
(1995) 09 AHC CK 0119

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 562, 608, 615 and 645 of 1980, 354 and 555 of 1981, 932 of 1982 and 263 and 528 of 1983

Kothari Chemicals

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 27-09-1995

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Central Excises and Salt Act, 1944 — Section 2, 35
Prevention of Food Adulteration Act, 1954 — Section 2

Citation : (1996) 86 ELT 209

Hon'ble Judges : S.N. Saxena, J;B.M. Lal, J

Bench : Division Bench

Advocate : B. Singh and U.S. Singh, for the Appellant; Y.K. Tiwari, J.N. Tiwari, Rakesh Tiwari and Shanti Bhushan, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Lal, J.—Since the question involved in all the aforesaid writ petitions is common hence they all are being disposed of by this are common judgment. However, Civil Misc. Writ petition No. 562 of 1980, Kothari Chemicals and Anr. v. Union of India and Ors. would be the leading petition, wherein main relief sought is to issue an order, direction or writ in the nature of Certiorari quashing impugned proceedings commencing from search and seizure to the supurdari of the goods made on 6-10-1980 (contained in Annexure 2 to the writ petition) and other reliefs are consequential to this relief. The reliefs claimed in other connected petitions are also similar to those of the leading petition, therefore, it is not necessary to repeat the same.

2. At the very outset Mr. U.N. Sharma, learned Senior Standing Counsel for Union of India, raised preliminary objection that the writ petitions as framed and filed are not maintainable as they suffer from the doctrine of EXHAUSTION inasmuch as petitioners have not availed of alternative remedy envisaged u/s 35

of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act), consequently all the writ petitions be dismissed on this ground alone.

3. Mr. K. Parasaran, learned Senior Advocate to Supreme Court, Ex-Attorney General of India, appearing for petitioners, submitted that since these are the of inherent want of jurisdiction in the central authorities for the reason that "pan masala" and other products of like nature are not excisable goods, hence preliminary objection as to alternative remedy is not admissible.

4. Without entering into merits of the arguments on the question of alternative remedy, we are of the opinion that since the petitions have been admitted for hearing the parties and are pending for the last about 15 years, hence the ratio laid down by the apex Court in L. Hirday Narain Vs. Income Tax Officer, Bareilly, is fully applicable, therefore, petitions are liable to be heard and decided on merits. The preliminary objection is disposed of accordingly.

5. The brief facts, as set out in leading writ petition No. 562 of 1980 filed by Kothari Chemicals and the Modern Packers, are these. The firm Kothari Chemicals had been dealing with the business of Tan Masala" since 18th August 1973 without having any concern with the Central Excise department. The respondent No. 2 along with a number of other officials of Central Excise department, raided the factory premises of petitioner No. 2 Modern Packers on 6-10-1980 at about 1.30 P.M. without any prior information or notice. The packing activities were going on. They seized the Tan Masala" which was being packed and prepared a recovery memo after seizing the manufactured material in packed cases which were contained in wooden cases and other sealed tin containers. In the recovery memo total value of the seized goods had been mentioned as Rs. 1,72,495/- (Annexure 2 to the writ petition). Recovery Memo etc. was handed over to the "Supurdgar" under a Supurdginama.

6. All the petitioners have got their concern at Kanpur where they manufacture Tan Masala" and other products of like nature for sale in the market under different trade names and marks viz. (i) "Pan Parag" (ii) "Chaman Bahar", (iii) "Badshah Pasand" etc.. Some of the petitioners prepare tobacco also for which they held licences from the excise department under the provisions of the Act.

7. Those petitioners who prepare Tan Masala" have obtained requisite certificate from Nagar Mahapalika Kanpur for food items issued by the Health Officer in accordance with the provisions of "Nagar Mahapalika Adhiniyam". The certificate was granted under the provisions of the Prevention of Food Adulteration Act, 1954 (as amended by Act No. 34 of 1976) and it required annual renewal for the sale of the Food Items.

