

(1982) 11 BOM CK 0010

In the Bombay High Court

Case No : Sales Tax Reference No. 4 of 1981 in Reference Application No. 10 of 1979

Commissioner of Sales Tax

APPELLANT

Vs

Agarwal and Co.

RESPONDENT

Date of Decision : 25-11-1982

Acts Referred:

Citation : (1983) ECR 65 : (1983) 12 ELT 116 : (1983) 52 STC 117

Hon'ble Judges : Sujata V. Manohar, J;D.P. Madon, J

Bench : Division Bench

Judgement

Mr. Sujata Manohar, J.—Respondents Messrs Agarwal & Co. are resellers in tea, coffee and skimmed milk powder. For the period 1-4-1975 to 31-3-1976 the Sales Tax Officer subjected the sales of skimmed milk powder to tax rejecting the contention of the respondents that skimmed milk powder was covered by entry No. 36 of Schedule "A" to the Bombay Sales Tax Act, 1959 as then in force and hence was exempt from the payment of sales tax. The Sales Tax Officer accordingly held that the sales of skimmed milk powder amounting to Rs. 24,593 were liable to be taxed. From this finding the respondents appealed before the Assistant Commissioner of Sales Tax. The appeal was dismissed. The respondents preferred a second appeal before the Tribunal. The respondents relied upon a decision of the Commissioner in the determination proceedings u/s 52 of the Act in the case of Messrs Vyas Corporation (DDQ-1171/164-/B-2 dated 4-10-1972) and the detailed discussion of facts and law in that decision. They also submitted that a subsequent decision of the Commission in determination proceedings in the case of Messrs Hariom Sales Corporation (No. DDQ-1174/198/B-10 dated 13-12-1975) was not applicable to the present case. The respondents also challenged the correctness of the decision in Hariom Sales Corporation case. The Tribunal considered in detail the decisions of the Commissioner in the two earlier case as well as the detailed reasoning given in these two decisions and came to the conclusion that skimmed milk powder is covered by entry No. 36 of Schedule "A" to the Bombay Sales Tax Act, 1959 as then in force. The Tribunal

accordingly allowed the second appeal filed by the respondents. Thereafter at the instance of the department, the following two questions have been referred to us u/s 61(1) of the Bombay Sales Tax, 1959 :

(1) Whether on a true and proper interpretation of entry No. 36 in Schedule "A" to the Bombay Sales Tax Act, 1959 the Tribunal was correct in holding that the "skimmed milk powder" falls within the scope of the said entry ?

(2) Whether there was any evidence before the Tribunal for coming to the conclusion that skimmed milk powder is now understood as milk in common parlance ?

2. u/s 5 of the Bombay Sales Tax Act, 1959 the sale and purchase of goods specified in Schedule "A" is free from all taxes. Entry 36 of Schedule "A" to the Bombay Sales Tax Act, 1959 at the relevant time was as follows :

"milk whole of separated or reconstituted".

We have to consider whether skimmed milk powder falls within this entry. According to the applicant, "milk" must be construed as milk in liquid form. Milk powder, according to the Applicant, cannot be considered as milk. Mr. Jetly, learned Counsel for the Applicant, relied upon the dictionary meaning of "milk". The Concise Oxford Dictionary defines "milk" as "Opaque white fluid secreted by female mammals for nourishment of their young". The applicant placed an emphasis on the word "liquid" and submitted that milk in powder form cannot be considered as milk. Mr. Jetly also drew our attention to the observations of the Supreme Court in the case of Healthways Dairy Products Company Vs. The Union of India (UOI) and Others, . The Supreme Court in that case was concerned with the interpretation of various entries in the Central Excises and Salt Act, 1944 and notification issued thereunder, which entries are very different from the present entry in the Bombay Sales Tax Act, 1959. In view of the specific entries in that Act and notification, the Supreme Court held that the entry relating to condensed milk did not cover condensed skimmed milk. In the Healthways Dairy Products Co. case the Supreme Court was considering item 1B of the First Schedule of the Central Excises and Salt Act, 1944 whereunder 10% ad valorem duty was levied on "prepared or preserved foods put up in unit containers and ordinarily intended for sale including preparations of.....milk.....". By an exemption notification certain items were exempted from this levy. From this exemption, however, certain specified items were excluded. Among these items so excluded, the relevant items which the Supreme Court considered were items 12 and 13. Item 12 was as follows :

"12. Milk powder but excluding such powder specially prepared for feeding of infants."

