(1983) 07 CAL CK 0012

In the Calcutta High Court

Case No : C.R. No. 2708 (W) of 1972

Nilsin Company — APPELLANT

Vs

Collector of Central Excise and Others — RESPONDENT

Date of Decision : 18-07-1983

Acts Referred:
Central Excises and Salt Act, 1944 — Section 2, 25, 3

Citation : 88 CWN 253 : (1984) 2 ECC 278 : (1985) 22 ELT 739

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Advocate : Sanjoy Bhattacharyya and Chandrima Bhattacharyya, for the Appellant;R.N. Das and Uma Sanyal, for the Respondent

Judgement

Chittatosh Mookerjee, J.—The petitioner-firm, since the year 1965, had been manufacturing "ultramarine blue" at its factory at 59, Grand Trunk Road, Liluah, District Howrah. The petitioner-firm had taken out requisite licence for manufacturing excisable goods and had also executed necessary bond under the Central Excise Rules, inter alia, undertaking to produce for charge of duty all excisable goods manufactured in its factory, to maintain accounts and to pay excise duty leviable thereon, etc. Both the petitioner and the Central excise authorities, until the time mentioned hereinafter, had acted on the basis that ultramarine blue manufactured by the petitioner was included within Item No. 141(5) of the First Schedule to the Central Excises and Salt Act, 1944. The petitioner was being assessed u/s 3 of the Central Excises and Salt Act, 1944, in respect of ultramarine blue according to the rate of duty mentioned against the goods specified in Item No. 141(5) of the First Schedule to the said Act.

2. On 20th August, 1971, a learned Judge of the City Civil Court, Ahmedabad, had decreed a civil suit brought by M/s. C.M.C. India, inter alia, for declaring that the product ultramarine blue manufactured by the said plaintiff was not a pigment to common people, businessmen and consumers, and, therefore, the plaintiff''s said product was'' not excisable under Item No. 141(5) of the First

Schedule to the Central Excises and Salt Act, 1944. The learned Civil Judge also granted consequential relief by way of permanent injunction against the Union of India and others defendants of the suit. We understand that the High Court at Gujarat had subsequently dismissed the appeal preferred by the Union of India and others against the said decision of the learned Civil Judge, City Civil Court, Ahmedabad. The said High Court also reversed the decision of the trial court in another suit for similar reliefs brought by Jaynal Tarachand and others and decreed the suit. The learned Judges of the Gujarat High Court by the same judgment allowed a writ petition filed by M/s. Nilsin Industries and another and directed the Union of India to refund the excise duty levied for a period of three years prior to the filing of the writ petition upon the petitioner''s product ultramarine blue. It is stated that the above matters are now pending before the Supreme Court.

3. The petitioner by a letter dated 3/10th November, 1971, requested the Collector of Central Excise, Calcutta, to adjudicate the question as to whether the product ultramarine blue manufactured by the petitioner was liable to levy of excise duty under Item No. 141(5) of the First Schedule to the Central Excises and Salt Act, 1944, and the petitioner also prayed for refund of the excise duty already collected from it. The petitioner had drawn the attention of the Collector of Central Excise, Calcutta, to the judgment dated 20th August, 1971, of the learned Judge, City Civil Court, Ahmedabad, mentioned hereinbefore. A Dy. Collector of Central Excise, Calcutta, by his reply dated 3/10th November, 1971, had informed the'' petitioner that so far as the Collectorate at Calcutta was concerned, ultramarine blue had been held to be assessable to Central Excise duty under Item No. 14 of the First Schedule to the Central Excises and Salt Act, 1944. According to the Deputy Collector, the question of granting refund of the duty paid did not arise, and the petitioner was also asked to follow the remedy by way of appeal provided in Section 25 of the Central Excises and Salt Act, 1944. After making further futile demands, the petitioner moved this Court and obtained the present rule, inter alia, for commanding the respondents not to levy and collect Central excise duty in respect of ultramarine blue manufactured by it and also for refunding excise duty already collected in respect of the said product manufactured by the petitioner.

