
(1988) 02 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 234 of 1987

Leukoplast (India) Ltd.

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 03-02-1988

Acts Referred:

Central Sales Tax Act, 1956 — Section 6(1A)
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 25, 27(1)
Drugs and Cosmetics Act, 1940 — Section 11B, 18, 27, 3
Goa, Daman and Diu Sales Tax Act, 1964 — Section 10(2), 10A, 7
Sales Tax Act — Section 10

Citation : (1992) 40 ECC 186 : (1988) 36 ELT 369 : (1988) 71 STC 180

Hon'ble Judges : G.F. Couto, J;G.D. Kamat, J

Bench : Division Bench

Judgement

Couto, J.—Petitioners are a company registered under the Companies Act, 1956. By this writ petition under Article 226 of the Constitution, they seek the quashing of the assessment orders made by the Sales Tax Officer on August 23, 1985, December 26, 1986 and December 24, 1986, the first relating to the period from 1-1-1981 to 31-12-1981, the second and the third to the period commencing on 1-1-1982 and ending on 31-12-1982 and on 24-12-1987 as regards the period starting on 1-1-1983 and ending on 31-12-1983 in respect of the Central and Local Sales tax payable by them, as well as a mandamus directing the respondents to withdraw the orders of assessment, and further, to refund to the petitioners the Local and Central Sales Tax paid by them in excess for the period commencing on 1-1-1981 and ending on 31-12-1987 together with interest at the rate of 21% from the date of collection till the date of refund.

2. Petitioners manufacture under a licence dated July 13, 1967, issued by the Drugs Controller under the Drugs and Cosmetics Act, 1940, which was amended on September 7, 1987, several products, inter alia, Zinc Oxide Adhesive Plaster B.P.C. (Leukoplast); Surgical Wound Dressing (Handyplast); Belladonna Plaster

B.P.C.; Capsicum Plaster B.P.C. and Cotton Crepe Bandages B.P.C. (Leukocrepe).

3. The aforesaid goods or products were liable to Local Sales Tax as well as Central Sales Tax and prior to 1st November, 1981, the rate of the Local Sales Tax leviable on then being of 6% and u/s 8(2-A) of the Central Sales Tax Act, the rate of the Central Sales Tax of 4% 28-10-1981, drugs and medicines were exempted from the levy of Local Sales Tax in excess of 3% and thus, according to the petitioners, as a result of this exemption, the Central Sales Tax leviable u/s 8(2-A) of the Central Sales Tax Act was also reduced to 3%.

4. The petitioners however had been paying Central Sales Tax at the rate of 4% on the sales of the goods and also Local Sales Tax at the rate of 6% from 1-11-1981 to 1-4-1987.

5. By another notification, being the Notification No. 5/5/87(R&C) - 8, the first respondents in exercise of the powers u/s 10 of the Local Sales Tax amended the Second Schedule to the Local Sales Tax Act, inter alia, inserting Entry No. 77 which speaks of Drugs and Medicines, including all I. V. Drips. By the said notification, the goods were totally exempted from levy of the Local Sales Tax, and consequently, in view of the provisions of Section 8(2-A) of Central Sales Tax Act, from the levy of the Central Sales Tax. Therefore, the Sales tax Authorities, including the second and third respondents, ceased to collect Central Sales Tax from April 2, 1987 on the above mentioned products or goods manufactured by the petitioners.

6. The petitioners only then realized that the Sales Tax payable from 1-11-1981 to 1-4-1987 was at the rate of 3% only and as such, by two letters both dated April 3, 1987, pointed out to the third respondent that the goods in question were "drugs and medicines", and hence, on and from the 1-11-1981 to 1-4-1987, the said goods were liable to Local and Central Sales Tax at the rate of 3%. They further prayed that refund of the duty paid in excess of Local and Central Sales Tax levied and collected as a result of the Sales Tax assessments which had been completed. They also filed revised Sales Tax returns for the assessment periods, 1-1-1985 to 31-12-1985 and 1-1-1986 to 31-12-1986. However, despite these two letters, no action was taken by the respondents as regards the claim refund of the Central and Local Sales Tax collected in excess. Petitioners therefore addressed two fresh letters on 9-7-1987 to the second respondent requesting him the refund of the Local and Central Sales Tax and an expeditious disposal of their applications. Again, no action was taken by the respondents to dispose of the said applications, and hence, petitioners addressed on 24-7-1987, fresh letters reiterating the request for the refund levied and collected in excess of 3% both as regards the Local Sales Tax and the Central Sales Tax. They further prayed for the completion of the assessment proceedings which were still pending for the subsequent periods, that is, from 1-1-1983 to 31-12-1986.

7. No action was, however, taken by the respondents on the said letters claiming

refund of the tax paid in excess till the time of the institution of the present writ petition. However, after the admission of this writ petition, the Assistant Sales Tax Officer made orders dated December 24, 1987 for the period commencing on 1-1-1983 and ending on 31-12-1983. He rejected the claim for refund, applying the principle or the doctrine of unjust enrichment.

