

(1981) 10 BOM CK 0038

Bombay High Court

Case No: Misc. Petition No. 1135 of 1978

Parle Beverages (P)
Ltd.

APPELLANT

Vs

Union of India and
others

RESPONDENT

Date of Decision: Oct. 15, 1981

Acts Referred:

- Central Excise Rules, 1944 - Rule 8(1), 9(2)

Citation: (1982) 10 ELT 142

Hon'ble Judges: M.L. Pendse, J

Bench: Single Bench

Judgement

1. The petitioners are a company incorporated under the companies Act and carry on business as bottlers of soft drinks and have a factory situated at Chakala, Andheri (East), Bombay. The petitioners for several years have been carrying on business of bottling soft drink such as Gold Spot, Limca, Rimzim etc., which are marketed under the registered trade mark of a concern known as Parle (Exports) Pvt. Ltd. The petitioners have entered into an agreement known as Franchise Agreement with the Parle (Exports) Pvt. Ltd. on July 25, 1977 and on March 7, 1978. Under the said Franchise Agreement the petitioners from time to time buy the essence supplied by the Parle (Exports) Pvt. Ltd. and utilise the same in the manufacture of soft drinks. The petitioners have installed an elaborate bottling plant in the factory at investment of about Rs. 95 lacs, all of which have been contributed from the assets of the petitioners. The petitioners purchase in addition to the essence numerous articles such as bottles, crown corks, sugar, citric acid etc., from the market. Parle (Exports) Pvt. Ltd. have no control over the mode or manner of manufacture of soft drink save and except to ensure the quality of product. Parle (Exports) Pvt. Ltd. have no control over the procurement of other raw materials save and except the right to inspect the quality to ensure that the soft drinks are in accordance with the quality

standard. The premises in which the petitioners manufacture soft drink are in exclusive control of the petitioners and the Parle (Exports) Pvt. Ltd. have no control in the engagement, supervision or employment of the labour. Parle (Exports) have entered into similar Franchise Agreements with large number of parties such as Gujarat Bottling Co., Surat Bottling Co., Poona Bottling Co. etc.

2. Aerated water, including the aerated water or the soft drinks, manufactured by the petitioners are assessable to Central Excise duty under the provisions of the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act). Item 1D provides for the duty to be paid on the manufacture of soft drink. The Central Government in exercise of the powers conferred by Sub-rule (1) of Rule 8 of Central Excise Rules published a Notification dated July 4, 1977 exempting certain categories of aerated waters from so much of the excise duty leviable thereon as was in excess of 25% provided that such exemption would only apply to the first clearance for home consumption not exceeding 37 lac bottles by or on behalf of a manufacturer from one or more factories during any financial year 1976-77 and 50 lac bottles in any financial year subsequent to 1976-77.

3. In pursuance of the Notification, the petitioners filed their price list claiming exemption on the first 37 lack bottles cleared by them during the financial year 1976-77. The price list was filed on July 13, 1977. The price list was not approved by the Superintendent of Central Excise and the petitioners paid full duty in respect of first 37 lac bottles and thereafter filed a claim for refund of Rs. 4,79,915.36 on September 23, 1977. The said refund application is still pending before the Superintendent of Central Excise.

4. The petitioners submitted a fresh price list on March 3, 1978 claiming the benefit of the Notification. The price list was again not approved by the Superintendent of Central Excise, but the petitioners were permitted to clear the goods under Rule 9(2) after executing the requisite bond and furnishing a bank guarantee of Rs. 6 lacs. In the meanwhile on February 28, 1978, respondent No. 3 addressed a communication to the petitioners pointing out that the Parle (Exports) Pvt. Ltd. are deemed to be the manufacturers of the products made by various bottling companies and the petitioners would be entitled to the benefit of the concessional rate of duty under the Notification only if the aggregated clearance of all parties manufacturing the products under Franchise Agreements with the Parle (Exports) did not exceed the limits specified in the Notification. The petitioners sent a reply on March 27, 1978 pointing out that the claim made in the communication was not correct and invited attention to several orders passed by the Excise Authorities in various places in the country holding that in respect of Franchise Agreement the real manufacturers were the bottlers and not the Parle (Exports). The petitioners received a further communication on July 20, 1978 reiterating what was mentioned earlier by respondent No. 3. The petitioners have thereafter filed the present petition in this Court on August 17, 1978 under article 226 of the Constitution of India claiming that

the communication dated July 20, 1978 should be struck down and the petitioners should be granted refund of Rs. 4,79,915.36.

