

(1976) 03 BOM CK 0052

In the Bombay High Court

Case No : Sales Tax Reference No. 44 of 1972

Commissioner of Sales Tax

APPELLANT

Vs

Bombay Traders

RESPONDENT

Date of Decision : 03-03-1976

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2, 2(17), 61(1)

Citation : (1976) 5 CTR 477 : (1976) 384 STC 286

Hon'ble Judges : M.H. Kania, J;D.P. Madon, J

Bench : Division Bench

Advocate : K.S. Cooper and R.A. Dada, for the Appellant; K.A. Mehta and D.H. Parikh, for the Respondent

Judgement

Kania, J.—This is a reference u/s 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the said Act"), made at the instance of the Commissioner of Sales Tax.

2. The facts giving rise to this reference are as follows : The assessee (respondent) is registered as a dealer under the said Act and holds a registration certificate. By an application dated 8th July, 1968, made by the assessee to the applicant, the Commissioner of Sales Tax, the assessee set out that they were buying plain cashew-nuts in tins and after frying and applying spices to the cashew-nuts to make them tasty, the assessee packed them in plastic bags and sold them locally. By this application, the assessee requested the Commissioner to determine as to whether the aforesaid activity of frying and spicing amounts to "manufacture" u/s 2(17) of the said Act, and that if the answer to the first question was in the affirmative, then what would be the rate of tax on the sale of fried cashew-nuts. Along with this application, the assessee sent a copy of the purchase bill dated 21st February, 1968, and the sale bill dated 31st May, 1968. As far as the purchase bill is concerned, we are not concerned with the same, because that relates to the purchase of plain cashew-nuts by the assessee. But, as far as the sale bill is concerned, it is made out on

the Controller of Stores and Purchases, Santa Cruz Airport, Bombay, and shows that the assesseees have sold to the purchaser ten thousand two hundred packets of cashew-nuts, the purchaser being Air-India. Apart from this document, the assesseees have also produced at the hearing before the Commissioner a purchase order placed by Air-India on the assesseees. The relevant part of this purchase order, showing the nature of the cashew-nuts ordered by Air-India, runs as follows :

"Cashew-nuts : of 210 count, best selected whole nuts. Fried lightly without browning and no losing salt present. To be packed and supplied in heat-sealed transparent cellophane packets of size 75 X 75 mm. bearing our insignia the centaur and the logo (probably meaning legend) AIR-INDIA in red. Each packet shall weigh 30 gm. nett when packed, as per your sample approved by us."

3. The Commissioner held that ordinary plain cashew-nuts and the fried and salted cashew-nuts sold by the assesseees were quite distinct commercial commodities. In coming to this conclusion, the Commissioner relied on the fact that Air-India has described in detail the process which must be carried out on cashew-nuts and the manner in which it was to be carried out and that if they were not of the required standard and taste, Air-India would have refused to take delivery of the same. The Commissioner held that the activity of frying the cashew-nuts and spraying them with spices and salt to make them tasty would amount to "manufacture" within the meaning of section 2(17) of the said Act. The Commissioner further held that the fried and salted cashew-nuts sold in heat-sealed plastic bags of less than 5 kg. each fell within the scope of entry 6 of Schedule E to the said Act. The assesseees appealed against this decision to the Tribunal. The Tribunal came to the conclusion that as a result of the activity of frying and salting carried out by the assesseees on the cashew-nuts, no new or different commercial commodity had come into being and hence the process or activity applied on the cashew-nuts could not be said to be "manufacture" within the meaning of the said term in section 2(17) of the said Act. As far as the question of the rate of tax is concerned, the Tribunal has pointed out in its judgment that the plastic paper bags in which the cashew-nuts were packed for sale were produced before the Tribunal. The Tribunal came to the conclusion that from examining these plastic paper bags it could not be said that the cashew-nuts were sold by the assesseees in sealed containers. On this basis, the Tribunal came to the conclusion that the cashew-nuts sold by the assesseees were covered by entry 5 of Part I of Schedule D and not entry 6 in Schedule E to the said Act as held by the Commissioner. Arising from this judgment and order of the Tribunal, the following two questions have been referred to us for our determination :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the activity of frying and spicing of the cashew-nuts did not amount to manufacture within the meaning of section 2(17) of the Bombay Sales Tax Act, 1959 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the fried and salted cashew-nuts sold to Air-India under bill dated 31st May, 1968, in pursuance to Purchase Order No. CM-58633 dated 11th April, 1968, in heat-sealed transparent cellophane packets of size 75 X 75 mm. and weighing 30 gm. each were not covered by entry 6 of Schedule E but were covered by entry 5 of Schedule D to the Bombay Sales Tax Act, 1959 ?"