8. In other petitions also it has been averred by the petitioners that similar raids were made and search and seizures were effected in their factory premises. Thus by means of aforesaid writ petitions, petitioners have challenged the power, authority and jurisdiction of Central Excise authorities to search and seize the Tan Masala" and other products of like nature in their respective factory premises.

9. Mr. Parasaran, learned counsel for the petitioners contended that the search of petitioner's premises and seizure of Tan Masala" and other products of like nature by the Central Excise authorities are without jurisdiction and bad in law as those were not excisable and no necessity for taking Central Excise Licence was there.

10. Learned counsel further contended that before 1985, preparation of Tan Masala" from the stage of supari will not amount to "manufacture" within the meaning of Section 2(f) of the Act and even if it is held that Pan Masala" was a manufactured product, it was classifiable under Tariff Item 1B of the Central Excise Tariff as it stood then and was wholly exempt from payment of duty in terms of Notification No. 55/75-CE dated 1-3-1975.

11. Learned counsel also contended that Tan Masala" is a "food product" therefore, eligible for exemption under the Notification dated 1-3-1970 and if not then it can be classified under Tariff Item 68 and thus it is eligible for exemption under Notification dated 1-3-1975.

12. Mr. U.N. Sharma, learned counsel appearing for Union of India contended that Tan Masala" is not covered under the term "food product" and "food preparation" therefore, the exemption granted by aforesaid two notifications is not applicable to Tan Masala" and other products of like nature.

13. Learned counsel further contended that the petitioners were using three machines, two for cutting of supari and illaichi and the third one for packing. They also use power, for the manufacture of Tan Masala" and the Tan Masala" is a marketable product.

14. Learned counsel also contended that in the process of manufacturing Tan Masala" the raw material undergoes a drastic change and as a result of such transformation a totally new and distinct article having a distinct name, character and vise comes into existence.

15. Having heard at a considerable length, learned counsel for the parties, having perused the record and having considered the ratio laid down, by the apex court in numerous cases cited for and against by respective learned counsel for parties, the pivotal question that poses itself for determination in aforesaid writ petitions is as to whether Tan Masala" and other preparations of like nature were covered under the term "manufacture" within the meaning of Section 2(f) of the Act before the year 1985 and were excisable under the Act. The next question which germinates from the first one is as to whether Tan Masala" and other products of like nature were wholly exempt from payment of excise duty in terms of Notifications dated 1-3-1970 and 1-3-1975.

16. For determination of aforesaid questions it appears necessary to first see as to how the Tan Masala" and other products of like nature come into existence. In this context it may be made clear that Tan Masala", Tan Parag" "Chaman Bahar" and "Badshah Pasand" etc. involved in these petitions are the products of like

nature for sale in the market under different trade marks and names. With reference to a test report of Tan Masala" conducted by Food Drug Testing & Quality Control Laboratory approved by the Government of India it is submitted that the ingredients of these products are as under :

1. Betel nuts (supari) 83.31% 2. Lime 6.24% 3. Catechu 6.72% 4. Cardamom 1.60% 5. Menthol, Sandalwood Oil and flavouring agents 2.13% -----
100.00 % -----

The mixture of these components in the above ratios brings into existence the Tan Masala" and other products of like nature.

17. Now let us have the term "manufacture" as defined u/s 2(f) of the Act. In the instant petitions we are concerned with the position of law as it stood before 1985. At the relevant time Section 2(f) read as under :

"manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and ... "

18. It is not disputed that from 1986 onwards, the process of converting supari etc. into Tan Masala" is defined to be a process of manufacture within the meaning of Section 2(f) of the Act, therefore, since March 1986 admittedly Tan Masala" and other products of like nature are excisable under the Act. The lis pertains to the period prior to March 1985. Therefore, we are proceeding to examine the term "manufacture" as it was before 1985.

