1980 (2) GLR 424 : 1980 (6) ELT 759

GUJARAT HIGH COURT

Hon'ble Judges:S.H.Sheth and G.T.Nanavati JJ.

Suhrid Geigy Limited Versus Union Of India

Criminal Miscellaneous Application No. 657 of 1977 ; *J.Date :- SEPTEMBER 30, 1980

- CENTRAL EXCISE RULES, 1944 Rule - 8(1)
- CONSTITUTION OF INDIA Article - 14 , 19(1)

Central Excise Rules, 1944 - R. 8(1) - Exemption Notification No. GSR 163(E) - Constitution of India - Art. 14, 19(1)(g) - definition of manufacturer - clear distinction between companies incorporated in India which do not have any capital from a foreigner and which do not have any share in capital of foreign company - petitioner company 'manufacturer' as it does not hold any share in capital of foreign company - company incorporated in Switzerland - it is a foreign company - Art. 19(1)(g) of Constitution of India confers fundamental rights on India Citizens - petitioner not citizen of India - held, Art. 19 not attracted - clinical samples of patent or proprietary medicines granted exemption, if manufactured by Indian company and not by foreign company - no rational nexus between this classification and primary object of serving patients - Clause (a) in explanation found ultra vires of Art. 14 of Constitution of India and Rule 8 of Central Excise Rules.

Cases Referred To :

1. Buddhan Choudary And Others V/s. State Of Bihar, AIR 1955 SC 191
2. Everett Orient Line V/s. Jasjit Singh And Others, AIR 1962 Cal 303
3. Hansraj Gordhandas V/s. H.H.Dave, AIR 1970 SC 755
4. Ishwar Singh Bindra And Others V/s. State Of U.P., AIR 1968 SC 1450
5. Municipal Committee Amritsar And Another Etc. V/s. The State Of Punjab And Others, AIR 1969 SC 1100
6. Pembina Consolidated Silver Mining And Milling Company V/s. Commonwealth Of Pennsylvania, 31 LE 650
7. State Of Madhya Pradesh V/s. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179

Cited in :

1. (Referred To) :- Searle (India)limited Vs. Union Of India, 2002 JX(Guj) 87 : 2002 GLHEL_HC 211086

Equivalent Citation(s):

1980 (2) GLR 424 : 1980 (6) ELT 759
JUDGMENT :-
G.T.NANAVATI and S.H.SHETH JJ.

Shri K. S. Nanavati
Sr. Advocate

1 The petitioner is a company registered under the Companies Act and has its registered office at Ahmedabad. It has been manufacturing medicines. Its pharmaceutical products are liable to pay duty under Item 14E in the First Schedule to the Central Excises and Salt Act, 1944 Under the Act the Central Excise Rules 1944 have been made. Rule 8 which is reproduced below enables the Central Government to exempt excisable goods from the whole or any part of duty leviable on such goods by publishing a notification in the Official Gazette. While exercising power under sub rule (1) of Rule 8 the Central Government can specify conditions subject to which the exemption will be available in respect of excisable goods. It reads as follows:-

> "The Central Government may from time to time by notification in the Official Gazette exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or any part of duty leviable on such goods. Sub-rule (2) of Rule 8 is not relevant for the purpose of the present case.

2 Under sub-rule (1) of Rule 8 the Central Government issued on 1 April 1977 the following notification:- G.S.R. 163 (E). In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules 1944 and in supersession of the notification of the Government of India Ministry of Finance (Department of Revenue) No. 105/61Central Excises dated the 20th April 1961 the Central Government hereby exempts clinical samples cleared by a manufacturer of patent or proprietary medicines being medicines falling under Item No. 14E of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) from the whole of the duty of excise leviable thereon:- Provided that

> (i) such clearances in any month are limited to a quantity not exceeding four per cent by value of the total study paid clearances during the preceding month of all types of patent or proprietary medicines (ii) samples are intended for free supply to hospitals nursing homes or medical practitioners and (iii) the samples are packed in a form distinctly different from regular trade packing and each smallest packing is clearly and conspicuously marked physicians samples not to be sold;
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> Provided further (that) in respect of a patent or proprietary medicine aforesaid the exemption under this notification will be available only for a period of three years from the date of first clearance of the said medicine from any factory of a manufacturer.
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> Explanation:- In this notification manufacturer means
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> (a) where it is a company within the meaning of the Companies Act, 1950 (1 of 1956 a company (i) which does not hold any share in the capital of any foreign company and (ii) no part of the capital of which is held by a foreigner or a foreign company; (b) where it is a firm (i) the first has no interest in any foreign firm; and (ii) no interest in the firm is held by a foreigner or a foreign company; and (c) where it is an individual such individual is not a foreigner. The central excise authorities have refused to the petitioner the benefit of this exemption notification because according to the Central excise authorities the petitioner is not a manufacturer as defined in the Explanation.