8. Petitioners' case is that the aforesaid products or goods are "drugs and medicines" and therefore, fall under the purview of the exemption Notifications No. 14/41/81-Fin (R&C) and No. 5/5/87(R&C)-8. The assessment orders under challenge are accordingly illegal and liable to be set aside and the petitioners are entitled to the refund of the taxes paid under a mistake of law and collected by the respondents without authority of law. Respondents however contend that the aforesaid products are not "drugs and medicines", and as such, the question of the refund of the taxes paid does not at all arise. Hence, two are the questions that fall for our determination, namely, (a) whether the products manufactured by the petitioner and listed in the paragraphs 2 and 4 of the petition are "drugs and medicines" within the purview of the aforesaid Notifications No. 14/41/81-Fin (R&C) and No. 5/5/87 (R&C)-8 and (b) whether the petitioners are entitled to the refund sought.

9. Petitioners answer both these questions in the affirmative. Mr. Hidayatullah, the learned counsel appearing for the petitioners, has indeed contended before us that the aforesaid products or goods are being manufactured by the petitioners under a licence issued by the Drugs Controller under the Drugs and Cosmetics Act, 1940. Such products are, according to the learned counsel, well within the definition of a drug given u/s 3(b) of the Drugs and Cosmetics Act, 1940 which lays down that drug includes 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 also 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 Gazette. The learned counsel emphasized that all medicines of internal or external use of human beings or animals as well as all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or intended to affect the structure or any function of the human body, are included in the said definition of "drug". Then, the Pharmaceutical Codex incorporating the British Pharmaceutical Codex, he urged, shows that surgical dressings similar to the products in question are utilized for mitigation and treatment of any disease or diseases in human beings and also affect to some extent the structure or the function of the human body. He placed special reliance in what is stated in the said Pharmaceutical Codex as regards Surgical Dressings Adhesive which include Adhesive support and compression bandages as well as Zinc Oxide Elastic Self-Adhesive Bandage, Zinc Oxide Self-Adhesive Tape, Plaster of paris Bandage and Belladonna Self-Adhesive Plaster. He,

therefore, submitted that, undoubtedly, the above products manufactured by the petitioners are well within the meaning of Drugs and Medicines given in Section 3 of the Drugs and Cosmetics Act, 1940. That apart, the learned counsel further urged that that had been the understanding of the Excise Authorities who had consistently classified the said products as Drugs and Medicines falling under Tariff Item No. 68, but exempted from payment of duty under Notification No. 55/75, dated 1-3-1975. Finally, the learned counsel, placing reliance on *Leukoplast (India) Ltd. v. Union of India and Others* 1983 E.L.T. 2106 (Bom.) , contended that the Divisions Bench of this Court has held that Zinc Oxide Self Adhesive Plaster B.P.C. manufactured by the petitioners is a Drug and Medicine and has, as such, granted refund of tax collected. He also placed reliance in support of his contentions in the decision of the Supreme Court in *Chimanlal Jagjivandas Sheth Vs. State of Maharashtra*, .

10. We have already mentioned that the case of the respondents is that the products question manufactured by the petitioners are not drugs and medicines and that therefore, the petitioners are not entitled to the sought refund of duty. The learned Advocate General has indeed contended before us that first of all, the Division Bench has not held in *Leukoplast (India) Ltd. v. Union of India and Others* 1983 E.L.T. 2106 (Bom.) that Zinc Oxide Self Adhesive Plaster B.P.C. is a drug and medicine. In fact, in the aforesaid case, the Division Bench has merely negated the contentions raised on behalf of the respondents that the refund claimed by the petitioners in that case was not to be granted, not only in view of the doctrines of unjust enrichment, but also because the provisions of Section 118 of the Excise Act were coming on their way since the claim has been made beyond the period of limitation of 6 months prescribed therein. Nowhere the Division Bench held that the *Leukoplast Zinc Oxide Self-Adhesive Plaster B.P.C.* is a drug or medicine. The Division Bench merely recorded the case of the petitioners, according to which the classification made by them on 14th November, 1981 as regards the said product had been approved by the Excise Authorities. He then urged that the definition of a drug given in section 3(b) of the Drugs and Cosmetics Act, 1940 is not at all relevant, since it is well settled that definitions given in a particular Statute cannot be used for the construction of a similar word or expression occurring in a different Statute or Act. Insofar as the Excise Law is concerned, he argued, what matters is not the definition given in the Drugs and Cosmetics Act but the commercial and popular understanding of the products, as has been held by the Division Bench of this Court in Writ Petition No. 85 of 1986, judgment delivered on November 3, 1987, *Uday Minerals v. S. V. Madkaikar and Union of India*, relying upon the decision of the Supreme Court in *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*, , wherein their Lordships of the Supreme Court observed that the test to be applied is what would be the meaning that persons dealing with the particular product would give to the word. The Division Bench observed that in construing the entries in the Schedule to the Sales Tax Act to determine whether they are taxable or not, regard must be had to the items/entries as ordinarily understood