19. The definition of term "manufacture" given in Section 2(f) of the Act is couched in inclusive texture and takes in its fold the incidental or ancillary processes in the nature of finishing towards to the manufactured product. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or vise. The term "manufacture" means the making by labour or machine of an object or various objects into another object of a different character. The essence of manufacture is the transformation of the parts of basic components into another article of a different character. The ingredients of a manufacture as visualised by Section 2(f) of the Act are (i) that there must be a transformation (ii) that from such transformation a new and different article must emerge and (iii) such new article must have a distinct name as a commercial commodity. Thus, this is the true test on which the process of preparing Tan Masala" and other products of like nature involved in instant petitions is to be tested.

20. As stated above the products in question are prepared from betel nuts, lime, catechu, cardamom, menthol, sandalwood oil and flavouring agents. In the process of preparation, these components are transformed and as a result of such transformation the new and different article which emerges is Tan Masala" and other products of like nature and this new article that emerges has a different name and character. In the process of preparation, the components

mentioned above cease to remain in their original form and they lose their original character and a transformation takes place. As a result of such transformation, the mixture of these components constitutes a different article. Prior to such transformation betel nuts remain betel nuts, lime remains lime, catechu remains catechu, cardamom remains cardamom, menthol etc. remain menthol etc. but after transformation their mixture takes shape of a new and different article and after transformation it ceases to remain what it was before the transformation. These components after mixture constitute Tan Masala" and other products of like nature which is a new and different article having a distinct name and character. In this process of preparation petitioners use machines, power and workers. Accordingly in the opinion of this Court the process of preparing Tan Masala" and other products of like nature involved in the instant petitions is covered under the comprehensive term "any process" used in the definition clause of Section 2(f) of the Act and thereby the products in question were covered under the term "manufacture" within the meaning of Section 2(f) of the Act even before the year 1985 and thus were excisable under the Act.

21. In Ashok Griha Udyog Kendra Pvt. Ltd. Vs. Collector of Central Excise and Customs, , the Division Bench of this Court held that if different spices are mixed in certain proportion and they are powdered, then the original property of the particular ingredient is lost and is mixed with the properties of the other ingredients with the result that a new and a different article having a distinct name, character or use emerges. Such masalas would be covered by Tariff Item 68. Thus, the ratio laid down in this case fully applies to the facts of instant petitions, as the ratio was laid down on the facts that different spices were mixed in certain proportion and they were powdered and as a result of the same different commodities came into existence known as Garam Masala, Dal Masala, Ghana Masala etc.

22. Learned senior counsel for petitioners, giving references of various decisions of apex court particularly in the case of Union of India (UOI) Vs. Delhi Cloth and General Mills, and Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, contended that the word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance" however minor its consequential change may be. It is submitted that this distinction is well brought about in a passage quoted in Permanent Edition of Words and Phrases from an American Judgment : The Passage runs thus :

"Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

23. There are no two opinions about the proposition of law laid down by the apex court in the above referred cases. Applying the same in the instant petitions it is

clear that the process through which "Pan Masala" and other products of like nature are prepared brings into existence a new substance known as "Pan Masala" etc. and it is not that it produces only some change in a substance. As stated above before this process Betel nuts, Lime, Catechu, Cardamom, Menthol etc. remain different substances but as a result of that process it brings into existence a new substance known as "Pan Masala" etc. Thus, the transformation does take place and a new and different article does emerge having a distinctive name and character. Therefore, in the opinion of this Court the decisions referred above are of no avail for present petitioners rather the case as set out by the respondents finds support from it.

24. In this regard their lordship's of apex Court ruled that when a new substance is brought into existence or if a new or different article having a distinct name, character or use results from particular process, such process or activity would amount to manufacture and duty of excise is leviable on such substance.

