(1990) 04 GAU CK 0002

In the Gauhati High Court

Case No : Civil Rule No. 368 of 1978, 310 of 1982

Naresh Chandra Ghosh APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 01-04-1990

Acts Referred:
Assam Finance (Sales Tax) Act, 1956 — Item 67, Item 67

Citation : (1990) 1 GLJ 422 : (1991) 1 GLR 278

Hon'ble Judges : R.K.Manisana Singh, J and B.P.Saraf, J

Bench : Division Bench

Advocate : U.Das, P.G.Barua, U.Barua, B.P.Kataki , B.L.Singh, S.K.Senapati, Advocates appearing for Parties

Judgement

Dr. B. P. Saraf, J.

Two questions arise for determination in these writ petitions. The first is whether "Mritasanjibani" falls under Item 67 of the Schedule to the Assam Finance (Sales Tax) Act, 1956. Item 67 reads :

"No. Name of taxable goods Rate of Tax

67. Spirituous medicinal preparation under any pharmacopoeia containing more than J2 per cent by volume of alcohol (but other than those which are declared by the State Government by notification in the official Gazette to be not capable of causing intoxication). 20 paise in the rupee."

This item was inserted by Assam Act XVIII of 1967 with effect from 25.10.67. The words "under any pharmacopoeia" were not there in the original item. These were later inserted by Assam Act XXI of 1972 with effect from 6.10.72.

The second important question that arises for consideration, if the first question is answered in the affirmative, is whether there is any justification for treating medicinal preparations containing more than specified percentage of alcohol differently from other medicinal preparations and levying a higher rate of sales tax thereon. In other words, whether Item 67 is liable to be struck down as violative of Article 14 of the Constitution of India.

The petitioner is the proprietor of a business run under the name and style of M/s. Sadhana Ausadhalaya. He manufactures various indigenous Ayurvedic medicines and medicinal prepartions. Many of the products manufactured by the petitioner have been patented. One such product is "Mritasanjibani". According to the petitioner "Mritasanjibani" is an Auyrvedic medicine. It is a prescribed remedy for human ailments, for diseases such as typhoid fever of acute type, cholera, complaints connected with digestion and loss of appetite, rheumatism, sciatica and also a general tonic to remove weakness and restore strength and vigour in the case of poor health and convalescent patients and in cases of postnatal complications. It is manufactured in accordance with the formula and the process laid down in the ancient Ayurvedic Shastras. It contains about 48 different ingredients which are mixed in the prescribed proportions with basic ingredients like molasses, gur, babla chhal, basak chhal, water etc. but no alcohol of any kind is added in the preparation though admittedly it contains some amount of selfgenerated alcohol. The controversy is whether it contains more than 12% alcohol and is capable of causing intoxication. The case of the petitioner is that it is not so and that it does not fall under Item 67 of the Schedule of taxable goods attached to the Assam Finance (Sales Tax) Act, 1956 and, as such, is not taxable. Alternatively, it is submitted that if it is held to be taxable under Item 67, the item itself would be violative of Article 14.

To properly appreciate the issues involved, it may be expedient to set out the relevant statutory provisions. Schedule IInd of the Assam Sales Tax Act, 1947 contains the list of goods which are exempted from sales tax under the said Act. Item 48 thereof reads: ''Ayurvedic, Homeopathic and Unani Medicines".

The Schedule to the Assam Finance (Sales Tax) Act, 1956 contains the list of goods taxable under the said Act. Item 28, which deals with "medicines and drugs", so far as relevant, reads:

"No. Name of taxable goods Rate of tax

28. Medicines and drugs other than the following :

d) Aurvedic, Homeopathic and Unani Medicines except those covered by item No. 67 of this schedule. 7 paise in the rupee".

It may be pertinent to mention that clause (d) in its existing form was substituted by Assam Act XXI of 1972 with effect from 6.1C.72. Earlier it read :

?(d) Ayurvedic, Homoeopathic and Unani medicines". Item 67 provides for levy of sales tax on certain spirituous medicinal preparations containing more than 12 percent by volume of alcohol at the rate of 20 paise in the rupee. This item has already been set out above.

