

(2006) 10 BOM CK 0037

In the Bombay High Court

Case No : Writ Petition No. 2913 of 2005

Vicco Laboratories, Proprietor Vicco Products

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 07-10-2006

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (2007) 1 MhLj 738

Hon'ble Judges : S.R. Dongaonkar, J; R.M.S. Khandeparkar, J

Bench : Division Bench

Advocate : V.R. Manohar, instructed by S.V. Manohar, for the Appellant; A.B. Choudhari and P.N. Gulhane, for the Respondent

Final Decision : Allowed

Judgement

R.M.S. Khandeparkar, J.—We have heard at length Sri V. R. Manohar, Senior Counsel for the petitioner and Sri A. B. Choudhary, Advocate for the respondents. We have also perused the written submissions filed on behalf of the parties.

2. The petitioner by this petition challenges the show cause notice dated 29th April, 2005 on the ground that the respondents by the said show cause notice are seeking to reopen and reiterate the issues which have been finally concluded by the decision of this Court and that of the Apex Court in favour of the petitioner and that therefore, the said show cause notice is without jurisdiction and has been issued in arbitrary exercise of powers and it is an abuse of process of law.

3. The petitioner is a manufacturer of various products including Vicco Vajradanti and Vicco Turmeric which are stated to be the ayurvedic medicines and the subject-matter of the petition. The respondents issued a show cause notice dated 8th November, 1976 requiring the petitioner to satisfy as to why the said products should not be classified as the cosmetics and not the ayurvedic medicines. This show cause notice is hereinafter called as "the 1st SCN". After

hearing the petitioner, the respondents under order dated 4th June, 1977 classified the said products as the cosmetics. The same was challenged by the petitioner by way of Civil Suit No. 143 of 1978 in the Court of Civil Judge, Senior Division, Thane, which came to be decreed in favour of the petitioner holding that the said products were the ayurvedic medicines, and therefore, cannot be classified as the cosmetics. The respondents carried the matter in an appeal by filing First Appeal No. 613 of 1982 before this Court without any success as the same was dismissed on 27th April, 1988 holding that the products were the ayurvedic medicines. The SLP preferred by the respondents being SLP No. 1918 of 1989 was dismissed on 6th September, 1990. Simultaneously, the petitioner had also filed the SLP No. 14082 of 1988 which came to be disposed of by an order dated 19th April, 1993 while affirming the judgment of this Court with a rider that the claim for refund of the amounts already paid, the same would be subject to ascertaining whether the amounts were passed on to the purchasers or not, and that the consequential relief shall be subject to the provisions of Section 11B of the Central Excise and Salt Act, 1944, as amended by Act 40 of 1991.

4. On 28th February, 1986, New Tariff Act, 1985 was introduced, to be effective from 1st March, 1986. Under the Old Tariff Act, the ayurvedic medicines fell under T. I. 68 and were exempted under the Notification No. 234 of 1982, the products being listed at Sr. No. 21. In terms of the New Tariff Act, the product was sought to be classified by the petitioner under Chapter 30 subheading 3003.30 and the same was approved by A.C., Nagpur, by its order dated 6th October, 1986. Pursuant to the direction by the Commissioner, the office of the A.C., Nagpur thereafter issued a show cause notice dated 3rd July, 1987 requiring the petitioner to show cause as to why the products should not be classified as cosmetics falling under Chapter 33. This was the second Show Cause Notice in relation to the same products, and hereinafter is called as "the 2nd SCN". After the reply being filed to the 2nd SCN, the same was recalled under the order dated 21st June, 1989. The matter was, however, carried in appeal before the Commissioner of Central Excise (Appeals) but the same was withdrawn on 26th December, 1989.