by the traders and the consumers and in the absence of the technical definition of the entries in the Act itself, it is not possible to construe entries by assigning scientific meaning. The learned Advocate General, therefore, contended that in the absence of any definition of drugs and medicines in the Excise Law, the definition given to drugs in the Drugs and Cosmetics Act is of no significance and does not advance the petitioners' case. He further placed reliance in support of his submission that the popular understanding of the word and not its technical meaning is to be considered in *Indo International Industries v. Commissioner of Sales Tax, Uttar Pradesh* 1981 (47) S.T.C. 359 , as well as in the decision of the Single Judge of this Court in *Prabhudas Kalyanji Adhia Vs. State*, . He equally placed reliance in AIR 1938 152 (Privy Council) to support his contention that definitions given in one Statute cannot be used to interpret the same expression occurring in a different Act or Statute. The learned Advocate General, proceeding with his arguments, further contended that definitions given in the Pharmaceutical Codex are not binding as observed in *Prabhudas Adhia's* case (supra), and in any event, the definition given in Section 3(b) of the Drugs and Cosmetics Act is, as the word includes shows, inclusive in nature. The learned Advocate General lastly conceded that as laid down by the Supreme Court in *Union of India (UOI) and Others Vs. Gujarat Woollen Felt Mills*, , it is well known rule in interpreting items in Statutes, like the Central Excises and Salt Act, 1944, that resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense.

11. The learned Advocate General is undoubtedly right in that the decision of the Division Bench in *Leukoplast (India) Ltd. v. Union of India and Others*, reported in 1983 E.L.T. 2016 (Bom.) has not held that Zinc Oxide Self-Adhesive Plaster B.P.C. is a drug and medicine. In fact, the question as to whether the said product is or not a drug or medicine did not fall for the determination of the Court. The petitioners' case had been that they had classified the said product as a drug and medicine subject to excise duty under the residuary Item No. 68 but that no excise duty was payable in view of the Notification No. 55/75. It was further their case that such classification has been approved by the Excise Authorities. The respondents did not deny these allegations and had resisted the claim for refund merely on three grounds, namely, (a) that the petitioners had not exhausted the remedies provided by law; (b) that the refund was not to be granted on the application of the principle or doctrine of unjust enrichment; and (c) that in view of Section 11B of the Act, petitioners were not entitled to any refund as the claim has been made beyond the period of limitation of 6 months provided in the said section. The Division Bench negated all these three grounds, and therefore, granted the relief sought by the petitioners. The above decision of the Division Bench in *Leukoplast's* case does not thus help the petitioners in the case before us. The learned Advocate General is also right when he contends that a definition given to a word or an expression in a particular Act or Statute cannot be utilized for the interpretation of a similar word

or expression occurring in a different Act or Statute. There is no need of any authority to support the above proposition but if any is necessary, the observations of the Privy Council in *Nippon Yusen Kaisha v. Ramjibai Serowgee* that it is always dangerous to seek to construe one Statute by reference to the words of another will suffice. But if this is true and correct, it may be also pointed out that this is not an absolute principle of law. Generally it is so, but in a given case, the definition given in a particular Statute, not being repugnant, may be used to construe and interpret the same expression occurring in another statute. The learned Advocate General is further right in his submission that inasmuch as the Excise Law is concerned, it is the understanding which a product has in trade or popularly that counts.

12. The question whether the technical or the commercial meaning is to be considered while interpreting the entries in the Schedule of the Sales Tax Act fell for the determination of the Division Bench of this Court in *Uday Minerals*" case (above). The Division Bench, relying on the observations made by the Supreme Court in *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*, and in *Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola*, , held that it is clear that while construing entries in the Schedule to determine whether they are taxable or not regard must be had to the items/entries as ordinarily understood by the traders and the consumers, and in the absence of a technical definition of the entries in the Act itself, it is not possible to construe entries by assigning them scientific meaning. This view has also been taken earlier by a Single Judge of this Court in *Prabhudas Adhia*"s case (above). In fact, *Vaidya, J.*, after reproducing Section 3(b) of the Drugs and Cosmetics Act and quoting from *Halsbury's Laws of England*, held that, in case of doubt, the question as to whether the term drug includes medicine for external or internal use is a question of fact and that the meaning in the *British Pharmacopoeia* is not relevant but the meaning in which the said product is understood popularly. In *Union of India and Others v. Gujarat Woollen Felt Mills*, the Court while addressing in special to the interpretation of Tax Statutes, namely, the *Central Excises and Salt Act, 1944*, observed that the well known rule in interpreting items in such Statutes is that resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them that is to say to their commercial sense.

13. But the question that falls for our determination is whether, in the facts and circumstances of the present case, the definition of drug given u/s 3(b) of the Drugs and Cosmetics Act has any relevance. Dealing with this question, MR. Hidayatullah contended that though the proposition that the commercial meaning of a product is generally correct for the purposes of the Excise Law and for the determination of whether or not such product is taxable, nonetheless, in view of the provisions of Chapter IV of the Drugs and Cosmetics Act, the definition given in Section 3(b) thereof is most relevant as such definition, in truth, reflects the real meaning of the word "drug" in the trade or in the commerce. The learned

