

(1987) 01 BOM CK 0052

In the Bombay High Court

Case No : Writ petition No. 2228 of 1986 with No's. 2381, 2382, 2383, 2401, 2435, 2436 and 2497 all of 1986

Kumar Prabhulal Shah and others

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 15-01-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 27(1)
Drugs and Cosmetics Act, 1940 — Section 3

Citation : (1987) 28 ELT 193

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Judgement

1. These petitions under Article 226 of the Constitution are aimed against the rejection of applications moved by petitioners for refund of Additional Duty levied and paid u/s 3 of the Customs Tariff Act, 1975.

2. The eight petitions afore-mentioned arise out of imports of Sorbitol Solution, Phenol USP, Phenol and Diethylene Glycol between 1980 and 1985. Upon the arrival of the consignments the importer-petitioners tendered Bills of Entry. In these Bills, the product imported was stated to be one of the afore-mentioned four, the column meant for Customs Tariff heading showing "29.01/45" and that for column C.E.T. Item mentioning the numeral "68". Additional Duty was recovered on the consignment along with the Customs Duty payable. A series of petitions came to be filed in this Court questioning the recovery of Additional Duty upon products imported, it being contended that they were exempted from such duty under Notification issued vide Rule 8(1) of the Central Excise Rules, 1944 as amended from time to time. Pendse J. in Rakesh Enterprises and another Vs. Union of India and another 1986 (26) E.L.T. 906 (BoM) held that Additional Duty could not be levied upon Phenol USP inasmuch as the same was drug or drug intermediate falling within the Notification dated March 1, 1975, at

Item No. 19 of the schedule annexed to the Notification. This decision was followed by the learned Judge in Writ Petitions Nos. 1681 of 1982 and 2190 of 1982 - the latter pertaining to "Sorbitol". The judgment in Rakesh Enterprises (supra) was pronounced on 12.8.1986. Taking support from the above judgment and others pronounced at about the same time, the different petitioners now before are moved applications for refund of the Additional Duty paid. It was their contention that the duty had been paid under a mistake of law, the mistake being mutual, and, that the recipient, the Union of India, could not retain the same. These applications were rejected by the second respondent in all the cases, on the short ground of the refund being claimed more than six months after the payment of the Additional Duty. It was held that Section 27(1) of the Customs Act, 1962, prescribed for recovery of duties wrongly paid, a period of six months to be computed from the date of payment of duty. For that reason, the applications were time barred, and thus, liable to be rejected. The rejection of the applications has given rise to the above eight petitions.

3. Petitioners' case is that Additional Duty was levied and collected under a mistake of law, the mistake being entertained by the petitioners as also the Customs Authorities. As a matter of fact, no Additional Duty was leviable u/s 3 of the Customs Tariff Act. This was because a "drug" and "drug intermediates" fell within the exemption Notification. Having regard to Pendse J.'s decision in Rakesh Enterprises (supra), the recovery was illegal. The amount could not be retained and Section 27(1) of the Customs Act, 1962 did not apply. Petitioners on becoming aware of the judgment in Rakesh Enterprises (supra), moved applications for refund and the rejection thereof had compelled them to move this Court under Article 226. They prayed for a writ of certiorari to quash the orders rejecting their applications for refund and a mandamus to direct the respondents to forthwith refund the Additional Duty collected along with interest at rate 21% per annum from the date of collection till payment.

4. On behalf of the respondents, one V.T.K. Nayanar, the Assistant Collector of Customs (Legal), has filed an affidavit in reply. It is contended that the Bills of Entry tendered by the petitioners were assessed without the petitioners raising any protest or objection. After the rejection of their refund applications, the petitioners could have preferred appeals under the Customs Act, 1962. They had no right to move the Writ Court directly. It was not correct to say that the decision of Pendse J. in Rakesh Enterprises (supra) covered the controversy arising here in respect of the applicability of the exemption Notification to the products imported. The imported articles were neither a "drug" nor a "drug intermediates". In fact, the Bills of the Entry tendered by the petitioners indicated that they fell under Customs Tariff Entry No. 29.01/45(10). Had the articles been drugs, petitioners would have been required to follow, and, they would have followed, the relevant provisions of the Drugs and Cosmetics Act of 1940 and the Rules framed thereunder. In particular, they would have had to comply with Rule 39 of the Drugs and Cosmetics Rules of 1945. This Rule requires an importer to make and sign a declaration that the imported drugs