5. On 31st October, 1996, the Central Board of Excise issued a circular withdrawing its earlier clarification dated 12th May, 1989 in respect of Vicco Products and asked the authorities to reopen and finalise the classification of Vicco products on the basis of a judgment in Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, . Consequently, fresh show cause notices dated 2nd May, 1997, 18th September, 1997 and 27th October, 1997 came to be issued requiring the petitioner to satisfy as to why the products should not be classified as the cosmetics falling under Chapter 33. These three show cause notices are hereinafter called as "the 3rd SCNs". Meanwhile, by Telex dated 8th September, 1997, the said Board further clarified that the circular dated 31st October, 1996 is general in nature and the Vicco products having been subjected to the specific judgment and order of this Court affirmed by the

Supreme Court, the circular would not have overriding effect. The department further sought opinion of the Law and Judiciary Department on 13th November, 1997. Thereafter, the Union of India moved an application being 1A-1 of 1999 in Supreme Court in Civil Appeal No. 2123 of 1993 arising out of the SLP No. 14082 of 1988 which was filed by the petitioner for clarification of the order dated 19th April, 1993 with reference to Shri Baidyanath's judgment (supra). On 17th July, 2000 the said application was withdrawn stating that the authorities will act in accordance with the provisions of law, which statement was recorded by the Apex Court while disposing of the said application.

6. On 14th May, 2001 with reference to the 3rd SCNs, the Deputy Commissioner passed orders classifying the petitioner's products as the cosmetics falling under Chapter 33. The petitioner preferred appeal before the Commissioner of Central Excise (Appeals) which came to be allowed by an order dated 10th January, 2002. The respondents carried the matter in appeal before CEGAT, which came to be dismissed by an order dated 3rd February, 2003. The respondents sought to prefer SLP before the Apex Court. However, the same were converted into the Civil Appeals No. 7896-97 of 2003 and were dismissed by the Apex Court on 7th December, 2004.

7. Again, on 29th April, 2005, a fresh show cause notice came to be issued requiring the petitioner to satisfy as to why the products should not be held as products under Chapter 33. This Show Cause Notice is hereinafter called as "the impugned SCN".

8. Normally, the writ Court is reluctant to interfere at the stage of issuance of show cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the concerned authorities and to satisfy the concerned authorities about the absence of case for proceeding against the persons against whom the show cause notices have been issued. Abstinence from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is a normal rule. However, the said rule is not without exceptions. Where a show cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ Court would not hesitate to interfere even at the stage of issuance of show cause notice. Since it is the case of the petitioner that the classification of the said products having attained finality pursuant to the decision of the Apex Court, the respondents have no jurisdiction to issue impugned SCN on the ground on which it has been issued and it virtually amounts to re-opening of the issue which stands concluded by the decision of the Apex Court, and that therefore, it is an abuse of process of law, it would be necessary to ascertain whether the interference of this Court at this stage is warranted.

9. It is a matter of record that the petitioner was subjected to face the show cause notices in respect of the same products on three earlier occasions, firstly in the year 1976, again in the year 1987 and then in the year 1997. The first SCN

was subjected to the Civil Suit by the petitioner. The Civil Court had clearly held that the said products are clearly classifiable as the ayurvedic medicines, and not cosmetics. The said decision was confirmed by this Court as well as by the Apex Court. The contention of the respondents, however, is that the Apex Court while disposing of the Civil Appeal No. 7896-97 of 2003 on 7th December, 2004 had clearly held that it will be open to the Department to take such tests, if otherwise so entitled, in respect of the products for the purpose of classifying the products under an appropriate tariff heading as they may be advised. Being so, it is the contention of the respondents that after having conducted such tests, different from those which were applied while issuing the earlier SCNs, the respondents being able to collect material in support of classification of the products as the cosmetics, and therefore, the impugned SCN has been issued. On the other hand, it is the case of the petitioner that the impugned SCN has been issued on the basis on which the earlier SCNs were issued and merely because some more material is collected, that itself does not amount to application of new tests nor it satisfies the requirements specified by the Apex Court in its decision dated 7th December, 2004, reported in Commissioner of Central Excise, Nagpur Vs. Vicco Laboratories, .

10. Considering the rival contentions on the point in issue, it would be necessary to scan through all the SCNs issued in the matter in hand, and to ascertain whether the impugned SCN discloses any ground different from those which were the basis for issuance of the earlier SCNs. It is also necessary to ascertain whether the impugned SCN is in consonance with the observations by the Apex Court in its decision dated 7th December, 2004.