counsel urged that Chapter IV of the drugs and Cosmetics Act comprehensively deals with the manufacture, sale and distribution of drugs and minutely regulates not only the manufacture, but also the sale and distribution of drugs. It is indeed provided in Section 18 that no person shall himself, or by any other person on his behalf, manufacture for sale, or sell, or stock or exhibit for sale, or distribute any drug which is not of standard quality or any misbranded drug or any adulterated drug and any patent or proprietary medicine unless it is displayed in the prescribed manner; any drug which by means of any statement, design or device accompanying it or by any other means purports or claims to cure or mitigate any such disease any cosmetic containing any ingredient which may render it unsafe or harmful for use, in contravention of any of the provision of the Chapter unless such manufacture is done under a licence issued for such purpose under the said Chapter. Then, Section 27 imposes penalties for the manufacture, sale, stock, exhibit for sale and distribution of drugs in contravention with the provisions of the Act and make it, inter alia, punishable with imprisonment. This being so, the learned counsel contended, in view of the mandate incorporated in the Drugs and Cosmetics Act, it is not open to a manufacturer to manufacture or sell or exhibit to sell or distribute any drug unless he manufactures it under a licence issued by the Drugs Controller under the Said Act, and further, in compliance with the provisions of Chapter IV. This, by implication, shows that the purchaser of the manufactured drugs is, in his turn, bound by the provisions of Chapter IV. He cannot thus lawfully purchase and sell drugs which are not manufactured under a valid licence and are in contravention with the provisions of the Act. Therefore, according to the learned counsel, it necessarily follows that the understanding of the products manufactured by the petitioners in the trade is the understanding thereof that the purchaser, that is, the dealer and not the ultimate consumer, will have. Reliance was placed in this connection in the decisions of the Division Bench of this Court in *Ashok Leyland Limited Vs. Union of India and others*, as of the Supreme Court in *Hindustan Sugar Mills Ltd. v. State of Rajasthan and J. K. Synthetics Ltd. v. Commercial Tax Officer, Kota 1979 (43) S.T.C. 13*.

14. We have already seen that the Supreme Court had laid down in *Gujarat Woollen Felt Mills*" case that the well known rule in interpreting fiscal statutes is that resort should be had not to the scientific or technical meaning attached to the goods but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense. The same view had been taken earlier in *The State of Mysore and Another Vs. Pendakur Virupanna Setty and Sons and Another, etc. etc.*, and in *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*, . This Court, naturally following the dicta of the Supreme Court, held the same view in *Uday Minerals*" case. It is thus well settled that, generally, while interpreting the fiscal statutes the scientific meaning of a product is not relevant but one has to consider its popular understanding or its understanding in the commerce or in the trade. But it is obvious that this trade understanding should be the understanding of those

who are actually dealing with that particular product or goods. The arguments advanced by Mr. Hidayatullah cannot thus be brushed aside summarily, and on the contrary, require deep consideration.

15. The Drugs and Cosmetics Act is a comprehensive piece of legislation which deals with drugs and provides not only for the standards of quality, misbranded and adulterated drugs but also for the safeguards for the manufacture, sale and distribution of such drugs, as well as of cosmetics. Chapter IV deals with the manufacture, sale and distribution of drugs and Section 18(c), *inter alia*, provides that no person shall himself or by any other person on his behalf manufacture for sale, or sell, or stock, or exhibit for sale or distribute any drug or cosmetic except under a licence issued for such purpose under the said Chapter. Clauses (a) and (b) prohibit the manufacture for sale, the sale, the stocking, the exhibition for sale and distribution of any drug or cosmetic which is not of standard quality, which is misbranded or adulterated or which has been imported or manufactured in contravention of any of the provisions of the Act or the rules made thereunder. Section 27 provides for penalties to the contraventions of the provisions of the Act and specifically lays down that whomsoever, himself or by any other person on his behalf, manufactures for sale, sells, stocks or exhibits for sale or distributes, *inter alia*, without a valid licence as required under clause (c) of Section 18 shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to 10 years and shall also be liable to fine. In other words the Drugs and Cosmetics Act makes it abundantly clear that only those drugs which are manufactured under a valid licence issued under the said Act and in compliance with its provisions can be lawfully sold, exhibited for sale or distributed. This also indicates that trade in respect of drugs is lawfully possible only when there is a compliance with the provisions of the said Act, both by the manufacturers and dealers. In *Ashok Leyland's case* (above), the Division Bench of this Court held that the relationship between the manufacturer and the dealer is not that of a principal and agent but that of a seller and a buyer. Applying the ratio of this decision to the case at hand, it seems to us obvious that the relationship that is established between the manufacturer and the dealer as regards the sale of the products manufactured by the petitioners is of a seller and a buyer and thus, the observations of the Supreme Court in *Hindustan Sugar Mills' case* (above) became most relevant. Their Lordships of the Supreme Court, dealing with the provisions of the Central Act regulating the sale and the price of cement vis-a-vis the clauses of the agreement entered into by the parties, indeed observed that the provisions of the Central Act regulating the sale and the price of cement had an overriding effect and thus, if the said Control Order was stipulating that the freight was to be paid by the purchaser, such stipulation had to prevail notwithstanding clauses to the contrary in the agreement. In the case at hand, considering the provisions of the Drugs and Cosmetics Act which minutely regulate the manufacture, sale and distribution of drugs and cosmetics, it appears to us that such provisions necessarily have an overriding effect and therefore, prevail and thus, the

definition of "drug" given in the said Act is most relevant for determining its meaning in the trade. We are thus of the view that Mr. Hidayatullah is entirely right when he contends that the true and real meaning which a drug has in the trade or in commerce is the meaning given to it in the Drugs and Cosmetics Act. The provisions for Section 18 are unquestionably motivated by public interest to protect and defend the health and lives of people. We are, therefore, of the view that the popular or the commercial meaning of a drug is synonymous to the one given in the Drugs and Cosmetics Act.