3 The petitioner has therefore filed this petition in which Mr. Nanavaty has raised the contentions with which we now proceed to deal.

Shri K. S. Nanavati
Sr. Advocate

4 The first contention which Mr. Nanavaty has raised is that the petitioner is a manufacturer within the meaning of the definition of that expression given in the explanation. The explanation makes it clear that ail manufacturers have been classified under three heads:- (i) companies (ii) firms and (iii) individuals. We are not concerned in this case with the firms or individuals. We are concerned with the definition of a company given in that Explanation because the petitioner is a company. Benefit of the exemption notification has been denied to the petitioner because at the relevant time Ciba Geigy Limited a company incorporated in Switzerland was holding share in the capital of the petitioner company. The petitioner company had not been holding any share in the capital of any foreign company.

5 The question which Mr. Nanavaty has raised for our consideration is whether two sub-clauses of clause (a) in the Explanation are conjunctive or disjunctive. In other words can it be said that in order to be entitled to the benefit of the exemption notification a company not only must not hold share in the capital of any foreign company but that no foreign company should hold share in the capital of the company registered under the Companies Act, 1956 ? Clause (a) in Explanation clearly contemplates companies incorporated in India under the Companies Act, 1956 The petitioner company is one such company. Except those which fall under the exception all companies which are incorporated under the Companies Act, 1956 and which are pharmaceutical manufacturers are entitled to the benefit of the impugned exemption notification. The exception is carved out by two circumstances. If there is a company which holds a share in the capital of a foreign company and in the capital of which a foreign company or a foreigner holds a share it is not a manufacturer for the purposes of the exemption notification. In other words the definition of manufacturer draws a clear distinction between companies incorporated in India which do not have any capital from a foreigner or a foreign company and which do not have any share in the capital of a foreign company. The expression and clearly suggests that both these conditions are required to be satisfied. It appears to us that it is the mutuality of foreign interest or foreign element which excludes a company from the class of manufacturers contemplated by the exemption notification. Therefore if a pharmaceutical company incorporated in India holds a share in the capital of a foreign company but in the capital of which no foreigner or a foreign company holds a share it is a manufacture within the meaning of that expression as defined in clause (a) in the Explanation to the exemption notification. So also a company which is incorporated in India and in the capital of which a foreigner or a foreign company holds a share but which does not hold any share in the capital of any foreign company falls within the meaning of the expression manufacturer as defined in clause (a) in the Explanation to the exemption notification. Therefore if there is a company which is Incorporated in India and to which both the circumstances specified in sub clause (i) and (ii) in clause (a) in the Explanation to the exemption notification are not attracted it cannot be excluded from the class of manufacturers within the meaning of the expression as defined in clause (a) in the Explanation to the exemption notification.

6 In the instant case since the petitioner company did not or does not hold any share in the capital of any foreign company it is the manufacturer within the meaning of that expression as defined in the exemption notification even though a part of its capital was at the relevant time held by a foreign company. In this context we may refer to the two decisions of the Supreme Court which lay down rules of statutory interpretation.

7 The first decision is in Ishwar Singh Bindra and Others V/s. State of U. P. AIR 1968 S.C. 1450. It was a case under the Drugs Act, 1940 The principle which has been laid down is as follows. And generally has a cumulative sense requiring the fulfilment of all the conditions

that it joins together. It is the antithesis of or. However sometimes in order to carry out the intention of the Legislature it may be necessary to read or for and for or.

8 In the instant case it is not necessary to read and disjunctively because the two negative conditions which are joined by the expression and appear to us to suggest the mutuality of foreign element in regard to a Company incorporated in India.

9 The next decision to which our attention has been invited is in Hansraj Gordhandas V/s. H. H. Dave AIR 1970 SC 755. It was a case under the Central Excises and Salt Act, 1944. The question of interpreting a notification issued under that Act arose in that case. The principle which the Supreme Court has laid down is that a notification is to be judged not by the object which the rule making authority had in mind but by the words which it has used in order to effectuate the legislative intent. The Supreme Court has further observed that it is well established that in a taxing statute there is no room for any intendment. The entire matter is governed wholly by the language of the notification. Therefore if the tax payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. We have borne in mind this principle while interpreting the exemption notification with which we are concerned.