4. Mr. Sanjay Bhattacharyya, the learned Advocate for the petitioner, has submitted that the petitioner''s manufactured product ultramarine blue sold under the trade names "JALJYOTI" and "CHANDRAJYOTI" constituted by itself a separate product distinct from "paints", "colours" and "pigments". In popular sense, ultramarine blue is not considered as a "paint", "colour" or "pigment". According to Mr. Bhattacharyya, it is no longer relevant that in technical or scientific sense, ultramarine blue might be an inorganic pigment because in popular sense ultramarine blue is always considered as a separate product. In popular mind, according to Mr. Bhattacharyya, ultramarine blue is not associated with pigments, colours and paints. Mr. Bhattacharyya has further submitted that the onus was upon the Central excise authorities to prove that the petitioner''s

product was liable to excise duty under Item No. 141(5) of the First Schedule to the said Act. The last submission of Mr. Bhattacharyya is that the levy of excise duty upon the petitioner''s product being without any lawful authority and ultra vires, the respondents are bound to refund all excise duties already collected from the petitioner.

4A. Before I consider the metits of the petitioner''s contention that "ultramarine blue" manufactured by it is not a "pigment", "colour" or "paint" within the meaning of Item No. 14 I(5) of the First Schedule to the Central Excises and Salt Act, 1944,1 may set out the said provision as it stood at the relevant time. It may be noted that the said item had been subsequently several times amended (vide Act 16 of 1972, Act 21 of 1973, Act 29 of 1977 and Act 21 of 1979).

THE FIRST SCHEDULE

Item No. Description of goods Rate of duty

14. Pigments, colours, paints, enamels, varnishes, blacks and cellulose lacquers. I(1) ... (2) ... (3) ... (4) ... (5) Pigments, colours, paints and Rs. 17.25 per enamels not otherwise specified. quintal if sold by weight : Rs. 0.45 per litre if sold by volume. II. ...

5. The statute has not given any definition of these expressions : "pigments", "paints", "colours", etc.

6. It is settled law that a word which is not defined in the statute ought to be construed not in any technical sense but as understood in common parlance. A word of every day use must be construed in its popular sense, meaning that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. It should be construed and understood in common language (see Craies on Statute Law, 6th Edn., pages 162-63). The Supreme Court in the case of Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, applied the said rules of interpretations and held that betel leaves were not liable to be assessed to sales tax as "vegetables" under the C.P. and Berar Sales Tax Act. The Supreme Court has reiterated the same principles in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. G.S. Pai and Co., .

7. The learned Advocates on both sides have placed before me various reported decisions which have considered on facts of each case the popular meaning of a particular product in the context of the language used in a taxing statute. The courts of law have attempted to ascertain the popular meaning of terms or expressions from broadly the following stand points :

I. Commercial sense, i.e., the sense in which a product or a goods is generally understood or attributed by people conversant with and dealing in such goods or product. The Supreme Court in the case of Commissioner of Sales Tax, Madhya

Pradesh Vs. Jaswant Singh Charan Singh, , held that for the purposes of sales tax the word "coal" included "charcoal" by applying the following test :

"What would be the meaning which people dealing with coal and the consumers purchasing it as a fuel have come to associate with that word."

While rejecting the contention that power-loom cloth was mill cloth, the Supreme Court in the case of Sales Tax Commissioner, U.P. Vs. Ladha Singh Mal Singh, , held that the question must be viewed from the angle both of a merchant dealing in that commodity and a consumer wanting to purchase it. See also the case of Commissioner of Sales Tax, U.P. Vs. S.R. Brothers, Kanpur, .

II. Everyday use of a product : The Court has also ascertained popular and commercial sense of a term by looking into everyday use of a product bearing the said term or name. The Supreme Court in the case of State of Uttar Pradesh and Others Vs. Indian Hume Pipe Co. Ltd., interpreted the expression "sanitary fittings" by referring to their everyday use. The Court held that hume pipes were not sanitary fittings because there was no evidence that they were meant for use in lavatories, urinals and bath-rooms. At the same time, the Court made it clear that if at any time, the materials produced before the sales tax authorities established that in a given case the hume pipes were meant for use in bath-rooms, lavatory and urinal, etc., then the assessee would be liable to be taxed on the basis that it sold sanitary fittings. These decisions thus also indicate that in ascertaining the popular sense of a term or expression, the Court ought to consider evidence, if any, about the uses to which a product bearing the name is put to.

III. Dictionary meaning of an expression or a term : Sometimes in order to ascertain the populer meaning of a term or an expression the Court has looked into dictionaries and other books giving description and identity of the product in question. Meaning given in a dictionary is, however, not conclusive but in each case the Court has to decide how much weight ought to be given to such dictionary meaning.

