(1990) 08 KL CK 0001

In the High Court Of Kerala

Case No : O.P. No''s. 9558,10918 of 1984, 6164 of 1985, 5834 of 1986 and 4208 of 1987

The Punjab Aromatics APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 22-08-1990

Acts Referred:

Citation : (1990) 08 KL CK 0001

Hon'ble Judges : K. Sukumaran, J;G. Rajasekharan, J

Bench : Division Bench

Advocate : Arikkat Vijayan Menon, P. Gopinatha Menon, Jose Joseph, E.V. Nayanar, K.K. Vijayaraghavan and K.P.P. Nambudiripad, for the Appellant; N.N.D Pillai, Government Pleader, for the Respondent

Judgement

Sukumaran, J.—The fragrance of sandalwood is well known. Any one born in India and having a smattering knowledge of geography, history or literature of the land will have sweet sentiments of the reference to the sandalwood tree in glowing terms. A soothing word is attributed ''sandalwood coolness''. Amorous warmth is treated with ''sandalwood paste''. Auspicious occasions must have its yellow paste fragrance in pleasing profusion. It is the sandalwood oil that is extracted from the sandalwood, that adds to the aroma and lends its fragrance when blended with other things.

Whether you crush the leaves of sandal or smell its flowers you will not find any scent whatever because the highly valued scented oil is contained only in the heart-wood of old trees which constitutes the well known sandalwood of commerce from which the sandal oil is also distilled.

(See ''Our Tree Neighbours'', page 95).

Is that sandalwood oil a ''perfume'' in the context of the entries in the First Schedule of the Kerala General Sales Tax Act, 1963??is the question posed in these writ petitions.

2. Judicial decisions dealing with ''perfume'' in the context of different statutory schemes, have helped to focus the core question and to give due emphasis on the determinative factors for the ultimate decision.

3. The availability of sandalwood in large forest tracts in Kerala, Karnataka and Tamil Nadu has fostered extensive trade, commerce and industry, whether it be in relation to the timber or its cut ends, the oil as extracted, of the perfume as made, or of the by-products where its fragrance predominates. Karnataka is noted not only for, its extensive sandal forest wealth but also for its pioneering industrial projects in sandalwood. Smaller patches of sandalwood growth still survive in Kerala and Tamil Nadu. Transactions connected with the commodity have been subjected to taxing officers'' watchful view. As far as Kerala is concerned, the question has arisen for the first time in relation to ''sandalwood oil''.

4. One of the earliest decision is that of the Madras High Court, Mettur Sandalwood Oil Co. v. The State of Madras (1965) 16 S.T.C. 9. The decision indicates the thoroughness with which counsel had marshalled materials for consideration by the court and the deep scrutiny and assessment of the materials so lavishly produced by those who scanned the case. A pronouncement of the Supreme Court, but more on a product of sandalwood-dhoop bhatti-is in Commissioner of Sales Tax v. Indian Herbs Research and Supply Co. (1970) 25 S.T.C. 151. The decision had understandable impact on later pronouncements of High Courts on allied questions. Some High Courts have followed the decision without any further or additional discussion. (See Assessing Authority v. Amir Chand Om Parkash (1974) 33 S.T.C. 120, Prakash Stores v. State of Tamil Nadu (1976) 38 S.T.C. 300, Kamaru Zuman Khan v. State of Orissa (1981) 47 S.T.C. 22, Deputy Commissioner of Sales Tax v. Latheef (1988) 69 S.T.C. 29. Some Ors. have discussed the decision extensively, so as to distinguish the same in relation to the particular entry occurring in a particular Statutory scheme. [See Boake Roberts and Co. (India) Ltd. v. Board of Revenue (C.T.), Madras, (1978) 42 S.T.C. 270. All these thought process have helped the court to have a clearer vision of the focal point.

5. The Madras decision in Mettur Sandalwood Oil Co. v. The State of Madras (1965) 16 S.T.C. 9 supra, had to deal with the term ''perfume'' in the context of an entry reading:

Scents and perfumes, powders, snows and scented hair oils.

