Citric India Ltd. Vs Union of India.

Court: Bombay High Court

Date of Decision: Oct. 21, 1992

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 35A, 35B
Constitution of India, 1950 â€" Article 226, 227, 35L

Citation: (1993) ECR 257 : (1993) 66 ELT 566

Hon'ble Judges: M.L. Pendse, J; A.A. Halbe, J

Bench: Division Bench

Advocate: Shri J.F Pochkhanwala, instructed by M/s. Mulla and Mulla and Craigie Blunt and Caroe, for the Appellant; Shri R.V. Desai and Shri K.C. Sidhwa, for the Respondent

Judgement

Pendse, J.
Petitioner No. 1 is a Public Limited Company and on September 24, 1968 obtained a licence from Food and Drug

Administration, Maharashtra, Bombay and commenced manufacture of pharmaceutical products, which are used in the drug formulations. One of

the items manufactured by the petitioners is Citric Acid I. P. The Company filed classification lists from time to time classifying the product under

Tariff Item No. 68 of the First Schedule of the Central Excises and Salt Act, 1944, and the classification lists were duly approved by the Excise

Authorities. On March 1, 1975 the Central Government issued notification in exercise of powers conferred by sub- rule (1) of Rule 8 of Central

Excise Rules, 1944 exempting goods of the description specified in the Schedule annexed to the notification and falling under Item No. 68 of the

First Schedule from the whole of the duty of excise leviable thereon. this Notification No. 55 of 1975 was amended on March, 1978 by

Notification No. 62 of 1978 and certain additional items were introduced in the Schedule. Item No. 9 reads as follows :

19. All drugs medicines, pharmaceuticals and drug intermediates not elsewhere specified"".

2. The petitioners claimed that Citric Acid I. P. was manufactured strictly in accordance with the standards prescribed under the Indian

Pharmacopoeia and was manufactured in terms of the Drug Licence. The petitioners filed fresh classification list on March 4, 1978 claiming benefit

of exemption notification. On May 3, 1978 the Superintendent of Central Excise, Nasik approved the classification list confirming that the

Company is entitled to the exemption under the notification.

3. Between January 1, 1979 and April 24, 1981 the Company was served with eleven show cause notices by Superintendent of Central Excise,

Nasik, calling upon to explain why the claim for exemption should not be rejected and excise duty levied on citric acid under Tariff Item No. 68. In

answer to the notices, the Company claimed that Citric Acid is item and in terms of provisions of Notification No. 62/78 excise duty cannot be

levied on a drug item. On September 29, 1991 the Assistant Collector discharged the show cause notices holding that Citric Acid is a drug item

eligible for exemption under Notification No. 62/78.

4. The Order of the Assistant Collector holding that the Company is entitled to the benefit of exemption notification was examined by the Collector

of Central Excise, Poona in exercise of revisional powers u/s 35A(2) of the Excise Act, and by order dated April 26, 1993 the Collector declared

that the benefit of exemption under the notification cannot be claimed by the Company as the view taken by the Assistant Collector that Citric Acid

is a drug or a pharmaceutical was erroneous. The Collector also held that Citric Acid is only a basic chemical and not used directly as a drug

intermediate.

The Company challenged the order passed by the Collector by preferring an appeal as prescribed u/s 35B of the Excise Act before the Appellate

Tribunal, New Delhi. The Tribunal by order dated March 4, 1985 came to the conclusion that the claim of the Department that Citric Acid is not a

pharmaceutical cannot be accepted and the Collector was wrong in assessment that Citric Acid is merely a chemical. The Tribunal in paragraph 4

of the order rejected the contention of the Department that Citric Acid is not a pharmaceutical and should not be so classified notwithstanding its

use as an acidulate in dye manufactures, food processing and metal treatment. The Tribunal held that citric acid is widely used as pharmaceutical.

The Tribunal noticed that the Collector found that the manufacture of citric acid by the Company is in accordance with pharmacopoeial standards.

After recording finding that citric acid finds use as a drug and pharmaceutical even though it has more uses in the food preparation industry and

other process the Tribunal held that the exemption available under the notification is to drug, a drug- intermediate, a pharmaceutical and not to

citric acid. The Tribunal held in paragraph 26 of the order :

We, accordingly, order that the exemption should be extended to all citric acid cleared by M/s. Citric India Ltd. and used in the manufacture of

drug, medicines / pharmaceuticals. The Central Excise may make enquiries and satisfy itself about the uses and M/s. Citric India Ltd. should, to this

end, furnish all help and aid to the Central Excise department so that the concession can be extended to all the deserving clearances, in accordance

with the law. But the citric acid not so used must be denied the exemption and we reject the appeal in regard to such clearances.

