(1984) 09 CAL CK 0036

In the Calcutta High Court

Case No : Civil Rule No. 12432 (W) of 1976

Gulabchand Harekchand and Another APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 21-09-1984

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 4, 5, 8(3)
Bengal Finance (Sales Tax) Rules, 1941 — Rule 3, 3(28)
Constitution of India, 1950 — Article 226

Citation : (1985) 5 ECC 235 : (1986) 23 ELT 306 : (1985) 59 STC 224

Hon'ble Judges : Prabir Kumar Majumdar, J

Bench : Single Bench

Advocate : Gopal Ch. Chakraborty, N.C. Bhattacharya, Ranjit Kr. Karmakar and Udayan Chakraborty, for the Appellant;Samar Dutta, for the Respondent

Final Decision : Allowed

Judgement

Prabir Kumar Majumdar, J.—This is an application under Article 226 of the Constitution of India. In this application the petitioners ask for a writ of mandamus or prohibition prohibiting the respondents from making any assessment or collecting any tax or further tax on "gudaku" or "guraku" packed or unpacked under the Bengal Finance (Sales Tax) Act, 1941 and the Taxes on Entry of Goods into Calcutta Metropolitan Area Act, 1972. The petitioners also pray for writ of or in the nature of mandamus calling upon the respondents to make refund of taxes already assessed and collected in respect of "gudaku" or "guraku" sold during the periods 4 quarters ended Chait Sudi 8, 2028, 2029, 2030 and 2031 Sambat year and subsequent periods.

2. The case of the petitioners is that petitioner No. 1 is a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the Sales Tax Act). The petitioners have been dealing in tobacco brought from outside the State of West Bengal, that is to say, tobacco leaf and tobacco paste popularly known as "gudaku" or "guraku" for use in teeth and also for hookha.

3. According to the petitioners, under item 18 of Schedule I to the Sales Tax Act, tobacco for hookah in any form and under Rule 3(28) of the Bengal Sales Tax Rules, 1941 (hereinafter referred as the "Rules") the sale of tobacco as defined under the Central Excises and Salt Act, 1944 are deductible from gross turnover in calculating taxable turnover. Therefore, such gudaku being a tobacco product cannot be subject to tax, either under the Sales Tax Act as also under the Taxes of Entry on Goods into Calcutta Metropolitan Area Act, 1972 (hereinafter referred to as the Entry Tax Act).

4. Mr. Gopal Chakraborty, the learned Senior Advocate appearing for the petitioners, contends that "gudaku" manufactured out of tobacco and having as its constituents lime, molasses, gerumati and some essence to give it flavour is covered by the expression "tobacco". He further argues that "gudaku" being wholly or essentially manufactured out of tobacco, which is an exempted item both under the Sales Tax Act and the Entry Tax Act, is not liable to be assessed to tax. As such, the said item cannot be taken into consideration in calculating taxable turnover.

5. Mr. Chakraborty draws my attention to item 18 of Schedule I to the said Sales Tax Act and Rule 3(28)(b) of the Bengal Sales Tax Rules, 1941. He refers also Section 5 of the said Sales Tax Act which provides, inter alia, that no tax shall be payable under this Act on the sale of goods specified in the first column of Schedule I, subject to the conditions and exceptions, if any, set out in the corresponding entry in the second column of the said Schedule I. Item 18 of the said Schedule I to the said Sales Tax Act mentions tobacco for hookah (that is to say tobacco paste ready for use in hookah). Rule 3 of the said Bengal Sales Tax Rules, 1941 provides, inter alia, that in calculating his taxable turnover a dealer liable to pay tax u/s 4 or 8(3) of the Act (the said Sales Tax Act) may deduct from his gross turnover the various items set out under Rule 3. Rule 3(28)(b) which says that in this sub-clause the expression "tobacca" has the same meaning as attributed to it in the First Schedule to the Central Excises and Salt Act, 1944. "Tobacco" as defined in the First Schedule to the said Central Excises and Salt Act, 1944 so far relevant for this application runs thus : "Tobacco means any form of tobacco, whether manufactured or not, and includes the leaf, stalks and stems of tobacco plant, but does not include any part of a tobacco plant while still attached to the earth."

6. Mr. Chakraborty, learned Senior Advocate, relying on the said provisions referred to above, argues that definition of "tobacco" has not been changed till today in the said Sales Tax Act. As tobacco and its products are not taxable under the said Sales Tax Act and also the Rules framed thereunder, the gudaku being essentially a tobacco product cannot be brought to tax as sought to be done by the respondents-sales tax authorities in respect of the said four assessment years referred to in the petition.

