

BOMBAY HIGH COURT

Rakesh Enterprises

Vs

Union of India

(M Pendse, J.)

12.08.1986

JUDGMENT

M Pendse, J.

1. The petitioner No. 1 is a partnership firm registered under the Indian Partnership Act and carries on business as importers of chemicals. The petitioners placed order for import of "Phenol USP" with Nampoo Trading Company Limited of Japan and the indent was for a total quantity of 26 metric tonnes. The consignment arrived in Bombay on September 8, 1982 and the petitioners had filed five Bills of entries on September 1, 1982 in respect of this consignment. The petitioners claim that Phenol USP is a basic drug or a pharmaceutical or a drug intermediate and in accordance with Notification No. 55/75 dated March 1, 1975 duty of excise is not leviable on the import of Phenol USP. The Assistant Collector of Customs did not accept the claim and levied countervailing duty at the rate of 8% which is the rate specified under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944. The order of assessment passed by the Assistant Collector has given rise to the filing of this petition on September 6, 1982 under Article 226 of the Constitution of India.

2. The point which arises for determination is whether the import of phenol USP is entitled to advantage of Notification No. 55/75 dated March 1, 1975. It is not in dispute that phenol USP is liable to duty under Tariff Item No. 68 of the First Schedule to the Central Excises and Salt Act. The description of the item is "All other goods, not elsewhere specified" and the rate of duty prescribed is 12% ad valorem. The Central Government, in exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 published Notification dated March 1, 1975 prescribing that the goods specified in the Schedule annexed to the Notification are exempt from the whole of the duty of excise leviable thereon. Item No. 19 of the Schedule reads as under :

"All drugs, medicines, pharmaceuticals and drug intermediate not elsewhere specified". The petitioners claim that the import of phenol USP is exempted from whole of

duty of excise and countervailing duty cannot be levied in view of the Notification. The department disputes the claim on the ground that phenol USP is neither a drug, nor a drug intermediate and that dispute is required to be resolved in this petition. The respondents have filed return dated August 11, 1986 sworn by Sunil Kumar, the Assistant Collector of Customs.

3. Dr. Kantawala, learned counsel appearing on behalf of the petitioners, in support of his submission that phenol USP is a drug or a drug intermediate, relied upon diverse material and it is necessary to examine the same. The learned counsel submitted that phenol USP is included in the Indian, British and United States of America Pharmacopoeia. The item 'phenol' is described on page 381 of Pharmacopoeia of India, Volume I, Third Edition, 1985. In 1970 Edition at page 376, it is stated that Phenol is either in liquid or glycerin form. On page 359 of British Pharmacopoeia, 1973, the drug phenol has been described and recites that it is used as antiseptic, preservative and antipruritic. On page 611 of the United States Pharmacopoeia, Twentieth Edition, 1980, drug Phenol has been described and the perusal of the same indicates that Phenol is mixed with the fixed oil, mineral oil, or white petroleum for further usage. Dr. Kantawala submits, and in my judgment, with considerable merit that if phenol is included in Pharmacopoeia of India, Britain and United States of America, there cannot be any manner of doubt that the phenol is a drug or in any event a drug intermediate. The learned counsel also relied upon Certificate dated November 19, 1981 issued by T.S. Shah for URALAB declaring that phenol has been used as a preservative and has been officially categorised as a basic drug and included in the Indian, British and various other Pharmacopoeis. It further recites that phenol is one of the most important raw material employed in the manufacture of intermediates which subsequently are used for manufacturing of many well-known basic/bulk drugs. Another certificate dated November 20, 1981 issued by the Director of Italab Private Limited is relied upon and the said certificate declares that phenol is used in pharmaceutical industries as a component in formulations such as injections, mouth-wash, ear-drugs, etc. It further recites that it is also an intermediate in the manufacture of basic drug such as Aspirin.

4. Dr. Kantawala invited my attention to Circular No. 11/75 dated May 8, 1975 issued by Central Board of Excise and Customs. The circular, inter-alia, mentions that a bulk pharmacepoeial drug, if it contains, single therapeutic agents, which is not in the nature of patent or proprietary medicine at the time of clearance, would not be covered by Item No. 14E itself. It further recites that such bulk drugs would be covered under Item 68, provided, otherwise, classifiable under the said item. The learned counsel submitted that the question as to whether a particular item is a drug intermediate or not was considered by the special Bench of CEGAT and the decision is reported in 1984 (17) Excise Law Times 185, Trichem Laboratories, Bombay V/s. Collector of Customs, Bombay. The Tribunal took the view that there is no such things as a drug intermediate

because all substances having such uses find many more different uses. To demand predominant use, felt the Tribunal, is impracticable because even if there was any substance, there is no guarantee and the position would not change with the advance in science and technology. It was further held that the claim that drug intermediate is a penultimate substance from which a drug is obtained by simple process is too narrow an interpretation for a term carrying wide description. The reliance was placed on this decision to urge that the Department was bound by the view taken by the Tribunal and could not even suggest that phenol USP was not intermediate drug. There is considerable merit in the submission of the learned counsel. In any judgment, from the material brought on record, it must be held that phenol USP is both a drug and a drug intermediate.

5. Shri Rege, learned counsel appearing on behalf of the department, strenuously urged that the advantage of exemption notification is not available unless it is established by the petitioner that the drug or the drug intermediate is actually to be used. According to Shri Rege, it is not enough that the imported material is branded as a drug or a drug intermediate, but in addition, the importer must establish that the imported article was so used. It is impossible to accede to the submission of the learned counsel because it is not permissible to read some additional words in the notification. Item No. 19 of the Schedule makes it clear that if the imported article is drug or drug intermediate, then the import is exempted from levy of countervailing duty. Shri Rege submitted that to determine whether phenol USP is intermediate drug, the Court must refer to the dictionary meaning given in the Condensed Chemical Dictionary, Eighth Edition by Gessner G. Hawley. The expression "intermediate" is set out in this Dictionary at page 471, and inter-alia, states :

"An organic compound, either cyclic (derived from coal tar or petroleum products such as benzene, toluene, naphthalene, etc.) or acyclic (e.g. ethyl and methyl alcohol). These compounds may be considered as chemical stepping stones between the parent substance and the final product".

It is difficult to appreciate what Shri Rege desires to convey by relying upon the dictionary meaning of the word "Intermediate". In my judgment, phenol USP must be treated as a drug because of its inclusion in Pharmacopoeia and as phenol USP can be used as an intermediate for manufacture of drugs, it can also be described as a drug intermediate. In my judgment, on the strength of the material produced by the petitioners, it is impossible to accede to the claim of the department that the petitioners are not entitled to the benefit of exemption notification.

6. Accordingly, petition succeeds and it is declared that the import of phenol USP is not liable for countervailing duty under Section 3 of the Customs Tariff Act. Rule is made absolute in terms of prayer (c)(i). Consequential relief under prayer (c)(ii) is not required to be granted as the consignments are already cleared by interim order passed by this Court. The Bank guarantees

and the bonds furnished by the petitioners in accordance with interim order to stand discharged.
In the circumstances of the case, there will be no order to costs.