of this section if they are allowed to be manufactured without payment of any duty of excise leviable under any law for the time being in force in respect of alcohol, opium, Indian hemp or other narcotic drug or narcotic which is to be used as an ingredient in the manufacture of such goods."

In is useful to reproduce Item-1 (iii) in the Schedule to the Act as well and that is as follows:

1. Item No.

2. Description of dutiable goods

(iii) Medical preparation not containing

alcohol but containing opium, Indian hemp,

or either narcotic drug or narcotic.

3. Rate of duty.

Ten per cent ad valorem.

10. It is not disputed, that these products, as is evidenced by Exhibit-B, do not contain alcohol. Therefore the question on the plain language of sub-item (iii) of Item-1 in the Schedule to the Act is whether the products in question manufactured by the Company are local anaesthetics containing opium, Indian hemp norcotics or narcotics drugs.

11. I have already pointed out that under sub-sec. (h) of Sec. 2 of the Act narcotic drugs or narcotics had been defined in a particular manner at the relevant period i. a., from 1-4-75 to 15-3-76. The petitioner has clearly asserted in para 7 of his statement of facts the composition of the three ranges of local anaesthetics it produces and they are as follows:

"Local Anaesthetics.

(1) Lingnotox 2% plain.

(2) Lingnotox 4% topical solution.

(3) Lingnotox 2% with Adrenaline are 3 local Anaesthetic Agents.

(4) Lingnotox Jelley 2%

(5) Lingnotox Ointment 5% have been developed by the petitioner and Local Anaesthetics.

(1) Xylotox 2% E 80.

(2) Xylotox Hydrocholoride 2% E 80.

(3) Xylotox 2% E 80 (Dental).

(4) Xylotox Hydrochloride Plain 1% and 2 per cent.

None of the components indicated above contain alcohol nor do they contain opium, Indian hemp, narcotic drugs or narcotics. Prima facie, therefore, it must be held that it does not fall within the ambit of sub-item (iii) of Item-1 in the Schedule to the Act, attracting levy of duty.

12. But Smt. Vanaja, learned Government Pleader appearing for the respondents has contended that the local anaesthetic products themselves are narcotics or narcotic drugs because the effect is to induce when swallowed, inhaled by, or injected into a human being would induce drowsiness, sleep, stupefaction or insensibility and therefore they are medicinal preparations falling squarely within the scope of sub-item (iii) of Item-1 in the Schedule to the Act attracting levy at 10 per cent advalorem. This argument does violence to the language used in sub-item (iii) of Item 1 in the Schedule. What is exigible to tax or duty is not the manufacture of narcotic drug or narcotic but medicines containing them even if I should accede to the argument.

13. It is difficult to accede to the argument of the learned Government Pleader. To be a narcotic drug or narcotics as these terms were defined in the Act before March 1976, use of the said drugs in one of the manners or modes mentioned therein should progressively induce drowsiness, sleep stupefaction and then finally insensibility. Anaesthetics as we all know are used in surgery in the allopathic medicinal system without which minor and major surgery becomes impossible. Surgery generally or can be broadly classified into two classes namely, major and minor. While major surgeries are carried out under the influence of general anaesthesia, minor surgery can be carried out under local anaesthesia. This is common knowledge and does not require any expert opinion or authority. It is equally common knowledge when general anaesthesia is administered to a human being, he first becomes drowsy then goes to sleep inducing an element of stupefaction and then loses sensibility making it possible for the surgeon to carry out surgery without that human being feeling pain. In other words the final stage of human being who has been administered general anaesthesia is total insensibility of the whole body on account of the central nervous system being affected by the effects of a particular general anaesthetic used. As opposed to this, local anaesthetic when applied to a given area of the body, in respect of which surgery is to be conducted, there is no drowsiness induced by the administration of the local anaesthetic nor is sleep induced resulting in stupefaction as that local anaesthetic does not affect the central nervous system. There is no insensibility of the whole body as no part of the central nervous system particularly the thalamus is affected. If this clear distinction exists between what is general anaesthetics, and local anaesthetics, the question of produces of the petitioner-Company in the field of local anaesthetics being narcotic or narcotic drugs does not arise at all.

14. A Division Bench of the High Court of Gujarat in the case of Suhrid Geigy Ltd. Ahmedahad v. Union of India, 1989 Excise L.T. 538 Guj, had occasion to go into this very question. After exhaustively dealing with the various contentions and rival contentions advanced before them the same is the conclusion reached by them. In fact, much of my conclusion is based on the general discussion and approach made by the learned Judges of the Gujarat High Court who rendered Judgment in that case. It will be useful to reproduce para 13 of that Judgment to make the point clearer.

"13. Whether the medicinal preparation which the petitioner has been manufacturing contain a "narcotic drug" or ''narcotic'' (as understood and argued by Mr. Patel) was a question which we put to him. We do not have on record the scientific analysis of the components which enter into manufacture of the 13 medicinal preparations in question, Mr. Patel fell back upon the books to which we have made reference and which say that xylocanine may produce drowsiness and has a unique after-effect of producing drowsiness. Therefore, Mr. Patil started his argument from the wrong end and said that since they produce this symptom, they contain a "narcotic drug" or "narcotic". This argument raised by Mr. Patil suffers from a serious fallacy. We cannot start from a wrong end and determine the character of a medicinal preparation only from its effects in a human organism. Suffice it to say that a heavy meal produces drowsiness and some times sleepiness.

It cannot, therefore, be said to contain a ''narcotic'' or a ''narcotic drug''. We are, therefore, unable to accede to the argument which Mr. Patil has raised before us in that behalf. We are, of the opinion that within the meaning of S. 3 read with Items-1 (iii) and 2 (h) as it was at the relevant time, 13 medicinal preparations which the petitioner has been manufacturing are not liable to pay excise duty under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, because they do not contain a ''narcotic drug'' or ''narcotic''. The first contention raised by Mr. Nanavaty is, therefore, upheld."

15. For the above reasons, the petitioner must succeed. It is submitted from the Bar that subsequent to the amendment in March, 1977, the local anaesthetics are exempt from the levy and therefore does not pose any problem. The demand notice impugned at Ex-E is clearly without jurisdiction as a local anaesthetics with which we are concerned in this writ petition are not exigible to levy of duty under sub-item (iii) of Item-1 in the Schedule to the Act. It is therefore unnecessary for me to deal with the other contentions raised by the petitioner.

16. Rule is made absolute. Exhibit-E is quashed and a mandamus will issue to the respondents to for bear from collecting the sum of Rupees 1.97,128-40 from the petitioner as demanded.

17. There will be no order as to costs.

