State Of Goa & Ors vs Leukoplast (India) Ltd on 27 February, 1997

Equivalent citations: AIR 1997 SUPREME COURT 1875, 1997 AIR SCW 1617, 1997 (4) SCC 82, (1997) 2 ELT 19, (1997) 69 ECR 486, (1997) 3 SCJ 68, 1997 STI 118, (1997) 137 TAXATION 322, (1997) 43 KANTLJ(TRIB) 554, 1997 UPTC 1 512, 1997 ADSC 3 59, (1997) 2 SCR 516 (SC), (1997) 2 SUPREME 625, (1997) 2 SCALE 372, 1997 BRLJ 208, (1997) 3 JT 322 (SC), (1997) 69 ECR 500

Bench: Suhas C. Sen, Sujata V. Manohar

PETITIONER:
STATE OF GOA & ORS.

Vs.

RESPONDENT:
LEUKOPLAST (INDIA) LTD.

DATE OF JUDGMENT: 27/02/1997

BENCH:
SUHAS C. SEN, SUJATA V. MANOHAR

ACT:

HEADNOTE:

JUDGMENT:

(With Civil Appeals Nos. 2462-63 of 1988) J U D G M E N T SEN,J.

Leukoplast (India) Limited, the assessee-company was granted a licence by the Drugs Controller under the Drugs and Cosmetics Act, 190. It was amended on September 7. 1987 Under this licence, the assessee was entitled to produce inter alia Zinc Oxide Adhesive Plaster B.P.C. (Leukoplast), Surgical Wound Dressing (Handyplast); Balladona Plaster B.P.C.; Capsicum Plaster B.P.C. and Cotton Crape Bandages B.P.C. (Leukocrapes).

The aforesaid goods or products were liable to local sales tax as well as Central sales liable to local

sales Tax as well as Central sales tax and prior to 1.11.1981, the rate of 6 per cent and under Section 8(2A) of the Central Sales Tax Act, the rate of Tax was 4 per cent. By the notification No. 14/41/81-Fin (R&C), dated 28.8.1981, drugs and medicines were exempted from the levy of local sales tax in excess of 3 per cent and thus, according to the assessee- company, as a result of this exemption, the Central Sales Tax leviable under Section 8(2-A) of the Central Sales Tax Act was also reduced to 3 per cent.

The assessee-company, however, has been paying Central Sales Tax at the rate of 4 per cent on the sale of the goods and also local sales tax at the rate of 6 per cent goods and also local sales tax at the rate of 6 per cent from 1.11.1981 to 1.4.1987.

By another notification No. 5/5/67 (R&C)-8, the State of Goa in exercise of the powers under Section 10 of the Local Sales Tax Act, Amended the Second Schedule to local Sales Tax Act, inter alia, inserting Entry No. 77 which speak of "drugs and medicines, including all I.V. Drips". By the aid notification, the goods were totally exempted from levy of the local sales tax and consequently. The Sales tax from 2.4.1987 on the above mentioned products or goods manufactured by the assessee-Company.

Further, the case of the assessee is that the sales tax payable from 1.11.81 to 1.4.87 was at the rate of per cent only and as such by two letter both dated 3.4.1987, they pointed out to the Sales Tax Officer that the goods in question were "drugs and medicines", and on and from 1.11.1981 to 1.4.1987 the said goods were liable to local and Central sales tax at the rate of 3 per cent. They further prayed for refund of the duty paid in excess of local and Central sales tax levied and collected as a result of the Sales tax assessment which had been completed. They also filed revised sales tax returns for the assessment periods, 1.1.1985 to 31.12.1985 and 1.1.1986 to 31.12.1986. However, despite these two letters, no action was taken by the state of Goa a regards the claim for refund of the Central and local sales tax collected in excess. They further prayed for the completion of the assessment proceedings which were still pending for the subsequent periods, that is, from 1.1.1983 to 31.12.1986.

They further contended that after the admission of the writ petition, the Assistant Sales Tax officer made order dated December 24, 1987 for the period commencing on 1.1.1983 and ending on 31.12.1983. He rejected the claim for refund, applying the doctrine of unjust enrichment.

Thereupon, the assessee-company filed a writ petition challenging the decision of the Assistant Sales Tax Officer, the contention of the assessee was that the assessment orders should be set aside and it was entitled to the refund of the tax paid under mistake of law and collected by the State without the authority of law. On behalf of the State, however, it was contended that the products were not "drugs and medicines" and as such no question of refund of tax paid did arise. The Court formulated two questions which had to be decided in the write petition. The questions were:

"(a) whether the products manufactured by the petitioners and listed in the paragraph 2 and 4 of the petition are 'drugs and medicines within the purview of the aforesaid Notification No. 14/41/81-Fin (R & C) and NO. 5/5/87 (R&C)-8 and

(b) Whether the petitioners are entitled to the refund sought"

After a long discussion about the nature of the products of the assessee-company and after referring to Pharmaceutical Codex incorporating the British Pharmaceutical Codex, the meaning given to "drugs and medicines' in Drugs and Cosmetics Act and also to the under standing of the phrase "drugs and medicines" by the excise authorities, and several affidavits filed on behalf of the assessee, the High Court came to the decision that the products manufactured by the assessee-company had to be treated as "drugs and medicines" and the writ petition was entitled to succeed.