According to the High Court, the entry showed that the various articles enumerated therein are ordinary articles used for cosmetic purposes, and must be in such a form as can be used forthwith by the customer without taking the further trouble of putting them through some other process, to make them ready for use. A perfume must be one which is ready for use because of its odoriferous and high volatile character. That stage is reached after the admixture of proper solvents, fixative and odoriferous substances. Sandalwood oil, in that view of the matter, could not be classified as a perfume.

6. The word ''perfume'' was considered at some length with reference to the Shorter Oxford Dictionary and a technical book "Chemical Process Industries" by Harris Shreve (Mac Graw Hill series publication). It was noted that the constituents of a perfume are three-fold: (i) a vehicle or solvent, (ii) a fixative, and (iii) an odoriferous element. Sandalwood oil was treated as the odoriferous element.

7. The chemical properties of sandalwood oil were then enumerated. It vaporises at a high temperature which ranges between 285 to 290?C. The necessity for the use of a solvent like alcohol to make the resultant perfume volatile was adverted to. Sandalwood oil could serve only the purposes of the fixative and the odoriferous elements, in the making of a perfume. The court further observed:

It is also common experience that sandalwood oil as sold in the market does not vaporise readily, to serve the purpose of a common perfume. It has to be rubbed hard on the hand or some other part of the body so that the temperature can be raised by friction arid better vaporisation takes place.

One other significant factor was referred to in the judgment, The bulk of the sales was in large containers holding from 5 lbs. to 50 lbs. The intention in effecting such sales was to sell the oil only as a base for preparing perfumes and other articles.

8. The book on "Our Tree Neighbours" also confirms the above attribute of sandalwood oil. It states:

The highly fragrant Sandal Oil is used in perfumery, soap making and in medicine.

The features and qualities of sandalwood oil are revealed in a large measure by the materials referred to in the decision of the Commissioner of Sales Tax v. Gordhandas Tokersey (1983) 52 S.T.C. 381.

9. The material portion of the evidence before that court and their effect was discussed thus:

From the evidence lead in the case it seems that sandalwood is mainly used for the purpose of extracting oil from it. The bulk of it is used for distillation of oil in the Mysore Government Factory. Only 10 or 12 percent of sandalwood is sold outside and is used mainly as firewood by Parsees in temples and homes or in some cases, for cremation of Jain munis. Some of it is used for wood carvings. There is thus no evidence to show that sandalwood is used as a perfume or is known in the trade as a perfume.

10. A brochure (Marketing Series No. 128) on marketing of sandalwood and its oil in India issued by the Government of India, contained useful information on sandalwood oil. It stated:

The greater proportion of oil of sandalwood is at present made use of in perfumery. It is a liquid of very high boiling point and has great fixative properties for perfumes. The main function of a fixative is to ''hold'' the perfume so that its fragrance will last long after the evaporation of the solvent, such as alcohol. Oil of sandalwood does this exceedingly well. It blends with almost every type of perfume and is an ideal constituent for composite perfume preparations. It has a very light colour and may therefore be used without fear of ultimate discolouration of any articles to which it is applied. It is so tenacious and delightful a perfume that its use in large quantities is indispensable where the heavy oriental type effect is desired. On the other hand, it is so delicate in aroma that it may advantageously be blended in small quantities where the dominant odour of sandalwood is not desired.

11. The Bombay High Court rightly inferred from the passage that sandalwood oil is mainly used as a fixative in the preparation of perfumes, for the purpose of holding the perfume so that the fragrance will last for a long time after evaporation of the solvent such as alcohol.

12. A letter of February, 1971, issued by the Joint Agricultural Marketing Adviser to the Government of India was also extracted. It reads:

...sandalwood oil cannot be called a perfume on its own.

