
(1991) 06 BOM CK 0036

In the Bombay High Court

Case No : Appeal No. 402 of 1987 in Writ Petition No. 1808 of 1982

Union of India

APPELLANT

Vs

Rakesh Enterprises

RESPONDENT

Date of Decision : 26-06-1991

Acts Referred:

Citation : (1991) 37 ECR 23 : (1991) 56 ELT 39

Hon'ble Judges : S.P. Bharucha, J;M.F. Saldhana, J

Bench : Division Bench

Advocate : Shri C.J. Shah, Mr. S.M. Shah and Mr. K. C. Sidhwa, for the Appellant; Shri Dr. N.R. Kantawala, instructed by M/s. Kantawala and Co., for the Respondent

Judgement

Bharucha, J.—The learned single Judge allowed the writ petition filed by the respondents. The appeal is filed the reagainst, and we may at once mention that the appeal is devoid of merit.

2. The petitioners placed orders for the import of phenol U.S.P. from Japan. The indented quantity was 26 metric tons. The same arrived in Bombay on 8th September 1982. The petitioners filed, on 1st September 1982, five bills of entry in respect of the consignment. It was the case of the petitioners that phenol USP was a basic drug or a pharmaceutical or drug intermediate which qualified for exemption from excise duty under the provisions of an Exemption Notification dated 1st March 1975, bearing No. 55 of 1975. The Assistant Collector of Customs, however, levied countervailing duty upon the consignment at the rate of 8%, being the rate specified in the residuary item (Item 68) of the First Schedule to the Central Excises and Salt Act, 1944. The order of the Assistant Collector of Customs was impugned in the writ petition. The learned single Judge made reference to the terms of the said Notification which exempted (under Item No. 19 of its Schedule) "all drugs, medicines, pharmaceuticals and drug intermediates not elsewhere specified." The learned Judge referred to the inclusion of phenol in the Indian, British and American Pharmacopoeias. He also

referred to the certificates issued by laboratories in this behalf. The learned Judge was of the view that the material brought upon record by the petitioners showed that phenol was both a drug and a drug intermediate. On behalf of the respondents it was argued that the advantage of the Exemption Notification was not available unless it was established by the petitioners that the drug or the drug intermediate had actually been used as such. The learned Judge found it impermissible to read additional words into the Notification. Accordingly, the learned Judge allowed the writ petition.

3. It is not disputed before us, as it cannot be, that phenol finds place in the various pharmacopoeias. But our attention is drawn to the extract, Ex.D to the petition. It was submitted by Mr. C. J. Shah, learned Counsel for the appellants, that it was not enough that phenol figured in the pharmacopoeias but that reference had to be made, having regard to the extract aforementioned, to the Drugs and Cosmetics Act, 1940, and the other Acts therein mentioned. The purpose of the foreword to the Indian Pharmacopoeia, which is extracted as aforesaid, is to caution those who consult the pharmacopoeia to comply with the provisions of the Drugs and Cosmetics Act, 1940, and the other Acts therein mentioned, also, to make it clear that the inclusion of any drug within the pharmacopoeia did not and could not be deemed to imply or convey permission, authority or licence to exercise any right or privilege protected by any patent or trade mark. The extract has nothing whatsoever to do with that with which we are concerned. We are concerned with determining whether phenol is a drug or a drug intermediate. Its inclusion in the Indian and the other pharmacopoeias clearly indicates that it is a drug and that, therefore, it is entitled to the exemption provided by the said Notification.

4. Mr. C. J. Shah next submitted that the bills of entry showed that the petitioners had themselves scored out the letter "U.S.P." written upon the bills of entry after the word "phenol". This, in his submission, was the same argument that was advanced before the learned Judge put in a different way. In the first place, there is no allegation in the affidavit filed by the respondents in reply to the writ petition that the petitioners had themselves scored out the said letters upon the bills of entry. Had such an allegation been made, it could have been traversed by the petitioners. It is impermissible to take cognizance of an allegation of fact, which is not taken in reply to the writ petition, in appeal. In any event, end-use is, as the learned Judge held, irrelevant for the purpose of the Exemption Notification. The exemption given thereby is to the articles therein mentioned and there is not a word which suggests that the exemption is available only if the articles are used in any particular way.

5. The appeal is, accordingly, dismissed. The respondents shall pay to the petitioners the costs of the appeal.