

(2006) 07 KL CK 0041

In the High Court Of Kerala

Case No : S.T.R. No"s. 18 and 48 of 2006

Caravan Softies

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 20-07-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Kerala General Sales Tax Act, 1963 — Section 5(1), 5(2), 5(B), 5A, 9

Citation : (2006) 3 KLT 686 : (2006) 148 STC 393

Hon'ble Judges : K.M. Joseph, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : K.I. Mayankutty Mather and Sunil Shanker, for the Appellant;
Georgekutty Mathew, Spl. Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.M.Joseph, J.—Common question arises in these Revision Petitions and therefore, they are disposed of by a common Judgment.

2. The question that is to be decided is whether ice cream manufactured by the petitioner and served to the customers in the petitioner"s Ice Cream Parlour is exempt on the ground that it is cooked food. "Cooked food" falls in Entry 12 of Schedule III of the KGST Act and it is exempt. Entry 12 reads as follows:

12. Cooked food including coffee, tea and like articles served in a hotel, restaurant or any other place not falling under entry 40 of the First Schedule and when the turnover does not exceed Rs. 5 Lakhs." The Appellate Assistant Commissioner as also the Tribunal have found that Ice Cream is not "cooked food". In fact, the finding of the Tribunal is as follows:

...According to the appellant, ice cream is a cooked food and the place where ice cream and fruit juice is supplied is a restaurant and hence they need to pay only the licence fee u/s 5(B) of the KGST Act. The contention of the appellant is that ice cream and fresh fruit juice are beverages served to customers for quenching,

hunger and thirst. However in common parlours, the ice cream, cannot be described as an item intended to quench hunger It is only a refreshment.

S.5B of the KGST Act reads as follows:

5B. Levy of license fee on cooked foods:- Any dealer in cooked food, including beverages sold or served not falling under the entries against serial No. 46 and 60 of the first schedule whose turnover in a year exceeds five lakh rupees, shall pay annual license fee at the rate of five hundred rupees for every one lakh rupees or part thereof in excess of five lakh rupees, in such manner as may be prescribed.

Provided that such dealer shall not be liable to pay tax under Sub-section (1) and (2) of Section 5 and u/s 5A.

Petitioner has taken out a licence thereunder. Petitioner would, therefore, contend that ice cream which is served in the restaurant is exempt and she need pay only the licence fee.

3. The word "cook" is defined in Concise Oxford Dictionary as meaning "prepare food by heating". The process of making ice cream is set out by the petitioner in the Revision Petition as follows:

The main raw materials for ice cream mix are milk, skimmed milk powder, butter, cream, sugar, stabilizers and emulsifiers, colours and essences. Process of mix preparation is by reconstituting the constituents viz. Milk, butter, SMP, cream, sugar and stabilizers and emulsifiers in the correct proportion to form the mix. The mix is then pasteurized by heating to +80 Degree Centigrade and holding it at that temperature for 10 minutes which the mix passes through the homogenizer where the fat in the mix gets dispersed into minute particles. The homogenized mix is then chilled in the chiller after which it is kept in the ageing vats in which the temperature is maintained at approximately +4 Degree Centigrade for about 10 hours. To the aged mix depending on the requirements, colours, essences and flavours are added and agitated for homogeneity. Mix is then poured into soft ice cream machine where it gets churned, expands in volume and comes out as soft ice cream at -6 Degree Centigrade, which is then served in cups and plates to customers on table in the parlour according to their requirements.

4. It is contended on behalf of the petitioner that as could be seen from the process indicated above, heating is one of the process involved in the making of ice cream. Learned counsel for petitioner would also rely on the following decisions:

(1) State of Andhra Pradesh v. Ajanta Cool Drinks (1997) 106 STC 135 SC.

(2) Philips Smith And Ors v. Additional Sales Tax Officer 1984 KLT 483.

