

(1976) 09 AHC CK 0020

Allahabad High Court

Case No: Civil Miscellaneous Writ No. 137 of 1976

Ramsey Pharma Private Ltd.

APPELLANT

Vs

Superintendent, Central Excise
and Others

RESPONDENT

Date of Decision: Sept. 8, 1976

Acts Referred:

- Central Excise Rules, 1944 - Rule 10, 10(1), 10A
- Central Excises and Salt Act, 1944 - Section 3(1)
- Constitution of India, 1950 - Article 226
- Drugs and Cosmetics Rules, 1945 - Rule 88

Citation: (1983) 12 ELT 78

Hon'ble Judges: R.M. Sahai, J; D.M. Chandrashekhar, J

Bench: Division Bench

Judgement

D.M. Chandrashekhar, J.

The petitioner is a company engaged in manufacturing pharmaceuticals. In this petition under Article 226 of the Constitution, it has prayed for quashing the order of the Assistant Collector, Central Excise, levying excise duty on certain medicinal preparations, the appellate order of the Appellate Collector Excise, affirming the order of the Asstt. Collector and the order of the Central Government dismissing the revision petition.

2. The petitioner cleared certain medicinal preparations without payment of excise duty. Subsequently the Superintendent, Central Excise, issued to it a notice dated 9-6-1972 asking it to show cause why it should not be required to pay excise duty of Rs. 6,508.19 on certain medicinal preparations as set out in appendices "A" and "B" to that notice. The petitioner sent a reply to that notice contending that those medicinal preparations were not liable to excise duty and that the demand of excise duty under that notice was time barred under Rule 10 of the Central Excise Rules,

1944 (shortly called the Rules). After considering the aforesaid reply, the Assistant Collector, Central Excise, Allahabad held that the medicinal preparations in question were liable to excise duty since they had "their Brand Name, Trade Mark, Symbol, Monogram and also their firm"s Name".

3. In the appeal preferred by the petitioner, the Appellate Collector, while upholding the order of the Assistant Collector, observed inter alia, as follows:

"Examination of the labels borne on the containers in which the medicines were packed clearly showed that they bore a symbol or a monogram label which establishes a connection in course of trade between the medicines and the manufacturer having the right either as proprietor or otherwise to use the symbol or monogram with or without any indication of the identity of its manufacturer. Also the name of the manufacturer was given prominently under a colour scheme to establish the proprietary nature of the medicines. Under the circumstances, the medicines manufactured by the appellants fall within the definition of P. & P. medicines falling under Item 14E of the Central Excise Tariff."

Regarding the question to limitation, the Appellate Collector held that as the petitioner had not paid the duty the demand made came within Rule 10-A of the Rules and hence was not time barred.

4. In the revision petition filed by the petitioner, the Central Government observed as follows :-

"From the labels available on case records, it is seen that those have got colour symbol/monogram, name of the manufacturer etc. According to the explanation given below Tariff Item 14-E the medicines having any other mark such as symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person having the right either as a proprietor or otherwise to use the name and mark with or without any indication of the identity of that person or medicine. In view of that, medicines in question have correctly been classified as P or P medicines assessable under Tariff Item 14-E."

Regarding limitation the Central Government held that as the goods were cleared without payment of duty, it was a case of non-levy and, therefore, the demand was not time barred under Rule 10 of the Rules.

5. In this petition Sri S.N. Kacker, learned counsel for the petitioner, urged the following two grounds :

"(i) The medicines in question were neither patent nor proprietary, nor had they any brand name or symbol or monogram or any other device indicating a connection between those medicines and the petitioner and hence the medicines in question were not liable to excise duty, and

(ii) The Central Excise authorities erred in holding that the demand for excise duty was not barred by time under Rule 10 of the Rules."

6. On the other hand, the learned Standing Counsel for the Central Government contended that the design of the label on the bottles of the medicines and on the cardboard cartons in which such bottles were packed, indicated a connection in the course of trade between those medicines and the petitioner who had a right to use that mark and that hence the Central Excise authorities were justified in holding that the medicines in question attracted excise duty. The learned Standing Counsel also contended that since no assessment had been made previously on the medicines in question, the impugned demand came within the ambit of Rule 10-A and not Rule 10 of the Rules and that hence there was no time limit for making that demand.