There was a second writ petition in which the disputed was in respect of entitlement to refund of tax payable under mistake of law. Following the decision in the first writ petition, the second writ petition was also decided in favour of the assessee-company with some modifications.

The State has come up in appeal. We have heard the case in extenso. The dispute basically centres around the contention of the assesse that its products like Zinc Oxide Adhesive Plaster B.P.C. (Leukoplast), Surgical Wound Dressing (Handyplast); Balladona Plaster B.P.C.; Capsicum Plaster B.P.C. and Cotton Crape Bandages B.P.C. (Leukocrapes) can be treated as "drugs and medicines". The assessee's contention that it has got a licence to manufacture these products under the Drugs and Cosmetics Act and its production is controlled at every stage by the Drug Control authorities does not conclude the matter. The Question is how these terms are understood by people generally? For example, can a bandage be treated as a drug or a medicine? Will the position be different if the bandage is medicated? These question cannot be decided by reference to any definition of the Drugs and Cosmetics Act or product control licence issued by the Drug Controller. There is no definition given in the local sales Tax Act or in the Central Sales Tax Act of these terms. It has to be found out how these products are understood and treated in the market. In the ordinary commercial sense, are these articles considered as drugs or medicines? These are basically questions of fact.

In fact, the difficulty of defining what is drug and medicine was discussed in the case of Customs and Excise Commissioner v. Beecham Food Ltd. (1972) 1 W.L.R. 241 (H.L.) where the question was where Ribena blackcurrant juice B.P.C. could be treated as drug or medicine. The plantiff's case was theat this product consisted of syrup of blackcurrant made in accordance with the British Pharmaceutical Codex and containing some natural vitamin C and a syrup made in accordance with the British Pharmacopoeia and synthesised vitamin C. It has a prophylactic function when taken by those who need vitamin C. It was sold and advertised on the basis of that function. The plantiffs sought a declaration that Ribena was a "drug or medicine" and was entitled to the benefit of exemption from Purchase Tax Act, 1936. It was held by the House of Lords that Ribena could not be treated as a drug or medicine. It coming to this decision certain in mind.

Lord Reid pointed out that in the Purchase Tax Act, "Medicine" had not been defined. so it had to be under stood as a ordinary word of English language. Lord Reid observed:

> "At with so many English nouns there is no clear limit to the denotation of the word medicine. All the circumstances must be considered and there may be cases where it is extremely difficult to decide whether or not the term medicine is properly

> applicable. But here I think that, however one approaches the matter, it would be a misuse of Language to call Ribena a medicine and I would therefore allow the appeal"

Lord Morris who delivered a dissenting judgment tried to define the term "medicine" in the following manner:

> "What then is medicine? the learned judge (1969) 1 W.L.R. 1518, 1827 pointed to a dictionary definition of medicine (when used in a sense other than a substance (when used in a sense other than a substance) as: "The science and art concerned with the cure, alleviation, and prevention of disease, and with the restoration and preservation of health." In line with the learned judge I think that a fair approach is to regard a medicine as a medicament which is used to cure or to alleviate or to prevent disease or to restore health or to preserve health."

Lord Wilberforce, who agreed with Lord Reid, pointed out that the fact that t drug was present in something did not convert that preparation as a whole into a drug. Merely because Vitamin C. was present in Ribena, it did not become a drug.

In our view, whether the products manufactured by the assessee can be treated as "drugs or medicine" cannot be answered straightway. The medicinal content of the products, if any, has to be ascertained. Its curative function has to be found out. Can the product be called a medicament at all ? Is it used to cure or alleviate or to prevent disease or to restore health or to preserve health? Are these products treated as drugs of medicines in common parlance? These are basically questions of fact. These was no reason for the assessee-company to bypass the statutory remedy and come to the Court with a writ petition. These questions basically of fact should be agitated before the statutory appellate authority.

In the case of Titaghur Paper Mill Co. Ltd. and another v. State of Orissa and another, (1983(142 ITR 663, a Bench of three Judges of this Court pointed out the inadvisability of entertaining a writ petition questioning a sale tax assessment. This Court held:-

> "Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained or. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s.
>
> (1) of s. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal. They can prefer a further appeal to the Tribunal under sub-s. (3) of s. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under s. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution."

We are of the view that the assessee should not have been allowed to bypass the statutory remedies where questions of fact could have been properly agitated and ascertained.

The appeal, therefore, is allowed. The impugned order of the High Court is set aside.

The assessee-company will be at liberty to prefer appeal against the assessment order in accordance with law within a period of six weeks from date. If such appeal is preferred within the said period of six weeks, the appellate authority will entertain the appeal without raising any question of limitation. all the question of fact and law are left to be decided by the appellate authority.

There will be no order as to costs.

CIVIL APPEALS NOS. 2462-63 OF 1988 In view of our decision in Civil Appeal NO. 2461 of 1988, the above Appeals are also allowed. There will be no order as to costs.