Commissioner Of Central Excise, ... vs Sharma Chemical Works on 30 April, 2003

Equivalent citations: AIR 2003 SUPREME COURT 2448, 2003 (5) SCC 60, 2003 AIR SCW 2464, 2003 (4) SCALE 437, 2003 (5) ACE 227, (2003) 3 SCR 1027 (SC), (2003) 9 ALLINDCAS 277 (SC), 2003 (3) SLT 406, (2003) 132 STC 251, (2003) 3 SUPREME 634, (2003) 4 SCALE 437, (2003) 108 ECR 481, (2003) 154 ELT 328

Author: Brijesh Kumar

Bench: Brijesh Kumar

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           CASE NO.:
Appeal (civil)  7610 of 1999

PETITIONER:
COMMISSIONER OF CENTRAL EXCISE, CALCUTTA

RESPONDENT:
SHARMA CHEMICAL WORKS

DATE OF JUDGMENT: 30/04/2003

BENCH:
S.N. VAR1AVA & BRIJESH KUMAR

JUDGMENT:
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JUDGMENT 2003 (3) SCR 1027 The Judgment of the Court was delivered by VARIAVA, J. In all these Appeals facts are common and the question of law is common. Therefore, all are being disposed of by this common judgment, in all these Appeals the question is whether "Banphool Oil" is classifiable as a "perfumed hair oil" or as an "Ayurvedic Medicament". It must be mentioned that prior to 28th January, 1986, the question was whether "Banphool Oil"

> could be classified under Tariff Item 68 i.e. "Ayurvedic Medicament" or under Tariff Item 14F(ii) i.e. "Perfumed Hair Oil". After this date, the question is whether it falls under Tariff Item 3305.10 i.e. "perfumed hair oil" or 3003.30 i.e. "Ayurvedic Medicament". Civil Appeal No. 7610 of 1999 is against the judgment dated 24th June, 1999 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). In this case the Judicial Member took the view that Banphool Oil was classifiable as an Ayurvedic medicament whereas the Technical Member took the view that it was classifiable as a perfumed hair oil. In view of this difference, the matter was referred to a third Member who has agreed with the Judicial Member and held that Banphool

Oil is classifiable as an Ayurvedic Medicament. Thus by majority, CEGAT has held that Banphool Oil is classifiable as an Ayurvedic Medicament under Tariff Item 3003.30.

Civil Appeals Nos. 283-284 of 2001 are against judgment of CEGAT dated 3rd April, 2000. Civil Appeal No. 2640 of 2001 is against the judgment of CEGAT dated 27th July, 2000 and Civil Appeals Nos. 707-709/2003 are against the judgment of CEGAT dated 26th February, 2003. In all these matters CEGAT has followed the majority judgment dated 24th June, 1999 and held that Banphool Oil is classifiable as an Ayurvedic Medicament.

Learned Additional Solicitor General, Mr. Raju Ramachandran pointed out that the Respondent in Civil Appeal No. 7610 of 1999 had initially classified Banphool Oil as a toilet preparation. He points out that this initial classification was sought to be revised as an Ayurvedic Medicament. He submitted that this showed that even the Respondent considered their product to be a toilet preparation. He submitted that it is an admitted position that 98% of Banphool Oil consists of "til oil" and the remaining 2% are ayurvedic ingredients like amla, chandan, camphor etc. He submitted that in order to suppress the strong smell of til oil, perfumery is added:

He further submitted that the cartons and labels of Banphool oil show that it is a perfumed hair oil. He submitted that it is an admitted position that Bhanpool Oil is sold across the counter and stored not just by chemists but even by ordinary grocers. He submitted that there is no evidence led in any of the matters to show that the common man uses this oil as a medicine.

Reliance is placed upon the case of Shree Baidyanath Ayurved Bhavan Ltd. v. Collector of Central Excise, Nagpur reported in 1996 (83) ELT 492 (SC), Where the question was whether "Dant Manjan Lai" was an Ayurvedic Medicament or not. This Court approved the findings of the Tribunal that in interpreting statute like the Excise Act, the primary object of which is to raise revenue for which purpose various products are differently classified, resort should not be had to the scientific and technical meanings but to their popular meaning. It was held that Courts have to see what the persons who use the product understand that product to be. It was held that generally medicines are prescribed by medical practitioners and used for a limited time and not every day. It was held that as the product was not sold under a medical prescription it was not an Ayurvedic Medicament.