7. Before dealing with the rival contents of learned Counsel, we shall set out the relevant provisions of the Central Excise Act (shortly called the Act), and the rules under the Drugs and Cosmetics Act, 1940.

Sub-section(1) of 3 of the Act provides, inter alia, that duties of excise shall be levied and collected in such manner as may be prescribed on all excisable goods which are produced or manufactured in India, as, and at the rates, set out in the First Schedule to the Act.

Item No. 14-E of the First Schedule reads:

"Patent or proprietary medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics other than those medicines which are exclusively Ayurvedic, Unani Siona or Homoeopathic.

Explanation I.-Patent or proprietary medicine means any drug or medicinal preparation in whatever form for use in the internal or external treatment of, or for the prevention of, ailments in human beings or animals which bears either on itself or on its container or both a name which is not specified in a monograph in a Pharmacopoeia. Formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is brand name that is a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958) or any other mark such as symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person.

Explanation II...."

Rule 88 of the Drugs and Cosmetic Rules, 1945, made under the Drugs and Cosmetics Act, 1940 reads :

"88. Labeling of drugs supplied to other persons-If any drug manufactured for the purpose of examination test or analysis is supplied by the manufacturer to any other person, the container shall bear a label on which shall be stated the name and address of the manufacturer, the accepted scientific name of the substance if known or if not known a reference which will enable the substance to be identified and the purpose for which it has been manufactured".

8. It is common ground that the medicines in question bear names which are contained in the Indian Pharmacopoeia, that none of them had any brand name and that the petitioner has not got any trade mark registered under the Trade and Merchandise Marks Act, 1958, in respect of any of those medicines. But the crux of the controversy is whether the labels on the bottles of these medicines and the cardboard cartons in which such bottles are packed bear any mark such as a symbol, monogram, invented words or writing indicating a connection in the course of trade between those medicines and the person having, either as proprietor or otherwise, the right to use such mark.

The petitioner has produced as Annexure II to its petition a sample label, thereon after the name of the medicine, the ingredients therein the purpose for which it is intended to be used and how it should be administered, the following words are printed.

"Manufactured by

Ramsey Pharma Private Ltd.,

Naini (Allahabad)."

The name "Ramsey" is printed not in block letters but in calligraphic letters. On the left hand bottom corner of the label, is a symbol consisting of a circle within which the name "Ramsey" is printed both vertically and horizontally.

9. Sri Kacker contended that under Rule 88 of the Drugs Rules there is a statutory obligation on every manufacturer of a medicine to display on the container thereof the name of the manufacturer of such medicine and that the mere fact that the name of the petitioner company as the manufacturer of the medicines in question, has been printed on the label on the containers of such medicines, would not show any connection in the course of trade between those medicines and the petitioner as the manufacturer thereof. Sri Kacker contended that neither the name "Ramsey" written in calligraphic letters nor the circle within which the name "Ramsey" was printed vertically and horizontally would indicate any distinctiveness about those medicines which bear the common names contained in the India Pharmacopoeia. It was also contended by him that any distinctiveness of the mark used on the container of the medicine should be in regard to the medicine itself and not in regard to the name of the manufacturer. He maintained that even if the name "Ramsey" printed in calligraphic letters and the circle in which the name "Ramsey" is

printed vertically and horizontally constitute a mark having any distinctiveness such distinctiveness was only in regard to the name of the manufacturer and not in regard to the name of the medicine and that unless such distinctiveness was in regard in the medicine itself, such would not come within the ambit of Explanation I to Item 14-E in the First Schedule to the Act.

It was also contended by Sri Kacker that the petitioner did not claim any proprietary right in regard to the design of the circle with the name of the manufacturer printed horizontally and vertically within that circle and that hence the mere use of that design on the labels on the bottles or medicines and the cardboard cartons would not bring the medicines in question within the ambit of the aforesaid Explanation.

10. On the other hand, the learned standing counsel contended that the peculiarity of the letters namely, calligraphic letters in which the name "Ramsey" is printed after the words "Manufactured by" and before the words "Pharma Private Ltd" and the symbol consisting of the circle within which the name "Ramsey" is printed both vertically and horizontally, constitute a distinctive mark indicating a connection in the course of trade between each of these medicines and the petitioner who has a right to use such mark in relation to such medicine and that hence these medicines clearly come within the ambit of Explanation I to Item No. 14-E in the First Schedule to the Act.

