REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8656 OF 2015
(@ S.L.P. (C) No. 21106 of 2014)

State of Madhya Pradesh **Appellant (s)**

VERSUS

Marico Industries Ltd **Respondent(s)**

J U D G M E N T

Dipak Misra, J.

In this appeal, by special leave, the State of Madhya Pradesh and its functionaries have called in question the legal acceptability of the judgment and order dated 19.08.2013 passed by the Division Bench of High Court of Madhya Pradesh, Indore Bench in W.P. No. 1198 of 2004 whereby the order dated 05.01.2004 passed by the Additional Commissioner, Commercial Tax in Review case No.80/03/Ind/Entry Tax imposing entry tax on the products, namely, Mediker and Starch (Revive) after declining to entertain the stance of the assessee that "Mediker" being a drug Starch

(Revive) being not a chemical, are not liable to levy of entry tax under the Madhya Pradesh Entry Tax Act, 1976, (for short "the E.T. Act"), has been dislodged and both the products have been held not to be within the ambit of entry tax.

2. The facts giving rise to the present appeal are the respondent is a manufacturer of hair oil, edible oil, Mediker and Starch (Revive) and other products and is a registered dealer under the Madhya Pradesh Commercial Tax Act, 1994, as well as a dealer under the E.T. Act. The Assistant Commissioner, Commissioner Tax Division II, Indore vide order dated 28.04.2003 imposed entry tax on Mediker treating it as a hair shampoo and "Revive Instant Starch" as a chemical; and as the tax was not paid, interest and penalty were also levied. Being grieved by the aforesaid order the respondent-company preferred Review case No. 80/2003 before the Additional Commissioner, Commercial Tax, Indore. It was contended before the said authority that the entry tax imposed on the assessee on Mediker, which is meant for anti-lice treatment, was illegal being not permissible under any of the entries mentioned in Schedule II of the E.T. Act and there was no material on record to treat starch as a chemical. It was also

urged that Mediker is a medicine and hence, it did not attract entry tax. The said submissions were repelled and tax was imposed and on that basis penalty and interest were also levied. Aggrieved by the order passed by the Additional Commissioner, Commercial Tax, Indore, the assessee approached the High Court in Writ Petition No. 1198 of 2004 and the Division Bench referring to the charging Section and the Entries, came to hold that Mediker is basically a medicinal product and starch being not meant for sale but used in production of other articles, could not have been made amenable to entry tax, more so, in the absence of its mention in the Schedule. It was also held that starch is not a chemical.

3. Criticising the order passed by the High Court, Mr. C.D. Singh, learned counsel appearing for the State would contend that Mediker, in common parlance, is considered as shampoo and not as a medicine because it is nowhere mentioned in the label of the product that after removal of the lice, it cannot be used again or cannot be used as other shampoos for hair wash. Relying on the decision in ***Deputy Commissioner v. G.S. Pai***[1] learned counsel for the State would contend that while

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(1980) 1 SCC 142

interpreting entries in sales tax legislation, it is to be borne in mind that the words used in the entries must not be construed in any technical sense nor from a scientific point of view. They should be understood in their popular sense and in the sense which the people conversant with the subject matter with which the statute is dealing, would attribute to it. For the said purpose, learned counsel has also drawn inspiration from ***United Offset Process Pvt. Ltd. v. Asst. Collector of Customs, Bombay & Ors***[2]**.** Submission of Mr. Singh is that just because the product contains D-Phenothrin EP and is used for treating lice, it cannot be termed as medicament in view of the principles stated in ***Sunny Industries Pvt. Ltd. v. Collector of Central Excise, Calcutta***[3]. According to the learned counsel for the State, Mediker is a kind of shampoo and hence, it is covered under Schedule II of the E.T. Act which incorporates the heading "shampoo of all variant and forms". As far as the Revive starch is concerned, it is urged by Mr. Singh that it is a chemical covered by Entry 55 of Schedule II and consequently it is chargeable to entry tax.