10 The next contention which Mr. Nanavaty has raised is that though the exemption notification uses the expression foreign company it does not define that expression. It appears that the Central Excises and Salt Act, 1944 the Central Excise Rules 1944 and the exemption notification do not define that expression. However taking into account the scheme of the Explanation appended to the exemption notification in our opinion a foreign company is a company so called under the Companies Act, 1956. Sec. 591 thereof provides:-

> "Sections 592 to 602 both inclusive shall apply to all foreign companies that is to say companies falling under the following two classes namely (a) companies incorporated outside India which after the commencement of this Act establish a place of business within India; and (b) companies incorporated outside India which have before the commencement of this Act established a place of business within India and continue to have an established place of business within India at the commencement of this Act. Sub-sec. (2) of sec. 591 is not applicable to the instant case. Within the meaning of sub-sec (1) of sec. 591 a company can be said to be a foreign company if inter alia it has a place of business within India. Ciba Geigy Limited is a company incorporated in Switzerland. However in order to be a foreign company within the meaning of sub-sec. (1) of sec. 591 of the Companies Act, 1956 it must have a place of business in India. Mr. Nanavaty has fried to argue that it has no place of business in India a. We could not permit Mr. Nanavaty to raise this question before us because the petitioner has not pleaded in the petition that Ciba Geigy Limited is not a foreign company within the meaning of sub-sec. (1) of sec 591 of the Companies Act, 1955 because it has no place of business in India. Whether it has a place of business in India or not is a question of fact and unless it is pleaded the respondents can not reply to it. Therefore without going into the question whether Ciba Geigy Limited has a place of business in India for the purposes of this case we are of the opinion that since it is incorporated in Switzerland it is a foreign company. In other words in absence of any pleading to the contrary we assume against the petitioner that it has a place of business in India. The second contention which Mr. Nanavaty has raised therefore fails and is rejected.

11 The third contention which Mr. Nanavaty has raised is that the exemption notification goes beyond the scope of Rule 8 of the Central Excise Rules 1944 read with Art. 14. We have quoted sub-rule (1) of Rule 8 hereinabove. The only contention which Mr. Nanavaty has raised is that the expression subject to such conditions as may be specified in the notification connotes a reasonable condition and not any condition whatsoever. There is no doubt about the fact that any condition which the Central Government may specify in an exemption notification issued under Rule 8 must be reasonable and rational in order that it satisfies the constitutionality test under Art. 14. We are required to examine this aspect not only in the context of Rule 8 but also in the context of Arts. 14 and 19 (1) under which clause (a) in the Explanation appended to the exemption notification is being challenged. The argument which Mr. Nanavaty has raised is that the Explanation treats unequals as equals and is therefore unreasonable. According to him therefore it is violative of the petitioners fundamental right under Art. 14 and also under Art. 19 (1)(g). It is difficult to uphold the contention based on Art. 19 (1) (g) because Art. is confers fundamental rights upon the citizens of India. The petitioner which is a public limited company cannot be a citizen of India. That Art. 19 cannot be invoked by any one except a citizen of India is a settled law. We therefore proceed to examine the reasonableness or the rationality of clause (a) in the Explanation appended to the exemption notification in the context of Rule 8 read with Art. 14.

12 Mr. Nanavaty has argued that the exception which clause (a) in the Explanation to the exemption notification carves out does not disclose any intelligible differentia which has rational nexus with the object sought to be achieved. In order to answer this contention it is necessary first to find out whether there is a differentia. A close reading of clause (a) in the Explanation appended to the exemption notification clearly brings out two classes of companies engaged in the manufacture of pharmaceuticals. There may be some which are incorporated in India and which do not hold any share in the capital of a foreign company and no part of whose capital is held by a foreigner or a foreign company. Such companies will be manufacturers within the meaning of that expression given in the exemption notification. There may be other companies which may be holding a share in the capital of a foreign company and in the capital of which foreigner or a foreign company may be holding a share. Distinction has been made by the exemption notification between these two classes of companies even though all of them are incorporated in India under the Companies Act, 1956 or its predecessor Act. Therefore there is no doubt about the fact that there is a differentia which clearly demarcates one set of companies from another set. We may call them for the purpose of this decision wholly indigenous company and companies having foreign element in them. We are required to filed out whether the denial of exemption to the latter class of companies has any rational nexus with the object sought to be achieved. What is the object which the exemption notification seeks to achieve ? It has been pleaded by the petitioners that the object is to encourage the marketability of new patent or proprietary medicines.