IV. Physical constituents of a product : It is settled law that for purposes of taxation the popular sense of a term prevails over its scientific or technical meaning. But, in a case where the technical or scientific meaning of a term does not differ from the sense in which it is understood by the people conversant with and dealing in the said product, the Court has also considered the physical constituents of a product along with evidence about the popular understanding of the meaning of it and about the uses to which the same is put to. Thus, in the case of State of Uttar Pradesh and Another Vs. Kores (India) Ltd., , while holding that carbon paper was not paper, the Court had looked into (a) definition of the expression "paper", (b) popular understanding about uses to which paper is put, and (c) physical constituents of paper and carbon paper respectively.

8. In the light of the above propositions of law, I may now proceed to examine the merits of the petitioner''s claim that its product ultramarine blue was not

assessable under Item No. 141(5) of the First Schedule to the Central Excises and Salt Act, 1944. The petitioner in paragraph 2 of its writ petition has stated that its product ultramarine blue is a mixture of clay, carbonate of soda, sulphur and silica. The respondents, in paragraph 13 of their affidavit in opposition, have stated that the Chemical Examiner of Central Excises, Calcutta, held a chemical test of a sample drawn from the petitioner''s factory. According to the said test the raw materials used in the manufacture of ultramarine blue were sulphur, soda ash, pitch, china clay and silica. Thus the petitioner has not questioned the correctness of the said chemical test and in fact has not disputed that the physical properties of ultramarine blue constitute the same as an inorganic pigment in its technical or scientific sense. But. the petitioner''s main contention is that according to the popular view, the product ultramarine blue is understood as a separate product distinct from pigments, colours and paints. In popular mind ultramarine blue is not associated with pigments, colours and paints. The petitioner in paragraph 2 of its writ petition has merely alleged that its product is mainly used as temporary whitening agent for heightening the whiteness of things particularly cotton textiles. It is significant that ''even the petitioner has not averred that the sole or only use of its product is for whitening clothes. Even according to the petitioner the alleged principal use was as washerman''s blue. I would later on point out that the respondents have proved convincingly that whitening or imparting brightness to cotton textiles is only one of the many uses of their said product ultramarine blue. Along with the writ petition the petitioner did not file any supporting affidavit to substantiate the claim made in paragraphs 4 and 5 of the writ petition that its product ultramarine blue was not a pigment as understood in its popular, natural or legal meaning. The petitioner entirely placed reliance upon the aforesaid decision of the learned Judge, City Civil Court, Ahmedabad, to sustain its claim that the product ultramarine blue is commonly and popularly known as washing blue, dhobi blue or laundry blue and the same was not included within the word "pigment" in the popular or technical or scientific sense. I have already noted that the said decision of the learned Judge, City Civil Court, Ahmedabad, has been since affirmed by the Division Bench of the Gujarat High Court.

9. In my view, the decision of the learned Judge, City Civil Court, Ahmedabad, and the judgment of the Division Bench of the Gujarat High Court are distinguishable on facts and the petitioner cannot derive any assistance from the distinguishable on facts and the petitioner cannot derive any assistance from the same. The learned Judge of the Ahmedabad City Civil Court who tried Civil Suit No. 271 of 1968 recorded that the plaintiff of the said suit had examined several witnesses who proved that the plaintiff''s product was popularly known as gali used for heightening whiteness of clothes. According to the learned Judge, the defendant, Union of India, did not adduce any oral evidence to contradict the said evidence. The defendants had only relied upon a report of a chemical analyser to the effect that ultramarine blue was a complex inorganic pigment. The chemical analyser himself did not testify and according to the learned Judge,

there was no evidence or material on record to show that the plaintiff''s product was regarded as a pigment as is commercially understood. The learned Judges of the Gujarat High Court had affirmed the said findings of fact made by the trial court because, according to the learned Judges, the defendant did not controvert the plaintiff''s evidence that the particular product was known only as ultramarine blue not only to manufacturers and traders but even to common people. In the absence of any evidence on the point the learned Judges of the Gujarat High Court observed that it would be hazardous to interpret the term "pigment" in Item No. 141(5) of the First Schedule to the Central Excises and Salt Act, 1944, in the manner suggested by the learned Advocate for the Union of India. While deciding the case, neither the trial Judge nor the Division Bench of the Gujarat High Court had any opportunity of considering the weight of the authorities which have been cited before me on behalf of the respondents. The learned Judges of the Gujarat High Court incidentally had declined to accept as authoritative publication of the Indian Standards Institution on the ground that the attention of the plaintiff''s witnesses was not drawn to the same and the defendants did not examine anyone from the Indian Standards Institution to explain the purpose for which the booklet had been published and to what extent the manufacturers were expected to follow.