7. It is also his argument that the constituents of hookah gudaku are not very much different from the gudaku used for cleansing teeth.

8. He also submits relying on certain decisions which I will refer to presently, that gudaku used for smoking by hookah comes within the meaning of manufactured tobacco. Therefore, he submits, there is no reason why gudaku used for teeth would not be construed as tobacco.

9. Mr. Chakraborty further submits that under the West Bengal Sales Tax Act, 1954 tobacco for hookah or teeth gums are not taxable under the said Act. He, however, points out that under Notification No. 3123-FT dated 15th July, 1975 the tooth-paste/dentifrice has been brought to tax. But according to Mr. Chakraborty, the tobacco for hookah or teeth gums could never be brought within the meaning of tooth-paste and dentifrice. It is his submission that gudaku which may be used for cleansing teeth cannot be tooth-paste or dentifrice within the meaning of the said West Bengal Sales Tax Act.

10. It is the case of the petitioners that the ingredients which constitute a tooth-paste are absent in gudaku. The petitioners state that according to the specification for tooth-paste as prescribed by the Indian Standards Institution the materials used in the manufacture of tooth-paste fall into the following categories--(a) polishing agents, (b) soap or detergent, (c) humectant, i.e., glycerol or sorbitol, (d) binding agent, (e) astringent, (f) deodorant, (g) water and (h) permitted colours, preservatives, flavour and sweetening agents.

11. Mr. Chakraborty submits that the constituents of tooth-paste are not present in gudaku. Therefore, according to Mr. Chakraborty, occasional use of gudaku for cleansing teeth cannot make such thing a tooth-paste or dentifrice.

12. Mr. Chakraborty in support of his contention that gudaku cannot be subject to tax places strong reliance on a decision of the Orissa High Court in the case of State of Orissa v. Samsuddin Akbar Khan & Co. reported in [1976] 35 STC 179 Ori.

13. This is a case arising out of a reference under the Orissa Sales Tax Act. The question raised in the said reference was whether gudaku was covered by the expression "tobacco" and exempted from tax under the Orissa Sales Tax Act. The Orissa High Court after reviewing certain authorities came to the conclusion that gudaku came within the definition of "tobacco" and as such was tax-free.

14. The learned Counsel for the petitioners points out in this connection that the petitioners have been purchasing the very same product, namely, gudaku, from Messrs. Samsuddin Akbar Khan & Co., a dealer in Orissa, in whose case the said decision was rendered by the Orissa High Court.

15. He further submits that the petitioners'' claim for exemption under Rule 3(28) (b) of the Bengal Sales Tax Rules was allowed by the Commercial Tax Officer, Rajakatra Charge, relying on the said decision of the Orissa High Court. In the assessment order being annexure B to the petition, in respect of the year Chait Sudi 8, 2031. The Commercial Tax Officer following the said Orissa case also made an order for refund of the tax already paid by the petitioner. It is the

contention of the petitioners that they paid taxes on gudaku both under the said Sales Tax Act and the said Entry Tax Act under a mistaken concept of law, such mistake was detected in September, 1976.

16. Mr. Chakraborty also cites a decision of the Gujarat High Court in the case of B. Dar Laboratories Vs. The State of Gujarat, . In this case the question came up for consideration under a reference under the Bombay Sales Tax Act as to whether "Ipco-dental creamy snuff" was covered by entry 49 in Schedule A to the Bombay Sales Tax Act which exempted "tobacco" as defined in the First Schedule to the Central Excises and Salt Act, 1944 from the levy of sales tax.

17. The Gujarat High Court observed that the expression "any form of tobacco, whether cured or not and whether manufactured or not" as given in the definition of "tobacco" in the Central Excises and Salt Act, 1944 should be given a liberal interpretation. Giving such interpretation the Gujarat High Court held in that case that the said "Ipco-dental creamy snuff" was tobacco and was therefore exempt from sales tax.

18. Regarding taxability of gudaku under the said Entry Tax Act, Mr. Chakraborty''s contention is that gudaku" has been placed in item 41(c) of the Schedule to the said Entry Tax Act which reads: "Tooth-paste or powder, guraku". The contention of Mr. Chakraborty is that tobacco is not specified article in the said Schedule and is not liable to tax and gudaku being a tobacco product should be exempted from the levy of tax. He also submits that gudaku not being a toothpaste nor a tooth-powder as understood in the trade cannot be placed in the category of tooth-paste or tooth-powder under item 41(c) of the said Schedule.