13 Mr. H. M. Mehta who appears on behalf of the respondents has asked us not to discern any other object from the exemption notification because the petitioner has not pleaded it. We are unable to accede to this argument raised by Mr. Mehta. In our opinion it is open to a Court of law either to discern from the pleadings the object of a notification or to discern it from the notification itself even if such object as is discernible from the notification has not been pleaded. In order to discern the real object which the exemption notification seeks to serve it is necessary to have a fresh look at the notification itself which we have reproduced in the foregoing parts of this judgment. It exempts only clinical samples of a patent or proprietary medicine which a manufacturer manufactures and which other wise is liable to payment of excise duty. In other words exemption has been granted to the manufacturer from

payment of excise duty in respect of nothing else except clinical samples of its patent or proprietary medicine. This exemption is also subject to certain conditions. The first condition is that the value of such tax free clinical samples shall not exceed in value four percent of the total duty paid clearances made during the preceding month of all types of patent or proprietary medicines. this condition makes it clear that only a very infinitesimally small part of the patent or proprietary medicines which a manufacturer manufactures is exempt from payment of excise duty if it is supplied in the shape of clinical samples. Second condition subject to which exemption is available is that such clinical samples are intended for free supply to hospitals nursing homes and medical practitioners. In our opinion reference to hospitals nursing homes and medical practitioners exhausts the entire medical world. There is none else in the medical world who is left out of the aforesaid three categories. The next condition to which the availability of exemption is subjected is that such clinical samples shall bear a different trade packing and that each smallest packing is clearly conspicuously marked physicians samples not to be sold. This condition clearly demarcates clinical samples from the commercially marketable products belonging to that class. The last condition to which the availability of exemption is subjected is that such exemption shall be available only for a period of three years.

14 Taking into account the conspectous of the scheme which the exemption notification discloses can we say that it is intended to encourage only trade and commerce in patent or proprietary medicines? In our opinion encouragement of trade or business in patent or proprietary medicine is the secondary object of the exemption notification. Its primary object is to enable a manufacturer to supply such clinical samples free of charge to medical practitioners so that they having become known to them are made available to the patients. In order to know what new patent or proprietary medicines are manufactured in the country a medical practitioner will hardly take pains to purchase them which the object of finding out whether they can be prescribed to his patients. It is only when the manufacturer supplies such clinical samples free of charge to a medical practitioner that the medical practitioner tries to find out the utility of such patent or proprietary medicines and prescribes them to his patients who are in need of them. Therefore the primary object which underlies the exemption notification is to made available to the patients new patent or proprietary medicines by making them known to the medical practitioners which objective can be achieved by enabling the manufacturer to supply a certain quantity of their patent or proprietary medicines in the form of free clinical samples to the medical practitioners. Therefore whereas the primary object of the exemption notification is to serve the patients and the ailing humanity its secondary object is to encourage trade and business therein.

15 Now if the primary object of the exemption notification is to render service to the patients by enabling a manufacturer to make his patent or proprietary medicines known to the medical world can we say that such object will be better served by dividing in two classes the mamanufacturers of patent or proprietary medicines the wholly indigenous companies and the companies having foreign clement in them ? On this hypothesis we are unable to see any rational nexus which this classification may have with the primary object to serving the patients in the society. A patient may need as much a new patent or proprietary medicine manufactured by a whole indigenous company as he may need a patent or proprietary medicine manufactured by a company which has foreign element in it. So far as the object of serving the patients is concerned it is difficult to think that this classification has any rational nexus with it. In our opinion therefore the impugned part of the exemption notification does not have any rational nexus with the object which the exemption notification seems to serve and therefore though it makes a differentia between two sets of companies that differentia is

not intelligible. Rule 8 in the context of the present case cannot mean anything different. In our opinion therefore clause (a) in Explanation appended to the exemption notification does not satisfy the rationality test laid down under Art. 14. It is therefore ultra vires Rule 8 of the Central Excise Rules 1944 read with Art. 14.

16 Our attention has been invited by Mr. Nanavaty to the decision of the Supreme Court in Buddhan Choudary and Others V/s. State of Bihar AIR 1955 SC 191 in which the principle which has been laid down in the context of Art. 14 is that while it forbids class legislation it does not forbid reasonable classification for the purpose of legislation. In order to pass the test of permissible classification two conditions must be fulfilled viz. (a) the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (b) the differentia must have a rational relation to the object sought to be achieved by the statute in question.