16. We now turn to the next contention of the learned Advocate General. He urged that in *Leukoplast (India) Private Ltd. and others Vs. Union of India and others*, , a Division Bench of this Court has held that surgical dressings known as Handyplast, manufactured by the petitioners, are not a drug or a medicine. He contended that once the Division Bench had held that "Handyplast" is not commercially understood as a drug or medicine and since the petitioners had clubbed together several products, including Handyplast, in this petition, it necessarily follows that the said products are similar to Handyplast, and therefore, what was held by the Division Bench as regards Handyplast applies to them. Then, with a view to elaborate the above submission, the learned Advocate General took us minutely through the judgment delivered in the said case and contended that, though the Court has stated in paragraph 4 that the question which was falling to its determination was whether the said product Handyplast is a drug or medicinal preparation falling under Item 14E of the First Schedule of the Tariff for purposes of duty, the fact remains that while addressing to that question, the Court made general observations which show that the Division Bench held the view that, as a general proposition, Handyplast is not understood in the trade or in the commerce or popularly as a drug or medicine.

17. Though the submission is ingenuous, a careful reading of that judgment clearly shows that it has no force. In fact, petitioners' case was that the surgical dressings known as Handyplast manufactured by them, though containing a medicated pad with Nitrofurazone (0.125%), was not a drug or a medicinal preparation and was not falling under Item 14E of the First Schedule of the Tariff. The respondents resisted the petition, advancing a case that whatever may be the technical meaning of the said product Handyplast, the petitioners themselves had advertised it as a medicated product and, hence, it was not open to them to challenge the classification made by the Sales Tax Authority and say that Handyplast was not falling under Item 14E of the First Schedule of the Tariff. The Court, therefore, addressed itself to that narrow question, specifically stating in paragraph 4 that "the short question that falls for the determination of the Court is whether the product Handyplast is a drug or a medicinal preparation falling under Item 14E of the First Schedule of the Tariff". It is thus clear that the Court has restricted the question to which it was going to address. Then, after dealing with some preliminary objections, the Court reverted in paragraph 7 to the main question raised in the petition. The Division Bench quoted in extenso the Item 14E of the First Schedule and then observed that "a careful reading of the

aforesaid explanation makes it clear that the main ingredient of the definition "patent or proprietary medicines" is any drug or medicinal preparation. Therefore, it is necessary to find out what is the real meaning of a drug or a medicinal preparation." After having posed this question, the Division Bench proceed to observe that the meaning of the word in question was to be found in the Entry itself and further, that a medicinal preparation is, as the expression itself indicates, a preparation meant to heal or to cure an ailment suffered by a person or an animal, implying or connoting an idea of treatment and of giving relief for some sickness or ailment. Therefore, the Court concluded that it was thus necessary to determine whether Handyplast has or not any curative or healing qualities in order to make it fall under Item 14E of the First Schedule of the Act. The Division Bench then proceeded to discuss the matter in detail and while doing so, addressed to the question whether Handyplast was a drug or medicinal preparation without specifically stating again that this determination was for the sole purpose of determining whether the said product was falling under Item 14E of the First Schedule of the Tariff. After a detailed discussion, the Division Bench, finally held the view that Handyplast does not constitute a drug or medicinal preparation falling within the purview of Item 14E of the First Schedule which deals with patent or proprietary medicines, i.e., drugs or medicinal preparations. The above discussion and analysis of the judgment in Leukoplast (India) Private Ltd. and others Vs. Union of India and others, suffices to clearly show that the submissions of the learned Advocate General above referred to have no merit and what was held in the said case was for the limited purposes of determining whether Handyplast was or not a product falling under Item 14E of the First Schedule of the Tariff for the purposes of duty. The Division Bench has not, at all, addressed itself to the larger question as to whether or not Handyplast is a drug or medicine which benefits of exemption under the Notifications No. 14/41/81-Fin(R&C) and No. 5/5/87(R&C)-8.

18. Having dealt with the first question posed by this petition, namely, whether the products listed in paragraphs 2 and 4 of the petition are or not drugs and medicines within the purview of the exemptions under the aforesaid notifications, it is now necessary to deal with the second question, viz., whether the petitioners are entitled to the refund sought by them.

Mr. Hidayatullah urged that as far as this Court is concerned, the question is now laid to rest after the decision of this Court in Rapidur (India) Ltd. Vs. Union of India and another, . He however, in all fairness, admitted that in Associated Bearing Co. Ltd., Bombay v. Union of India and Others, and in Garware v. Union of India, (Writ Petition Nos. 679/79 and 3007/80), a difference of opinion arose between the learned judges who constituted the Division Bench, Shah, J., found himself bound by the decision given by the Division Bench in Rapidur (India) Ltd. case (above), after having examined the arguments advanced on behalf of the Union of India and some of the earlier judgments of this Court. However, Kolse Patil, J., disagreed and he held the view that the line of judgment of this Court that culminated in the judgment in Rapidur (India) Ltd. v. Union of India could

