

(1983) 03 AP CK 0027

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 44 of 1978

Nutrine Confectionary Company Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise, Nellore

RESPONDENT

Date of Decision : 04-03-1983

Acts Referred:

Constitution of India, 1950 — Article 226
Imports and Exports (Control) Act, 1947 — Section 3(1)

Citation : (1984) 2 ECC 201 : (1983) ECR 459D : (1983) 12 ELT 736

Hon'ble Judges : Ramachandra Rao, J; M. Jagannadha Rao, J

Bench : Division Bench

Advocate : P. Venkatrama Reddy, for the Appellant; Nagaraja Rao, Additional Standing Counsel for Central, for the Respondent

Judgement

Jagannadha Rao, J.—This writ appeal is directed against the judgment of the learned Single Judge dismissing W.P. No. 1445/1976.

2. The appellant manufacturers and sells toffees, boiled sweets and other confectionery products. The question that arises in the appeal is whether "lozenges" fall under Item I-A(I) of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter called the Act) and attract the levy of excise duty.

3. The appellant declared "Lozenges" as a non-excisable item in the classification list submitted to the Assistant Collector of Central Excise, Nellore. The Assistant Collector did not accept the said contention of the appellant and passed orders accordingly on 17-3-1973.

4. On appeal, the Appellate Collector of Central Excise, Madras, by his order dated 16-11-1973 rejected the appeal stating that the meaning of the word "Candy" includes "Lozenges" and observing as follows :-

"While admitting that the term "boiled sweets" utilised in the tariff description does not cover "Lozenges" notwithstanding that Lozenges form a distinct category, I hold that the term "candy" which is international usage covers

various other categories such as hard candy, coated candy, also includes sugar lozenges. The book "Chemical analysis - Food and Food Products by M. B. Jacob" is relied on for this view."

5. The appellant preferred a revision and the Central Government while rejecting the same, passed an order dated 31-5-1975 holding that according to the American usage "candy" includes "lozenges". They observed :-

"Government of India.....observe that it is clear from the evidence on record that the term "candy" is used in U.S.A.; it includes amongst other things, a lozenge of the type under discussion of this case. The reference to the Oxford Dictionary in interpreting the term "candy" does not help. It refers to toffees and the like, while "candy" is a term specified in the relevant tariff item, besides the term "toffee". The specification laid down the lozenges by the Indian Standards Institution makes no difference to the classification of the goods".

6. The appellant then approached this court under Article 226 of the Constitution of India for the issue of a Writ of Certiorari for quashing the above order of the Central Government and for a consequential direction to the 1st respondent not to levy and collect excise duty on lozenges manufactured by the appellant and to refund the duty already collected.

7. The learned single Judge who heard the writ petition dismissed the same and hence the writ petitioner has preferred this writ appeal.

8. In this appeal, the learned counsel for the appellant Sri P. Venkatarama Reddi has contended that "lozenges" manufactured by the appellant cannot be brought under the Tariff item of "candy" and that the understanding of the word "candy" in the United States of America cannot be taken into account in deciding the meaning of that word in India for purposes of excise duty. The word "lozenge" has to be understood, according to the learned counsel, in the manner in which the trade in India and the Indian consumer understand. He also pointed out that the appellant has placed before the respondents the specification laid down by the Indian Standards Institution (hereinafter called the ISI) and other books which clearly show that the essential components of "lozenges" and "candy" are different and that while "candies" have to be manufactured by the boiling process, lozenges do not require boiling at any stage. He also relied upon a direct ruling of the Madras High Court in *M/s. Parry Confectionery Limited, Madras v. Government of India - 1980 EIT 468*.

9. On the other hand the learned standing counsel for the respondents contended that the word "candy" is comprehensive enough to include "lozenges" and that, in the absence of any material produced by the appellant, the liberal meaning attributed to the said word "candy" in the U.S.A. has to be taken into account. He also submitted that the view taken by the taxation authorities cannot be said to be unreasonable or preserve and that therefore this court should not interfere under Art. 226 of the Constitution of India.