11. The requirement of Rule 88 of the Drugs and Cosmetics Rules would have been satisfied if the name of the petitioner had been printed in ordinary types on the labels on the bottles of medicines and the cartons, as the manufacturer of such medicines. The petitioner's name so printed would not have, by itself, constituted a distinctive mark. But in the present case the name of the petitioner has been printed in special types, namely calligraphic types. Moreover, the geometrical design of the circle within which the name "Ramsey" is printed both vertically and horizontally, is a distinctive design which together with calligraphic types in which the name "Ramsey" is printed constitutes a distinctive mark. The following passage in K.S. Shavakana's commentary on the Trade and Merchandise Marks Act, 1958 (1974 Edition) at page 33 is apposite :

"The name of a Company, individual or firm, if represented in a special or particular manner is considered prima facie distinctive. The question, however, arises what is meant by "special or particular manner". Obviously, the name written in ordinary type or block letters cannot be considered to be represented in a special or particular manner. Ordinary handwriting also cannot be considered to be a representation of the name in a special or particular manner".

The learned author has proceeded to state at page 56 of his book :

"Geometrical shapes are not necessarily unregistrable. The question in each case must be whether the mark is sufficient distinctive and the Registrar must take into consideration the precise nature of the shape and the particular way it is

represented."

12. Thus the calligraphic types used for the name "Ramsey" as distinct from the ordinary block letters used for the remaining portion of the name and address of the manufacturer, together with the geometrical design of the circle in which the word "Ramsey" is printed both vertically and horizontally, constitutes a distinctive design so as to distinguish the medicines manufactured by the petitioner from the medicines manufactured by others. We are unable to accept the contention of Sri Kacker that in order to attract the Explanation to Item No. 14E of the First Schedule the distinctiveness must be only in regard to the name of the medicine and not the name of the manufacturer. The relevant portion of the Explanation reads :

"...any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person."

According to the explanation it is sufficient if the mark used in relation to the medicine indicates a connection in the course of trade between such medicine and the manufacturer having a right to use such mark.

Thus we are unable to accept the first ground urged by Sri Kacker, namely that the medicinal preparation in question are not liable to excise duty.

13. We shall now deal with question of limitation. Rule 10 of the Rules reads :

"10. Recovery of duties or charges short levied, or erroneously refunded. -(1) When duties or charges have been short levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner or when any such duty or charge after having been levied has been owing to any such cause erroneously, refunded the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner account current if any or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1), shall determine the amount of duty or charges due from such person not being in excess of the amount specified in the notice and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case allow."

Rule 10-A of the Rules reads:

"10-A. Residuary powers for recovery of sums due to Government.-(1) Where these rules do not make any specific provision for the collection of any duty if the duty has for any reason been short levied or any other sum of any kind payable to the Central Government under the Act or these Rules, the proper officer may serve a notice on the person from whom such duty deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1) shall determine the amount of duty, deficiency in duty or sum due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period of time as the Assistant Collector of Central Excise may, in any particular case, allow."

14. The petitioner has not shown that in respect of the medicines in question there was any order by the Central Excise authorities in which they had applied their mind and had either levied any duty or had held that the medicines in question were not liable to excise duty. As explained by the Supreme Court in *N.B. Sanjana v. The Elphinstone Spinning and Weaving Mills Co. Ltd.* AIR 1970 S.C. 2039 at page 2048) in order to attract Rule 10, it is necessary that some amount of duty have been assessed and that the said amount should have been actually paid or there should have been a nil assessment. In the present case neither was any amount of duty assessed and paid earlier nor was there a nil assessment at any earlier point of time in respect of the medicines in question. Hence Rule 10 has no application to the present case which falls clearly within Rule 10-A under which there is no time limit for recovering the excise duty payable to the Central Government. Thus the petitioner's contention that the impugned demand is barred by time has no substance.

15. Both the contentions urged by Sri Kacker fail and we dismiss this petition.

16. Having regard to the circumstances of the case, there will be no order as to costs in this petition.