not have the effect setting aside the view of the Division Bench of this Court in *Ogale Glass Works Ltd. v. Union of India and Others* 1979 E.L.T 468 . The learned counsel further submitted that these differences of opinion between the learned Judges (Shah and Kolse Patil, JJ.) were decided by Pendse, J., the judgment being reported in *Associated Bearing Co. Ltd., Bombay Vs. Union of India and others*, . Pendse, J. after discussing the matter in detail, held that the decision in *Rapidur (India) Ltd.*, was binding on the Division Bench and therefore, Kolse Patil, J., was wrong in the view he had taken. Therefore, according to Mr. Hidayatullah, it is now well settled as far as this Court is concerned that when duty is paid under mistake of law and collected by the Revenue without authority of law, the party who paid such duty is entitled to the refund thereof. The learned counsel further urged that the same view was taken by another Division Bench of this Court (Jahagirdar and Puranik, JJ) in *Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another*, . In that case the learned Judges, after considering the decision in *Rapidur (India) Ltd. Patil, JJ. in Associated Bearing Co. Ltd. and Garware's* cases and after discussing in detail the law regarding the precedents and that the interpretation given by a High Court of a decision of the Supreme Court is binding in a coordinate bench of the same High Court as held in *Panjuman Hassomal Advani Vs. Harpal Singh Abnashi Singh Sawhney and Others*, , held that the view taken by Kolse Patil J., was erroneous and concluded in a very expressive manner by saying that "the total effect is therefore, as far as this Court is concerned or at any rate as far as the Division Bench is concerned, that the doctrine of unjust enrichment is buried 10 fathoms deep".

19. Though it is not disputed that this clear view was taken by this Court in a long line of decisions which has culminated in the decisions in *Associated Bearing Co. Ltd., Bombay Vs. Union of India and others*, , the learned Advocate General, placing reliance in the decision of the Supreme Court in *State of Madhya Pradesh Vs. Vyankatlal and Another*, , contended that the judgment of their Lordships of Supreme Court in *D. Cawasji's* case is no more good law and the doctrine of unjust enrichment was revived and approved by the Supreme Court in *Vyankatlal's* case.

20. In *Rapidur (India) Ltd. Vs. Union of India and another*, , the Division Bench discussed in detail several decisions of the Supreme Court on the subject and in particular, the decisions in *D. Cawasji's* and *Vyankatlal's* cases. The Division Bench also made a reference to a judgment delivered by a Single Judge of this Court (Jahagirdar, J) in *Parle Products Limited and Another v. Union of India and Another*, which was not at the relevant time reported but is, at the present, reported in *Parle Products Ltd. and another Vs. Union of India and another*, . The Division Bench accepted as correct the view taken in *Parle's* case and also the view taken in *I.T.C. Limited Vs. M.K. Chipkar and others*, deciding the difference of opinion between Lentin and Sawant, JJ. The Division Bench further considered the decision in *Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others*, and bearing in mind that the interpretation given to the decisions of the Supreme

Court in the said two cases (Parle Products Limited and Shalimar Textile Mfg. Pvt. Ltd.) was binding in it as held in Panjuman Hassomal Advani Vs. Harpal Singh Abnashi Singh Sawhney and Others, , held the view that D. Cawasji's case was still good law and the decision in Vyankatlal's case was distinguishable, not only for the reasons given in Parle Products Limited but also because Vyankatlal's case was dealing merely with a statutory order dealing with prices and not with a fiscal statute as such. We reiterate that we are bound by the decisions of the Divisions Benches of this Court in the cases cited above and therefore, it is not possible for us to accept the contention of Mr. Nadkarni as regards the revival of the doctrine of unjust enrichment.

21. Petitioners barely averred in paragraph 9 that without being away of the correct legal position that both Local and Central Sales Tax was payable at the rate of 3% had paid Central Sales Tax at 4% on the said goods. They did not state the precise date on which they found their mistake. Therefore, in the light of the law laid down in D. Cawasji's case, the question arises as to whether petitioners have approached this Court in time. Dealing with this question Mr. Hidayatullah submitted that it is obvious that the petitioners would not have paid duty in excess if they had been aware of the exemption. Hence, the allegation made that they became aware of the exemption only when the concerned authorities stopped levying tax is to be accepted. In this connection, reliance was placed in two decisions of this Court namely, in Indian Plastics Ltd. v. Union of India and Others 1981 E.L.T. 509 (Bom.) and in Industrial Cables (India) Ltd. v. Union of India and Others 1985 (19) E.L.T. 341 (Bom.).

In Indian Plastics Ltd., a similar question indeed arose and the learned Single Judge who dealt with the case observed :-

"It is inconceivable that the petitioner, a business concern, would act in such an irrational manner as not to claim this large amount running into several lakhs of rupees, in the petition as initially filed, instead of restricting its claim only to the later period of 12th May, 1974 to 11th May, 1975. No prudent and reasonable person, much less a business concern, would wantonly make an overpayment running into lakhs of rupees and thereafter deliberately refrain from taking the earliest possible steps to recover money collected by the Department without authority of law."

The same view was later taken by the Division Bench in Industrial Cables (India) Ltd. Vs. Union of India and others, . The Division Bench observed :-

"It is highly improbable and for that matter almost inconceivable, that an importer and a businessman would blithely go on paying duty to the Department which he knew he was under no obligation to pay"

With respect, we adhere to this view and therefore, adopt the above observations.