It is used in the perfumery industry to a greater or lesser extent. The characteristics of sandalwood oil referred to in the brochure on the marketing of sandalwood and its oil in India (Marketing series No. 128) referred to by you in your letter itself shows that it is a good vehicle only for high-class perfumes and its own value as a perfume is insignificant.

13. The further discussion of the evidence as available in the case may usefully be extracted inasmuch as they give the basic data in relation to the characteristics and properties of sandalwood oil:

The evidence produced also shows that sandalwood oil is used in ayurvedic medicinal preparations. In modern medical preparations sandalwood has been replaced by sulpha drugs and other antibiotics. In the light of this evidence it is not possible to come to a conclusion that sandalwood oil is itself a perfume though it is extensively used in the preparation of perfumes. Undoubtedly, both sandalwood and sandalwood oil have a delicate fragrance and are prized on that account. But everything possessing a delicate fragrance is not necessarily a perfume. Fresh flowers such as roses or jasmine, and spices such as cardamom or saffron for example, have a fragrance, but are not, for that reason, perfumes. Sandalwood and sandalwood oil are not known as or used as perfumes. Moreover they are not used in personal toilet or for the beautification of the body as perfumes.

14. The conclusion of the Tribunal that sandalwood oil does not come within the purview of ''perfume'' in that context was thus affirmed by the Bombay High Court decision. We record our unreserved approval of die reasoning and

conclusion contained in the judgment of the Bombay High Court.

15. We may now summarise the broad features of sandalwood oil as gathered from the varieties of publications, reports and decisions.

16. Sandalwood oil is extracted from the sandalwood. The crude extraction does not straightaway get into cute bottles which would give the aura of its odour. Many more processes have to be undergone before that final fragrance is condensed and contained.

17. The distilled sandalwood oil is collected in comparatively large receptacles. It is in that form mostly that the oil is sold. The oil so sold is transported also to distant places where the perfume is manufactured. The chemistry of perfumatory transforms the sandalwood oil from its bulky size into something with its essential handy form. A base is added when the sandalwood oil is blended, in such a fashion as to maintain the proper proportions of the various ingredients. A larger percentage of volatile base will lead to a quicker evaporation of the entire perfume. A smaller proportion of the fragrant oil may not serve the purpose of scenting the air around. The point to be emphasised (and has been so emphasised in the Madras decision) is that as extracted from the wood, sandalwood oil is collected in larger receptacles till it comes out later with better blend.

18. One of the significant aspects of the intermediate stage in which sandalwood oil is seen, is that it requires a fairly strong rub to emit the fragrance to reach the nostrils. This was rightly emphasised in the Madras decision. It is, however, to be noted that it is only one among the other factors, in the process of determining whether sandalwood oil is a perfume. In relation to other factors for the determination of the question, such as the manner in which it is stored, carried and transported, there could not be, and had not been, any doubt at all. A decision of the Kerala High Court rendered in Deputy Commr. of Sales Tax v. Latheef (1988) 69 S.T.C. 29, at about the time, independently came to a similar conclusion in relation to agarbathi, long and narrow filament quoted with a paste, which on burning will emit an agreeable odour, depending on the scent. Some are employing sandalwood dust and accordingly the smoke generated has that affinity in the odour emitted.

19. The Supreme Court in Commr. of Sales Tax v. Indian Herbs Research and Supply Co. (1970) 25 S.T.C. 151 had to consider the question whether "dhoopbathi"- rounds made of amalgam of various articles including sandalwood particles-would come within the term ''perfume'' as employed in the Uttar Pradesh Act. The entry read:

Scents and perfumes (in English) and Itra tatha suganthian (in Hindi).

20. Adverting to the argument that "dhoopbatti does not by itself emit in its natural state any agreeable odour", the Supreme Court held that "there is no warrant for restricting the meaning of the expression ''perfume'' only to

substances which emit fragrance in their natural state and not as including those which produce fragrance as a result of the application of heat or the application of some foreign matter to induce the chemical reaction which would result in the odours being released from the substance." The dictionary meaning was examined by the Supreme Court. The court observed:

It is evident therefore that the word ''perfume'' originates from the word ''fumare'' which means to ''smoke'' or to emit vapour given off by some burning substance.