From a conjoint reading of these items, it is clear that till 6.10.72 all Ayurvedic, Homeopathic and Unani medicines were not subject to the levy of finance sales tax under Item 28 as it stood originally. None of these medicines could be subjected to tax under Item 67 also as there was no yardstick to determine the percentage by volume of alcohol in spirituous medicinal preparations. It was only by virtue of insertion of the words "under any pharmacopoeia" that spirituous medicinal preparations could be brought to tax (See Basudeo Nirraal vs. Assam Board of Revenue, (1980) 45 STC 306 Gauhatl. However, on and after 6.10.72 spirituous medicinal preparations became subject to tax under Item 67 if they conformed to the requirements specified therein.

The first contention of Mr. Senapati that Mritasanjibani does not fall under Item 67 is based on the following grounds: (I) That no spirit being used in the preparation of Mritasanjibani, it cannot be termed as "spirituous medicinal preparation ; (2) that there being no Ayurvedic Pharmacopoeia in existence, in the absence of any machinery to determine the alcoholic content of a medicinal preparation, Item 67 cannot be given effect to; (3) that there is no finding in the instant case that Mritasaojibani contains more than 12% alcohol.

We have considered the submissions of Mr. Senapati. We have also heard Mr. P. G. Barua, the learned Advocate General, Assam and Miss U. Barua, Govt. Advocate, Assam. The admitted position is that Mritasanjibani is an Ayurvedic medicinal preparation manufactured in accordance with the formula and process laid down in the ancient Ayurvedic Shastras. There is no controversy about the various ingredients used in its preparation. Admittedly, spirit is not one of the ingredients. The question that has to be decided is whether in the absence of "spirit" as its component, it can be termed as "spirituous preparation". We have carefully considered this question. It appears that though the expression "spirituous medicinal preparation? has not been defined in the Act it is often used with reference to drugs and medicines. We find that this expression has been defined in the Spirituous Preparation (InterState Trade and Commerce) Control Act, 1955 (Act 39 of 1955) According to clause (2) of section 2 of the said Act

?''Spirituous preparation'' means

(i) Any medicinal preparation containing alcohol, whether self generated or

otherwise ; or

(ii any mixture or compound of wine with medicinal substance, whether the

wine is fortified with spirit or not; or

(iii) any other substance notified under section 4 to be a

spirituous preparation,"

From this definition it is clear that any medicinal preparation containing alcohol, whether selfgenerated or otherwise, is a spirituous medicinal preparation. This definition answers the first question. There being no dispute about the fact that Mritasanjibani contains selfgenerated alcohol, the contention of the petitioner that Mritasanjibani is not a spirituous medicinal preparation has no force.

The next submission that there is no Ayurvedic pharmacopoeia under which Mritasanjibani is prepared prima facie does not Appear to be correct, particularly, in view of the decision of the Supreme Court in A. M. B. Sakti Oushadhalays, Dacca (P) Ltd. vs. Union of India, AIR 1963 SC 622, wherein it has been held that Mritasanjibani, Mritasanjibani Sudha and Mritasanjibani Sura are medicinal preparations prepared according to the Ayurvedic Text Books which are accepted throughout India and are in vogue as Ayurvedic pharmacopoeia. This decision of the Supreme Court is complete answer to the contention that Mritasanjibani is not prepared under of a pharmacopoeia.

We are now left with the third submission of the learned counsel for the petitioner which relates to alcoholic content of Mritasanjibani. It is contended that the finding arrived at by the taxing authorities in this regard is not based on any chemical analysis or other report. We are not impressed by this submission. Firstly, when Mritasaojibani is prepared according to the Standard Ayjrvedic Text Books or Pharmacopoeia, the components thereof are known. No actual analysis or examination is necessary to ascertain whether it contains more than 12% of alcohol or not. That can be ascertained from the formula itself available in the pharmacopoeia. It is with this object in view that in Item 67, |the words "under any pharmacopoeia? were inserted by the Legislature. Reference to the Aurvedic pharmacopoeias in vogue, namely. Arka Prakash, Ayurvedic Sangraha and Bbisajya Ratnabali clearly goes to show that the alcoholic content of Mritasanjibani is about 42%. Despite all that, in course of hearing of these writ petitions, to meet the ends of justice, this Court allowed time to the learned counsel for both the parties to bring materials on record to enlighten the Court as to the alcoholic content of Mritasanjibani. No materials was produced except a bare statement by revenue that it contains 40% alcohol. Under the circumstance, this Court thought it fit to obtain the opinion of an expert on the p,)int. The matter was, therefore, referred to the Principal of the Ayurvedic College, Guwahati for his expert view as to whether Mritasanjibani "is a spirituous medicinal preparation" (under any pharmacopoeia) containing more than 12% of alcohol by volume. The opinion received from Dr. P. C. Bhattacharje, Principal, Ayurvedic College, Guwahati reads as follows:

(i) That, "Mritasanjibani? is a spirituous medicinal preparation. The alcohol that contains in it is selfgenerated and is produced during the process of fermentation,

(ii) That "Mritasanjibani" is prepared as per formula of Ayurvedic pharmacopoeia that contains more than 12% of Alcohol by volume".