22. We have dealt with the two main question which this petition given rise to. It

is however necessary to deal with some other relevant submissions made by the learned Advocate General. He in fact, observed that the Notification No. 14/41/81-Fin(R&C) was issued by the Government of Goa, Daman and Diu in exercise of the powers conferred by Section 10A of the Goa, Daman and Diu Sales Tax Act, 1964, and therefore, said notification was not issued by the Legislature u/s 10(2) of the Act. A reading of the said notification makes it clear, he urged, that what was exempted was the sale of drugs and medicines other than those specified in Entry No. 72 of the Second Schedule to the Act and that the exemption was merely in respect of the tax payable thereon and to the extent of 3 paise in the Rupee. He therefore contended that there was no reduction in the rate of duty. The rates are levied in Section 7 of the Goa, Daman and Diu Sales Tax Act, 1964 and the minimum rate levied therein was 4%. This being so, according to the learned Advocate General, it necessarily follows that the case of the petitioners does not fall within the purview of the said notification. That apart, he submitted that, Section 8(2-A) of the Central Sales Tax Act provides that notwithstanding anything contained in sub-section (1-A) of Section 6 or in sub-section (1) or clause (b) of sub-section (2) of Section 8, the tax payable under the Act by a dealer on his turnover insofar as the turnover or any part thereof relates to the sale of any goods, the sale or, as the case may be, the purchase of which is under the sales tax law of the appropriate State exempt from tax generally or subject to tax generally at a rate which is lower than four per cent whether called a tax or fee or by any other name shall be nil or as the case may be shall be calculated what the lower rate. The learned Advocate General emphasized that the above provision of law refers to exemption from tax generally or subject to tax generally at a rate which is lower than 4%. Since the Notification No. 14/41/81-Fin(R&C) did not reduce the rate of duty levied but had only reduced the tax payable, it is obvious, he urged, that the petitioners are not at all benefiting from the exemptions given in the said notification. He further contended that the burden to establish the exemption lies on the petitioners and in this connection, placed reliance on the decision of the Supreme Court in *Controller of Estate Duty, Kerala Vs. V. Venugopala Varma Rajah*, .

23. Mr. Hidayatullah however took strong objection to the above submissions of the learned Advocate General. He contended that, first of all, it is not open to the concerned authorities to supplement and plug the loopholes in the orders by way of returns, and much less to raise for the same purpose new questions in the course of the arguments. In this connection, the learned counsel placed reliance on the decisions of the Supreme Court in *The Commissioner of Police, Bombay v. Gordhandas Bhanji* 1952 B.L.R. 383 and in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , as well as in *Bush (India) Ltd., v. Union of India and Others* 1980 E.L.T. 258 (Bom.). He, further placing reliance on the decision of the Supreme Court in *Indian Express Newspapers (Bombay) Pvt. Ltd. and Others v. Union of India and Others*, , contended that it is irrelevant whether the notification was issued by the Legislature or by the Government for there is always a presumption of legislative

exercise. On the merits of Mr. Nadkarni's submissions. Mr. Hidayatullah contended that Section 8(2-A) makes no reference to the "levy" of a rate, and therefore, the word rate is used in the said provision of law in a loose sense. This is corroborated, according to the learned counsel, by the omission in using specifically the word "levy" and by the use of the expressions "subject to tax generally" and "calculated at lower rate". He submitted that Section 8(2-A) is couched in a language wide enough as to exclude the narrow interpretation given to it by the Advocate General and it indicates that what really the Legislature intended was to give a fiscal benefit as regards the actual amount of the tax payable. That is why the word "levy" was not used. Mr. Hidayatullah further contended that Section 8(2-A) is occurring in a Central Act which is applicable throughout India whereas the Local Sales Tax is applicable only within the territories of each State which vary from State to State and also vary as regards its quantum. Therefore, the interpretation given to the said provision by Mr. Nadkarni is not acceptable on this court also.

24. It is now well settled that an order, validity of which is challenged, stands or falls on its own strength and it cannot be supplemented and any existing loopholes cannot be plugged in by explanations given in affidavits or otherwise. This is the law laid down by the Supreme Court as far back as in *The Commissioner of Police, Bombay v. Gordhandas Bhanji* 1952 (54) B.L.R. 383, Bose J., dealing with such question, observed as under :-

"An attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him and that the order was his order and not that of Government. We are clear that public order, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Similarly, in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, their Lordships of the Supreme Court observed that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. The same view was naturally taken by a Division Bench of this Court in *Bush (India) Ltd. v. Union of India and Others* 1980 E.L.T. 258 (Bom.). The Division Bench observed that it is not open to the Excise authority to urge in its affidavit-in-reply a ground not taken in the order sought to be impugned and thereby seek to make a new case in justification of the impugned order. The contentions now raised by Mr. Nadkarni do not find a place in the impugned orders and it is thus clear that Mr.

Hidayatullah is quite right in his submission that it was not open to the learned Advocate General to supplement the impugned orders by advancing the said submissions. That apart, we may also point out that the differentiation between the issuance of the notification u/s 10(2) or Section 10A of the Act is meaningless, for as the Supreme Court observed in *Indian Express Newspapers (Bombay) Pvt. Ltd. and Others v. Union of India and Others*, . "It cannot be that a notification issued u/s 25(1) of the Customs Act granting, modifying or withdrawing an exemption from duty being in the nature of a piece of subordinate legislation, its validity cannot be tested by the Court by applying the standards applicable to an administrative action even though it may be that all the grounds that may be urged against an administrative order may not be available against the notification issued u/s 25 of the Act."