10. With respect I fail to see the cogency of the reasons for rejecting the aforesaid publication of the Indian Standards Institution. The Indian Standards Institution (Certification Marks) Act, 1952, was enacted by the Parliament to provide for the standardisation and marking of goods. The expression "Indian Standard" according to Section 2(c) of the Act, means "the standard (including any tentative or provisional standard) established and published by the Indian Standards Institution, in relation to any article or process, indicative of the quality and specification of such article or process and includes any standard recognised by the Institution". Section 3 of the said Act specifies the powers and duties of the Indian Standards Institution. In their affidavit-in-opposition the respondents in the rule among other authorities had relied upon the "Indian Standards Specification" for ultramarine blue for paints published by the Indian Standards Institution, New Delhi. A copy of the same has been also filed and it has been kept with the records. The said standard prescribes "the requirement and methods of sampling and test for the material commercially known as ultramarine blue intended for use as a paint pigment".

11. In my view, the basis of the aforesaid decision of the learned Judge, City Civil Court, Ahmedabad, and the judgment of the Gujarat High Court affirming the same was that the Union of India had failed to adduce any evidence about the sense in which the product ultramarine blue was understood and attributed to by the people conversant with and dealing in the said product. The learned Judges proceeded on the basis that the only everyday use of the product ultramarine blue was by the washerman for brightening clothes. In the present case, before me, as already observed, the respondents had relied upon the various international books, treatises, dictionaries, etc., to prove how the product

ultramarine blue is understood by the people conversant with the product and who purchase and use them. The respondents at the time of the hearing of the rule also produced the said original books and dictionaries.

12. According to the "Colour Index", 2nd Edn., Vol. II, published by the Society of Dyers and Colourists, Yorkshire, England, and the American Association of Textile Chemists and Colourists, Lowell Technological Institute, Lowell, Mass, U.S.A., the following are the usages of ultramarine blue :

"In paints and alkyd resin enamels, lacquers, distempers and emulsion paints, also for paper colouring and coating, wall-paper and as a whitening agen t (laundry blue) and in rubber, plastics, vinyl products, leather cloth, book-cloth, soap, linoleum, artists'' colours, crayons, chalks and modelling clays, specially finished brands are used in printing inks and cosmetics. Ultramarine is especially useful where fastness to lime or alkali is essential but unsuitable where fastness to acids is required. In these respects its utility is the reverse of that of C.I. Pigments Blue 27."

13. The respondents have also relied upon the standard specifications for ultramarine blue contained in A.S.T.M. standards published by the American Society for Testing of Materials which describes ultramarine blue as pigment suitable for use in paints, enamels, lacquers and similar products. The said pigment could be in the dry form or as a paste in oil. In Kingzett''s Chemical Encyclopaedia, 9th Edn., ultramarine blue has been described as a blue pigment. Dictionary of Commercial Chemicals by Snell also states ultramarine blue as an insoluble bright blue pigment of varying composition. The respondents have also relied upon Riegal''s Industrial Chemistry by James A. Kent, Outlines of Paint Technology by Morgans Glossary of Terms used in the Paint, Varnish and Allied Trades Outlines of Paint Technology by Noel Heaten and various other technical books and treatises on paint technology which describe ultramarine blue as a pigment. In paragraph 15 of their affi-davit-in-opposition the respondents have given a further list of books and treatises which also describe ultramarine blue as a pigment.