2 (1989) Supp. 1 SCC 131
3 (2003) 4 SCC 280

4. Mr. Bagaria, learned senior counsel appearing for the assessee, in his turn, would argue that Mediker is a product meant for curing hair lice infection in hairs and the product is marketed as "Mediker anti-lice treatment". It is urged by him that Mediker anti-lice treatment is manufactured after obtaining the drug licence under the Drugs and Cosmetics Act, 1940 (for short, "the 1940 Act") wherein it has been classified as a drug falling under Section 3(b) of the 1940 Act. It is contended by him that that "Mediker anti-lice treatment" satisfies the definition of the drug and after due scrutiny, the drug control authorities have granted licence for the said product as a drug. Mr. Bagaria would submit that period of treatment is four weeks and shampooing is only a method to apply the medicine. In essence, the submission of learned senior counsel is that the medium cannot determine the nature of the product. He has commended us to certain authorities of this Court as well as CESTAT which have been approved by this Court to bolster his stand, and we shall refer to them at the appropriate stage. It is canvassed by him that it is the admitted position that drugs are not covered under the E.T. Act and do not find any mention either in the Schedule I or

Schedule II and are not liable to levy of entry tax. Incrementing the submission learned senior counsel would contend that the revenue has charged entry tax under Entry 32 of Schedule II which really relates to different cosmetics, depilatories, etc. and hair shampoo is one of such items, but "Mediker anti-lice treatment" is not a hair shampoo but is a medicine/drug. As far as the Revive instant starch is concerned, learned senior counsel has propounded that starch is manufactured by using the Tapioca roots and even on the packets, it is clearly mentioned Revive instant starch and, therefore, by no stretch of imagination it can be treated as a chemical to be covered under Schedule II of the Act. He has also addressed us with regard to the burden of proof which rests on the revenue when it intends to classify a product differently than that as claimed by the assessee and according to him, it has not been discharged in the case at hand.

5. Section 3 of the E.T. Act deals with incidence of taxation. Section 3(1)(a) reads as follows:-

> "There shall be levied an entry tax:
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> (a) on the entry in the course of business of a dealer of goods specified in Schedule II, into

each local area for consumption, use or sale therein; and

(b) ……."

6. In the case at hand, we are concerned with certain entries in Schedule II. Entry 32 which has been sought to be used to justify the imposition of entry tax on Mediker, reads as follows:-

"Scents, perfumes, hair tonics, hair cream, hair shampoo, depilatories and cosmetics including face creams, snows, lipstics, rougue and nail polish"

7. As noted earlier, submission of Mr. Singh, learned counsel for the revenue is that the Mediker is nothing but a hair shampoo and, therefore, it squarely falls under Entry 32. Learned counsel appearing for the assessee has controverted the same on many an aspect. The High Court, as the impugned order would show, has returned certain findings which are to the effect that Mediker contains active Permethrin which is used to paralyse the insect lice, thereby killing it; that Mediker is basically a medicinal product, since the skin (cuticulam) of the louse is similar to the structure of human nail it has first to be made porous so that the active ingredient can penetrate and enter the louse and paralyse it; that for the purpose of treatment a wetting agent is needed and this

wetting agent is the surface active agent used in Mediker; that the surface agent is nothing but a medium to convey the active ingredient on to the louse; and that the period of treatment is four weeks and the product is not used generally for washing the hair.

8. We shall presently consider the authorities cited at the Bar to appreciate the actual background. In ***G.S. Pai*** (supra), the Court was considering what meaning is to be placed on "Bullion and Specie" in the light of the provisions of the Kerala General Sales Tax Act, 1963. In that context, the Court observed that:-

> "... Now there is one cardinal rule of interpretation which has always to be borne in mind while interpreting entries in sales tax legislation and it is that the words used in the entries must be construed not in any technical sense nor from the scientific point of view but as understood in common parlance. We must give the words used by the legislature their popular-sense meaning "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it". The word "bullion" must, therefore, be interpreted according to ordinary parlance and must be given a meaning which people conversant with this commodity would ascribe to it. Now it is obvious that "bullion" in its popular sense cannot include ornaments or other articles of gold. "Bullion" according to its plain ordinary meaning means gold or silver in the mass. It connotes gold or

> silver regarded as raw material and it may be either in the form of raw gold or silver or ingots or bars of gold or silver. …"

Learned counsel for the State has heavily relied on the said passage. It is well settled in law that ratio of a judgment is to be appreciated in the factual backdrop of the case. In the said case, as we find, the factual background was absolutely different and, therefore, we have no hesitation in holding that the said authority remotely does not assist the revenue for buttressing the contention that Mediker is a shampoo.