The conclusion recorded by Tribunal in paragraph 26 is on the basis that to ascertain whether the duty is leviable on manufacture of citric acid, it is

necessary to ascertain the end-use of the product manufactured. The Company feeling aggrieved by the conclusion recorded in paragraph 26 of

the order passed by the Tribunal, preferred this petition under Articles 226 and 227 of the Constitution of India May 2, 1985. The petition was

admitted on May 3, 1985 and is now set down for final disposal.

5. Shri Pochkhanwala, learned counsel appearing on behalf of the petitioners, submitted that the declaration given by the Tribunal that exemption is

available only to manufacture of citric acid which is cleared and used in the manufacture of drug medicines / pharmaceuticals and the Department

should have enquired and satisfied about the end use is contrary to law and not sustainable. The learned counsel urged that it is wholly unnecessary

to examine what is the end-use of the manufactured product to determine whether the excise duty is leviable on the process of manufacture of a

product. The learned counsel urged that an identical question came up for consideration before one of us (Pendse, J.) and by judgment reported

in'' Rakesh Enterprises and another Vs. Union of India and another, , it was held that once a product is found to be a drug or drug-intermediate or

pharmaceutical then the advantage of exemption notification is available to the manufacturer and it is not permissible for the Department to claim

that exemption can be claimed only if the end-product of the manufactured item is used as a drug. The decision was confirmed by Division Bench

of this Court by judgment reported in Union of India Vs. Rakesh Enterprises, .

The submission is correct and deserves acceptance. The controversy arose as to whether phenol USP is a drug, drug-intermediate or

pharmaceutical, and after the finding was recorded that phenol is both drug and drug-intermediate, it was contended by the Department that it is

not suffice that the product is a drug or drug-intermediate for the purpose of exemption. The Department claimed that it must be established that

the article was so used as a drug. The contention was turned down with finding that it is not permissible to read some additional words in the

exemption notification. It was held that the plain reading of the exemption notification makes it clear that the exemption is available as soon as the

article as found to be a drug or drug-intermediate. We are in respectful agreement with the view taken by the single Judge and which was

confirmed by the Division Bench of this Court, and the order of the Tribunal directing that the exemption is available only if it is established that the

end-use of the Citric Acid was for the manufacture of drug medicines and pharmaceuticals cannot be sustained.

6. Shri Desai, learned counsel appearing on behalf of the Department raised a preliminary objection to the maintainability of the petition filed by the

Company under Article 226 of the Constitution of India. The learned counsel submitted that u/s 35L of the Excise Act it is open to challenge the

order passed by the Appellate Tribunal by filing an appeal before the Supreme Court. The learned counsel urged that as an adequate and

efficacious remedy was available to the Company of filing appeal to the Supreme Court, it is not proper to entertain the petition under Article 226

of the Constitution of India. Normally, we would have acceded to the submission of the learned counsel and directed the petitioners to approach

the Supreme Court by filing an appeal, but we are not adopting this course for more than one reason. Shri Desai informed us with reference to the

averments made in paragraph 3 of the return shown by Mr. C. T. Dhindale, Assistant Collector of Central Excise, on October 19, 1992 that

against the order of the Tribunal holding that Citric Acid is a drug and pharmaceutical the Department has filed an appeal before the Supreme

Court u/s 35L of the Excise Act and the same is pending. On the last occasion when this claim was made that the appeal filed by the Department is

still pending in the Supreme Court, we called upon the learned counsel to furnish the number of pending appeal. Shri Pochkhanwala submitted that

the claim that appeal is pending in the Supreme Court is entirely incorrect because during last seven years the petitioners had never received any

notice from the Supreme Court and it is inconceivable that the appeal lodged in the year 1985 would remain pending for more than seven years.

Shri Desai sought adjournment and which was readily granted to ascertain about the claim of pendency of the appeal. In spite of diligent search

made by the learned counsel with the assistance of the officers of the Central Excise, to trace can be found of any pendency of appeal against the

order of the Tribunal. In these circumstances were proceed on the basis that either appeal which is alleged to have been filed in the Supreme Court

by the Department was not prosecuted or was dismissed on merits. In these circumstances the question to be determined is whether the petition

filed under Article 226 of the Constitution to challenge the direction of the Tribunal in paragraph 26 quoted hereinabove, should be entertained.