4. We now propose to consider the first question, as to whether the activity of frying and spicing of the cashew-nuts by the assesseees amounted to "manufacture" within the meaning of that term in section 2(17) of the said Act. We may clarify here that although the expression "spicing" had been used, what really the assesseees did was that they fried plain cashew-nuts and salted the same. However, we are not reframing the question, because, in our view, whether the assesseees salted or spiced the cashew-nuts would not make much difference. Clause (17) of section 2 of the said Act reads as follows :

"'manufacture', with all its grammatical variations and cognate expressions, means producing, making, extracting, altering, ornamenting, finishing or otherwise processing, treating, or adapting any goods; but does not include such manufactures or manufacturing processes as may be prescribed;"

5. There is little dispute that the activity carried on by the assesseees on the plain cashew-nuts could be said to be "processing" or "treating" within the meaning of the said expressions in clause (17) of section 2 of the said Act. The question, however, is as to whether this activity could be said to amount to "manufacture". In this connection, we may usefully refer to our decision in *Commissioner of Sales Tax v. Dunken Coffee Manufacturing Co.* [1975] 35 S.T.C. 493 , where we have laid down certain principles as to when an activity can be said to amount to manufacture for the purposes of section 2(17) of the said Act. We have observed there, after considering several decided cases, as follows :

"The above discussion shows that the ratio of decided cases is that for an activity to amount to manufacture it must result in a different commercial article or commodity. It must not be a commodity which is commercially the same as it was before the activity was applied to it. In a given case, it may be that the ingredients are totally transformed and in another given case, it may be that they undergo some change, alteration or transformation and yet retain their essential character and properties. The test in all cases, therefore, is to ascertain whether the result is commercially a different commodity and it is irrelevant whether this result is produced by a mechanical or chemical process or otherwise."

6. The question thus which we have really to consider is whether the fried and salted cashew-nuts prepared by the assesseees could be said to be a different commercial commodity from plain cashew-nuts. In our view, this is primarily a question of fact to be determined on the evidence before the sales tax authorities. In the present case, the Tribunal in its judgment has, after referring

to this test, repeatedly stated that even after the plain cashew-nuts were fried and salted by the assesseees they still continued to be the same commercial commodity, viz., cashew-nuts.

7. Mr. Cooper, the learned counsel for the applicant, has pointed out to us that in certain examples which the Tribunal has given as to when an activity cannot be said to amount to manufacture, the Tribunal seems to have taken an erroneous view, namely, that even when potatoes were fried and salted they could not be said to be a new commercial commodity or that when chapatis are prepared out of atta, they could not be said to be a new commercial commodity. Mr. Cooper may be right in contending that these examples given by the Tribunal are not correct, and, in those cases, the activity might amount to manufacture. However, we are concerned with the case before us and, on the facts before the Tribunal, the Tribunal has come to the conclusion that fried and salted cashew-nuts sold by the assesseees could not be said to be a new commercial commodity from the plain cashew-nuts. No question has been referred to us as to whether this conclusion of the Tribunal was based on no evidence at all and, therefore, strictly speaking, we are not entitled to go into that question at all. Even if we were to do that we find that there was ample material before the Tribunal for the Tribunal to have come to that conclusion. The most important evidence, in this connection, is the purchase order dated 11th April, 1968, where it is significant that Air-India has referred to the commodity ordered as "cashew-nuts" and not as "khare kaju" or "salted cashew-nuts", which would have been the case if salted cashew-nuts were a new and distinct commercial commodity. It is true that in this purchase order, Air-India has described the nature of the process which should be carried out on the plain cashew-nuts. But, this to our mind, makes no difference. What Air-India ordered was cashew-nuts to be prepared in a particular manner. Similarly, the bill sent by the assesseees to Air-India on 31st May, 1968, also refers to the commodity sold as "cashew-nuts" and not as "khare kaju" or "salted cashew-nuts". There was thus ample material before the Tribunal on which it could come to the conclusion that the fried and salted cashew-nuts sold by the assesseees could not be said to be a new or different commercial commodity from the plain cashew-nuts, which had been purchased by the assesseees. In our opinion, therefore, the conclusion of the Tribunal as regards this question is correct.

