

(1991) 03 GUJ CK 0032

In the Gujarat High Court

Case No : Sales Tax Reference No's. 15 and 17 of 1981

Chunilal Mayachand

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-03-1991

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 49, 49(2), 62, 69

Citation : (1991) 03 GUJ CK 0032

Hon'ble Judges : S.D. Shah, J;G.T. Nanavati, J

Bench : Division Bench

Judgement

G.T. Nanavati, J.—The questions which are referred to us by the Gujarat Sales Tax Tribunal u/s 69 of the Gujarat Sales Tax Act, 1969, are as under :

(1) Whether the Tribunal was right in law in holding that "Milkmaid full-cream condensed milk" was not "milk, whole or separated or reconstituted" as appearing in entry 10(i) of Schedule 1 to the Gujarat Sales Tax Act, 1969 ?

(2) Whether the Tribunal was right in law in holding that "Nespray full-cream powdered milk" was not "milk, whole or separated or reconstituted" as stated in entry 10(i) of Schedule I to the Gujarat Sales Tax Act, 1969 ?

(3) Whether the Tribunal was right in law in holding that "Milkmaid full-cream condensed milk" was neither "food-stuff" nor "food provisions of all kinds" within the meaning of entry 6 of Schedule III to the Gujarat Sales Tax Act, 1969 ?

2. The two products with which we are concerned in these references are "Milkmaid full-cream condensed milk" and "Nespray full-cream powdered milk". M/s. Chunilal Mayachand Mehta is a dealer in these articles. It made an application u/s 62 of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act") on May 15, 1978 to the Deputy Commissioner of Sales Tax for his determination whether tax was payable on the sales of the two products and, if tax was payable, then the rate thereof. The Deputy Commissioner, who heard that application, held that the two products were neither "milk, whole, separated

or reconstituted" within the meaning of entry 10(i) of Schedule I to the Act, nor residuary goods covered by entry 13 of Schedule III to the Act, but were "food-stuff or food provisions" within the meaning of entry 6 of Schedule III to the Act. He held that the sales were subject to levy of sales tax at 5 per cent and general sales tax at 3 per cent and accordingly sales tax and general sales tax were payable at the rates specified against that entry.

3. Against that determination, the assessee preferred an appeal to the Tribunal. The Tribunal was of the view that the words "milk, whole, separated or reconstituted" would reasonably mean only three categories or varieties of milk, viz., whole milk, separated milk or reconstituted milk. After noticing the meaning of the words, "constituted" and "reconstituted", the Tribunal held that as the manufacturer of these products can be said to have changed the form of milk in order to produce or make or manufacture condensed milk or powdered milk, the two products can be described as constituted milk but not as reconstituted milk and thus they were not covered by entry 10 of Schedule 1 to the Act. The Tribunal rejected the contention raised on behalf of the Revenue that the two products were covered by expression "food-stuff or food provisions of all kinds" in entry 6 of Schedule III. As re "Milkmaid full-cream condensed milk", it held that as it was not covered by any specific entry, it fell under the residuary entry 13 of Schedule III. With respect to "Nespray full-cream powdered milk", it held that it was covered by entry 80 of the Schedule to the Government notification issued u/s 49 of the Act. As the Tribunal did not accept the contention of the assesseees that the two products were covered by the entry milk, whole, separated or reconstituted" it applied to the Tribunal to refer first two questions to this Court for its decision. As the Tribunal did not accept the contention of the Revenue that "Milkmaid full-cream condensed milk" is either food-stuff or food provision, the Commissioner of Sales Tax also moved the Tribunal for referring the third question. That is how the three questions have been referred to this Court by the Tribunal.

4. As the two references arise out of the same case, they are disposed of by this common judgment.

5. It was submitted by the learned advocate for the assessee that condensed milk and milk powder sold by the assessee are milk in different forms, but nonetheless "milk" as contemplated by entry 10 of the First Schedule. He submitted that condensed milk and milk powder even after they have been so changed, retain all the characteristics of milk and their use also remains the same as that of "milk". He submitted that milk is either condensed or turned into powder form so as to preserve it for a longer time and make its transport easier. In support of his submission that milk even after its form is changed either into condensed milk or powdered milk, remains milk, he has relied upon the decisions of the Bombay, Allahabad, Madras and Andhra Pradesh High Courts.

6. In Commissioner of Sales Tax v. Agarwal & Co. [1983] 52 STC 117, the Bombay High Court was concerned with "skimmed milk powder". The question,

which arose for consideration was, whether "skimmed milk powder" was covered by entry 36 in Schedule A to the Bombay Sales Tax Act, 1959. The said entry at the relevant time, was "milk, whole or separated or reconstituted"s After considering how milk powder is produced from milk, the Bombay High Court held that milk powder is nothing except milk in powdered form or milk from which water has been removed and, therefore, milk would include milk in powdered form also. The Bombay High Court referred to the Full Bench decision of the Allahabad High Court in *Indian Milk Products Ltd. v. Commissioner of sales Tax* [1974] 33 STC 381 and that of the Madras High Court in *State of Tamil Nadu v. Indian Milk Products* [1980] 45 STC 498, in which it has been held that condensed milk obtained by a process of dehydrating milk or taking water out of milk, so that milk can, with added preservative stand for a long time, does not cease to be milk, and has followed those decisions. It is not necessary to refer to those two decisions as the reasons given by all the three High Courts are almost the same for taking the view that milk includes condensed milk. It may be stated that in all the three cases the courts were concerned with exemption granted to milk under the relevant Sales Tax Acts.