Perfume and burning had therefore an intimate bond between themselves in the context of the meaning of that word as given in the dictionary. If smoking is such an integral part of the process of emitting an agreeable odour, dhoopbatti, in an inert context, could be taken in by the word "perfume". This is the only point which had been decided by the Supreme Court.

21. Whether any particular article releasing odours, as a result of the application of some foreign matter to induce the chemical process would come within ''perfume'' did not arise in that case. A forceful argument advanced to push it out of the entry ''perfume'' was that left by itself, dhoopbatti does not generate any fragrant smell. In its case, actual burning was necessary to release the smoke with the scented smell. The Supreme Court adverted to the various shades of meaning of perfume. An article would be ''perfume'' even if it has to be burned to produce the sweet smell. In that view dhoopbatti would come within the term perfume. The fact that it has to be ignited and that the burning should continue to produce the fragrant odour in the atmosphere around, did not detract from the commodity being a perfume-declared the Supreme Court. This declaration has necessarily to be confined to the scheme of that enactment and the commodity specifically considered by the Supreme Court. A general observation which did not arise for consideration cannot be treated as the ratio of that decision. As indicated by the Supreme Court itself, the judicial observations made in the context of a special and specific problem should not be understood as the words in a statute, in the appreciation and application of the principles actually laid down. To follow a different course would be to miss the wood for the trees; or to miss the way itself. A situation where the dictum, particularly one of the highest court in the land-has to be distinguished, is an extraordinary situation. Extraordinary situation requires, some times, extraordinary remedial measures.

22. The art of distinction adopted by courts of law, has indeed played a revolutionary part in the evolution of law itself. Lord Diplock''s decision in the House of Lords adverts to many relevant thoughts on that topic, and has indicated even the stress and strain placed on the art of distinguishing earlier decisions. Trained judicial minds should not permit perpetration of patently erroneous views, unnecessarily imagining a rub on the judicial discipline when really there is none. Judicial discipline is inviolable. (Only rarely one would come across Lord Atki who would roar):

If this were this result of the authorities, I should consider the result a grave defect in the law....

as in Donoghue v. Stevenson (1932) A.C. 562. However, it is not inconsistent with a necessary intellectual exercise when warranted by larger interests of justice. Such a right and bold approach had been adopted by a Bench of this Court even earlier, and in respect of the very same entry. Though a blindfold following of the Supreme Court decision might have induced this Court to hold that ''agarbathi'' also would fall within the purview of perfume, this Court came to a different conclusion. It placed emphasis on the difference in the statutory scheme. The great trust placed by the collocation of the term in the context in which it occurred, would bring about a radically different situation. So viewed, and so reviewed, this Court came to the conclusion that ''agarbathi'' will not answer the description of ''perfume'' as it occurs in the Kerala Schedule. A word, like a man, may have to be judged by the company it keeps. In the present context, the clause contains other commodities like talcum powder and consequently the article concerned should have something connected with the genus of the opening term, in the entry reading ''Talcum powder, other perfumeries and cosmetics''.

23. The Bombay High Court had in its decision (1983) 52 S.T.C. 381 supra, had distinguished the Supreme Court decision while deciding the question whether sandalwood oil was not a perfume within the meaning of entry 19 of Schedule E of the Bombay Sales Tax Act, 1959, which dealt with "perfumes, depilatories and cosmetics" (except soap and articles specified in entry 7 in this Schedule). The court noted that perfumes in that entry are "coupled with depilatories and cosmetics..." and observed:

Such entries have to be construed with reference to the words found in immediate connection with them. When two or more words which are capable of being understood in an analogous manner are coupled together, they should be understood in the common analogous tense and not in a general sense.

The necessity to consider the word ''perfume'' in conjunction with cosmetics and depilatories was accordingly stressed by that court.