comply with the provisions of Chapter III of the Drugs and Cosmetics Act, 1940 and the Rules thereunder. The declaration had to be supplied to the Customs Collector. Admittedly, no such declaration was made or supplied. The articles imported were neither "drug" nor "drug intermediates" and having regard to what is stated above, the petitioners were stopped from contending the contrary. This apart, the refund applications were rightly rejected as being time barred. In relation to the import of Phenol and Diethylene Glycol, which figure in Writ Petitions Nos. 2436 of 1986 and 2497 of 1986, the additional defence raised is that these products were not "drugs" as was clear from the absence of the letter "P" at the end indicating their recognition by any Pharmacopoeia.

5. Having regard to the rival submissions, the points for determination are :-

1. Whether Sorbitol and Phenol USP were "drug" or "drug intermediates" exempted from the whole of the duty of excise leviable vide exemption Notification ?
2. Whether Phenol and Diethylene Glycol were "drugs" immune from the whole of the duty of excise leviable under the exemption Notification ?
3. Whether the rejection of the refund applications by respondent No. 2 is unsustainable in law ?
4. What interest, if any, and on what terms, are the respondents liable to pay ?
5. To what relief are petitioners entitled ?

My findings, for reasons given below, are :-

1. Yes.
2. Yes.
3. Yes.
4. 12% per annum from expiry of eight weeks as from today.
5. See order.

REASONS

6. The preliminary objections taken in the affidavit in reply do not merit any serious consideration. The fact that Additional Duty was paid by the petitioners without raising any objection or protest will not preclude them from filing the present petitions. The challenge here is based upon the total invalidity of the assessment and recovery - this being attributed to a mistake of law on the part of the petitioners as also the Customs Authorities. Next, is the contention that petitioners could and should have preferred an appeal under the Customs Act, 1962. The fact that such an appeal has not been preferred, will not bar a petition under Article 226. A grievance of the petitioners is that the Customs Authorities have ignored the judgment in Rakesh Enterprises (supra), not to speak of several

others which bound them. Taking recourse to the remedies provided under the statute would be a fruitless task. It would be virtually like an appeal from Caesar to Caesar. It is well settled that the existence of an alternative remedy does not always necessitate the exhaustion of that remedy, before a suitor can seek assistance from a Writ Court. In the present case, the assessments were made way back from 1981 until 1985. Compelling petitioners to go back to the appellate authority will entail further consumption of time. The preliminary objections have therefore to be over-ruled.

7. Point No. 1 deals with an issue covered by Pendse, J.'s decision in Rakesh Enterprises (supra), though, of course, respondents strenuously contend that the said decision does not apply to the instant case. The decision in Rakesh Enterprises was followed by Pandse, J. in Writ Petition No. 2190 of 1982 decided on August 13, 1986, which dealt with the payment of Additional Duty upon "Sorbitol". Respondents' attempt to get out of the ratio of Rakesh Enterprises may be stated thus :-

While importing Phenol USP and Sorbitol Solution, the Bills of Entry described the products as falling under heading 29.01/45. That heading deals with organic compounds. The import was so assessed and it is not now open to the petitioners to contend to the contrary. Had the products been "drugs or drug intermediates", the import would have had to be in conformity with the Drugs and Cosmetics Act and the Rules framed thereunder. From the Drugs and Cosmetics Act, reliance is placed upon the definition of "drug" given in section 3(b) of the said Act and from the Rules, recourse is taken to Rule 39. Before setting out these provisions, let me quote that portion of Pendse, J.'s judgment, which incidentally, dealt with a somewhat similar contention. It reads thus :-