11. Perusal of the 1st SCN and the proceedings which followed the said SCN disclose that the issue as to whether the products in question were classifiable as cosmetics or ayurvedic medicines was raised and decided taking into consideration various grounds and tests, namely, common parlance test, Doctors' opinion, consumers' understanding and advertisements issued by the petitioner in relation to the products in question. After considering all those aspects, the Civil Court had held that the products to be classifiable, as the ayurvedic medicines and not the cosmetics and the said decision was confirmed by this Court and, the Apex Court had refused to interfere in the said decision of this Court.

12. The 2nd SCN issued in the year 1987 was on the basis that the products issued in the form of cosmetics/vanishing cream were floated in the market as tooth paste and vanishing cream and even so advertised, and therefore, were classifiable as cosmetics. The proceedings instituted consequent to the SCN were dropped and the appeal was also dismissed as withdrawn.

13. The 3rd SCNs were issued in the year 1997 on the basis that the products were advertised as cosmetics, they were not generally used as medicines and were sold without any prescription by the physician or medical practitioner and the same were primarily used and understood by the consumer as cosmetics and

they were available in general stores, besides reliance was sought to be placed in the matter of Shree Baidyanath's judgment (*supra*). The similar products even though they had curative or prophylactic value were being classified under Chapter 33, the products were being available in General or Departmental Stores and the ingredients of the products did not appear in any authoritative texts of Ayurveda, nor they were manufactured according to any formula disclosed in the authoritative text books, nor they were sold under any of the names specified in such authoritative text books in Ayurveda, besides the circular of the Central Board of Excise and Customs dated 31st October, 1996 clearly directed that the earlier classification of the products be withdrawn. The proceedings initiated by the said SCN were carried upto Apex Court in Civil Appeal Nos. 7896 and 7897 of 2003, which culminated in its decision dated 7th December, 2004.

14. Reverting to the impugned SCN, perusal thereof undoubtedly discloses that the same has been essentially issued consequent to the decision in the Shree Baidyanath's case (*supra*) and on the ground that the market inquiries revealed from the statements of the two chemists, two consumers and Ayurvedic lecturers that the products are not to be treated as ayurvedic medicines, the same are sold without prescription by the physicians or medical practitioners and are available in General Stores as well as Grocery Shops, they are primarily used and understood by the consumers as cosmetics, the advertisement on the website discloses the same to be cosmetics, they have non-therapeutic ingredients, the export packing material describes the products as powder and cream and not ayurvedic medicines.

15. If one compares the impugned SCN with the earlier SCNs and consider the same in the face of the decision of this Court delivered in First Appeal No. 613 of 1982 on 27th April, 1988 as well as of the Apex Court in Civil Appeal Nos. 7896 and 7897 of 2003 dated 7th December, 2004, it is at once clear that no new test as such has been disclosed as the basis for issuance of the impugned SCN. The common parlance test, the opinion of the Doctors, Consumers, etc., the methodology of packing of products as well as the advertisement, the contents of the advertisement, availability of the products in Departmental or General Stores, non-requirement of prescription by physicians or medical practitioners for the purchase of such products, all these tests were considered and dealt with not only by the authorities but even in the course of trial before the Civil Court in the Civil Suit No. 143 of 1978 and the same were the subject-matter of the decision of this Court in First Appeal and that of the appeals before the Apex Court. Merely because some different persons have been examined at a different point of time, that by itself will not be sufficient to contend that common parlance test has been applied *de novo* or the earlier test in that regard which was one of the basis for the decision by the Civil Court can be ignored and classification can be reopened on such test even though it was concluded by the decision of the Civil Court.

16. It is true that the Apex Court while disposing the civil appeal had clearly

observed that the respondents would be entitled to take such tests if otherwise so entitled in respect of the products in question to ascertain whether the same can be classified otherwise than the medicines. The expression "tests" used in the said decision refers to the products in question. It clearly shows "such tests if otherwise so entitled in respect of the products". Obviously, it would include any physical or chemical tests in respect of the products of the petitioner. The website, wrappers or covers of the products or advertisement in relation to the products which were all subject-matter of the proceedings before the Civil Court cannot be said to be new tests in respect of the said products so as to empower the respondents to reopen classification on the basis of such tests.