24. The Madras High Court in (1978) 42 S.T.C. 270 supra, had to consider entry 51 of the Tamil Nadu General Sales Tax Act, 1959, which read:

Scents and perfumes, powders, snows (including all purpose Creams and cold and vanishing creams) and scented hair oils.

That court then observed that if "scents and perfumes" had stood by themselves without anything else being mentioned, then they could have been construed in a wider sense, and the fact that although heat had to be applied or that the substance was required to be mixed with some other substance to produce a chemical compound which would result in fragrance being produced, would not alter the effect of the substance being construed as a "perfume." The conjunction of the other words, however, made all the difference, according to that court.

25. The earlier decision of the Madras High Court (1976) 38 S.T.C. 300 supra, with respect, did not attempt an incisive analysis of the Supreme Court decision. Nor did that decision assign the necessary stress and emphasis on the understanding of a term in the context and company of other words and terms. The ardous task was, however, undertaken in the later decision referred to above.

26. In Boake Roberts and Co. (India) Ltd. v. Board of Revenue (C.T.), Madras (1978) 42 S.T.C. 270 the Madras High Court steered clear of a collision course with the view taken by the Supreme Court, by a deft piloting. Govindan Nair, C.J. writing for the Bench, was at pains to parade the supportive factors in coming to a conclusion that jasmine essence was not perfume. The court had the advantage of viewing the article served in bottles and presented to the court for examination. The earlier decision of the Madras High Court and of the Supreme Court were specifically referred to in the consideration of the question. The strong factors which would impel an inference of an implied overruling of the Madras decision were indicated. Ultimately, the court left open the question whether the Madras view on sandalwood oil has been overruled by the Supreme Court. Jasmine essence would not answer the requirements of perfume as defined in the schedule-was the ultimate conclusion.

27. The entry in the Punjab General Sales Tax Act, 1948 which was considered by the Punjab and Haryana High Court in Assessing Authority v. Amir Chand Om Prakash (1974) 33 S.T.C. 120, may be usefully compared with the Tamil Nadu entry. Entry 16 of Schedule A to the Punjab General Sales Tax Act, 1948, "cosmetics, perfumery and toilet goods, but not including tooth-paste, tooth-powder, soap and kum-kum." The court held that in that context, the word "perfumery" would not include "dhoop" and "agarbathi".

28. In this case there is a stronger factor for facilitating the easier distinguishing process. The commodity considered by the Supreme Court is entirely different from the commodity-Sandalwood oil-to be considered by us in this decision. We are clearly of the view that the Supreme Court decision in (1970) 25 S.T.C. 151 supra, should be confined to the facts of the case and the statutory scheme considered therein.

29. If at all an overruling by implication could be inferred, it is only in relation to one facet of the logic contained in the decision of the Madras High Court; When, and only to the extent, the Supreme Court holds that in order to answer the definition of perfume, a substance in its natural form need not necessarily emit the scent or smell. That, as noted earlier, was only one among the very many factors which weighed with the Madras High Court. In that view of the matter, other pillars of reasoning remain unaffected, and are strong enough to support the edifice above.

30. In that view of the matter, we have no hesitation to hold that sandalwood oil in that form and at that stage as dealt with by the Assessees in the present case

would not come within the purview of perfume in the context of entry No. 80. If agarbathi itself could not be brought within that entry, the sandalwood oil collected and carried through bottles or cans in the manner referred to in the original petitions will not be taken in by the term ''perfume'' as given in entry No. 80, of the First Schedule.

31. We have scrutinised the file made available to us as constituting the thought process before the decision of the Government. No intellectual treatment of the topic is visible from its pages. The file would remind one of the reference made to a speech: much to be heard but nothing worth listening to. There is nothing worth ''listening to'', in the Government file.

32. The discussion attempted above leads us to the inescapable conclusion that the view taken by the Government in its order passed, is totally unsustainable. We accordingly quash those orders, and declare them to be invalid and inoperative. The writ petitions are disposed of as above. There will be no order as to costs.