We are inclined to entertain the petition as the dispute is pending in this Court for last over seven years and driving the parties now to file an appeal

to the Supreme Court would lead to multiplicity of litigation and considerable expenses. We are conscious that when remedy of appeal is available,

this Court is reluctant to exercise writ jurisdiction, but taking into consideration the peculiar facts and circumstances of the case, we are not

prepared to accede to the preliminary objection raised by Shri Desai that the petition should not be entertained.

7. Shri Desai then submitted that the finding recorded by the Tribunal that the Citric Acid the product manufactured by the petitioners, is a drug,

drug-intermediate or pharmaceutical is incorrect. We are afraid we cannot permit the learned counsel to raise this contention, because the

Department has not challenged that finding of the Tribunal either by filing petition in this Court or by filing appeal before the Supreme Court. The

appeal alleged to have been filed is either not filed or stands summarily dismissed. Consequently the conclusion of the Tribunal as regards the

nature of product manufactured has become final and it is not open for the Department to reagitate in the present proceedings.

Shri Desai then submitted that even accepting that Citric Acid is a drug, drug-intermediate or pharmaceutical still the finding of the Tribunal that

unless the Company established the end-use of the manufactured product, exemption is not available, should not be disturbed. We are afraid we

cannot acceded to the submission. It is necessary to reiterate that the impost of excise duty is in respect of manufacture of a product and the

liability to pay excise duty accrues as soon as manufactured article comes into existence. The liability to pay duty is not dependent upon the end-

use of the product and it is not open for the manufacturer to claim that the liability is dependent upon the end-use of the product and so also to the

Department to claim that exemption cannot be claimed till it is established that the manufactured product is used for ultimate manufacture of a drug

or drug-intermediate. The advantage of exemption cannot be denied with reference to end-use, unless exemption notification so provides. In our

judgment, in view of the decision recorded by this Court in the case of Rakesh Enterprises, the contention of Shri Desai cannot be acceded to.

8. Shri Desai referred to the decision of the Supreme Court reported in Collector of Central Excise, Guntur Vs. Andhra Sugar Ltd.,

Venkataraypurama, , to urge that the requirement of end-use though not built into the exemption notification is not only implied but also becomes

imperative in a situation when the product has uses other than drug intermediate. The learned counsel submitted that this is the ratio laid down by

the Supreme Court. The submission is not accurate On careful perusal of the entire judgment of the Supreme Court, it is obvious that the

observations set out in the head-note are not the findings or conclusions of the Supreme Court. The issue before the Supreme Court was whether

the Acetic Andydride manufactured by the respondents and sold to drug manufacturers is eligible to benefit of exemption under Notification No.

55/75 as amended by Notification No. 62/78 as drug intermediate. The manufacturer has succeed before the Tribunal and the appeal was carried

to the Supreme Court by the Collector. The Supreme Court in paragraph 2 of the judgment observed that the question is was the item

manufactured a drug or an intermediate in terms of the notification. In paragraph 6 of the judgment the Supreme court noted that on the facts of the

case that Acetic Andydride manufactured was used in the manufacture of the drugs. In view of the finding of fact noticed by the Supreme Court,

the question as to whether the end-use of the manufactured product can be considered to determine levy of duty or benefit of exemption

notification did not come up for consideration. The Supreme Court referred to the decision of the single Judge of Karnataka High Court and where

the learned Judge had quoted the observations of Government of India in a revision petition to the following effect :

In the Government''s view this requirement of end-use though not built into the exemption notification, is not only implied but also becomes

imperative in a situation where the product is used other than as drug intermediate.

It is therefore obvious that the Supreme Court has not laid down any such principle, but the head-note merely carves out what was quoted in the

order passed by the Government in the revisional jurisdiction and which was noted by the Single Judge of the Karnataka High Court. In our

judgment, the reliance on the decision of the Supreme Court in these circumstances is not accurate. In our judgment the petitioners are entitled to

the relief.

9. Accordingly, petition succeeds and the direction given by the Tribunal in paragraph 26 of the order dated March 4, 1985 is quashed. It is

declared that the petitioners are entitled to exemption in respect of manufacture of citric acid and it is not permissible for the Department to make

enquiry and satisfy about the end-use of the same.

10. There will be no order as to costs.

11. Shri Pochkhanwala assures that the bond furnished by the petitioners in pursuance of the interim order passed by this Court will be kept alive

for eight weeks.