(1977) 01 BOM CK 0012

In the Bombay High Court

Case No : S.T. Ref. No. 14 of 1973 & Sales Tax Reference No. 14 of 1973

Commissioner of Sales Tax	APPELLANT
Vs	
National Chikki Mart	RESPONDENT

Date of Decision : 12-01-1977

Acts Referred:
Bombay Sales Tax Act, 1959 — Section 61(1)

Citation : (1977) 6 CTR 296 : (1977) 39 STC 447

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

Bench : Division Bench

Advocate : K.S. Cooper and M.M. Dadhich, for the Appellant; B.C. Joshi and P.C. Joshi, 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. The question referred to us for our determination is as follows :

"Whether, on the facts and in the circumstances of the case and on correct interpretation of the scope of entry 6 of Schedule E to the Bombay Sales Tax Act, 1959, the Tribunal was correct in law in holding that sales of ''chikki'' packed in heat-sealed polythene bags were not covered by the said entry ?"

2. The facts giving rise to this question are as follows : The respondent-firm is a manufacturer of chikki and farsan and is a registered dealer under the said Act. It appears that the respondent sold the chikki made by it in the following four ways : (1) loose, (2) in ordinary paper packing, (3) inserting the paper packed chikki in heat-sealed polythene bags, and (4) putting chikki in cardboard box and inserting it in heat-sealed polythene bags. In respect of the assessment period from 13th November, 1966, to 2nd November, 1967, the Sales Tax Officer, in effect, held that the chikki sold by the respondent in the manner described in categories (3) and (4) set out aforesaid was sold in sealed containers. It may be mentioned here that the contention of the respondent was that the sales of

chikki made by the respondent were covered by entry 31 of Schedule C to the said Act. This contention was rejected by the Sales Tax Officer as far as the chikki sole by the respondent in the manner described in categories (3) and (4) above was concerned. It was held by the Sales Tax Officer that the chikki sold as described in categories (3) and (4) was covered by entry 6 of Schedule E to the said Act. The appeal preferred by the respondent against this order was dismissed by the Assistant Commissioner of Sales Tax. The respondent then filed a second appeal before the Tribunal. The Tribunal came to the conclusion that a heat-sealed polythene bag was not a container and that the question of considering whether it was a sealed container did not arise. They, however, further held that it could not be said that the polythene bags in which the chikki was sold by the respondent as aforesaid were sealed containers, because such a polythene bag did not require a knife or even nails for cutting the plastic covering but any portion of it could be removed with fingers. It was held by the Tribunal that the expression "sealed" means bearing the impression of wax, etc., which is evidence of guarantee of authenticity or fastened with a lid so close to the contents that access is impossible without breaking the fastening. It is the correctness of this conclusion which is challenged by the department before us by way of the question raised.

3. Before going to the contentions raised it may be useful to refer to the entries in question. Briefly stated, entry 31 of Schedule C to the said Act refers to sweets and sweetmeats except when sold in sealed containers of weight not exceeding five kilograms in each container. Entry 6 of Schedule E covers food-stuffs and food provisions of all kinds when sold in sealed containers of weight not exceeding five kilograms in each container but excluding certain items with which we are not concerned here. Very briefly stated the question here is whether the polythene bags into which the paper-packed chikki or the cardboard boxes containing the chikki were inserted and which polythene bags were heat-sealed can be said to be "hear-sealed containers", it being the admitted position that the weight thereof did not exceed five kilograms.

4. The first question which we have to consider is whether a polythene bag can be said to be a container. In this regard the question, in our view, is practically concluded by the decision of the Supreme Court in Commissioner of Sales Tax, U.P. Vs. G.G. Industries, Agra, In that case, the assessee-firm which carried on the business of manufacture and sale of confectionery such as chocolates, lollipops, lemondrops, etc., sold the confectionery in packings of tins and cardboard which were closed by the use of cellophane paper to protect the contents from being affected by the atmosphere. A question arose whether the confectionery sold by the assessee-firm was sold in "sealed containers". In that case, the Supreme Court accepted the contentions urged by the State that the expression "sealed container" means a container which is so closed that access (to the contents) is impossible without breaking the fastening. The Supreme Court has pointed out that this is one of the meanings given to the word "sealed" in the Shorter Oxford English Dictionary. In view of this decision it appears to us

that the polythene bags in which the chikki was sold by the respondents in the manner described in categories (3) and (4) above must be held to be sealed containers.

