

(1998) 01 AHC CK 0045

Allahabad High Court

Case No: C.M.W.P. No. 174 of 1996 Connected with C.M.W.P. No. 175 of 1996

State of U.P.

APPELLANT

Vs

Government of India, Ministry of
Finance, Department of
Revenue, Central Board and
Excise-Customs and another

RESPONDENT

Date of Decision: Jan. 12, 1998

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 3, 4
- Constitution of India, 1950 - Article 263
- Medicinal and Toilet Preparations (Excise Duties) Act, 1955 - Section 3

Citation: (1998) 1 AWC 718

Hon'ble Judges: S.L. Saraf, J

Bench: Single Bench

Advocate: Krishna Prasad, for the Appellant; U.N. Sharma, S.C., A.K. Yog and H.N. Mehrotra, for the Respondent

Final Decision: Disposed Of

Judgement

S.L. Saraf, J.

The dispute between the parties in the present writ petition arises out of Homeodent Tooth Paste manufactured by M/s. Dabur India Ltd., and distributed by M/s. Sharda Bairon Lab., Ltd., Ghaziabad as to whether the same is taxable under the Medicinal and Toilet Preparation (Excise Duties) Act, 1955 or under the Central Excises and Salt Act, 1944. Initially, the Homeodent Tooth Paste was made taxable under the Central and Excises Salt Act, 1944. Subsequently, in the year 1988, it was made taxable by the District Excise Officer under the Medicinal and Toilet Preparation (Excise Duties) Act, 1955. By an order dated 17th March, 1988, a sum of Rs. 68,30,134.20 as duty, was directed to be deposited under the Medicinal and Toilet Preparation Act, 1955. The said order was finally confirmed by the District

Excise Officer holding that both M/s. Dabur India Ltd., Ghaziabad and M/s. Sharda Bairon Lab., Ltd., Ghaziabad were severally and jointly liable to pay the said amount. The matter, after going through the several legal proceedings, finally went up to the Supreme Court. The Supreme Court by its judgment delivered in Writ Petition No. 426/1989 connected with SLP (Civil) No. 1610/1989, SLP (Civil) No. 135-36/89 and Writ Petition No. 264 of 1989 on 12th July, 1990 rejected the aforesaid Special Leave Petitions along with writ petitions filed by the assessee vacating all interim orders. The Supreme Court in the said decision was pleased to hold that the assessee was liable to pay the excise duty under the Medicinal and Toilet Preparation (Excise Duties) Act. 1955. The Supreme Court in the said judgment noted the points which have been urged by the petitioner before the assessing authority as follows :

"Assuming and not admitting that your classification is correct, even then your calculation of duty of the product is erroneous on the following points:

- (a) The total wholesale value of the goods manufactured as on 18.1.1988 is Rs. 65,73,915.63.
- (b) The trade discount at the rate of 2% has to be deducted from the wholesale price Rs. 1,32,53,776.27.

The balance amount comes to Rs. 52,67,542.36. The excise duty element in this amount comes to Rs. 26,33,771.18. The calculation chart showing these calculations is attached as Annexure-"B".

Kindly note that for Central Excise purpose the excisable value declared to the C. E. Deptt., on the total goods manufactured upto 18.1.88 is only Rs. 46,66,451.45 and the wholesale price of these goods is Rs. 66,31,866.35 only. This too is evident From Annexure-"B"."

2. At page No. 40 of the judgment delivered by the Supreme Court, it held as follows :

"Our attention was drawn to the observation of this Court in *Union of India and others v. Bombay Tyre International Ltd., etc., (supra)*, in respect of the valuation. But the point not having been taken at any stage before the authorities. It is not proper for us at this stage to go into these question. We will proceed in view of the facts and circumstances of this case and to do justice between the parties on the basis that the duty has been correctly imposed. We have looked into the order of the District Excise Officer, Ghaziabad and we find that all relevant facts have been considered and no facts were brought before us contrary to the findings nor contentions of substance raised which can induce us to hold to the contrary.