10. Before advertng to the above points, we have set out tariff item 1-A in Schedule 1 of the Act which was in force from 1-3-1968 to 31-3-1977 and it reads as follows :

"Confectionery, coca powder and chocolates in relation to the manufacture of which any process is ordinarily carried on with the aid of power namely :

(1) Boiled sweets, toffees, caramels, candies, nuts (including almonds) and fruit kernels coated with sweetening aghot, and chewing gums. ... 10% adv. (2) Cocoa Powder. ... 10% adv. (3) Drinking chocolates, chocolates in the form of granules or powder ... 10% adv. (4) Chocolates in the form of blocks, slabs, tablets, bars, pastilles or croquettes or in any other form, not otherwise specified whether or not containing nuts, fruit kernels or fruits. ... 10% adv. It will be noticed that out of various types of confectionery only those enumerated in sub-item I are excisable of duty. Learned counsel for the respondents fairly and in our opinion rightly stated that he cannot fall back on the word "confectionery" for, in view of the judgment of a Division bench of this Court in M/s. Godrej Soaps Limited, Secunderabad v. The State of A.P., - T.R.C. No. 77 of 1982, dated 31-12-82 = (1983) (1) A.P.L. J., 23 , the words "namely" in the above tariff item have to be construed in a restrictive sense as enumerating an exhaustive list of the items which can be brought within the taxing provision. It may be noted that the Division Bench relied upon the judgment of the Supreme Court in State of Tamil Nadu Vs. Pyare Lal Malhotra and Others, which constructed the words "that is to say" as meaning an exhaustive list of taxable goods.

Therefore the main question that falls for consideration is whether the word "candy" is wide enough to include "lozenges" within the meaning of the said word in the above tariff item ?

11. Counsel on both sides have referred to several books and Dictionaries in support of their respective contentions. But therefore referring to them it is necessary to consider the ISI publications which have a bearing on this question. In fact the Supreme Court pointed out in the case in Union of India (UOI) Vs. Delhi Cloth and General Mills, that the opinion of the Indian Standards Institution is preferable to other opinions. In that case their Lordships were considering the meaning of the words "refined oil" in the context of the central Excises and Salt Act, 1944. We shall therefore initially refer to the booklets of the ISI.

12. It may be noted that the ISI has published a separate booklet exclusively on "lozenges" while it published two other booklets separately on "candies". These booklets are published by the ISI with the aid of a Committee called the "Bakery and Confectionery Sectional Committee". The said Committee consists of representatives of Government of India and the leading industries, as also experts from various technical bodies such as (a) The Central Committee for Food Standards, Ministry of health, New Delhi, (b) The Technical Standardisation Committee (Food Stuffs), Ministry of Agriculture and Irrigation, New Delhi, (c)

The Director General of Technical Development, New Delhi; (d) The Defence Food Research Laboratory, Mysore, (e) The Central Food Technological Research Institute (CSIR), Mysore, (f) The Director General, ISI and (g) The Federation of Confectionery Manufacturers Association and other representatives of leading confectionery industries.

The fact that the expert body of representatives of trade and Government treat "lozenges" as distinct from "candy" in India is very significant and throws light on the question as to whether "lozenge" has a separate connotation different from "candy" in the Indian confectionery trade.

13. In the ISI booklet relating to "Lozenges" it is stated as follows :

"Lozenges (as different from medicated lozenges or others with special claims) are confections mainly made out of pulverized sugar or icing sugar with certain binding material and lubricants with the addition of suitable flavours and colours."

According to the said booklet, the essential ingredients of "lozenges" are -

(i) Sugar :- Pulverized sugar obtained by powdering vaculim pan sugar - or refined sugar - or icing sugar, and

(ii) Binding materials :- Edible gelatine, edible gums, liquid glue and dextrins.

Then follows a list of twenty one optional ingredients including peppermint oil. It is also stated that the lozenges shall be smooth and have good snap.

14. There are two ISI publications regarding "candies". One relates to protein chewing candy and the other to peanut candy. According to the former, the "protein chewing candy" is a hard-boiled confection made from a mixture of sugar and edible protein flour or protein isolate, fat, milk solids and other ingredients. The essential ingredients are (i) Sugar, (ii) edible fats (margarine, butter or vegetable hydrogenated fat i.e., vanaspathi); (iii) edible groundnut - flours protein isolates; (iv) Liquid glucose; (v) condensed milk and (vi) skimmed milk powder. According to the other ISI booklet on "peanut candy" which is popularly called "chikki", it is a sweetmeat, and is made of peanuts, jaggery (gur), raw sugar, khandasari sugar, liquid glucose, spices, and flavouring essences; and the essential ingredients are (i) Peanut kernel, (ii) jaggery, (iii) sugar, (iv) liquid glucose, (v) spices and (vi) vanaspathi.