25. Though the objections of Mr. Hidayatullah are to be upheld, we think it expedient to, in any event, deal with the contentions raised by the learned Advocate General on their merits. No doubt, those arguments are subtle but we cannot forget and we have, on the contrary, to be in mind that the Government intended, by issuing the said Notification No. 14/41/81-Fin(R&C), to give fiscal benefit, exempting partly the sale of drugs and medicines from the payment of duty. Therefore, the key to the problem does not rest in the rate, as submitted by Mr. Nadkarni, but as rightly pointed out by Mr. Hidayatullah, is in the amount of the tax payable. Section 7 of the Goa, Daman and Diu Sales Tax Act provides for the duty payable. Section 8 of the Central Sales Tax Act postulates in its sub-section (2-A) that the tax payable under the said Act shall be nil, or as the case may be, shall be calculated at a lower rate, if there is an exemption of the tax or if the product is subject to a tax at a rate lower than 4%. We already mentioned that the learned Advocate General urged that since the minimum rate prescribed in Section 7 of the Goa, Daman and Diu Sales Tax Act is of 4%, the effect of the above provision of Section 2-A will be that the benefit of the said section cannot be given to the petitioners. The learned Advocate General indeed submitted that the rate of duty was not reduced and what was reduced was the amount of tax payable. This argument is undoubtedly enticing and subtle but we are unable to accept it, since we are in one with Mr. Hidayatullah in that the provision of sub-section (2-A) of Section 8 of the Central Sales Tax Act is couched in a language wide enough to permit a liberal interpretation thereof and to give the citizens the intended benefits of the exemption. As rightly submitted by Mr. Hidayatullah, the Legislature made a choice of particular words while enacting sub-section (2-A) of Section 8. Nowhere a reference was made to the tax levied or to the rate levied, and on the contrary, what is stated is that the tax payable under the Central Sales Tax Act will be nil or as the case may be, shall be calculated at a lower rate, if there is a general tax exemption or if the payment of tax is generally subject to rate which is lower than 4%. Now, by virtue of the aforesaid Notification No. 14/41/81-Fin(R&C), the tax payable was reduced from 6 paise in a rupee to 3 paise. In other words, though the rate was not specifically changed, what was prescribed is that, in any event, the tax actually to be paid is only of

3%. The effect, therefore, is that the Government actually reduced for all the purposes the rate of the tax to 3%. We thus find no merit in the above submissions of Mr. Nadkarni.

26. Before we part with this case we may make a reference to the other submissions made by the learned Advocate General. The first is that the petitioners had relied in some affidavits in order to prove that the goods in question are commercially understood as being drugs and medicines and that, therefore, an opportunity should be given to the respondents to cross-examine such witnesses. In view of what we held on the basis of the definition of a drug given in Section 3(b) of the Drugs and Cosmetics Act, we find that, in any event, such cross-examination will be meaningless. That apart, we may also observe on the strength of the ruling of this Court in *Subhash Chandarnishat v. Union of India and Another* 1979 E.L.T. 212, that questions like the present are to be decided only on the basis of the affidavit evidence, without any cross-examination. As regards the next submission of the learned Advocate General that the petitioners are barred to come out now with a case that the products listed in paragraphs 2 and 4 of the petition are drugs and medicines in view of their own understanding of the said products, we may say that as observed by the Supreme Court in *Dunlop India Ltd. and Another v. Union of India and Others* AIR 1977 S.C. 597, there is no estoppel in law against a party in a taxation matter. We may also make a brief reference to another argument advanced by Mr. Nadkarni as regard the definition given in Section 3(b), of the Act. He submitted that the use of the word "includes" indicates that the definition is merely inclusive and therefore, the word "includes" occurring therein does not connote the idea of meaning. But here too, we again fail to agree with the learned Advocate General. As Mr. Hidayatullah submitted, placing reliance on the decision of the Supreme Court in *The South Gujarat Roofing Tiles Manufacturers Association and Another Vs. The State of Gujarat and Another*, the word "includes" should not always be read as meaning an extension and there may be cases where the word connotes the idea of meaning. In the context of Section 3(b) of the Drugs and Cosmetics Act, we are inclined to think that the word "includes" occurring in the said Section should not be read as a word of extension with reference to its context, but on the contrary, it is equal to "means".

27. Petitioners seek, inter alia, a mandamus directing the respondents to refund the excess of Central and Local Sales Tax paid together with interest at the rate of 21% from the date of the collection of the amount to the date of the refund. Although we held that the petitioners are entitled to the refund of the excess tax paid, are unable to grant the relief of interest as prayed by them. We direct that the refund of the duty collected without authority of law should be made within 3 months from today without any interest thereon. However, if the refund is not made within that time, the said amount will accrue interest at the rate of 6% per annum from the expiry of the said three months.

28. The result is that with the modification as regards the interest mentioned in the preceding paragraphs, the rule is made absolute in terms of prayers (a) and (b). There will be no order as to costs, in the circumstances of the case.