Reference may also be made to the observations of this Court in *Mohanlal Maganlal Bhavsar (Deceased) through Lrs and Others Vs. Union of India (UOI) and Others*, for the test to determine whether an item of medicinal preparation falls under item 1 of the Schedule to the 1955 Act. It has been determined by the authorities

enjoined to enforce that act and such finding has not been assailed on any cogent or reliable ground in any proper manner. If that is the position, then that order must be upheld out it must be upheld that Homeodent was dutiable and as such, the impugned order was correctly passed by the District Excise Officer.

In the aforesaid view of the matter, we are of the opinion that the impugned order dated 18th January, 89 passed by the District Excise Officer, Ghaziabad, must be given effect to and thereafter the petitioner's application for refund, if any, made before the authorities u/s 4 of the 1944 Act within the time indicated as before should be disposed of in the manner indicated above. If made."

As against the said judgment passed by the Supreme Court, a review application was filed by the assessee. In the said review applications, both assessee. i.e., M/s. Dabur India Ltd., Ghaziabad and the M/s. Sharda Bairon Lab.. Ltd., Ghaziabad contended as follows :

"It is submitted that for all practical purposes it was conceded by the State Counsel that the final order dated 18.1.1989 passed by the District Excise Officer, Ghaziabad contained no reasons whatsoever and it had only confirmed the earlier order dated 18.3.1989 which was set aside in revision by the Central Government on 22.9.1988. Equally it was practically conceded that if the provisions of law relating to valuation was correctly applied. An amount of Rs. 68,50,745.20 determined by the Excise Officer was incorrect because the trade discount of 2% and the ad-valorem duty of 100% should be deducted to determine true value of the clearance. The judgment under review does not deal with this aspect but simply upholds the order passed by the District Excise Officer dated 18.1.1989. For this reason also the judgment under review deserves re-consideration.

It is submitted that the petitioner had preferred the writ petition being Writ Petition No. 264 of 1989 against the order dated 18.1.1989 in view of the fact that the petitioner had filed earlier a SLP impugning the order of the High Court. The petitioner had not preferred an appeal or the revision prescribed under law against the order dated 18.1.1989. In view of the dismissal of the writ petition of the petitioner the position reverts back to the position appearing as on 18.1.1989. The petitioner did not avail of the opportunity of filing an appeal or revision against the order dated 18.1.1989. This Hon'ble Court ought to have considered this aspect and directed in the Judgment under review that the petitioner can avail the appeal against the said order dated 18.1.1989 and the period spent in this Hon'ble Court in filing the writ petition against that order will be excluded for the purpose of filing an appeal. For this reasons also a clarification will have to be given by this Hon'ble Court and, therefore, the Judgment under review deserve to be reconsidered."

3. On the basis of the said review application, a prayer was made before the Hon'ble Supreme Court to review its judgment dated 12th July. 1990. As a matter of fact, additional ground in support of the review application was also filed by M/s. Sharda

Bairon Lab. Ltd., Ghazlabad. The said grounds read as follows :

"The method of calculation of valuation is prescribed in the law. The District Excise Officer. Ghazlabad used his own arbitrary method and exaggerated the value against the provisions of law. This Hon"ble Court did not decide on this issue at all. However, the District Excise Officer proceeded on the basis of his arbitrary earlier calculation and then used coercive methods to collect the said State excise."

4. The Supreme Court was pleased to pass an order on the said review application which reads as follows :

"We have carefully considered the grounds in the Review Petition and the documents filed in support thereof. We find no ground to review the judgment. The Review Petitions are accordingly dismissed. No cost."