9. In ***Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Limited***[4] *[**Shree Baidyanath Ayurved Bhavan Limited-II***] the issue pertained to classification of "Dant Manjan Lal" (DML) manufactured by M/s Baidyanath Ayurved Bhavan Limited. The Court took note of the earlier decision in ***Shree Baidyanath Ayurved Bhavan Ltd. v. CCE***[5] [***Shree Baidyanath Ayurved Bhavan Ltd.-I***] wherein it had been held that DML was not known as an ayurvedic medicine and the finding of the tribunal that DML

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4 (2009) 12 SCC 419

5 (1996) 9 SCC 402

was toilet requisite was upheld. During the pendency of the appeals before this Court, the Central Excise Tariff Act, 1985 was enacted which replaced the Schedule to the Central Excise and Salt Act, 1944. The 1985 Act, as the Court noticed, dealt with pharmaceutical products and there was a Sub-Heading 3003.30 which provided for no excise duty leviable on medicaments, including those used in ayurvedic, unani, siddha, homeopathic or bio-chemic system. The Court also noticed that in 1987 the First Schedule to the 1940 Act was amended and the book *Ayurveda Sara Samgraha* was included therein. On 25.09.1991, the Central Board of Excise and Customs issued a circular in respect of DML and advised its classification as an ayurvedic medicine. But the said circular was withdrawn after the decision in ***Shree Baidyanath Ayurved Bhavan Ltd.-I*** (supra). The assessee approached the Board regard being had to the amendment to decide the classification of the product. Thereafter the dispute arose with regard to the classification. Mr. Singh has drawn our attention to paragraph 46 of the decision in ***Shree Baidyanath Ayurved Bhavan Limited-II*** (supra) to emphasise on the common

parlance test. We think it appropriate to reproduce the entire paragraph:-

> "As a matter of fact, this Court has consistently applied common parlance test as one of the well-recognised tests to find out whether the product falls under Chapter 30 or Chapter 33. In a recent decision in *Puma Ayurvedic Herbal (P) Ltd.* v. *CCE*[6] this Court observed that in order to determine whether a product is a cosmetic or medicament, a twin test (common parlance test being one of them) has found favour with the courts. This is what this Court observed: (SCC pp. 269-70, para 2)
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> "*2.* … In order to determine whether a product is a cosmetic or a medicament a twin test has found favour with the courts. The test has approval of this Court also vide *CCE* v. *Richardson Hindustan Ltd.*[7] There is no dispute about this as even the Revenue accepts that the test is determinative for the issue involved. The tests are:
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> *I.* Whether the item is commonly understood as a medicament which is called the common parlance test. For this test it will have to be seen whether in common parlance the item is accepted as a medicament. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the product is very material. One may buy any of the ordinary soaps available in the market. But if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.

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6 (2006) 3 SCC 266

7 (2004) 9 SCC 156

II. Are the ingredients used in the product mentioned in the authoritative textbooks on ayurveda?"

The two-Judge Bench agreed with the view taken in ***Puma Ayurvedic Herbal (P) Ltd.*** (supra) and applied the common parlance test and accepted the submissions of the revenue.

10. There can be no dispute over the proposition of law laid down in the aforesaid authority. The thrust of the matter is how the courts have treated a particular product for the purpose of classification under the excise law and what status is to be given. The issue of anti-lice treatment arose in ***Collector of Central Excise v. Pharmasia (P) Ltd.***[8]. The tribunal reproduced the label appearing on every bottle of Mediker. The label is reproduced below:-

"Mediker

ANTI-LICE TREATMENT

DIRECTION FOR USE

Shampoo hair with one capful of Mediker, Massage scalp for 3 minutes Rinse, Repeat. This

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8 1990 (47) E.L.T. 658 (Tribunal)

usually eliminates Lice. For best results repeat shampooing 2 days later.