15. Now we shall briefly refer to the other books which have been referred to us. The book "The Chemistry and Technology of Food and Food Products" Vol. 1, 1944 is Edited by Morris B. Jacobs (pp. 911-913). It states that in U.S.A. the word "candy" and confectionery are used synonymously. According to the Pure Food and Drug Act, candy is a product made of sugar, cocoa products, corn syrup, dairy products, peanuts, cocoanut and other nut meats, fruits, licorice, gum arabic, gelatin, cooking starch, molasses, essential oils, pectin, and material salt. According to the same book at page 586, candies are sugar mixtures consisting of a solid or crystalline phase and a liquid or non-crystalline phase.

Again according to the book "wealth of India" (A Government of India publication) on Industrial products (p. 174) (part IIC, 1951) candy is prepared by the process of boiling under the vacuum-boiling process or open-fire boiling process. The same book deals with Lozenges at page 175. It states that Lozenges are prepared by cold mixing of icing sugary gum arabic, gelatine or stearine and flavouring materials. Lozenges should have good snap or brittleness. According to R. Lees & B. Jackson, Lozenge is a sugar dough containing a binder which has been flavoured, cut to shape and dried. Skuse says that the process of boiling is involved in candy, toffees and caramels.

16. From these ISI publications and the books it is clear that a "lozenge" is not treated as "candy" in the Indian trade, according to the popular sense in which these words are understood. Further, there are basic differences in the components as well as the method of manufacture for, while lozenge is manufactured out of a dough of pulverised sugar by adding nothing else except a binding material and a flavouring agent (Such as mint oil) and the lozenge has good snap and is brittle, the same is not the case with "candy". The "candy" is a mixture of sugar and other ingredients and is manufactured by a process involving boiling. It is also hard.

In fact, the Madras High Court in *M/s. Parry Confectionary Limited, Madras vs. The Government of India* referred to the technical opinion given by the ISI on 11-10-74 and the opinion of the Central Food Technological Institute, Mysore dated 6-2-74 which also bring about the above differences prominently.

17. But then the learned Standing Counsel for the Central Government contended that in America, the word "candy" is understood to include a "lozenge", and that whatever may be the position according to Morris B. Jacob's book "The Chemistry and Technology of Foods and Food Products" already referred to, the same American author has stated in another book "Chemical Analysis of Foods and Food Products (3rd Ed.) (page 472) that "candy" is divided into the following general classes :-

"Hard candy, sugar creams (fondants), sugar lozenges, fudge, caramel including toffee, Marshmallow including whips, neugat jellies and gums, Bon Bons (coconut and plain), coated candies (chocolate and otherwise)"

and that therefore "candy" includes "sugar lozenges". In fact the Appellate Collector refers specifically to this book and the government of India also appear to have had this book in their mind while rejecting the revision.

This submission of the respondents' counsel is no doubt supported by the passage from the above book. In fact as pointed out by the appellant's counsel, the Oxford English Dictionary, the Webster's Universal Dictionary and the Chambers Dictionary expressly mention that in U.S.A., the word "candy" is understood to include "lozenges".

18. That brings us to the main question whether it is permissible to import the

American usage of the term "candy" into our country ?

19. A similar question arose before the Court of Appeal as to whether the American usage of the expression "poultry" can be imported into the English usage. In *Hardwicke Game Farm vs. Suffolk etc. Association Limited* - (1966)(1) All ER 309, the question was whether "pheasants" can be brought within the connotation of the words "poultry" for purposes of application of the Fertilizer and Feeding Stuffs Act, 1926. Rejecting the same Davies, L.J. (with whom Diplock L.J. Concurred), stated :

"No ordinary person would, in my view, consider that pheasants and partridges are or would be included in the word "poultry". In common parlance there is a marked distinction between "Poultry" and "game"... The exception was an American Dictionary, namely Websters Third New International Dictionary which is of no value as to English, as opposed to American usage in 1926. The Judge rightly held that evidence...was inadmissible."

Therefore, the American usage of the word was not accepted in preference to the popular English usage.