14. The respondents in paragraph 17 of the affidavit-in-opposition have averred that in paints like emulson paints or water paint, pigment finishes for leather, printing ink, textile printing, ultramarine blue is compounded in larger proportion. They have also set out in paragraph 18 of their affidavit-in-opposition the definition of the expression "pigment" given in various dictionaries. In the book Modern Surface Coating by Paul Nylen and Edward Sunderland, at page 349, of the said book has described "pigment" as the internationally accepted term for the powdered material intended to be dispersed in liquid or solid binders for the production of paints, printing inks, plastic materials, rubbers, virtrine enamels". Inithe said book ultramarine blue has been classified as a synthetic and inorganic pigment. The respondents have also relied upon Webster''s 3rd International Dictionary, 1968, page 1714, which describes "pigment", inter alia as a natural or synthetic inorganic or organic substance that imparts a colour

including black or white to other materials, especially, a powder or easily powdered substance mixed with a liquid in which it is relatively soluble and used in making paints, enamels and other coating materials, inks, plastic, rubber and also for imparting opacity and other desirable properties as well as colour.

15. After the hearing was concluded, the learned Advocate for the petitioner placed before me the Condensed Chemical Dictionary, 10th Edn., revised by Gessner G. Hawley, published by Van Nostrand Reinhold Co. Incidentally the respondents in paragraph 17 of their affidavit-in-opposition had relied upon the 1953 edition of Van Nostrand''s Chemical Dictionary for the definition of "pigment" as a colouring substance. The said Condensed Chemical Dictionary claims to contain three distinct types of information, namely, (i) technical descriptions, (ii) extended definition, and (iii) description or identification of wide range of trade mark products. The said dictionary, in my view, does not support the claim laid by the petitioner. Thus at page 1068 of the said dictionary the properties of ultramarine blue have been, inter alia, described as "inorganic pigment ; blue powder ; good alkali and heat resistance...". The said dictionary mentions the following uses of ultramarine blue : "Colorant for machinery and toy enamels ; white baking enamels ; printing inks, rubber products, soaps and laundry blues, cosmetics ; textile printing". "Note : Used in very low percentage to intensify whiteness of white enamels, rubber compounds, laundered clothing, etc., by off setting yellowwish understones ; gives a ''blue'' rather than a ''yellow'' white." According to the same dictionary, the expression "colorant" means "any substance that imparts colour to any other material or mixture". "Colorants are either dyes or pigments" (vide page 267 of the book). I may now also refer to the definition of "pigment" given at page 817 of the said Condensed Chemical Dictionary :

"Any substance, usually in the form of a dry powder, that imparts colour to another substance or mixture. Most pigments are insoluble in inorganic solvents and water...To qualify as a pigment, a material must have positive colorant value."

16. The definition given in the said book excludes certain substances including whiting. Mr. Bhattacharyya is not correct in contending that ultramarine blue is whiting because according to the said dictionary, whiting is entirely a distinct product consisting of finely ground, naturally occurring calcium carbonate derived from chalk, limestone, etc., and used as filler, putty etc. One of the properties of ultramarine blue is that it is a whitener, i.e., of white pigment or colorant used in the paper and textile industries {vide Condensed Chemical Dictionary, page 1096). Therefore, I conclude that the Condensed Chemical Dictionary, 10th Edn., relied upon by the petitioner shows that ultramarine blue is a pigment having various uses, one of which is whitening or brightening textiles and clothes.

17. For the foregoing reasons, I conclude that there is overwhelming evidence that ultramarine blue is a pigment. Ultramarine blue does not constitute a separate product as contended by the petitioner. People conversant with and

dealing with the said product understand ultramarine blue as a pigment, i.e., as a colorant. It is used for imparting colour to various substances. Thus, not only from the standpoint of its physical constituent but also from the stand points of its various uses and of popular understanding ultramarine blue is a pigment. In this connection, it is also necessary to note the comprehensive manner in which the Entry No, 14 gave description of the goods which were subject to the rate of duty specified in the said item. Item No. 14 1(5) was broadly in the form of a residuary clause for inclusion of pigments, colours, paints and enamels which have not been otherwise specified. Thus pigments colours, paints and enamels which have not been mentioned in any other sub-items would be covered by item No. 24 I (5) of the First Schedule to the Central Excises and Salt Act, 1944. Accordingly, I hold that the petitioner is not entitled to challenge the validity of the excise duties imposed upon the product ultramarine blue manufactured by the petitioner. No question also arises of commanding the respondents to refund excise duties recovered from the petitioner under Item No. 14 I (5) of the First Schedule to the Central Excises and Salt Act, 1944.

18. I accordingly discharge this rule without any order as to costs. Operation of this order be stayed, as prayed for, for three weeks.