In view of this clear opinion and the formula for the preparation of Mritasanjibani available in Auyurvedic pharmacopoeia, we are left with no doubt in our mind that Mritasanjibani is a spirituous medicinal preparation under Ayurvedic pharmacopoeia containing more than 12% by volume of alcohol and falls under Item 67 of the Schedule of goods taxable under the Assam Finance (Sales Tax)

Act. As the admitted position is that it ha not been declared by the State Government to be not capable of causing intoxication, it is taxable at the rate of 20% as specified against Item 67.

Having answered the first question in the affirmative, we may now consider the second question whether Item 67 is discriminatory and violative of Article 14 of the Constitution. The contention of the petitioner is that Mritasanjibani admittedly being an Ayurvedic medicine used for treatment, mitigation or prevention of diseases in human beings like any other Ayurvedic medicines which are exempted from tax, it cannot be treated differently only on the ground that it contains more than 12% of alcohol. To put it differently, the contention is that Item 67, which provides for levy of tax on Mritasanjibani, which is also one of the Ayurvedic medicines @ 20% as against exemption from tax granted in respect of sale of all other Ayurvedic medicines under Item 28 of the Schedule and Item 48 of the third Schedule to Assam Sales Tax Act, is violative of Article 14 of the Constitution.

We have given our careful consideration to the aforesaid submission and we find force in the same. There is no controversy in regard to the factual and legal position that no sales tax is leviable in Assam on the sales of any Ayurvedic medicine except those covered by Item 67 above. The Ayurvedic medicine known as Mritasanjibani being covered by Item 67 is subject to tax @ 20. The question for determination is whether this classification is justified or not.

The submission of Mr. P. G. Barua, the learned Advocate General, Assam is that the State has a wide discretion in selecting the persons or objects it wants to tax and that a statute cannot be challenged on the ground that it levies tax on one class of articles and not on others. In support of his contention Mr. Barua relies on the decision of the Supreme Court in East India Tobacco Co. vs. State of Andhra Pradesh, AIR 1962 SC 1733 more particularly the following passage :

?It is not in dispute that taxation law must also pass the test of Art. 14...... But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind the

State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification that it would be violaiive of Article 14."

Mr. Barua submits that the differentiation made by Item 67 between different medicines for the purpose of levy of sales tax is based on valid classification. According to him, medicines containing more than 12% of alcohol being capable of causing intoxication constitute a distinct class than other medicines and, as such, levy of higher rate of sales tax on such medicines cannot be termed as discriminatory so as to violate Article 14.

Mr. Barua further submits that it is for the petitioner to establish that the differentiation is not based on any valid classification and that in the instant case the petitioner having failed to do so Item 67 cannot be held to be violative of Article 14, In support of this submission Mr. Barua placed reliance on the following observation of the Supreme Court in East India Tobacco Co. (supra):

".....under the law it is for person who assails a legislation as discriminatory to establish that it is not based on valid classification and it is wellsettled that this burden is all the heavier when the legislation under attack is a taxing statute?.. "

Mr. Barua also relies on another decision of the Supreme Court in Katra Education Society vs. State of U. P., AIR 1966 SC 1037,