17 The next contention which has been raised by Mr. Nanavaty is that the exemption notification is vague inasmuch as it does not specify the extent of the share which an Indian incorporated company may hold in the capital of a foreign company or the extent of the share which a foreigner or a foreign company may hold in the capital of an Indian incorporated company. Mr. Nanavaty has in that context posed before us this question how can an Indian incorporated company which holds one per cent of share in the capital of a foreign company and one per cent of whose capital is held by a foreigner or a foreign company be treated equally with an Indian incorporated company which holds 60 per cent share in the capital of a foreign company or 60 per cent of whose capital is held by a foreigner or foreign company. The question which Mr. Nanavaty has raised more pertains to the legislative field than to the judicial field. As clause (a) in the Explanation to the exemption notification stands it excludes from the class of manufacturers companies which may be holding even a very small share in the capital of a foreign company or even a very small sheriff whose capital may be a foreigner or a foreign company. It is the foreign element associated with the Indian incorporated company which distinguishes it from other companies and not the extent of such foreign element. It is difficult for us to come to the conclusion that merely because the impugned exemption notification does not specify the extent of foreign element in an Indian incorporated company that it should be struck down on the ground of vagueness.

18 In Municipal Committee Amritsar and Another etc. V/s. The State of Punjab and Others AIR 1969 SC 1100 the Supreme Court has observed that the rule that an Act of a competent Legislature may be struck down by the Courts on the ground of vagueness is alien to Indian constitutional system. A law may be declared invalid by the Supreme Courts of law if the Legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provisions but it cannot be declared invalid merely on the ground of vagueness. The Courts in India have no authority to declare a statute invalid because it violates the due process of law the rule which American Courts have enunciated and incorporated in the American Constitution. In light of this decision of the Supreme Court we are unable to uphold the contention raised by Mr. Nanavaty as to the vague character of the exemption notification.

19 Lastly Mr. Nanavaty has argued that clause (a) in the Explanation appended to the exemption notification is such that whereas a wholly foreign company which is producing patent or proprietary medicines in India shall be entitled to the exemption under the exemption notification the Indian incorporated companies with foreign element in them shall not be entitled to that benefit. Mr. Nanavaty has read clause (a) in the Explanation to the

exemption notification in a wholly unwarranted manner. Clause (a) defines a manufacturer. Those who satisfy the terms of clause (a) in the Explanation to the exemption notification are so far as companies are concerned manufacturers within the meaning of the exemption notification and all other companies are not manufacturers. Therefore a company which is wholly foreign does not fall within the ambit of the expression manufacturer specified in clause (a) in the Explanation to the exemption notification. We are therefore unable to uphold the last contention raised by Mr. Nanavaty before us.

20 Mr. Mehta has referred to three more decisions. In our opinion they are not apposite or applicable to the facts of the present case. We only note them in this judgment. The first decision is in Pembina Consolidated Silver Mining and Milling Company V/s. Commonwealth of Pennsylvania 31 Lawyers Edition 650. The second is in Everett Orient Line V/s. Jasjit Singh and Others AIR 1962 Cal. 303. The last is in State of Madhya Pradesh V/s. Bhopal Sugar Industries Ltd. AIR 1964 S.C. 1179.

21 In our opinion clause (a) in the Explanation to the exemption notification is severable from the rest of the notification. Striking it down will not render the rest of the notification unworkable. The rest of the notification can stand by itself. To strike down clause (a) in the Explanation to the exemption notification will mean extending the benefit of the exemption notification to all companies which are engaged in the manufacture of patent or prorietary medicines.

22 In the result we allow the petition and declare that clause (a) in Explanation to the exemption notification G. S. R. 163 (E) issued under Central Excises Rules 1944 on 1st April 1977 is ultra vires Art. 14 of the Constitution and Rule 8 of the Central Excise Rules 1944 A writ of mandamus shall issue directing the respondents to desist and forbear from implementing it. Rule is made absolute accordingly with costs.

23 Mr. H. M. Mehta who appears on behalf of the respondents makes an oral application under Art. 133 (1) of the Constitution for a certificate of fitness in order to enable the respondents to appeal to the Supreme Court against this decision. Since we have struck down a part of the exemption notification we think it raises a substantial question of law of all India importance. We therefore grant the respondents the certificate of fitness under Art. 133 (1) of the Constitution. The implementation of the writ issued by us shall be stayed for a fortnight pending interim orders from the Supreme Court in that behalf.

Shri K. S. Nanavati
Sr. Advocate