In State of Andhra Pradesh v. Ajanta Cool Drinks (1997) 106 STC 135 SC, the question which arose was whether cool drink house and ice cream parlour are

eligible for exemption under a Notification granting exemption to dealers running eating houses, restaurants, and hotels whose total turnover is less than Rs. 2 Lakhs. The Court held as follows:

On a careful consideration of the notification issued in G. O. Ms. No. 1025 supra, we are of the view that the Tribunal is right in granting the benefit of the CO.; firstly, because the meaning of "restaurant" as given in Oxford Concise Dictionary is - a place where meals or refreshments may be had. There can be no doubt that refreshment includes refreshment by taking food or drink. Therefore, a place, where cool drinks including fruit juice and aerated water are supplied and ice cream is served, is within the meaning of restaurant in its extended meaning. And secondly because from a perusal of the G.O., it appears that the intention of the Governor is to grant exemption in favour of such dealers who are running eating houses, hotels, restaurants, etc., whose total turnover per year is less than rupees two lakhs, and if that be so, a dealer running a cool drink house having turnover of less than rupees two lakhs would fall within the benefit of exemption granted by the aforesaid G.O., from payment of sales tax on the turnover. For these reasons, we are of the view that cool drink house, ice cream parlours, etc., do fall within the benefit of exemption granted in G. O. Ms. No. 1025.

We are afraid that it is inapposite on the part of the petitioner to draw any sustenance for deciding the issue involved in this case, the question pointedly arising in these cases being whether ice cream is cooked food.

5. The decision in *Philips Smith and Ors. v. Additional Sales Tax Officer* (1984) 56 STC 142 SC, is a Bench decision of this Court wherein the Court was considering a challenge by bakery owners to the exemption granted u/s 9 of the KGST Act, 1963 in regard to cooked food sold by owners of hotels and restaurants, on the ground that it violates Articles 14 and 19 (1)(g) of the Constitution. The bakery owners sought amendment of the law. Therein, the Court held as follows:

The exemption in Entry 12 of the Third Schedule to the Kerala General Sales Tax Act, 1963, does not depend on who sells the cooked food; it depends on how they are sold. Every seller, whether he be the owner of a bakery or of a hotel is entitled to get the benefit so long as the articles of cooked food are served for immediate consumption and not sold for consumption at some other point of time at the convenience of the purchaser. Even the owners of hotels and restaurants do not get exemption for every kind of sale of cooked food; they can claim exemption only for the cooked food served for immediate consumption. There is therefore no question of discrimination between bakery owners on the one hand, and owners of hotels and restaurants on the other and Article 19(1)(g) of the Constitution is also out of picture, because the exemption has no direct bearing on the business of the person who claims exemption.

We do not see how the said decision can be of any assistance to the petitioner. In fact, if at all, the said decision is against the petitioner.

6. As per the definition of the word "cook" as referred to already, "cooked food" must be treated as food which is prepared by heating. No doubt, learned Counsel for the petitioner referred to the process of making ice cream which we have already adverted to, to contend that in making ice cream, heating is involved. We would, however, consider this contention as misplaced. It may be true that there is some process of heating involved. But, it is not to be classified as "cooked food" merely for the reason that the process of making ice cream involves heating. In fact, the Apex Court considered the question as to whether "biscuit" is to be considered as "cooked food" in its decision in *Annapurna Biscuit Manufacturing Co., Kanpur Vs. Commissioner of Sales Tax, U.P., Lucknow*, . Therein, their Lordships held as follows:

It may be that biscuit is served at tea time and in its wider meaning "cooked food" may include biscuit. But ordinarily biscuit is not understood as cooked food. If a person goes to a hotel or restaurant and asks for some cooked food or *pakaya hua bhojan*, certainly he will not be served with biscuits in Uttar Pradesh. While it is not necessary to state in the present case as to what all items may be called as cooked food, we can definitely say that in the context and background of the notification biscuit cannot be treated as cooked food.

The Court also held that it is a well settled rule of construction that the words used in a law imposing a tax should be construed in the same way in which they are understood in ordinary parlance in the area in which the law is in force. We are of the view that even though in a wider sense "cooked food" may include ice cream, ordinarily it would be difficult to characterise ice cream as "cooked food".

7. By the time, ice cream is made and is served to the customers the fact that there was heating must be relegated to the background. In view of the properties in the final product, it would also not be in consonance with the popular meaning of ice cream in the market, to characterise it as "cooked food". In such circumstances, we are of the view that the view taken by the Tribunal is only to be supported, and consequently the Revision Petitions are dismissed.