20. There is a judgment of the Supreme court which is directly in point where Their Lordships rejected the English usage in preference to the Indian usage. That is the case in *Annapurna Biscuit Manufacturing Co., Kanpur Vs. Commissioner of Sales Tax, U.P., Lucknow*, . There it was contended that the words "cooked food" included "biscuits" within their amplitude. Rejecting the said construction, Justice E. S. Venkatramaiah laid down :

"Relying on some foreign English dictionaries it is contended that cooking means preparation of food by application of heat as by boiling, baking, roasting, boiling etc. and biscuits should therefore be treated as cooked food.

..... It is a well settled rule of construction that the words used in a law imposing a tax should be construed in the same way in which they are understood in the ordinary parlance in the area in which the law is in force."

Therefore, the English usage was held to be inapplicable to the area in which the U.P. Sales Tax Act, 1948 was in force.

Explaining what was meant by "common parlance" or "the consumer and trade understanding", the Supreme Court has, in the same case, observed that the test is this :

"If a person goes to a hotel or restaurant and asks for some cooked food certainly he will not be served with biscuits in Uttar Pradesh."

21. In the leading case in *The King v. Planters Nut and Chocolate Company Limited* 1951 CLR 122, arising under the Canadian Excise Act a similar question arose as to whether salted peanuts and cashew nuts could be considered to be "fruits" or "vegetables". Cameron J. who delivered the judgment, posed the test as follows (P. 129) :

"..... would a house-holder, when asked to bring some fruit or vegetables for the evening meal bring home salted peanuts, cashew nuts or nuts of any sort ? The answer is obviously "no"."

Applying the above principles and tests, it is clear that the American usage of the word "candy" cannot be applied in the Indian context so as to include "lozenges" within the connotation of the tariff item "Candy" - Surely, an Indian consumer who goes to purchase a "lozenge" from an Indian shop would not ask for a "candy". The extract from the American Book "The Chemistry and Technology of Food and Food Products" by Morris B. Jacob cannot therefore be admissible in understanding the commercial usage of the word "candy" and "lozenges" in India. The taxing authorities and the learned Judge were therefore wrong in accepting the opinion of the American author, Morris B. Jacob in preference to the classification made by the Indian Standards Institution.

22. One of the points mentioned by the learned single Judge was that the appellant failed to adduce the necessary evidence before the taxing authorities as to the Indian meaning attributable to the words "candy" and that in the absence of such evidence, it was permissible to use the American usage to the Indian context.

We are of opinion that this criticism is not justified. A reading of the order of the Central Government discloses that they rejected the usage of the words as evidenced by the "ISI booklets" and the Oxford Dictionary relied upon by the appellant. As already stated, the Oxford Dictionary specifically highlights the liberal meaning of the word "candy" in the U.S.A. The learned single Judge himself refers to the report of the Chemical Examiner submitted to the government of India (the revisional authority) and, in fact, a reading of that report shows that the Chemical Examiner has adverted to the various text-books and dictionaries etc. the extracts from which have now been placed before us. Further the memorandum of revision refers elaborately to these items of evidence. The learned Judge was therefore in error in thinking that the appellant did not produce the relevant material regarding the Indian usage and in holding that the usage in America had therefore to be applied in India.

23. The last submission of the learned Standing Counsel for the respondents was that no interference was called for in Writ Proceedings against the orders of the Excise authorities unless it was proved that the views taken by the latter were perverse or unreasonable. For that proposition, the learned counsel relied upon the decision of the Supreme Court in V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another, .

In our opinion, that decision is not applicable to the facts of this case. There the question was with regard to the scope and applicability of item 74(vi) of Part V of Schedule I to the Imports (Control) Order, 1955 made u/s 3(1) of the Imports and Exports (Control) Act, 1947. It was held that when two alternative interpretations were possible, and when the Customs authorities adopted a

reasonable view, the said finding could not be interfered with under Article 226 of the Constitution of India. But that is not the position here. Here the authorities have ignored the Indian usage and the ISI publications, and erroneously followed the American usage which was "inadmissible" (vide Davies L.J. in *Hardwicke Game Farm v. Suffolk etc. Association Limited* (5)). It is therefore a case where relevant considerations have been ignored and irrelevant considerations have been applied and there is therefore a clear error of law apparent on the face of the record. (vide *Union of India (UOI) Vs. Tarachand Gupta and Bros,*).

24. For all the above reasons, we are unable to agree with the view taken by the respondents as also the learned Single Judge. The appeal is accordingly allowed and a Writ of Certiorari will issue as prayed for. There shall however be no order as to costs in the circumstances of the case.