7. In *State of Andhra Pradesh v. Guntur District Milk Producers Co-operative Unit Ltd* [1990] 79 STC 211, the Andhra Pradesh High Court, while considering the exemption available under the Andhra Pradesh General Sales, Tax Act, 1957, held that skimmed milk powder is nothing but dehydrated form of pasteurised milk and is, therefore, exempt under G.O.Ms. No. 20 dated January 2, 1980, issued u/s 9(1) of the Andhra Pradesh General Sales Tax Act, 1957. The Andhra Pradesh High Court observed that since milk cannot be preserved for long period, it is converted into powder and sold as such and, therefore, it is nothing but dehydrated form of pasteurised milk. The Andhra Pradesh High Court further observed that such an interpretation subverted the object of exemption and, therefore, deserved to be adopted.

8. This Court, in Sales Tax Reference No. 1 of 1976, was concerned with the same entry with which we are concerned in these references, though the product in that case was sterilized sweetened milk. Controversy in that case was whether sterilized sweetened milk was covered by entry 10(i) of the First Schedule, or by entry 65 of Schedule 11, Part A which was in respect of aerated waters and all non-alcoholic beverages (including fruit juices, squashes, syrups and cordials) when sold in sealed or capsuled or corked bottles or jars. This Court held that even after milk is put to the process of sterilisation and is coloured as well as sweetened it still remains milk, though in a more accepted form in the market. As even after undergoing the process of sterilisation "and sweetening, such milk retains the characteristics of original milk, it must be regarded as milk. In that case, this Court also referred to and a with the Full Bench decision of the Allahabad High Court in the case of *Indodan Milk Products Ltd.* [1974] 33 STC 381.

9. Replying to the contention raised on behalf of the assessee, the learned

Assistant Government Pleader submitted that condensed milk and milk powder are distinct items known to the market and, therefore, they cannot be considered as milk as contemplated by entry 10 of the First Schedule. In support of that contention, he relied upon the decision of the Supreme Court in *Healthways Dairy Products Company Vs. The Union of India (UOI) and Others*, . In that case the Supreme Court has observed that in common parlance, milk means the full-cream milk as mulched from the cattle. It becomes skimmed milk when cream, i.e., fat is extracted from milk. Thereafter the skimmed milk which also can be called a form of preparation of milk is known as such. He submitted that, for the same reasons, condensed milk and milk powder should be regarded as milk preparations, particularly when they are also commonly understood as items of milk preparations. This judgment was considered and distinguished by the Bombay High Court in the case of *Agarwal & Co.* [1983] 62 STC 117. We agree with the reasoning of the Bombay High Court and are also of the view that the said decision has no bearing on the questions which are to be decided in these references.

10. It was also submitted by the learned Assistant Government Pleader that the State Government, in exercise of its powers u/s 49(2) of the Act, has issued a notification exempting from payment of tax to the extent specified in the Schedule to the notification the classes of sales or purchases specified in the Schedule on the conditions specified therein. Entry 80 of the Schedule to the notification is with respect to the sales or purchases of whole milk powder and skimmed milk powder. The said entry was inserted with effect from January 9, 1976. Relying upon that entry, it was submitted by him that whole milk powder and skimmed milk powder are not considered as milk as contemplated by entry 10 of Schedule 1 to the Act. Otherwise the State Government would not have made a specific provision for exemption of sales or purchases of whole milk powder and skimmed milk powder by exercising its power u/s 49(2) of the Act. Merely because the State Government has issued a notification u/s 49(2) and partly exempted the sales or purchases of whole milk powder and skimmed milk powder from payment of sales tax, it cannot be said that the Legislature did not intend to include whole milk powder or skimmed milk powder within the meaning of the term "milk" of entry 10 of the First Schedule. The Full Bench of Allahabad High Court in *Indodan Milk Products case* [1974] 33 STC 381, while dealing with a similar contention held that a notification issued by the State Government in exercise of its powers of granting exemption cannot have the effect of changing the scope of the expression used in the Act itself. Section 4 of the U.P. Sales Tax Act provided that no tax shall be payable on the sale of water, milk, salt, newspaper and motor spirit. Acting u/s 4 of the U.P. Sales Tax Act, the State Government issued a notification dated March 31, 1956. The goods mentioned in List II of the said notification were made exempt from payment of tax. Item No. 10 of the said list mentioned milk and milk products such as chhena, dahi, khoa, butter and cream but excluding (1) products sold in sealed containers, and (2) sweetmeats, as items exempt from payment of sales tax. Thereafter the State