Reliance was also placed in the case of Alpine Industries v. Collector of Central Excise, New Delhi reported in [2003] 3 SCC 111. In this case the question was whether "Lip Salve" could be classifiable as a preparation for care of skin or as a medicament. Admittedly the product was mainly supplied to the Defence Department for use by military personnel who are posted in high altitude areas. The Court approved the principle laid down in Shri Baidyanath Ayurved Bhawan 's case supra

that in interpreting provisions of statute like the Excise Act the popular meaning as understood by the users should be applied and not the scientific or technical meaning. It was held that in deciding under which Entry a product would fall, help could be taken from the Chapter Notes.

Reliance was also placed upon the decision of the Sales Tax Tribunal in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore v. Shri Sadhna Aushadhalaya reported in Sales Tax Cases 1963 Vol. 14 page 813. In this case the question was whether Maha Bhringraj hair oil was a toilet article or a medicinal preparation. The Tribunal held as follows:

"It is a common ground that if the hair-oil manufactured and sold by the assessee does not fall under the above entry, then it is not covered by any other entry in Schedule I or II. The question, therefore, that arises for determination is whether Maha Bhringraj Hair-oil is an article falling under entry No. II. The assessee's argument which prevailed with the Board of Revenue, is that the hair-oil manufactured by them is not a "toilet article" but a "medicinal preparation" inasmuch as the oil is prepared and manufactured according to a certain formula given in Ayurvedic medicinal book, that it has a bad odour, and that it is a specific for headache, burning of eyes, and for preventing falling hair. In our opinion, there can be little doubt that the oil in question is a "toilet article" as well a "cosmetic". The question whether an oil, which is to be applied to the hair, is or is not a "cosmetic" or a "toilet article" does not depend on its fragrance or on the formula according to which it is manufactured. A hair-oil is clearly not a pure and simple perfume, and the question whether it has a sweet fragrance or a disagreeable odour is in no way determinative of its character as a hair-oil. Every hair-oil whether it is manufactured scientifically with ingredients containing some medicinal properties or crudely, is intended and for beautifying ultimately the hair and the appearance of the person using it. A hair oil may cool the brain or improve the system and induce sound sleep, but none the less it does not because of these qualities become a medicial preparation. Now the word "cosmetic" has been defined in Webster's International Dictionary as meaning "any external application intended to beautify and improve the complexion, skin or hair."

Other dictionaries also give the same meaning. The meaning of the word "toliet", as given in Webster's International Dictionary, is "act or process of dressing, especially, formerly of dressing hair, now usually cleansing and grooming of one's person". A "toilet preparation" is any preparation which is intended to affect, and conceivably to improve the bodily appearance. The words "cosmetics" and "toilet", being words of everyday use, must be construed not in any technical or scientific sense, but as understood in common parlance and in commercial language. A hair-oil intended to be applied to the hair and supposed to act as a hair-tonic and to prevent dandruff, failing hair and baldness and to cool the brain does not cease to be a hair-oil merely because it is manufactured and sold by a person dealing in medicines and according to a process more complex than used in the manufacture of ordinary hair-oil. The object of all hair-oils is to tidy the hair, to

promote luxuriant growth of hair-and to prevent dandruff and falling hair and it cannot be denied that if a hair-oil produces the effects proclaimed and claimed in regard to it, then the appearance of the person using it is undoubtedly improved. We have no doubt that the hair-oil manufactured by the assessee is a "toliet article" and falls also within the meaning of the term "cosmetics."

Based on the above decisions, the learned Additional Solicitior General, Mr. Raju Ramachandran submitted that the product Banphool Oil is clearly classifiable as a perfumed hair oil under Tariff Item 3305.10 and not as an Ayurvedic medicament under Tariff Item No. 3003.30. He also referred to Chapter Note l(d) to chapter 30 which provides that preparation under Chapter 33 even if they have therapeutic or prophylactic properties would not fall under pharmaceutical products but would remain as toilet preparations.