(See *Aditya Mills Ltd. v. Union of India* 1988 U.P.T.C. 1386)

25. Similarly in *S.P.S. Jayaram and Co. Vs. Assistant Collector of Central Excise (Preventive), Madurai*, where the argument advanced was that tooth-powder is manufactured from ash and the ash as such is also used for cleaning the teeth, Madras High Court ruled (vide para 10 of the judgment) that such use by itself will not be a decisive factor in determining whether a transformed product has a distinct use quite different from its component part. As a matter of fact, the petitioner does not market its product as medicated or scented ash. On the other hand, it takes care in naming the transformed product as "tooth powder". Therefore, it is too late in the day to doubt that ash-vibhuti and tooth powder are two different and distinct commercial commodities. If, after transformation, vibhuthi is turned into tooth-powder and is sold as such, it is no more open to the petitioner to contend that there is no change either in the use of ash-vibhuthi or in the transformed product "tooth-powder". Further in para 13 of the judgment it has been pointed out that it might be that if the tooth-powder is put into the water, the ash can be obtained. But this is wholly irrelevant in the teeth of the definition of "manufacture" occurring in Section 2(f) of the Act and thus "tooth powder" has been held subject to excise duty.

26. In the instant case also "Pan Masala" and other products of like nature are manufactured from betel nuts and other components but as a result of the process betel nuts and other components are transformed into "Pan Masala" and other products of like nature and the components lose not only its identity but also its commercial name, character and use, therefore, the ratio laid down in aforesaid case is fully applicable to the instant case.

27. Thus, in view of the discussions made above this Court is of the considered opinion that the process of preparing "Pan Masala" and other products of like nature amounts to "manufacture" within the meaning of Section 2(f) of the Act as it stood before the year 1985.

28. Now coming to the next question as to whether these products in question were wholly exempt from payment of excise duty in terms of Notifications dated 1-3-1970 and 1-3-1975, it is necessary to have the Notification No. 17/70-C.E., dated 1-3-1970 first, relevant portion of which reads as under :

"The Central Government hereby exempts prepared or preserved foods falling under this Item other than those specified in the Schedule hereto annexed, from the whole of the duty of excise leviable thereon."

Thus, by this Notification dated 1-3-1970 only prepared or preserved foods other than those specified in the schedule annexed thereto, are exempt from the excise duty.

29. Learned counsel for the petitioners contended that "Pan Masala" and other products of like nature are food products or food preparations, therefore, under aforesaid notification dated 1-3-1970 they are wholly exempt from payment of excise duty. Referring to the judgment of the apex court in the case of Pyarali K. Tejani Vs. Mahadeo Ramchandra Dange and Others, , learned senior counsel appearing for the petitioners contended that the supari has been held to be "food" within the meaning of Section 2(v) of Food Adulteration Act, 1954, therefore, applying the doctrine of "CONTEMPORANEOUS EXPOSITIO" supari has to be construed as "food" within the meaning of the Excise and Salt Act too.

30. Before proceeding to examine as to whether "Pan Masala" and other products of like nature are food products or food preparations, it is to be made clear that in the instant petitions we are not concerned with supari because "Pan Masala" and other products of like nature come into existence as a new and distinct article as a result of transformation in its manufacturing process.

31. The term "food" in Corpus Juris Secundum, Volume 36 at page 1041 is stated to mean and include that which is drunk as well as that which is eaten for nourishment. As used in statutes, it may include food for animals, as well as food for human beings, although in common use the word feed is employed when referring to articles fed to animals. In food statutes the term usually includes all articles used for food or drink by a man or by men and other animals whether simply mixed or compound,. It is further stated therein that under some statutes, even the articles used for medicines are also included within the meaning of the word "food". The passage from Corpus Juris Secundum itself shows that the word "food" has no definition of universe application and that it varies from statute to statute.

32. Under similar circumstances in Brooke Bond India Limited Vs. Union of India and Others, it has been held that Trench Coffee" has a distinctive name, character and use different from chicory roots. The process of roasting, powdering and its mixing with coffee powder is a "manufacturing process". There is no conceivable similarity between the use of the original roots and the ultimate use to which the coffee chicory is put.