17. Undisputedly, the products in question are manufactured under a valid Drug License and not by obtaining a license for cosmetic product. The license has been issued under the Drugs Act. The products have been certified on examination thereof as ayurvedic medicines. The claim of the petitioner in that regard has been subjected to trial before the Civil Court. After hearing the parties, the Civil Court has arrived at a finding about the products being classifiable as the ayurvedic medicines. The decision of the Civil Court has been affirmed by the High Court, and the Apex Court had refused to interfere in the said decision of this Court. It is also pertinent to note that the Apex Court while confirming the decision of the CEGAT in its judgment dated 7th December, 2004 while referring to the 3rd SCNs, had observed that "the two tests according to the show cause notice for determining whether the product was classifiable under Chapter 30 were (I) whether the products are being used daily and sold without prescription, and (II) whether the products are available in the general stores, departmental/ grocery shops," and after taking into consideration the decision in Shree Baidyanath's case (supra) had held that "the mere decision of a Court of law without more cannot be justification enough for changing the classification without a change in the nature of product or a change in the use of the product or a fresh interpretation of the tariff heading by such decision." It was further ruled that "the show cause notices having proceeded on a misapprehension of the tests laid down in Shree Baidyanath's case, the same cannot be sustained." It is pertinent to note that the said decision is a ruling in the matter between the parties to these proceedings and in relation to the subject-matter in question. Being so, apart from laying down the law, it clearly binds the parties in respect of classification of the products in question.

18. The authorities while issuing the impugned SCN have referred to the statements of some persons. However, it is to be noted that as already held above, the common parlance test with reference to the products in question was also considered in detail by the Civil Court before arriving at a finding about the products being ayurvedic medicines. Merely because two chemists, two consumers and ayurvedic lecturers now consider the said products as not to be ayurvedic medicines, that itself will not be sufficient to classify the products to be cosmetics as being so understood in a common parlance.

19. The entire basis of the defence in support of the impugned SCN is the decision of the Apex Court dated 7th December, 2004 wherein the Apex Court had observed that it is open to the department to take such tests if otherwise so entitled in respect of the said products so as to ascertain whether the same can be classified other than as medicines. However, as already observed above, the liberty in that regard is essentially on the basis of the tests which shall disclose the products to be classifiable otherwise than as medicines. As seen above, the tests obviously have to be those which were not subject-matter of the earlier proceedings. Once, while applying certain tests, a decision has been arrived at and it has attained finality, it is not open for the authorities to reopen the said issue unless some other tests disclose that the products are to be classifiable otherwise than as ayurvedic medicines. Besides, on application of a test, there has to be a cogent material which can sustain any finding contrary to the finding arrived at earlier on the point of classification of the products as the ayurvedic medicines. But mere opinion of one or two chemists or consumers or ayurvedic lecturers cannot be said to be a common parlance test which would justify reopening of the classification already considered by the Court's decision.

20. In *Dabur India Limited Vs. Commissioner of Central Excise, Jamshedpur*, , the Apex Court, reiterating its earlier decision in *Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works*, , had held that merely because a product is sold across the counters and not under a doctor's prescription does not by itself lead to the conclusion that it is not a medicament. It was also held that in the product the percentage of medicament may be small but that by itself does not ipso facto mean that the product is not a medicament. It was specifically ruled that generally the percentage or dosage of the medicament will be such as can be absorbed by the human body and that the medicament would necessarily be covered by fillers/vehicles in order to make the product usable.

21. In *Meghdoot Gramodyog Sewa Sansthan, U.P. v. Commissioner of Central Excise, Lucknow* reported in : (2005)4SCC15 , the Apex Court had held that the products cannot be classified as cosmetics solely on the basis of outward packing of the products. It was specifically held that the composition and the curative properties of the product being admitted, it was not open to the department to hold the product to be cosmetics merely by reason of the outward packing.

22. In *B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara*, , the Apex Court had held that merely because there is some difference in the tariff entries, the product will not change its character and something more is required for changing the classification especially when the product remains the same. The Apex Court had upheld the contention of the CCE when it was contended that there could be no good reason to change the classification merely on the ground of coming into force of the new Central Excise Tariff Act, 1985 without establishing that the product has in fact changed its character.