5. Shri Setalwad, the learned counsel appearing in support of the petition, submitted that the view taken by the Excise Authorities that the Parle (Exports) Pvt. Ltd. were the manufacturers is totally incorrect and the perusal of the Franchise Agreement would leave no manner of doubt that the petitioners were the manufacturers and not the Parle Exports. The learned counsel pointed out that the view taken by the Excise Authorities is based upon the advice given by the Law Ministry on January 20, 1978 and the decision based upon that advice is totally incorrect. Shri Setalwad pointed out that the Central Government in exercise of the revisional jurisdiction has found in the case of Surat Bottling Co. that the Franchise Agreement does not lead to the conclusion that Parle (Exports) are the manufacturers and not the bottling company. The learned counsel also relied upon the decision of a Division Bench of Delhi High Court reported in 1981 E.L.T. 389 in the case of Poona Bottling Co. Ltd. and another v. Union of India and others wherein an identical issue arose for consideration and it was held that the bottling company are the manufacturers and not the Parle (Exports) Pvt. Ltd. Shri Dalal appearing on behalf of the Department relied upon the contents of return filed by Parasram Govindram Belani, the Assistant Collector of Central Excise, sworn on October 6, 1981 to claim that the Parle Exports have absolute control over the manufacture of the soft drinks produced by the petitioners and therefore the conclusion that the Parle (Exports) are the manufacturers and petitioners are not entitled to the advantage of the notification on the assumption that the petitioners are the manufacturers is correct. It is not possible to accept the submission of Shri Dalal.

6. A copy of the Franchise Agreement between the petitioners and Parle (Exports) Pvt. Ltd. is annexed as Exh. A to the petition. The perusal of the agreement indicates that the Parle (Exports) Pvt. Ltd. have permitted and authorised the petitioners to sell and distribute the beverages known as and sold under the trade marks "Gold Spot" within the territory mentioned in the agreement. The agreement nowhere indicates that the petitioners have taken any financial assistance from the Parle (Exports) Pvt. Ltd. The Parle (Exports) Pvt. Ltd. have no control over the manufacture of the soft drink save and except to determine the quality of the manufactured product. The condition to keep control over the manufactured products is only with a view to guarantee the quality, specification and such other standards of the products to be manufactured by several bottling companies. It is obvious from this agreement that the petitioners have merely obtained raw material used in the manufacture of excisable goods and have produced the soft drink by manufacturing in their own plant and the these circumstances it is not possible to hold that the petitioners are not the manufacturers, but the Parle (Exports) Pvt. Ltd. The reliance by Shri Setalwad on the decision taken by the Government of India in exercise of the revisional jurisdiction under Central Excise Act holding that the manufacture by Surat Bottling Co. is not by or on behalf of the Parle (Exports) Pvt. Ltd. is very

appropriate. The decision of the Government is reported in 1980 E.L.T. 353. The revisional authority was considering the identical Franchise agreement and has recorded the finding that the bottling company is the manufacturer and not the Parle (Exports) Pvt. Ltd. The reliance by the learned counsel on another decision of Central Government reported in 1980 E.L.T. 475 in the case of Punjab Beverages Limited, Chandigarh is also appropriate. As mentioned hereinabove, an identical question came up for consideration before the Division Bench of Delhi High Court and the judgment is reported in 1981 E.L.T. 389. The Division Bench held on consideration of the terms of Franchise agreement that the imposition of various restrictions on the petitioner company under the Franchise agreement on buying the essence for the beverages, like maintenance of records, chemical tests, sale and distribution of beverages, types of bottles or crowns to be used, control over retail sale price, company's right of inspection, were merely to safeguard the trade mark interests and cannot lead to the conclusion that the bottling companies were manufacturing for or on behalf of the Parle (Exports) Pvt. Ltd. I am in agreement with the view taken by the Division Bench of Delhi High Court.

7. Shri Dalal relied upon the contents of paragraph 4 of the return and urged that several conditions and restrictions provided by the Franchise agreement would lead to the conclusion that the petitioners had no control over the mode or manner of manufacture of soft drinks and it is the Parle (Exports) Pvt. Ltd. who were in fact the manufacturers, having absolute control over the manner and mode of manufacture. It is difficult to accept the submission. The restrictions are put merely with a view to safeguard the quality of the soft drink to be sold under the trade name of Parle Exports. The petitioners have not received any financial assistance from the Parle (Exports) Pvt. Ltd. nor Parle (Exports) Pvt. Ltd. have got any control over the manner and working of the plant which exclusively belongs to the petitioners. In my Judgment, the excise authorities below were in error in holding that the petitioners were not the manufacturers but the Parle (Exports) Pvt. Ltd. The view taken by the Central Excise Authorities cannot be sustained and the petitioners are entitled to the relief sought in the petition.

8. Accordingly, the petition succeeds and the rule is made absolute in terms of prayer (b). In the circumstances of the case, there will be no order as to costs.

The petitioners have furnished bank guarantee in pursuance of the interim orders passed by this Court. The bank guarantee shall stand discharged and the same will be returned to the petitioners. The respondents shall refund the amount within a period of six weeks from today.