5. The Supreme Court, however, in the said judgment delivered on 12th July, 1990, was pleased to direct refund collected in excess under the Central and Excise Salt Act, 1944 to the petitioner and I am also informed from the Bar that in fact, the assessee has got refund under the Central and Excise Salt Act, 1944. An appeal against the said order of the District Excise Officer that was filed under the 1955 Act and was pending before the Commissioner, the Commissioner dismissed the same in view of the dismissal of the aforesaid writ applications, special leave application and review application filed before the Supreme Court. As against the said order of dismissal, a revision application was filed by M/s. Dabur India Ltd., and M/s. Sharda Bairon Lab. Ltd., Ghaziabad, raising the same very contentions that were raised before the Hon"ble Supreme Court. The Additional Secretary to the Government of India entertained the said application and passed orders on the revision application totally contrary to and/or inconsistent with the judgment of the Hon"ble Supreme Court. The said Additional Secretary to the Government of India directed the refund of Rs. 4,12,922.48 to M/s. Dabur India Ltd.. and M/s. Sharda Bairon Lab. Ltd., in the ratio of recoveries made from them and refunded the interest of Rs. 6.84,676.72 to M/s. Sharda Bairon Lab. Ltd., Ghaziabad as the said amount was borne only by them.

6. I have gone through the said order dated 9.8.1994 passed by the Additional Secretary to the Government of India and find that it has willfully ignored the confirmation of the finding of facts and made by the District Excise Officer. Ghaziabad in the said judgment of the Hon"ble Supreme Court. It was the duty of the Additional Secretary to the Government of India to carefully look into the Judgment delivered by the Hon"ble Supreme Court along with the writ petition. SLP as well as review application filed by the assessee and the contentions raised by the assessee in the said review application and the writ petition but the same was totally and willfully ignored by the Additional Secretary to the Government of India. The Supreme Court had specifically held that the petitioner"s application for refund, if any, made before the authorities u/s 4 of the Act, 1944 should be disposed of in the

manner indicated in the said judgment. The Supreme Court, however, was pleased to direct refund of the amount deposited under the 1944 Act. The Supreme Court did not pass any order of refund of any duty paid under the 1955 Act but on the contrary, was pleased to hold that the order passed by the District Excise Officer, Ghaziabad must be upheld, as the impugned order was correctly passed.

7. Learned counsel for the respondents, Sri A. K. Yog argued regarding feasibility of setting up of a machinery under a council to be formed under Article 263 of the Constitution of India to adjudicate and adjust the dues to the respective Governments. The Supreme Court was pleased to observe as follows :

"In these peculiar facts, it appears that the dispute is under two different Central Legislations and under one the State authorities will realise and impose the taxes on certain basis and under the other the same transaction may be open to imposition by Central Government on a particular view of the matter. In such a situation, how and wherein the refund should be made or any duty paid in respect of transaction to one of the authorities, the State or the Centre, to be adjusted should be the subject-matter of a settlement by the council to be set up under Article 263 of the Constitution of India. This is a matter on which we draw the attention of the concerned authorities for examination because Section 3 of the 1955 and Section 3 of the 1944 Act may overlap similar transaction in certain cases."

8. The aforesaid directions issued by the Hon"ble Supreme Court is a matter for consideration by the Central Government. In any event in the instant case that there was no ambiguity or scope for the Additional Secretary to the Government of India to entertain the said revision application and pass an order contrary to the judgment of the Hon"ble Supreme Court. In the premises, the order passed by the Additional Secretary to the Government of India dated 9.8.1994 is hereby quashed and set aside.

9. In the result, the writ petition is allowed. There will be no order as to costs. In the light of the observations made above, the Writ Petition No. 175 of 1996 is also disposed of finally.

10. However, I shall be failing in my duty if the aforesaid action of the Additional Secretary to the Government of India in passing the said order allowing a huge refund of about Rs. 50 lakhs is not brought to the notice of the Hon"ble Supreme Court. The said officer appears to me to have committed contempt of the Hon"ble Supreme Court by passing the said order willfully, deliberately, consciously and in flagrant violation of the judgment delivered by the Hon"ble Supreme Court. It was an attempt to subvert the judicial system of this country by passing the said order thereby committing gross contempt of the Hon"ble Supreme Court. I direct the Registrar, High Court to transmit the papers of this case to the Registrar-General of the Hon"ble Supreme Court for placing the same before the Hon"ble Chief Justice of India.