We have given our careful consideration to the submissions of Mr. Barua. In our opinion, the legal propositions put forward by Mr. Barua are wellsettled and need no elaboration. But that does not help us in resolving the controversy. Because, as observed by the Supreme Court in Aynrvedic Pharmacy vs. State of Tamil Nadu, AIR 1989 SC 1230, though it is open to the legislature or the Government if it is authorised in that behalf by the legislature to select different rates of tax for different commodities, it is well settled that where commodities belong to the same class or category there must be a rational basis for discriminating between one commodity and another for the purpose of imposing tax. la the instant case there is no dispute in regard to the facts or the relevant legal provisions. It is admitted position that Mritasanjibani is an Ayurvedic medicinal preparation. As discussed above it contains more than 12% of alcohol. It has not been declared by the State Government as not being capable of causing intoxication. That bring so it is subject to tax at the rate 20% under Item 67. AH other Ayurvedic medicines are exempt from tax. Though Mritasanjibani and Ayurvedic medicines evidently fall in the same category, a distinction has been made between the two for the purpose of taxation. What we have to find out is whether there is any justification for doing so. According to the petitioner there is absolutely no justification and that it is a case of arbitrary discrimination. According to the learned Advocate General the justification is self evident. The distinction is based on the high alcoholic content of Mritasanjibani and its capability to cause intoxication. According to him these two distinguishing factors are enough to justify the action of the legislature to treat it differently than other Ayurvedic medicines.

We have examined the rival submission. We do not find that the factors pointed out by the learned Advocate General can justify Mritasanjibani being treated differently from other Ayurvedic medicines. We may, in this connection, refer to a decision of the Supreme Court in Ayurvedic Pharmacy vs. State of Tamil Nadu, AIR 1989 SC 1230 where the Supreme Court had to deal with identical situation arising under the Tamil Nadu Sales Tax Act, 1959, In Tamil Nadu Sales Tax Act, 1959 while al! other Ayurvedic medicines were taxed @ 12% only Arishtams prepared under Ayurvedic system were made subject to levy of 30% tax by introducing a separate Item 135 dealing specifically with Arishtams and Asavas.

The levy of tax @ 30% on Arishtams and Asavas was challenged as discriminatory and unreasonable. The matter came before the Supreme Court. There was no controversy in regard to the fact that Arishtams and Asavas were Ayurvedic medicinal preparations. The question was whether these two medicines did attract considerations different from those applied to other medicinal preparations. The justification advanced by the State for the differential treatment of these two medicines was the high content of alcohol which it was contended attracted a class of customers who purchased them for the alcoholic content rather than other medicinal value. On this basis it was urged that there was a justification for higher rate of tax. Repelling the contention, it was observed :

?We are not satisfied for the reasons behind the rate of 30% on the turnover of Arishtams and Asavas constitutes good ground for taking those preparations out from the general class of medicinal preparation to which a lower rate has been applied."

The Supreme Court also referred to its earlier decision in A. M. B. Sakti Oushadhalya Dacca (P) Ltd. (supra) where considering the question whether Ajurvedic medicinal preparations knuwn as Mritasanjibani Sudha and Mritasanjibani Sura prepared in accordance with an acknowledged Ayurvedic formula, can be brought to tax under the relevant State Excise Act when medicinal preparations were liable to excise duty under the Medicinal and Toilet Preparations (Excise Duty) Act which was a Central Act, it was held that these medicines were medicinal preparations and observed that the mere circumstance that they contained a high percentage of alcohol and could be used as ordinary alcoholic beverages could not justify their being treated differently from other medicinal preparations. Following the aforesaid decision in Ayurvedic Pharmacy vs. State of Tamil Nadu (supra) it was held by the Supreme Court as follows :

''''?.The two preparations, Arishtams and Asavas, are medicinal preparations, and even though they contain a high alcohol content, so long as they continue to be identified as medicinal preparations they must be treated, for the purpose of the Sales Tax Law, in like manner as medicinal preparations generally, including those containing a lower percentage of alcohol. On this ground alone the appellants are entitled to succeed."

In view of the aforesaid decisions of the Supreme Court which in our opinion, are directly on the point, there is no escape from the conclusion that Mritasanjibani being an Ayurvedic medicine, even though it contains more than 12% alcohol, so long it continues to be identified as Ayuivedic medicine, it cannot be treated differently than other Ayurvedic medicines for the purpose of levy of sales tax. There is no justification for discrimination and in our opinion, Mritasanjibani should be treated for the purpose of levying sales tax in like manner as other Ayurvedic medicines which as stated above are exempt from sales tax in Assam. We, therefore, hold that Item 67 of the Schedule to the Assam Finance (Sales Tax) Act is violative of Article 14 of the Constitution.

In the result the writ petitions are allowed. The impugned orders including the orders of assessment are set aside. The assessing authority is directed to reassess the turnover of the petitioner treating Mritasanjibani as all other Ayurvedic medicines which are exempt from sales tax under the Act. We make no order as to costs.