8. The next question is as to the entry under which the aforesaid sales of these cashew-nuts would fall. According to the assesseees, the sales are covered by entry 5 of Part I of Schedule D to the said Act, as it stood at the relevant time, whereas, according to the Commissioner, these sales would be covered by entry 6 of Schedule E to the said Act. Little purpose would be served in setting out the entries here, because it is common ground that if the cashew-nuts were sold in sealed containers, the sales would be covered by entry 6 of Schedule E to the said Act as contended by the Commissioner, whereas if they were not sold in sealed containers the sales would be covered by entry 5 of Part I of Schedule D to the said Act as contended by the assesseees and as held by the Tribunal. In

connection with the aforesaid question, viz., the second question, from the question itself it would appear that the cashew-nuts were sold by the assesseees in heat-sealed transparent cellophane packets. In the judgment of the Tribunal, however, the material used for packing the cashew-nuts has been described in several different ways. For example, at the outset of the discussion regarding this question, the Tribunal has stated that the "packing papers" in which the cashew-nuts were packed had been produced before them. Somewhere further, from the discussion it appears that the cashew-nuts were sold in "small plastic bags". Later the Tribunal has stated that both the sides attempted to open the "plastic packet". Ultimately the Tribunal has held :

"... Considering the actual plastic packing papers and how it can be closed on both sides, we hold that it is a wrapper covering cashew-nuts in order to protect them from moisture and for the purposes of putting the cashew-nuts together and in no sense it could be called a container."

9. Later, there are observations of the Tribunal which show that before them was a simple plastic cover which could be opened and again it could be closed. It is on these facts that the question has to be determined as to whether the Tribunal was right in coming to the conclusion that the cashew-nuts sold by the assesseees were not packed in sealed containers. In connection with this question, it would be useful to refer to the decision of the Supreme Court in *Commissioner of Sales Tax, U.P. Vs. G.G. Industries, Agra*, In that case, the question related to confectionery which was sold in packings of tin and cardboard, which were closed by the use of cellophane paper to protect the contents from being affected by atmospheric conditions. The question was whether the confectionery could be said to be sold in sealed containers. It was held that the expression "sealed container" means a container which is "so closed that access (to the contents) is impossible without breaking the fastening". This meaning given to the word "sealed" in the Shorter Oxford English Dictionary was accepted by the Supreme Court. A similar decision has been arrived at by the Supreme Court in *The Martand Dairy and Farm Vs. The Union of India (UOI) and Others*, . It was urged by Mr. Cooper that in the present case the question itself shows that the cashew-nuts were packed by the assesseees in heat-sealed transparent cellophane packets, and as the packets were heat-sealed, it necessarily followed that in order to get access to the contents, viz., the cashew-nuts, the packet would have to be cut or broken open. It was urged by him that in view of this, and following the ratio of the aforesaid decisions of the Supreme Court, it must be held that the cashew-nuts were sold by the assesseees in sealed containers. Had the matter rested with the question alone we would have accepted the contention of Mr. Cooper. We, however, find, as we have already set out earlier, that the Tribunal has given a categorical finding which shows that a sample container in which the cashew-nuts were packed was produced before the Tribunal and the same could be opened and closed again. The other statements of the Tribunal, to which we have referred earlier, also show that the Tribunal has rejected the contention that these containers were such as they would have to be broken or torn open before

a person could get access to the cashew-nuts packed therein. In view of this, it appears to us that, following the ratio of the aforesaid decisions, we must hold that the cashew-nuts were not sold by the assessees in sealed containers and the Tribunal was justified in holding that the aforesaid sales were covered by entry 5 of Part I of Schedule D to the said Act. We may, however, make it clear that it does appear to us that there is grave doubt about the factual correctness of the conclusion reached by the Tribunal to the effect that the packets in which these cashew-nuts were packed could be opened and closed again. Such doubt is cast by the very fact that the said packets are said to be heat-sealed. The description given by the Tribunal of the packing material is again far from satisfactory. Quite apart from this, the assessees have produced before us a sample packet containing cashew-nuts of the same type as were used in the sales of cashew-nuts to Air-India, and even a casual examination of this packet shows that it cannot be opened without tearing the same or cutting it open. However, we are bound by the findings of fact given by the Tribunal, to which we have referred earlier. No question has been referred to us as to whether these findings are unsupported by evidence or against the evidence, and hence it would not be open to us to go into this question. It is only in view of this that we have come to the conclusion that the Tribunal's finding regarding the second question referred to us must be upheld.

10. In the result, the first question referred to us must be answered in the affirmative. As far as the second question is concerned, we find that in view of the other findings of the Tribunal, to which we have referred earlier, the description of the containers in which the cashew-nuts were packed as "heat-sealed" might be misleading and, therefore, we are reframing the second question as follows :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sales by the assessees of fried and salted cashew-nuts to Air-India under bill dated 31st May, 1968, in pursuance to Purchase Order No. CM-58633 dated 11th April, 1968, were not covered by entry 6 of Schedule E but were covered by entry 5 of Part I of Schedule D to the Bombay Sales Tax Act, 1959 ?"

11. We answer this question as reframed also in the affirmative. The applicant to pay to the assessees the costs of this reference fixed at Rs. 250.

Reference answered in the affirmative.