"Shri Rege, learned counsel appearing on behalf of the department, strenuously urged that the advantage of exemption notification is not available unless it is established by the petitioner that the drug or the drug intermediate is actually so used. According to Shri Rege, it is not enough that the imported material is branded as a drug or a drug intermediate, but in addition, the importer must establish that the imported article was so used. It is impossible to accede to the submission of the learned counsel because it is not permissible to read some additional words in the notification. Item No. 19 of the Schedule makes it clear that if the imported article is drug or drug intermediate, then the import is exempted from levy of countervailing duty. Shri Rege submitted that to determine whether phenol USP is intermediate drug, the Court must refer to the dictionary meaning given in the Condensed Chemical Dictionary, Eighth Edition by Gessner G. Hawley. The expression "intermediate" is set out in this Dictionary at page 471 and inter alia, states :

"An organic compound, either cyclic (derived from coal tar or petroleum products such as benzene, toluene, naphthalene, etc.) or acyclic (e.g. ethyl and methyl alcohol). These compounds may be considered as chemical stepping stones between the parent substance and the final product".

"It is difficult to appreciate what Shri Rege desires to convey by relying upon the dictionary meaning of the word "intermediate". In my judgment, phenol USP must be treated as a drug because of its inclusion in Pharmacopoeia and as Phenol USP can be used as an intermediate for manufacture of drugs, it can also be described as a drug intermediate. In my judgment, on the strength of the material produced by the petitioners, it is impossible to accede to the claim of the department that the petitioners are not entitled to the benefit of exemption notification."

From the above passage, it appears that Pendse, J. has disposed of the contention now being urged by the respondents. The only difference I can see in the two positions is that the respondents are now somewhat better armed and more articulate than they were before Pendse, J. That apart, I now turn to the provisions relied. Section 3(b) of the Act has this to say about the expression "drug" :-

""drug" includes -

- (i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals; and
- (ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazettee."

8. Mr. Shah submits that unless petitioners establish that Phenol USP and Sorbitol Solution were meant for use as a drug as required by the aforementioned definition, they are not entitled to claim the benefit of the exemption notification. What is important to remember is that the definition of "drug" given in section 3(b) is not exhaustive. This is made clear by the use of the word "includes" following the expression "drug" in section 3(b). In Maxwell on the Interpretation of Statutes, Twelfth Edition, at page 270, there is the following passage which throws a light on how definitions are to be construed. The passage says :-

"It is common for a statute to contain a provision that certain words and phrases shall, when used in the statute, bear particular meanings. Sometimes, it is provided that a word shall "mean" what the definition section says it shall mean; in this case, the word is restricted to the scope indicated in the definition section. Sometimes, however, the word "include" is used "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so use these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include." In other words, the word in respect of which "includes" is used bears both its extended

statutory meaning and "its ordinary, popular, and natural sense whenever that would be properly applicable".

Therefore, the word "drug", as used in section 3(b) of the Drugs and Cosmetics Act, cannot be confined to the terms set out in the statutory definition. This is because the use of the word "includes" shows, that it is to be understood in the statutory as also the ordinary, popular and natural sense. The reliance placed upon Rule 39 of the Drugs Rules is equally misplaced. From the decisions in Rakesh Enterprises and Writ Petition No. 2190 of 1982, it is clear that Phenol USP and Sorbitol Solution are covered by the decision of Pendse, J. That the import was not in conformity with Rule 39 may be of some assistance to the authorities in initiating proceedings against petitioners for breach of the said Rule. That, however, will not take the case of the petitioners out of the ratio of the decisions given in the two cases aforementioned.