33. Further in the aforesaid case His Lordship Hon^{ble} Mr. Justice Jeevan Reddy of Andhra Pradesh High Court as he then was (now Hon^{ble} Judge of apex Court), with reference to the aforesaid Notification dated 1-3-1975, held that what is exempt under Notification No. 55/75 is not "food" as such but "food products" and "food preparations" and Coffee chickory blend is neither food product nor food preparations, therefore, it will not be exempt from duty under Notification No. 55/75.

34. As regards the case of P.K. Tejani (supra) relied upon by the learned counsel for the petitioners, it is of no avail for the present petitioners as it was a case under the provisions of Food Adulteration Act and it was "supari" which has been held to be "food" within the meaning of Section 2(v) of Food Adulteration Act and not the "Pan Masala" and other products of like nature. As we have already observed above that betel nut is one of the components of "Pan Masala" etc. and in the manufacturing process of "Pan Masala" all the components including betel nut lost its identity as such and are mixed with the properties of the other ingredient with the result that a new and a different article having distinctive name, character and use emerged known in the market as "Pan Masala" and other products of like nature. Therefore, in the instant petitions we are concerned with the durability of "Pan Masala" and other products of like nature and not the supari as such.

35. Moreover, in that case decision is rendered with reference to the particular definition of the expression "food" under the Food Adulteration Act. Under that Act the expression "food" is very widely worded, whereas under the present Act i.e. Excise and Salt Act it is not so.

36. As regards the doctrine of CONTEMPORANEA EXPOSITIO, it is of no avail to the present petitioners firstly for the reason that in P.K Tejani's case (supra) it was "supari" which was held to be "food" within the meaning of Food Adulteration Act and not the "Pan Masala" etc. and secondly for the reason that this doctrine is not applicable to a modern statute. In the instant case we are not concerned with the excisability of the "supari" rather we are concerned with the Tan Masala" etc. The betel nut is not the finished goods in the instant case rather it is one of the raw-materials for preparation of Tan Masala" and other products of like nature. In the instant case finished goods is Tan Masala" etc. which is quite distinct from "supari".

37. The doctrine of contemporanea expositio applies only to old statutes and not to modern statutes. (See J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, and Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, .

38. In M/s. Doypack Systems Pvt. Ltd. (supra) their Lordships of Supreme Court observed as follows:

"Contemporanea expositio is a well settled principle or doctrine which applies only to the construction of ambiguous language in old statutes. Reliance may be

placed in this connection on Maxwell 13th Ed. P.269. It is not applicable to modern statutes. Reference may be made to G.P. Singh, Principles of Statutory Interpretation, 3rd Edn. Pages 238 and 239. As noted in Maxwell on the Interpretation of Statutes, 12th Edition at page 269 that the leading modern case on *contemporanea expositio* is the case of *Campbell College, Belfast v. Commissioner of Valuation for Northern Ireland* (1964) 1 WLR 912 in which House of Lords has made it clear that the doctrine is to be applied only to the construction of ambiguous language in the very old statutes. It is, therefore, well to remember what Lord Wetson said in *Clyde Navigation Trustees v. Laird* (1883) 8 A.C 658 that *contemporanea expositio* could have no application to a Modern Act".

39. Thus, for the reasons given above the doctrine *contemporanea expositio* is also of no avail to the present petitioners in the circumstances of present case.

40. Learned Senior counsel appearing for petitioners also contended that by virtue of the Explanation appended to Notification 17/70 Tan Masala" and other products of like nature were taken out of the Schedule to the Notification and since the items mentioned in the Schedule to the Notification alone were dutiable and other food products were wholly exempt from duty, hence TAN MASALA" and other products were not dutiable.

41. The Explanation to the Notification No. 17/70 reads as under :

"Explanation :- The following products shall not be deemed to be prepared or preserved foods falling under this Schedule, namely :-

(i) xx xx xx (ii) xx xx xx (iii) xx xx xx (iv) xx xx xx (v) Nuts, including cashew-nuts and ground-nuts, in any form."