WARNING

The product is toxic if swallowed. Store far from food and drinking water. Keep away from children and pets. If it gets into the eyes wash affected area immediately with clean water

COMPOSITION

D-Phenothrin EP 0.23% W/V

Triclosan E.P. 0.05% W/V base q.s.

MEDIKER is the registered trade mark of Richardson - Vicks Inc.

Manufactured by

PROCTER & GAMBLE INDIA LIMITED BOMBAY 400011

Licenced Users of the Trademark

Contents 45ml Mfg. Lic No. 526/A/AP

Retail price not to exceed Rs. 9.60

(Local Tax extra)

FOR EXTERNAL USE ONLY

MADE IN INDIA

Expiry date 2 years from the date of Mfg. Batch No. 8969 Date of Mfg. 12/88."

11. The tribunal, as the judgment would show, analysed many an aspect and opined that:-

> "17. Considering the arguments advanced before us, we are convinced that a person infested with lice does not get relief by merely washing his or her hair with water or various types of shampoo which are available in the market. The life and habits of the louse seem to call for more drastic steps in orders to get rid of the lice. On the label it is claimed that if the hair is shampooed with Mediker and left for 3 minutes and the process is repeated, lice are eliminated. The label also shows that Madiker consists of D-Phenothrin and other ingredients. The penetrating power of D-Phenothrin whereby it paralyses the lice was established before us during the course of hearing. The label itself immediately after the name of the product (Mediker) mentions "anti-lice treatment". These show that "Mediker" is a special product made for the treatment of lice. The submissions made by the learned Advocate that the anti-lice treatment is not subsidiary to the cosmetic function but is in the main function is borne out by the details given in the label and the explanations placed before us."

12. The tribunal posed a question: Can Mediker cure and prevent a disease? On the basis of material on record, the tribunal came to hold thus:-

> "20. ... Our perusal of these documents shows that the infestation of lice on the head causes several diseases and a product which is to treat such diseases has to be considered to be a medicament. Merck Index of Chemicals and Drugs, Biological, Tenth Edition describes D-phenothrin, its various isomers and its use as insecticides. Extra pharmacopea (Martindale) also mentions phenothrin as being used in drugs as insecticides. In this connection we find that the certificate from the Drug Control Administration, Government of

Andhra Pradesh dated 22-6-1987 is relevant. The following extract supports the case of the respondents :

"As D-phenothrin is used on human body for topical use and has medicinal properties on scalp for antilice treatment as per the Notification from Drugs Controller, India bearing No. 15-95/80-DC, dated 2-1-1982 D-phenothrin is to be considered as a drug under the Drug and Cosmetic Act, 1940."

21. A disease may affect the outside or inside of a person's body. Causes for diseases may vary; these can be micro-macro organism, insects, worms, bacteria, etc. Any preparation containing active ingredients to remove the root causes, whether they are used for internal consumption or external application has to be considered as a medicament. Therefore, we conclude that Mediker is a medicament. We further observe that the medicinal use of the product is not its subsidiary function but is the only function."

Be it noted, the order passed by the tribunal was assailed in Civil Appeal No. 3220 of 1990 and this Court had dismissed the Civil Appeal in ***Collector of Central Excise, Hyderabad v. M/s Pharmsia Pvt. Ltd.***[9]

9 1996 (83) ELT A178 (SC)

13. In ***Sujanil Chemo Industries v. Commissioner of C. Ex. & Cus., Pune***[10] a three-Judge Bench of this Court approved the decision of the tribunal by holding thus:-

