(1985) 03 MAD CK 0012

In the Madras High Court

Case No : Writ Appeal No. 529 of 1978

Union of India and Others — APPELLANT

Vs

T.S.R. and Co. — RESPONDENT

Date of Decision : 13-03-1985

Acts Referred:
Central Excise Rules, 1944 — Rule 173G

Citation : (1985) 5 ECC 177 : (1985) 22 ELT 701

Hon'ble Judges : Ramanujam, J;M.A. Sathar Sayeed, J

Bench : Division Bench

Advocate : T. Somasundram, Additional Governor Standing, for the Appellant; K.P. Jogdeesan, for the Respondent

Judgement

Ramanujam, J.—This writ appeal is directed against the judgment of Mohan, J., allowing W. P. No. 1604 of 1976 filed by the respondent

herein for quashing the order, dated 12th February, 1975 of the first appellant confirming the order dated 4th May, 1974 of the second appellant

which in turn confirmed the order dated 24th November, 1973 of the third appellant.

2. The facts leading to the filing of the above writ petition were as follows :

The respondent is a manufacturer of perfumeries and also other items of articles, namely, Sandanathi thailam, Bringamalika thailam, Ponnankani

thailam, Araikeeraivithai thailam, etc. These thailams are prepared with gingelly oil boiling the same with natural herbs, flowers and roots of plants.

They contain medicinal qualities and they are mostly used before bathing as bath oils and are not usable as hair oils for grooming the hair. The

thailams manufactured by the respondent are only known in the market and in the commercial field as bath oils and they are never known either as hair oils or as perfumed hair oils; nor are they marketed as hair oils.

3. On the introduction of the Finance Bill No. 2, dated 29th May, 1971, Schedule 1 of the Central Excises and Salt Act, 1944, the following item

was introduced as Item 14F (ii) which reads as under :

Preparations for the care of the hair -

(a) Hair lotions, creams and pomades,

(b) Perfumed hair oils,

(c) Shampoos, whether or not containing soap or detergent.

Consequent to the introduction of the said item, the samples of the thailams prepared by the respondent were taken by the Central Excise

Authorities for analysis. After analysis on 15th September, 1973, the respondent was issued a show cause notice enclosing the opinion of the Chief

Chemist, New Delhi, dated 2nd June, 1973 and calling upon the respondent to show cause against the proposed levy of Central excise duty in

respect of the thailams cleared from the respondent''s factory after 29th May, 1971 under the provisions of rule 173-G of the Central Excise

Rules, 1944. The respondent in its reply dated 10th October, 1973 objected to the proposed levy contending that the thailams cannot be taken as

perfumed hair oils as they are not marketed as such. However, by an order dated 24th November, 1973 the third appellant passed an order

rejecting the respondent''s contention and holding that the thailams prepared by the respondent fall within the expression ""perfumed hair oils"" and

therefore, they are liable to charge for excise duty under item 14F(ii). An appeal preferred to the second appellant failed. Thereafter, a revision

petition was filed to the first appellant which also suffered the same fate. Thereafter, the respondent came to this Court by way of the above writ

petition contending that the thailams prepared by it cannot in any sense be treated as ""perfumed hair oils"" which is the expression used in item

14F(ii)(b).

4. Mohan, J., after hearing the rival contentions of parties, held that the thailams prepared by the respondent can only be treated as bath oils and

they cannot be treated as hair oils much less perfumed hair oils. The said decision of Mohan, J., is under challenge in this appeal.

5. On a due consideration of the matter, we are inclined to agree with the view

taken by the learned single Judge. Item 14F of Schedule 1 of the

Central Excises and Salt Act, 1944, reads :

Cosmetics and toilet preparations not containing alcohol or opium, Indian hemp or other narcotic drugs or narcotics, namely :-

(i) ....

(ii) Preparations for the care of the hair -

(a) Hair lotions, creams and pomades,

(b) Perfumed hair oils,

(c) Shampoos whether or not containing soap or detergents.

6. It is not the case of the appellants that the thailams prepared by the respondent could be brought either under item 14F(ii)(a) ""hair lotions,

creams and pomades"" or under item 14F(ii)(c) ""Shampoos whether or not containing soap or detergents"". The specific case of the appellants is

that the thailams prepared by the respondent fall within the expression ""perfumed hair oils"" occurring in clause (b) of item 14F(ii). In this case,

before the learned single Judge the appellants contended that the classification made by the authorities cannot be interfered with except when such

classification is found to be perverse. But the learned Judge rejected the said contention and held that though there is wide discretion in the

department in the matter of classification, such classification cannot be perverse and if it is found to be perverse or unreasonable, the Court could

interfere. Then the learned Judge went into the question as to whether the classification by the department that the thailams are perfumed hair oil is

perverse or not. Thus, the learned Judge has rejected the contention of the appellants that the classification made by the departmental authorities