On the other hand Mr. Lakshmikumaran submitted that Chapter 30 dealt with all types of medicines. In support of this submission he pointed out various Tariff Entries under this Chapter. He submitted that medicaments could be patented or proprietary medicaments or even medicaments which are not patented or proprietary. He submitted that medicaments could be as per the formula set out in various pharmacopoeias or they could be under some patented formula of a particular party. He submitted that the ingredients having medicinal properties would necessarily be of a very small percentage in the medical preparation. He submitted that if the percentage was large it could be harmful to the human body. He submitted that as a general rule the medical ingredients would necessarily have to be mixed with fillers/vehicles in order to make that medicament palatable and/or usable. By way of an example, he submitted that Vicks Vaporub contained 98% Parafin Wax whereas the medicament i.e. menthol is only 2%. He submitted that merely because the filler/vehicle was of a large percentage did not ipso facto mean that the product was not a medicament. He submitted that, in any event, every single ingredient in Banphool Oil was contained in various pharmacopoeias and text books which deals with Ayurvedic medicines. He pointed out that in Bhavaprakash til oil is mentioned as an Ayurvedic ingredient.

Mr. Lakshmikumaran also referred to Board Circular dated 5th December, 1991 wherein it has ben directed that if there is any doubt or dispute regarding classification of a product whether it is an Ayurvedic medicament the matter should be referred to the State Drug Licencing Authority concerned with Ayurveda and that if a further reference is necessary then it should be sent to the Advisor, Ayurveda/Sub Commissioner in the Office of the Drug Controller India, Director General of Health Services, New Delhi. Mr. Lakshmikumaran pointed out that in fact a reference had been made to the Drug Controller. He pointed out that the Drug Controller by a letter dated 13th May, 1985 had opined as follows:

> "Banphool oil is an Ayurvedic preparation. Therefore 1 think that there is sufficient force in the argument of the party to claim its classification under erstwhile T.I. 68 as Ayurvedic preparation."

Mr. Lakshmikumaran further pointed out that for manufacture of Banphool Oil the respondent had a drug licence issued to them and that the product was being manufactured under such licence. He submitted that the burden of proving that the product was not an Ayurvedic medicament and/ or

that the common man did not understand this product as a medicament was on the revenue. In support of his submission he relied upon the case of Hindustan Ferodo Ltd. v. Collector of Central Excise Bombay reported in 1997 (89) ELT 16 (SC) wherein this Court has held that the onus of establishing that a product falls within a particular item is on the revenue. It has been held that if the revenue leads no evidence, then the onus is not discharged. He submitted that the Department had not made any enquiry in order to produce any evidence to show that in common parlance this product was not a medicament. He submitted that the label of the product lays down the dosage to be used for purposes of curing an ailment. He submitted that Chapter Note l(d) could be of no assistance to the revenue as they would first have to show that the good was classifiable under Chapter 33. He relied upon Chapter Note 2 and 6 of Chapter 33 which read as follows:

> "2. Heading Nos. 33.03 to 33.07 apply, inter alia, the products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings with tables, literature or other indications that they are for use as cosmetics or toilet preparations or put up in a form clearly specialized to such use and includes products whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value.
>
> Heading No. 33.05 applies, inter alia, to the following products' brilantines perfumed hair oils, hair lotions, pomades and creams, hair dyes (in whatever form) shampoos, whether or not containing soap or organic surface active agents."

He submitted that admittedly Banphool Oil would not fall into any of the categories set out therein. He further submitted that Tariff Item 33.05 was in respect of preparations for use on the hair. He submitted that Banphool Oil was not for use on the hair as it was a preparation for use on the head.

Mr. Lakshmikumaran relied upon the case of B.B.L Pharmaceuticals Ltd. v. Collector of Central Excise Vadodara reported in [1995] Supp 3 SCC 1. In this case the question was whether the product "Selsun" was a medicament or a toilet preparation. This Court held as follows:

> "24. Elaborating the above submissions, the learned counsel for the respondents invited our attention to chapter notes of. Chapter 30 and Chapter 33 and also the rules of interpretation. According to the learned counsel a careful reading of chapter notes of Chapter 30 would show that preparations of Chapter 33 even if they have therapeutic or prophylactic properties would not fall under Chapter 30. However, he fairly admitted that 'medicaments' are those that have therapeutic or prophylactic uses nevertheless those medicaments, if they are classifiable under Chapter 33 or Chapter 34 will not fall under Chapter 30, according to him, if they are more specifically preparation falling under Chapter 33 or Chapter 34. In other words, he wanted to equate the product in question to 'shampoo' enumerated under Heading No. 33.05. He also invited our attention to the fact that the appellants before the coming into force of the new Tariff Act described the product as shampoo and they have omitted the word 'shampoo deliberately only to claim that the product would

fall under Chapter 30.