42. Learned counsel submitted that Tan Masala" and other Products of like nature are nothing but areca nut in small pieces and thus are covered under the Explanation quoted above.

43. In this regard it may be stated that as observed above in these petitions we are not concerned with the excisability of the nuts rather we are concerned with the excisability of Tan Masala" and other products of like nature. We have already held that betel nut is one of the raw materials or the components of Tan Masala" & in process of manufacturing Tan Masala" and other products of like nature the identity of component ceases to exist and the same ... mixed with the properties of the other ingredient as a result of which a new and different article comes into existence known in the market as Tan Masala" and other products of like nature and not as betel nut or any other nut.

44. Learned senior counsel appearing for the petitioners then contended that even if it is held that Tan Masala" and other products of like nature were not a food product and not eligible for exemption under Notification 17/70 even then Tan Masala" and other products of like nature can be classified under tariff item 68 and therefore, are eligible for exemption under Notification 55/75-C.E., dated

1-3-1975. The relevant portion of the Notification reads as under:

"In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, and in supersession of the Notification of the Government of India in the Ministry of Finance (DR & I) No. 22/69-C.E., dated 1-3-1969, the Central Government hereby exempts prepared or preserved foods falling under Item No. 1B of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) other than those specified in the Schedule hereto annexed from the whole of the duty of excise leviable thereon."

45. Thus, from above, it is clear that by this Notification Central Government exempted only prepared or preserved foods falling under item No. 1B of the First Schedule to the Act, other than those specified in the Schedule to the Act, other than those specified in the Schedule to the Notification.

46. In this regard it may be made clear that in the instant petitions we are concerned with Tan Masala" and other products of like nature and these products are not covered under Item No. 1B of the First Schedule to the Act rather are classifiable under Item 68 of the First Schedule to the Act and the Notification No. 55/75 is in respect of prepared or preserved foods falling under Item No. 1B of the First Schedule to the Act, therefore, the exemption granted by this Notification is not applicable to Tan Masala" and other products of like nature. Indeed, Tariff Item 68 does not contain the definite description of the goods, nor does it disclose the identity of the goods but a careful reading of the First Schedule appended to the Act reveals that since Tan Masala" and other products of like nature are not covered under any other Item specified in the First Schedule to the Act, hence they are covered by Tariff Item 68 and not the Item 1B of the First Schedule to the Act.

47. As observed above, Tan Masala" and other products of like nature are neither foods nor food products or food preparations, therefore, they are not covered by the Notifications dated 1-3-1970 and 1-3-1975. Under similar circumstances considering the scope of aforesaid Notification No. 55/75, dated 1-3-1975, in Ashok Grih Udyog Kendra Pvt. Ltd. Kanpur's case (supra) it has been held that spices are neither "food products" nor food preparations", therefore, spices are not entitled to exemption under Notification No. 55/75 dated 1-3-1975. Similarly in Brooke Bond India Ltd. case (supra) it has been held that Coffee chickory blend is neither "food product" nor "food preparations", therefore, it will not be exempt from duty under Notification No. 55/75.

48. No other point was pressed before us except those discussed above, whereas numerous grounds have been taken in the memo of petitions. No other point finds place in the RESUME of the submissions made on behalf of petitioners except the points in issue pressed during the course of arguments and dealt with above.

49. In view of the premises aforesaid on the facts and in the circumstances of these petitions, we are of the considered opinion that the process of preparing

Tan Masala" and other products of like nature involved in these petitions, amounts to "manufacture" within the meaning of Section 2(f) of the Act as it stood before the year 1985 and these products were not exempted from payment of excise duty in terms of Notifications dated 1-3-1970 and 1-3-1975, therefore, for the reasons given above these products were excisable under the Act, consequently, impugned proceedings including search and seizure conducted by the excise authorities cannot be said to be contrary to the provisions of the Act, or without jurisdiction or illegal.

In the result all the aforesaid writ petitions fail and are dismissed with costs, being devoid of merits.