Item 13 was as follows :

"13. Condensed milk, whether sweetened or not."

3. Thus, under the exemption notification preparations of milk leviable to excise duty became exempt from the levy of duty. But from that exemption, certain milk preparations such as those mentioned in items 12 and 13 were excluded. On the basis of these exclusions, the excise authority levied excise duty on condensed skimmed milk. The Supreme Court was required to consider whether condensed skimmed milk was excluded from exemption by virtue of entry 13. In view of the provisions of the Central Excise Rules and the Hand Book on Self Removal Procedure under the Central Excise Rules and certain instructions in the Hand Book on Self Removal Procedure, which were considered in detail by the Supreme Court in its judgment, the Supreme Court came to the conclusion that in view of the clear differentiation made between whole milk and skimmed milk in various annexures referred to therein, a distinction should be made between condensed milk and skimmed condensed milk. It held that skimmed condensed milk was not covered by item 13 "condensed milk, whether sweetened or not" and hence was not excluded from exemption. In the course of its judgment the Supreme Court observed that in common parlance milk means full cream milk as milched from cattle. Mr. Jetly strongly relied upon this observation and submitted that milk must be taken in common parlance to mean full cream milk as milched from cattle and it cannot include within its connotation "powdered milk". The entry that we have to consider, however, is somewhat different from the entries which the Supreme Court was required to consider. The observations of the Supreme Court that milk in common parlance means full cream milk as milched from cattle, cannot be of much assistance in interpreting the present entry because the present entry refers not merely to whole milk but also to separated and reconstituted milk. Neither separated nor reconstituted milk is full cream milk as milched from cattle. Hence the term "milk" in this entry, at any rate, bearing in mind that it also refers to separated as well as reconstituted milk, is not confined only to fresh full cream milk as milched from cattle but has a wider connotation. The observations of the Supreme Court can, therefore, be of no assistance. They must be construed in the context in which they were made by the Supreme Court in that case and applied accordingly. They cannot be applied to the entry that we are required to construe.

4. Mr. Jetly also drew our attention to "A Dictionary of Dairying" by J. G. Davis. As stated in the preface to the first edition of this book the book is "a work of ready reference that would be of interest to, and understood by, any scientist in other fields and any intelligent layman in the dairy industry." It is meant to provide a scientific explanation of the various terms in use in the dairy industry. The explanations so provided do not have any bearing on the interpretation of an entry in a Statute such as the Sales Tax Act. Nevertheless, if we examine the description of the terms "milk" and "milk powder" given in this book, these descriptions do not support the contentions of Mr. Jetly. Thus, at page 703 against the term "milk" it is as stated as follows : "There is no legal definition of milk, but it is generally defined or described as the liquid obtained from the mammary gland of the healthy and normally fed cow". The author thereafter

refers to the present legal position in England and Wales. He sets out the definition of "milk" in the 1949 Regulations. This is as follows : "cow's milk, but does not include cream, or separated, skimmed, dried, condensed or evaporated milk, or butter milk." He goes on to say that this definition is obviously an ad hoc definition for the purpose of the Regulations, thereby implying that the items which are excluded from "milk" in the definition could have been considered as covered by the term "milk" in common parlance and that exclusion of these items from the term "milk" was an ad hoc exclusion not based upon any scientific principles. The author has also observed that "All attempts to define milk more accurately lead to difficulties....." and has stated that, "Scientifically there is no reason why milk should not be defined in terms of chemical constitution and ranges of concentration of the constituents." At page 716, the author has described "milk powder" and has stated that, "Milk powder is produced by the removal of the water from milk by heat or other means to produce a solid containing 3 per cent or less moisture. Whole milk, milk from which part of the cream has been removed or skim milk may be used for this purpose,". Thus, milk powder has been described as milk from which water has been removed. The Concise Oxford Dictionary describes milk powder as "milk dehydrated by evaporation". Thus, milk powder is nothing except milk in powder form or milk from which water has been removed.