5. In coming to their conclusion reliance has been placed by the Tribunal on an earlier decision of the Tribunal in Bombay Traders (Appeal No. 131 of 1968 decided on 30th September, 1969). In that matter a reference was made to the High Court and the same was decided by us in Commissioner of Sales Tax v. Bombay Traders [1976] 38 S.T.C. 286 . In that case, the assessees bought plain cashew-nuts in tins and after frying and applying spices to the cashew-nuts to make them tasty, packed them in plastic bags and sold them locally. The Tribunal gave a finding to the effect that the packets in which the cashew-nuts were packed could be opened and closed again. We have taken the view that the cashew-nuts were not sold by the assessees in sealed containers, observing that there was grave doubt about the factual correctness of the conclusion reached by the Tribunal to the effect that the packets in which the cashew-nuts were packed could be opened and closed again, but that the finding being on a question of fact, we were bound by it. We have, on these facts, taken the view that, in any event, the plastic bags in which the cashew-nuts were sold could not be said to the "sealed containers" and the later portion of our judgment in that case makes it amply clear that we have not considered the question whether a polythene bag could be said to be a "container". According to us, in view of the decision Commissioner of Sales Tax, U.P. Vs. G.G. Industries, Agra, of the Supreme Court, referred to above, the polythene bags in which the chikki was sold by the respondent must be regarded as containers.

6. The next question is whether such polythene bags could be held to be "sealed containers". In this regard the Tribunal has taken the view that such a bag cannot be regarded as a sealed container as no opening instrument nor any knife is needed to remove the polythene cover and even nails are not needed for removing the cover, but any portion of it could be removed with fingers. In our view, the approach of the Tribunal is altogether erroneous. To determine whether a container is sealed or not, it is not relevant to consider as to whether to break the covering any instrument or knife is needed or whether it could be done with bare hands or fingers. What is really to be considered is whether the contents of the container could be got at or whether access could be had to them without in any manner breaking any portion of the cover. It is not necessary for a container to be a sealed container that to get access to its contents, the container or cover has to be broken by removing the fastening although it would be the most common method of opening a sealed container. All that is necessary for a container to be a sealed container is that access cannot be had to its contents without breaking the fastening or some portion of the container. In the present case, the observations of the Tribunal clearly suggest that in order to get at the contents of the polythene bags in which the chikki was packed by the respondent, some portion thereof had to be removed although this could be done by fingers. It is, therefore, clear that the chikki contained in the polythene bags

could not be got at except after breaking the polythene bags at some place. In view of this, it would appear to us that the said polythene bags must be regarded as sealed containers.

7. Mr. Joshi, the learned counsel for the respondent, placed strong reliance on the observation of the Tribunal to the effect that the only difference between the polythene bags used in the case of Bombay Traders and in the present case was that of size and nothing else. It was urged by him that this observation would amount to a finding by the Tribunal that the polythene bags in the present case also could be opened and closed again as appears to be the finding regarding the polythene bags referred to in the case of Bombay Traders. We are unable to accept this contention. The aforesaid observation of the Tribunal on which reliance is placed by Mr. Joshi occurs in connection with the discussion as to whether a polythene bag is a container and not in connection with the question as to whether it can be regarded as a sealed container. This observation, therefore, in our view, cannot amount to a finding that the polythene bags in the present case were such as could be opened and closed again. In fact, the finding of the Tribunal that some portion of the polythene bags would have to be removed or broken open before the contents could be got at would show that the Tribunal could not have arrived at the finding as suggested by Mr. Joshi. In our view, therefore, the polythene bags used by the respondent in packing the chikki must be regarded as sealed containers.

8. In the result, the question referred to us is answered in the negative. The respondent to pay to the applicant the costs of the reference fixed at Rs. 300.

9. Reference answered in the negative.