19. Mr. S. N. Dutta, the learned Advocate appearing for the respondents, strongly contests the contentions of Mr. Chakraborty.

20. Mr. Dutta contends that gudaku is not essentially or wholly a tobacco product. It is given a tobacco flavour and essential elements of gudaku are "gerumati" and molasses. Just by giving a flavour of tobacco or some insignificant quantity of tobacco to it, it cannot become a tobacco in "any form". He further contends that gudaku in West Bengal is specially used as tooth-paste or dentifrice, and as such this is not exempted under either the Sales Tax Act or the Entry Tax Act.

21. It is also his argument that whether an essential or all the ingredients of tooth-paste are present in gudaku or not can only be investigated by proper authorities upon relevant materials and evidence. He submits that this is highly disputed question of fact, and this Court exercising jurisdiction under Article 226 of the Constitution should not take upon itself the burden of investigation of this fact in this proceeding. He further submits that the petitioners'' claim for exemption under Rule 3(28) of the Bengal Sales Tax Rules was allowed by the concerned Commercial Tax Officer under a mistaken impression that the said decision of the Orissa High Court was binding upon him. He has drawn my

attention to paragraph 12 of the affidavit affirmed by the concerned Commercial Tax Officer in which he states that he was misled to think that he was to obey the said decision of the Orissa High Court. He also states that exemption resulted in the excess payment, and therefore, the matter was referred to the Assistant Commissioner for sanction of refund. But since this question being sub judice the said Assistant Commissioner kept the matter in abeyance.

22. Referring to the taxability of gudaku under the said Entry Tax Act, Mr. Dutta submits that under the said Entry Tax Act the taxes are levied on the items specified in the Schedule to the said Act. Gudaku being a specified item under item 41(c) of the said Schedule is liable to be taxed, moreover, even if gudaku is taken to be a tobacco it is liable to tax being a specified item.

23. The next argument of Mr. Dutta is that both the said Acts provide complete machinery for adjudication of the question involved in this application, and such remedy as provided in the relevant statutes should be availed of. Moreover, it is the contention of the petitioners in the writ petition that it is the statutory obligation of the respondents to suo motu revise the assessment or dispose of the application for revision. Mr. Dutta submits that the petitioners in fact have made application for suo motu revision to the relevant authorities being annexure D to the petition at pages 45 and 58. In that view of the matter, he submits that this writ petition is not maintainable.

24. Mr. Dutta cites a decision of the Supreme Court in the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . The Supreme Court observes in this case that it is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute should be availed of. To this submission of Mr. Dutta, Mr. Chakraborty argues in reply that in the present case it is a question which concerns the construction of item 19 of the First Schedule to the Central Excises and Salt Act, 1944 and also Rule 3(28) of the Bengal Sales Tax Rules, and other relevant provisions of the statutes. It is also his submission that no further investigation as to any fact need be made in this proceeding, and as such this writ petition can be decided on merits having regard to the construction of the relevant provisions of law involved in this application.

25. In support of his said contention Mr. Chakraborty cites a decision of the Supreme Court in the case of Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others, and a decision of this Court in the case of Saifuddin Erahimbhai Vadnagarwalla v. Assistant Commissioner reported in [1976] 38 STC 463 Delhi.

26. I have carefully considered the rival submissions of the learned Advocates appearing for the respective parties. There is a considerable force in the contention of Mr. Chakraborty, learned Senior Advocate appearing for the petitioners. The expression "tobacco" as defined in item 19 of the First Schedule to the Central Excises and Salt Act, 1944 has been incorporated in the definition

of "tobacco" as provided under Rule 3(28)(b) of the Bengal Sales Tax Rules, and therefore whatever be the meaning of tobacco in the said Central Act of 1944, the same should attach to the definition of "tobacco" as provided in the said Bengal Sales Tax Rules.

27. In my view, definition of "tobacco" in item 19 of the Central Excises and Salt Act, 1944 is very wide and comprehensive. It includes "any form of tobacco whether cured or uncured and whether manufactured or not".