5. The determination proceedings in the case of Messrs Vyas Corporation have been forwarded to us as a part of the statement of the case. These determination proceedings were referred to and relied upon by both the parties and they were relied upon by the respondents for the purpose of showing the factual position in connection with milk powder. The proceedings in the Vyas Corporation case have accordingly been relied upon by the Tribunal also in its judgment. The factual position in respect of milk powder as set out in the order in the case of M/s. Vyas Corporation was not contested by the parties in the present case. From the factual position as set out in the order of M/s. Vyas Corporation, it can be seen that milk is internationally marketed in the form of powder as it is easier both to preserve and to transport milk in the form of milk powder. The Commissioner in that case has observed that the process of removing water from milk is necessary not only for the purpose of preservation but also for the purpose of easy transport. The Commissioner has also observed that the end use of milk powder is exactly the same as that of milk. Milk powder retains all the properties of milk and is used in exactly the same manner as milk. Admittedly also, like liquid milk, milk in powder form can also be either whole or skimmed. Therefore, milk - whole or separated - would include milk in powder form also. In these circumstances, it is not possible to confine entry 36 only to milk in liquid form.

6. In this connection, it is also relevant to examine the legislative history of this entry. As observed by a Division Bench of this High Court in the case of Commissioner of Sales Tax, Maharashtra, Bombay v. Lala Lajpatrai Hotel reported in 35 S.T.C. 368 it is permissible to look at the legislative history of an entry while interpreting the words of an entry in a Sales Tax legislation. A reference to

the legislative history of an entry was similarly made in the case of Commissioner of Sales Tax v. Sultan Shev Co. reported in 40 S.T.C. 583. The legislative changes pertaining to this entry can be seen at a glance from the following Table :

Entry	Description	of	Period	No.	Act Schedule				
					goods				
					1	2	3	4	5
					Bombay Sales				
II 14	Fresh milk, condensed	1-10-1946	Tax Act, 1946	milk, separated milk, to milk powder and infant	31-3-1948	foods. -- do --	II 14	Fresh milk, whole or	
1-4-1948	separated and milk to powder.	31-10-1982	Bombay Sales I 24	Fresh milk whole or	1-11-1952	Tax Act, 1952	separated to	31-3-1953	Bombay Sales A 34
	Milk, whole or	1-4-1953	Tax Act, 1953	separated to	31-12-1959	Bombay Sales A 36	Milk, whole or	1-1-1960	Tax Act, 1959
	separated or to reconstituted	31-6-1981	-- do --	A 34	Milk in liquid form, 1-7-1981	whether sweetened or till date not, but not including condensed milk or flavoured milk.			

Thus, originally the entry in terms pertained to fresh milk. Therefore, milk powder was expressly included in this entry upto 31st October, 1952. From November, 1952 to 31st March, 1953 the entry covered only fresh milk, whole or separated. As from 1st April, 1953 the word "fresh" has been removed. The entry as from 1st April, 1953 to 31st December, 1959 only refers to milk, whole or separated. As from 1st January, 1960 right upto 30th June, 1981 the entry covers milk, whole or separated or reconstituted. In view of the decisions of the Commissioner and the Tribunal holding that powder milk was covered by the term "milk", the relevant entry appears to have been amended as from 1st July, 1981 to cover only "milk in liquid form". We are not here concerned with this latest amendment in the Act. But the amendment itself indicates that unless there are express words which confine the term "milk" only to milk in its liquid form, ordinarily milk would include all types of milk including milk powder.

7. The Supreme Court decisions show that while interpreting a general term used for describing any commodity in any fiscal legislation, the general term so used covers that commodity or item or article in all its forms and varieties. Thus in the case of Tungabhadra Industries Ltd. v. Commercial Tax Officer, Kurnool reported in 11 S.T.C. 827 the Supreme Court construed "groundnut oil" to include hydrogenated groundnut oil (commonly called Vanaspati), and this was done inspite of the fact that chemical properties of Vanaspati are somewhat different from those of groundnut oil. Similarly in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore v. Jaswant Singh Charan Singh reported in 19 S.T.C. 469 coal was held to include charcoal. In the case of Alladi Venkatesarlu v. Government of Andhra Pradesh reported in 41 S.T.C. 394 the Supreme Court held that parched rice (Atukulu) as well as puffed rice (muramaralu) were included in the entry "rice". It is not necessary to go into a number of similar