Government issued another notification in exercise of its powers u/s 3-A(1) of the U.P. Sales Tax Act and provided for single point taxation on the turnover of sale of milk products sold in tins or sealed containers. Relying upon the subsequent notification, it was urged in that case that the notification clearly indicated that condensed milk was taxable at multiple point on the footing that it was not a milk product different from milk, and that the Legislature did not intend that the condensed milk should be understood as per the term used in section 4(a) of the U.P. Sales Tax Act. Rejecting this contention, the Allahabad High Court held that the notification issued by the State Government u/s 3 of that Act did not have the effect of changing the scope of expression "milk" as used in the notification issued u/s 4(a). It further held that the notification issued by the State Government could not be used for determining the scope of the expression "milk" as used by the Legislature u/s 4(a) of that Act. All that the notification indicated was that the Government thought that the condensed milk was a milk product different from milk and for that reason it made a provision for its sale being taxed at a single point. In clear terms the Allahabad High Court held that opinion of the Government cannot be equated with the intention of the Legislature. We respectfully agree with the said observations and hold that the notification relied upon by the learned Assistant Government Pleader cannot have the effect of changing or restricting the meaning of the word "milk" as used in entry 10 of the First Schedule.

11. As stated earlier, the Tribunal proceeded on the basis that the two products can be described as constituted milk. Reason given for taking such a view is that as the two products are made out of milk and as a result of the process of manufacture the original product, viz., milk changer, its form, and that is how they become constituted milk. They cannot be regarded as "reconstituted milk" as the expression "reconstituted milk means milk reconstituted by combining dry whole milk solids with appropriate amount of water, or milk made by adding water to evaporated milk. Relying upon the reasoning of the Tribunal, the learned Assistant Government Pleader submitted that as condensed milk and milk powder cannot be said to be whole milk, or separated milk or reconstituted milk, they would not fall under entry 10 of Schedule 1. He submitted that entry 10 contemplates only three types of milk and the words "whole", "separated" or "Constituted" qualify the meaning of the word "milk" and suggest that only liquid milk is contemplated by the entry. He submitted that it is in this restricted sense that the word is used in the entry. He submitted that this particular aspect was not considered by the Bombay, Allahabad, Madras and Andhra Pradesh High Courts and, therefore, this Court should not follow those decisions.

12. In our opinion, this contention also has no merit. Schedule I to the Act contains a list of goods the sales and purchases of which are to be free from payment of tax. That is the legislative mandate as contained in section 5 of the Act. The State Government has been given power to add to or enlarge any entry in Schedule I. Though it has power to relax or omit any condition or exception, it has no power to omit or modify any entry in the Schedule. Therefore, while

interpreting an entry in Schedule I, we will have to keep the object of the provision in mind and interpret the entry in a manner which would subserve the object of the exemption provision. The Legislature intended that no tax should be levied on sale or purchase of milk. The reason appears to be that it is an article of common use and, therefore, it should not be taxed. If we examine the items in the Schedule, it becomes apparent that it contains items which are in the nature of necessities and which are of daily use or such as would deserve protection or encouragement by way of exemption from payment of sales tax. If we interpret the entry as suggested by the learned Assistant Government Pleader, full-cream milk powder and full-cream condensed milk would lose protection of exemption for no good reason. We see no good reason why whole milk in its original liquid form should have an exemption and why it should not have an exemption when it is condensed or converted into powder form. To us it appears that the words "whole", "separated" and "reconstituted" have been used in entry 10 out of abundant caution and not for the purpose of restricting the meaning of the word "milk" as contended by the learned Assistant Government Pleader. The Legislature appears to have used those words to clarify that not only the whole milk in its original liquid form but even separated milk and reconstituted milk are also covered by that entry. For example, in absence of the word "reconstituted" in the entry, it could have been urged that since reconstituted milk is not milk in its original form but is a liquid prepared out of milk powder, it cannot be regarded as milk. In our opinion, to avoid such contentions, the Legislature thought it fit to use the words "separated" and "reconstituted" in that entry. The Tribunal was, therefore, wrong in holding that "Milkmaid full-cream condensed milk" and "Nespray full-cream powdered milk" are not milk as contemplated by entry 10 of Schedule I to the Act. The Tribunal was, therefore, also wrong in holding that "Milkmaid full-cream condensed milk" fell under residuary entry 13 of Schedule III to the Act. The Tribunal was also wrong in holding that "Nespray full-cream powdered milk" was covered by entry 80 of the notification issued u/s 49(2) of the Act. The Tribunal was, however, right in holding that neither of the two products was food-stuff or food provision as contemplated by entry 6 in Schedule III to the Act.

13. Accordingly we answer the questions as under :

14. Question No. 1 is answered in the negative, i.e., in favour of the assessee and against the Revenue.

15. Question No. 2 is answered in the negative, i.e., in favour of the assessee and against the Revenue.

16. Question No. 3 is answered in the affirmative, i.e., in favour of the assessee and against the Revenue.

17. There shall be no order as to costs in these references.

18. Reference answered accordingly.