9. Respondents contend that the goods were imported as falling under heading No. 29.01/45 and it is not now open to the petitioners to claim the benefit of the exemption notification. But this is reading the Bills of Entry partially. The said Bills of Entry also did make it clear that the articles imported fell under Tariff Item No. 68. It is, therefore, not permissible for the respondents to ignore the above and hold petitioners only to the Customs Tariff heading given in the Bills of Entry. In fact, in the case of Rakesh Enterprises (supra), it was not disputed that Phenol USP was liable to duty under Tariff Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944. Respondents appear to be shifting their ground from case to case. Understandable as that is, an admission given in respect of a product in an earlier precedent cannot be ignored when dealing with a similar contention in a succeeding case. Accepting the view taken in Rakesh Enterprises and in Writ Petition No. 2190 of 1982, I record an affirmative answer to the first point.

10. The imported articles in Writ Petition Nos. 2436 of 1986 and 2497 of 1986 are "Phenol" and "Diethylene Glycol". The submission is that these are not "drugs" and this is so because of the absence of the alphabets "USP", "BP", "IP", "USSRP", etc. etc. Unless a product be recognised by some recognised pharmacopoeia, it cannot be given the status of a "drug". Even if it be a "drug intermediate", the exemption notification at the date of import of the articles in these two cases had been amended to exclude a "drug intermediate". The exemption notification was amended on June 30, 1983, and, the amended entry, reads thus :-

"All bulk drugs and medicines not elsewhere specified."

The reply given on behalf of the petitioners to his submission, is, that the presence or absence of the word "P" to any product, is irrelevant. Once it is established that it is a drug in the popular or natural sense, it will be drug for the purposes of the exemption notification. Reliance is placed on the Bills of Entry and the assessments made, whereunder the articles figuring in the two writ

petitions were classified as falling under Tariff Item No. 68 of the First Schedule to the Central Excises and Salt Act. Next, petitioners rely on this defence not having been taken when petitioners applied for a refund of the Additional Duty. Once again, it is the definition of "drug" in section 3(b) of the Drugs and Cosmetics Act which furnishes the key to the understanding to the problem. If an article is a "drug" within the meaning of that provision, there is no reason to restrict the extent by reason of the presence or absence of the letter "P" to indicate recognition or absence thereof, by any pharmacopoeia" system. Viewed thus, Phenol and Diethylene Glycol would both be "bulk drugs" entitled to the exemption in the notification dated June 30, 1983.

11. The third point is concluded by Pendse, J.'s decision in Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others, . I need not, therefore, say anything further on this point, except to observe that the reason given by the 2nd respondent for rejecting the refund application was not good in law.

12. Petitioners have claimed interest at the rate of 21 per cent per annum over the Additional Duty illegally retained by the respondents, and, from the date on which the same was collected. The argument is that as between the parties, the respondents were supposed to be better versed in law and, therefore, should have abstained from collecting duty not payable by the petitioners. We need not go into abstractions. It is because of the verdict given in these petitions that the final seal is being put to the validity or otherwise of the recovery. This being the position, it is but proper that interest is made payable not from the date of collection, but from some other date. As to that other date, I think, it will be appropriate that interest becomes payable after the expiry of the time given to the respondents to make a refund. The other question is as to the rate at which interest should be made payable. Petitioners want interest to be calculated at the rate of 21 per cent per annum. This is a patent exaggeration. The fair rate would be 12 per cent per annum. The finding, therefore, is that interest will be payable at 12 per cent per annum on the retained sums, on the expiry of the date to be specified in the order.

13. Before I conclude, I will have to deal with as submission of Dr. Kantawala that respondents be directed to deposit the cheques representing the sums payable unto petitioners, in Court. The grievance is that despite orders, the authorities take their own time to comply with directions of the Court, thus compelling the successful petitioners to take out further proceedings. I do not think that whatever may have happened in the past, will be repeated in the instant cases. Hence the order.

ORDER

14. Petitions succeed. The orders rejecting the applications for refund moved by the petitioners, are hereby quashed. Respondents are directed to refund to the petitioners the Additional Duty recovered from them within eight weeks from this date. Failure to pay the same within the time stipulated will subject respondents

to the additional liability of having to pay the said sums along with interest at the rate of 12 per cent per annum to be calculated from the expiry of eight weeks. Respondents shall bear their own costs and pay those incurred by the petitioners. Rules in the above terms, made absolute.