cases. In the case of *Porritts & Spencer (Asia) Ltd. v. State of Haryana* reported in 42 S.T.C. 433 the Supreme Court was required to consider the interpretation of the term "textiles". The Supreme Court observed that in interpreting any word in an entry, one should bear in mind that it does not embody a static concept. It is the skin of a living thought, and may change its hue with new developments in technology and emergence of new items and processes. A term in a fiscal legislation should be interpreted having regard to newly developing materials, methods, techniques and processes. It held that the concept of "textiles" was not a static concept. It had, having regard to newly developing materials, methods, techniques and processes a continually expanding content and new kinds of fabric may be invented which may legitimately, without doing any violence to the language, be regarded as "textiles". In the same manner, milk in powder form can be looked upon as a result of this continually evolving technology. There is no reason why it should be excluded from the generic term "milk".

8. Mr. Jetly has submitted that powder milk must be looked upon as a different commodity from milk even though its composition and uses were the same as those of milk. He relied upon the analogy of water and ice and argued that though the chemical composition of water and ice was the same, the two were different commercial commodities. He relied upon a decision of the Allahabad High Court in the case of *Cool Industries (Pvt.) Ltd. v. Commissioner of Sales Tax, U.P. Lucknow* reported in 28 S.T.C. 729 where the Allahabad High Court made a distinction between water and ice although the chemical contents of the two commodities were the same. In our view, however, the analogy of water and ice is not appropriate. Although the chemical composition of water and ice may be the same, the use to which the two are put can be different. Further as the Allahabad High Court itself observed, it is a matter of common experience that while water is generally available free, ice is always sold in the market. This analogy therefore is of no assistance to the applicants. It is interesting to note that a Full Bench of the same High Court has held in the case of *Indodan Milk Products Ltd. v. Commissioner of Sales Tax, U.P.* reported in 33 S.T.C. 381 that the term "milk" as used in the U.P. Sales Tax Act, 1948 is not confined to milk obtained and sold in its natural form but includes milk in any form including condensed milk. It has held that condensed milk is nothing but milk in concentrated form which is obtained by evaporating water from milk in a fluid state and thereafter adding sugar or preservatives. This decision, thus, supports the view that we have taken, namely, that milk would ordinarily include milk in all its forms including evaporated or dehydrated milk or milk powder. The Madras High Court in the case of *The State of Tamil Nadu v. Indodan Milk Products* reported in 45 S.T.C. 498 has also followed the Full Bench decision of the Allahabad High Court and held that condensed milk obtained by a process of dehydrating the milk or taking the water out of the milk, so that milk can, with added preservative stand for a long time, does not cease to be milk, and is exempt from tax under the Tamil Nadu General Sales Tax Act, 1959. Similarly, powder milk obtained by a process of dehydrating the milk or taking the water

out of the milk - so that milk can be preserved for a long time and can be easily marketed, both nationally and internationally, also, in our view, does not cease to be milk and is covered by entry 36 of Schedule "A".

9. Accordingly the first question, which is posed before us, must be answered in favour of the Respondents.

10. As far as the second question is concerned, although it has been observed in the judgment of the Tribunal on the Reference Application of the Applicant that there is some force in the contention of the applicants that there was no material or evidence on record before the Tribunal for coming to the conclusion that skimmed milk powder is understood as milk in common parlance, we find from a perusal of the record as forwarded to us along with the statement of case that both sides had relied upon the factual position as set out in the case of M/s. Vyas Corporation, Bombay. It was nobody's case that the factual position regarding skimmed milk powder in the present case was in any manner different from that set out in the case of M/s. Vyas Corporation. The Tribunal also proceeded on that basis in arriving at its conclusion and has exhaustively discussed the factual position as set out in the case of M/s. Vyas Corporation and has relied upon the finding in that connection given in that case. In these circumstances, it is not possible to hold that there was no material or evidence before the Tribunal for coming to the conclusion that skimmed milk powder is not understood as milk in common parlance.

11. In the premises, we answer the question as follows :

Question No. 1 : In the affirmative, that is to say, in favour of the assessee and against the department.

Question No. 2 : In the affirmative, that is to say, in favour of the assessee and against the department.

12. Applicant to pay to the respondents the costs of the Reference.