cannot be interfered with by the Court. Though such a contention was repeated before us, we are inclined to agree with the learned Judge that if

the classification is found to be arbitrary and unreasonable so as to make it perverse, the Court acting under Article 226 of the Constitution will be

justified in interfering with such classification. Then coming to the question as to whether the thailams prepared by the respondent are perfumed hair

oils, we find that the articles manufactured by the respondent are used only as bath oils, i.e., they are oils which are used before bath. Therefore,

they are not like those thailams or oils which are used after bath. Even in the advertisements made by the respondent, the thailams are not shown as

meant for the growth of hair. Item 14F(ii) uses the expression ""preparations for the care of the hair"". Therefore, it is only such oils which are used

for the care of the hair that could be brought under item 14F(ii). In this case the original authority, namely, the third appellant observed in his order

as under :

It is used on the hair. Whether it is used in the body or for the bald head person is not a relevant fact here. Any oil can be used for any purpose. It

is held that they are capable for use as hair oil. As regards the manufacturers saying that the thailams are used only before bath and not after bath

for grooming the hair, it is also not fully acceptable. It is of course accepted that they are used before bath. Even before bath, they are used for the

hair and are meant for better luxuriant growth of hair. But its use after bath for grooming the hair cannot be ruled out.

7. Thus, the original authority has proceeded that the thailams can be used both before and after bath and that the use of the thailams after bath for

grooming the hair cannot be ruled out. The appellate authority in his order, however, proceeded to state :

Further, while these oils might be used as cooling bath oils, yet their use as hair oils as well, i.e., for the care of the hair, cannot be ruled out, as the

figure of the woman displaying her lavishly grown and flowing hair is suggestive of such use.

8. The first appellant, however, gave a different reason and the reason given is :

A perfumed hair oil is not necessarily required to be retained on the hair; it can go in the roots of hair as well. What is important is the application

on hair and whether it is used on body as well or not or retained or washed off the hair, is immaterial. Consequently, the said products are liable to

Central excise duty under Tariff Item No. 14F of Central Excise Tariff.

9. Thus, the appellants have given varying reasons for their conclusions that the thailams prepared by the respondent are perfumed hair oils. The

figure of the woman displaying her lavishly grown and flowing hair in the outer cover cannot indicate the purpose for which the oils are to be used.

It has been held by the Bombay High Court in Ramtirth Yogashram v. State of Maharashtra, [1968] 22 STC 76 that the mode in which a person

may choose to advertise his commodity cannot be decisive in determining its real nature and that the expression ""perfumed oil"" must connote an oil

to which perfume has been imparted by way of a positive and deliberate act, and not as meaning an article which just happens to have a perfume.

It is not the case of the appellants that any perfume has been added as an ingredient in making the thailams or bath oils. As a matter of fact,

sandalwood oil has been held to be a vegetable oil not falling within the expression ""scents, perfumes, powders, snows and scented hair oils

occurring in serial No. 51 in the First Schedule to the Madras General Sales Tax Act, 1959 as held in Mattur Sandalwood Oil Company v. State

of Madras - ILR [1965] Mad. 638 even though the sandalwood oils are being used both for their odorous as well as fixative properties.

According to the learned Judges in that case a perfume, to have its full effect, must volatise readily at the ordinary air temperature, that it is

common experience that sandalwood oil as sold in the market does not vaporise readily to serve the purpose of a common perfume, that 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 and better vaporisation takes place

and that the sandalwood oil has to be used in mixture with other substances so that the resultant product can emit the peculiar perfume

characteristics of sandal. In this case, the cover contains the expression ""bath oil"". The label of a woman in that style cannot be suggestive of the

use of the thailams as hair oils and will depict, according to the respondent, only the beauty of a woman and the refreshing effect the woman may

have with the use of the thailams as bath oils. In any event, it has only an advertising effect or value and nothing more. Further, tax on a product

cannot be levied merely on the basis of a suggestive aspect of a picture found in the label which is intended to attract the customers to use the

thailams. The expression ""perfumed hair oil"" will normally indicate an oil which is exclusively prepared for the care of the hair and it will not in any

sense include a bath oil which is applied to the entire body or portions of the body before bath. It is the specific case of the respondent that in the

commercial field the thailams manufactured by it are not treated as hair oils much less perfumed hair oils, as the thailams are intended for use for

cooling the body as such. These thailams could never be considered as an item of cosmetic or toilet preparation.

10. The learned counsel for the appellants then refers to the report of the Chief Chemist as indicating that the thailams prepared by the respondent

are perfumed hair oils. But a perusal of the said report indicates that he had got a doubt as to the tax liability on the product and he states that the

picture of the woman with luxuriant hair on the label may be taken to show the thailams as hair oils. In this view of the matter, we do not see any

justification for interfering with the order of the learned single Judge. The writ appeal is therefore dismissed with costs.