28. Respectfully agreeing with the decision of the Orissa High Court in case of State of Orissa v. Samsuddin Akbar Khan & Co. [1975] 35 STC 179 Ori, I am of the view that gudaku is manufactured out of tobacco and is covered by the expression "tobacco" as defined in Rule 3(28)(b) of the Bengal Sales Tax Rules read with item 19 of the Central Excises and Salt Act, 1944.

29. I also respectfully accept the view of the Gujarat High Court in the case reported in B. Dar Laboratories Vs. The State of Gujarat, that the Legislature has intended to give wide meaning to the expression tobacco "of any form", cured or uncured, manufactured or not.

30. I am of opinion that gudaku has not last its essential character, just because some gerumati or molasses are some of the constituent parts. It is not in dispute that gudaku is manufactured out of tobacco, and as such a tobacco product. This very same commodity may be used for smoking by hookah and also may be used for cleansing teeth. It cannot be said that gudaku if used for cleansing teeth will lose its character as tobacco. Taking into account the ingredients of gudaku, it cannot be said that the people familiar with tooth-paste or tooth-powder will take it as tooth-paste or tooth-powder. It must be construed in the sense in which they are understood in the trade by the dealer and the consumer. I cannot imagine that gudaku is understood in that trade by the dealer or the consumer as tooth-paste and nothing but tooth-paste. There are no materials placed before me in consideration of which I can come to a conclusion that gudaku can be taken as tooth-paste or tooth-powder. Mr. Chakraborty submits, and in my view rightly, that occasional use of gudaku for cleansing teeth cannot make it a tooth-paste or dentifrice. In this particular case the test is whether gudaku is covered by the expression of "tobacco" as defined in Rule 3(28)(b) read with explanation of the Bengal Sales Tax Rules or not. If it is found that it comes within the definition of "tobacco" then this item is entitled to exemption from the levy of tax.

31. The Orissa High Court in the case of State of Orissa v. Samsuddin Akbar Khan & Co. [1975] 35 STC 179 ori has considered this question whether gudaku is tobacco or not and came to this conclusion that gudaku came within the definition of "tobacco". I respectfully agree with reasoning of the Orissa High Court and do not see any reason to take a different view.

32. I also accept the contention of Mr. Chakraborty that no investigation of any disputed fact need be made in this proceeding. The question involved in this petition can be decided on the constructions of the relevant provisions of the

statutes.

33. Now I will consider whether gudaku, being a specified item of 41(c) of the Schedule to the said Entry Tax Act, is liable to tax under the said Entry Tax Act. Mr. Chakraborty contends that gudaku cannot be taken as a tooth-paste or tooth-powder and it is not understood as such in common parlance. Therefore, if it is not a tooth-paste or tooth-powder or the like, then it cannot be placed in that category under item 41(c) of that Schedule. In this category such thing can be placed which will have no other use but as tooth-paste or powder. His submission is that if it is not considered as tooth-paste or tooth-powder or the like, then it cannot be subject to tax only because it is a specified item under the said item 41(c). I accept this contention of Mr. Chakraborty. Tooth-paste or tooth-powder cannot have any other use except for cleansing teeth. In my opinion gudaku is not such a commodity. It may have different uses.

34. I will now consider the objection of Mr. Dutta as to the maintainability of the writ petition. He contends that the petitioners cannot maintain this application in view of this not having availed themselves of the remedies provided for in the statute. The question involved in this petition is as to whether the petitioners'' claim for exemption can be sustained on the construction of the relevant provisions of law involved. If gudaku is covered by the expression "tobacco", it is exempted from tax and there is no jurisdiction in the tax authorities to assess the petitioners on its turnover. The question is, therefore, in the nature of a jurisdictional fact. It is now well-settled that whether a jurisdictional fact has been rightly decided or not is a question that is open for examination by the Court in its writ jurisdiction. I will, therefore, hold that this writ petition is maintainable.

35. In the premises, I hold that tax cannot be levied on gudaku as this is covered by the expression "tobacco". The petitioners'' claim for exemption under Rule 3(28)(b) of the Bengal Sales Tax Rules should be allowed. I also hold that gudaku, not being a tooth-paste or tooth-powder, is not subject to the levy of tax under the said West Bengal Sales Tax Act and also under the said Entry Tax Act.

36. For the reasons aforesaid, this application succeeds. The rule is made absolute.

37. There will be no order as to costs.

38. There will be an order of stay of the operation of the judgment till a fortnight after the long vacation as prayed for by Mr. S. N. Dutta, learned Advocate for the State.