25. We do not think we can accept all the contentions of the learned counsel for the respondents except certain obvious admitted positions. The submission that the product in question must be equated to shampoo falling under Chapter 33 is not at all correct.

26. It is true that the learned counsel for the appellants have placed reliance on the definition of the words "cosmetic and drug" as defined in the Drugs and Cosmetics Act, 1940. On a perusal of the definitions, we can broadly distinguish cosmetic and drug as follows:

"A 'cosmetic" means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance and includes any article intended for use as a component of cosmetic."

and "A 'drug' includes all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment mitigation or prevention of any disease or disorder in human beings or including preparation applied on human body for the purpose of repelling insects."

27. We cannot ignore the above broad classification while considering the character of the product in question. Certainly the product in question is not intended for cleansing beautifying promoting attractiveness or altering appearances. On the other hand it is intended to cure certain disease as mentioned supra.

28. The fact that the appellants have previously described the product as "Selsun Shampoo" will not conclude the controversy when the true nature of the product falls for determination. In fact, notwithstanding the fact that the appellants have described the product as Selsun Shampoo, the Central Board of Excise and Customs, as noticed earlier, has classified the same as patent and proprietary medicine. The respondent have accepted the same. Therefore, there is no force in the submission of the learned counsel for the respondents that the product must be equated with shampoo.

29. The contention based on chapter notes is also not correct. Once of the reasons given by the authorities below for holding that Selsun would fall under Chapter 33 was that having regard to the composition, the product will come within the purview of Note 2 to Chapter 33 of the Schedule to Central Excise Tariff Act, 1985 is without substance. According to the authorities the product contains only subsidiary pharmaceutical value and, therefore, notwithstanding the product having a medicinal value will fall under Chapter 33. We have already set out Note 2 to Chapter 33. In order to attract Note 2 to Chapter 33 the product must first be a cosmetic, that the product should be suitable for use as goods under Heading Nos. 33.03 to 33.08 and they must be put in packing as lables, literature and other indications showing that they are for use as cosmetic or toilet preparations.

Contrary to the above in the present case none of the requirements are fulfilled. Therefore, Notes 2 to Chapter 33 is not attracted. Again it is without substance the reason give by the authorities that the product contains 2.5% w/v of Selenium Sulfide which is only of a subsidiary curative or prophylatic value. The position is that therapeutic quantity permitted as per technical reference including US Pharmacopoeia is 2.5%. Anything in excess is likely to harm or result in adverse effect. Once the therapeutic quantity of the ingredient used, is accepted, thereafter it is not possible to hold that the constituent is subsidiary. The important factor is that this constituent (Selenium Sulfide) is the main ingredient and is the only active ingredient.

30. As rightly contended by the learned Senior Counsel for the appellants that merely because there is some difference in the tariff entries, the product will not change its character. Something more is required for changing the classification especially when the product remains the same. We have noticed that the Excise authorities have accepted the decision of the Central Board of Excise and Customs treating the product in question as patent and proprietary medicine by not challenging the same or by allowing the same to become final. We have also seen that the Central Board of Excise and Customs has given numerous points in support of its conclusion for holding the product in question as patent and proprietary medicine. Principle among them at the risk of repetition can be recalled. They are as follows.