23. In *Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works*, , it was held by the Apex Court that the onus or burden to show that a product falls

within a particular tariff item is always on the Revenue and merely because a product is sold across the counters and not under a doctor's prescription, does not by itself lead to the conclusion that it is not a medicament. Further, it was held that merely because the percentage of medicament in a product is less, it does not ipso facto, mean that the product is not a medicament, and generally the percentage or dosage of the medicament would be such as can be absorbed by the human body.

24. In *Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad*, it was ruled that the essential character of medicine and the primary function of the medicine is derived from the active ingredients contained therein and it has certainly a bearing on the determination of classification under the Central Excise Act. Further reiterating its earlier decision in *Amrutanjan Ltd. Vs. Collector of Central Excise*, the Apex Court held that "the mere fact that the ingredients are purified or added with some preservatives does not really alter their character."

25. The Apex Court in *Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur*, while dealing with the terminology like medicament and cosmetic, held that the cosmetic products are meant to improve appearance of a person, that is, they enhance beauty, whereas a medicinal product or a medicament is meant to treat some medical condition. It may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. What is to be seen is the primary use of the product. A particular Ayurvedic product may be used for treating baldness. Baldness is a medical problem. By use of the product if a person is able to grow hair on his head, his ailment of baldness is cured and the person's appearance may improve. The product used for the purpose cannot be described as cosmetic simply because it has ultimately led to improvement in the appearance of the person. The primary role of the product was to grow hair on his head and cure his baldness. It was further held that:

In order to be a medicinal preparation or a medicament it is not necessary that the item must be sold under a doctor's prescription. Similarly, availability of the products across the counter in shops is not relevant as it makes no difference either way.

26. In the facts and circumstances of the case, and considering the law laid down by the Apex Court on different issues sought to be raised, the petitioner is justified in contending that the impugned SCN is nothing but an arbitrary exercise of powers. The issue relating to the classification of the product in question has been already conclusively decided and it has attained finality. Mere change in the Tariff Act, without any change in the characteristics of the product in question, there cannot be any change in the classification of the said product from ayurvedic medicines to cosmetics.

27. The Apex Court in *K.K. Modi Vs. K.N. Modi and Others*, had occasion to deal

with the matters involving abuse of the process of the Court by the parties, and in that regard, it was held that a party reagitating the same issue which has already been decided earlier against him, it would be contrary to the justice and public policy, and therefore, is an abuse of process of Court. It was held thus:

44. One of the examples cited as an abuse of the process of the Court is relitigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to reiterate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as *res judicata*. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of the Court's discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

The said decision was followed by the learned Single Judge of this Court in *SNP Shipping Services Pvt. Ltd. Vs. Kara Mara Shipping Co. Ltd. and Others*, , while holding that such attempt by the litigant should be stopped immediately in the interest of justice and for the benefit of public at large to prevent the time of the public and the Court being wasted.

28. The respondents have not conducted any test which could sufficiently disclose the products in question to be classifiable under Chapter 33 instead of Chapter 30. It is to be noted that the burden of proof in case of classification of the products primarily lies upon the department. It is more so, under the circumstances wherein the classification has attained finality by the decision in that regard by the Apex Court. However, the department has failed to discharge the same so as to *prima facie* establish that the said products are classifiable as the cosmetics and not the medicines.

29. There can hardly be any quarrel about the proposition canvassed on behalf of the respondents that in tax matters the principle of *res judicata* is not applicable. The law in that regard has been reiterated in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, . However, therein, it has been clearly held that "The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position" and further that "Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view."

30. In the circumstances, we are left with no alternative than to hold that the impugned SCN is nothing but a clear case of abuse of process of law, as rightly submitted by the learned senior counsel on behalf of the petitioner. In the circumstances, therefore, there is no case of directing the petitioner to face the proceedings de novo, on the basis of the impugned SCN. Consequently, the impugned SCN is liable to be quashed and set aside. Needless to say that this shall not preclude the department to take such tests if otherwise so entitled in respect of the products for the purpose of classifying the products under appropriate tariff headings as they may be advised as has been observed by the Apex Court in the judgment dated 7th December, 2004.

31. In the result, the petition succeeds. The impugned SCN for the reasons stated above is hereby quashed and set aside Rule is made absolute accordingly with costs.