> "6. In this case it has fairly not been denied that the only use of the product is for killing lice in human hair. We are unable to accept the submission that killing lice does not amount to a therapeutic or prophylactic use. Any medicine or substance which treats disease or is a palliative or curative is therapeutic. Licel cures the infection or infestation of lice in human hair. It is thus therapeutic. It is also prophylactic inasmuch as it prevents disease which will follow from infestation of lice. Thus, this is a product which is used for therapeutic and prophylactic purposes. It would thus be a Medicament within the meaning of the term "Medicament" in Note 2 of Chapter 30. It therefore gets excluded from Chapter 38.
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> 7. This view has also been taken by us in the case of *ICPA Health Products (P) Ltd. v. Commissioner of C. Ex., Vadodara* reported in 2004 (167) ELT 20. We are also in agreement with the opinion expressed by the Tribunal in *Pharmasia's case* (supra) wherein in respect of an identical product it has been set out that such product would fall under Chapter 30 under Tariff Heading 30.03."

14. In ***Puma Ayurvedic Herbal (P) Ltd.*** (supra) the distinction between "medicament" and "cosmetic" was highlighted in the following words:-

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10 2005 (181) ELT 206 (SC)

> "It will be seen from the above definition of "cosmetic" that the cosmetic products are meant to improve appearance of a person, that is, they enhance beauty, whereas a medicinal product or a medicament is meant to treat some medical condition. It may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. What is to be seen is the primary use of the product. To illustrate, a particular Ayurvedic product may be used for treating baldness. Baldness is a medical problem. By use of the product if a person is able to grow hair on his head, his ailment of baldness is cured and the person's appearance may improve. The product used for the purpose cannot be described as cosmetic simply because it has ultimately led to improvement in the appearance of the person. The primary role of the product was to grow hair on his head and cure his baldness."

15. In ***Commissioner of Central Excise v. Wockhardt Life Sciences Limited***[11] the Court treated the two products, namely, povidone iodine cleansing solution USP and wokadine surgical scrub as medicaments after appreciating the facts that the products are used by the surgeons for the purpose of cleaning or degerming their hands and scrubbing the surface of the skin of the patient before that portion is operated upon. Thereafter the Court observed thus:-

> "The purpose is to prevent the infection or disease. Therefore, the product in question can be safely

11 (2012) 5 SCC 585

> classified as a "medicament" which would fall under Chapter Sub-Heading 3003 which is a specific entry and not under Chapter Sub-Heading 3402.90 which is a residuary entry."

16. The aforesaid analysis makes it absolutely clear that Mediker which is used for anti-lice treatment is a drug because of its medicinal affect. This position has been accepted by this Court. Once it is a drug, it cannot be a shampoo. As a natural corollary, it will not invite the liability of levy of entry tax.

17. The second product is Revive instant starch. The revenue claimed it to be a chemical. An endeavour has been made to put it under Entry 55 Schedule II. Entry 55 Schedule II reads as follows:-

> "55. All kinds of chemicals and acids, sulpher and bleaching power."

18. The stand of the assessee before the authorities was that it is not a chemical. It is not sold or used for that purpose. It is a starch manufactured by using Tapioca roots. The revenue, *per contra*, without any material brought on record, put it in the category of a chemical. In ***Union of India v. Garware***

Nylons Ltd.[12] it has been held that the burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them. Elucidating further, the Court has held that there should be material to enter appropriate finding in that regard and the material may be either oral or documents and it is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Revive instant starch is used while washing the clothes. In common parlance it is not regarded and treated as a chemical or a bleaching powder. If the very substance or product would have a chemical composition, then only it would make the said substance a chemical within the meaning of Entry 55. Needless to say, the purpose and use are to be taken note of. Common parlance test has to be applied. If the revenue desired to establish it as a chemical, it was obligatory on its part to adduce the evidence. As is manifest, no evidence has been brought on record by the revenue that it is a chemical. Therefore, it can safely be concluded that it is not a chemical.

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12 (1996) 10 SCC 413

19. In view of the aforesaid analysis, the inevitable conclusion is that the appeal is devoid of any substance and deserves to be dismissed and, accordingly, we so direct. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
(Dipak Misra)

New Delhi.
July 22, 2016

.....J.
(Prafulla C. Pant)