> "(a) It was used for the treatment of a disease known as Seborthoeic Dermatitis commonly known as dandruff:
>
> (b) It was manufactured under a Drug licence.
>
> (c) The Food and Drugs Administrative had certified it as a drug.
>
> (d) That the Drug Controller had categorically opined that Selenium Sulfide present in Selsun was in a therapeutic concentration.
>
> (f) It was included as a drug in the National Formulary, US Pharmacopoiea and the Merck Index.
>
> (g) It fulfilled the requirements of a drug as understood in common parlance.
>
> (h) Selenium Sulfide was sold only on medical prescription and used as a medicine.
>
> (i) Selsun was not a medicated shampoo, which was recommended as conditioners with subsidiary medicinal effect. Selsun was on the contrary being recommended by physicians.
>
> (J) Various standard books and treatises such as (i) The Pharmacological Basis of Therapeuticus by Goodman and Gilman (ii) Harry's Cosmeticology referred to Selsun as a drug.

(k) It was being marketed as a patent or proprietary medicine through registered phamacists who hold valid drug licence, and not by any dealer, like other shampoos.

(1) Abbott's literature referred to it as a drug and such literature was addressed to physicians, also the label on the container mentioned that the product was to be used as directed by physicians.

(m) Affidavits of leading doctors established that Selsun was being manufactured for use as a drug.

(n) That the Excise Department had made inquires from the trade and found that other shampoos like Clinic, Tara, Halo etc. were much cheaper and that their advertisement campaigns were to leave the hair silky, soft and healthy' whereas Selsun was not so advertised. On the contrary there are precautions in use mentioned."

31. The above conclusions of the Central Board of Excise and Customs were reached on the basis of materials produced before it. The same materials are also placed before us and we have gone through them. We find no good reason to differ from the above conclusion of the Central Board of Excise and Customs especially in the absence of any other materials produced by the respondents to persuade us to take a different view. Certain contrary findings of the authorities below such as that 'Selsun' is only a medicated shampoo without any accepted supporting materials cannot be sustained."

Mr. Lakshmikumaran submitted that all the above criteria are fulfilled in respect of Banphool Oil also. He submitted that merely because a product was available across the counter did not mean that it is not a medicament. He pointed out that various products like Vicks, Strepsils, Mediker are available across the counters and even available in grocers shops. He submitted that a medicament may be prescribed by a Doctor but could also be available without a Doctor's prescription. He submitted that dosage would be indicated on the label only in respect of medicaments. In support of his submission, he relied upon the case of Collector of Central Excise v. Pharmasia (P.) Ltd. reported in 1990 (47) ELT 658 (Tribunal), wherein it has been held that mediker is classifiable under Tariff Item 33.03 as an Ayurvedic medicament. He also relies upon the case of Amrutanjan Ltd. v. Collector of Central Excise reported in [1996] 9 SCC 413, wherein the question was whether Amrutanjan Pain Balm was an Ayurvedic medicament. It was held that merely because the ingredients were known not only to Ayurveda but to the western science, would not make the balm non-Ayurvedic.

We have heard the parties and considered the submissions made by them. We have also read the opinion of the majority Bench and the minority opinion of the Technical Member. It is a settled law that the onus or burden to show that a product fall within a particular Tariff Item is always on the revenue. Mere fact that a product is sold across the counters and not under a Doctors prescription does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr. Lakshmikumaran that merely because the percentage of medicament in a

product is less does not ipso facto mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It could not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda text Books. Of course the formula may not be as per the text books but a medicament can also be under a patented or proprietary formula. The main criteria for determining classification is normally the use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as an hair oil was on the revenue. This burden is not discharged as no such proof is adduced. On the contrary we find that the oil can be used for treatment of headache, eye problem, night blindness reeling head weak memory, hysteria amnesia blood pressure, insomnia etc. The dosages required are also set out on the label. The product is registered with Drug Controller and is being manufactured under a drug licence.

Another aspect to be kept in mind is that the revenue is bound by the circulars issue by the Board. The Board circular dated 5th December, 1991 clearly stipulates that in case of doubt the matter should be referred to the Drug Controller. The matter was referred to the Drug controller who, as stated above, has opined that it is an Ayurvedic medicament. If the department was still entertaining any doubts they could have referred the matter to the Adviser, Ayurveda/Sub-Commissioner in the Office of Drug Controller, Director General of Health Services New Delhi. This was not done.

For the above reasons, we are in agreement with the majority opinion of the Tribunal that the Banphool Oil is classifiable as an Ayurvedic medicament under Tariff Item 3003.30. In this view of the matter, we see no infirmity in the impugned judgments. The Appeals accordingly stand dismissed. There shall be no order as to costs.