
(2006) 01 KAR CK 0004
In the Karnataka High Court
Case No : Writ Petition No. 28125 of 2002

Marico Industries Ltd.

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 03-01-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 301, 304

Citation : (2006) 148 STC 17

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : G. Sarangan, for M. Thirumales and G. Rabinathan, for the Appellant; T.K. Vedamurthy, High Court Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.,

1.A failed effort on the part of the Revenue to bring to tax coconut oil sold in branded form and in containers as a toilet article, i.e., as hair oil subject to tax under entry No. 10 of Part "T" of the Second Schedule to the Karnataka Sales Tax Act, 1957 (for short, "the Act") at the rate of 15 per cent as against the rate of four per cent claimed by the very Petitioner-assesses as an edible oil taxable at four per cent in entry No. 1 of Part "E" of the Second Schedule to the Act in which effort the Revenue failed in terms of the judgment of this court in the case of State of Karnataka v. Marico Industries Ltd, reported in [2001] 124 STC 196, has given rise to the present legislation by introduction of entry No. 17-A in Part "C" of the Second Schedule to the Act, with effect from April 1, 2001 by Act 5 of 2001 which is again challenged by the petitioner-dealer on the ground that the Legislature by introduction of this entry subjected coconut oil sold under a brand name to tax at a higher rate in comparison to other edible oils though sold under a brand name as under entry No. 1 of Part "E" of the Second Schedule to the Act has been discriminatory, violative of article 14 of the Constitution of India and liable to be declared as unconstitutional.

2. It is this challenge thrown by the petitioner-dealer registered under the provisions of the Act which is required to be met by the respondent-State in this writ petition.

3. The sole ground of attack on the validity of the legislation rather the change in law brought about by Act No. 5 of 2001 is that it is one resulting in invidious discrimination as against coconut oil sold or marketed in a branded form and in containers whether sachets, bottles or plastic cans is alone subjected to differential treatment vis-a-vis all other edible oils that are marketed in similar fashion. It is the act of the Legislature in singling out branded coconut oil for levy of tax at the rate of 15 per cent from April 1, 2001 to March 31, 2002 and at 20 per cent with effect from April 1, 2002 to July 31, 2004 in terms of Act 5 of 2001 as against levy of tax on other edible oils at four per cent for major part of this period and at five per cent for the period from June 1, 2003 to July 31, 2004 which has given rise to the present round of litigation and this writ petition.

4. The petitioner is a dealer registered under the provisions of the Karnataka Sales Tax Act, 1957 and sells, amongst other products, coconut oil in a branded form presented in sachets and plastic cans.

5. The writ petition is on the premise that subjecting coconut oil sold in branded form to levy of tax at a higher rate has substantially affected the business of the petitioner in the particular product; that the State is not justified in making artificial distinction as between coconut oil and other edible oils. The provisions under which the coconut oil alone is subjected to tax at a higher rate has to be declared as unconstitutional and for such relief, the present writ petition.

6. Levy of sales tax on goods is an indirect tax and the tax is inevitably passed on to the consumer and not borne by the dealer though under the Act the dealer is looked upon by the State to gather the tax. A dealer by himself though may not be one who bears the brunt of the tax and therefore cannot complain as it can be passed on to the consumer to the extent that an illegal levy if has the effect of affecting his business prospects or other activities, even a dealer has the locus to question the constitutional validity of a suspect legislation and that is how this writ petition is entertained and examined.

7. Apart from elucidating as to how the impugned legislation fails to pass the test of article 14 of the Constitution of India by placing reliance on several decided cases in this regard, the petitioner has also sought to call in aid the provisions of articles 301 and 304 of the Constitution of India for attacking the validity of the legislation. However, in the course of arguments, Sri G. Sarangan, learned Senior Counsel for the petitioner, having confined the challenge to the validity of the legislation only on the ground of discrimination, the other ground urged to support the violation of articles 301 and 304 of the Constitution of India is not as much examined in this writ petition.

8. The State has been put on notice and writ petition was admitted on July 26, 2002. Respondents have entered appearance through Sri Vedamurthy, learned

Government Pleader and have also filed their statement of objections dated February 6, 2003.

9. The validity of the impugned legislation is sought to be defended mainly on the ground that coconut oil is generally used as a hair oil in the State of Karnataka to the extent of 95 per cent of the user being as hair oil and only about five per cent of the people living in the coastal belt using coconut oil as an edible oil; that coconut oil though had been forming a part of other edible oils under entry No. 1 of Part "E" of the Second Schedule to the Act, as it had been noticed that this particular oil is being substantially used only as a hair oil, a toiletry article, legislation has brought about a change in the existing law to subject coconut oil also to tax at the rate on par with other toiletry articles and that is how entry No. 17-A was introduced by taking out coconut oil from the group of other edible oils as it occurred in entry No. 1 of Part "E" and shifted to entry No. 17-A of Part "C" by Act No. 5 of 2001, with effect from April 1, 2001.

10. It is also the version of the respondents that the very petitioner who has about 80 per cent of the market share of coconut oil sold in branded form, markets it mainly for use as a hair care product and this had resulted in an unhealthy competition vis-a-vis other small coconut oil dealers and traders as other such dealers and traders in toiletry articles even when coconut oil was being used as such, were being subjected to tax at a higher rate vis-a-vis coconut oil though branded was sold but not marketed as a hair oil but for ostensible purpose of cooking and this anomaly was sought to be set aside by introduction of entry No. 17-A in terms of Act No. 5 of 2001. The user of the coconut oil as a hair oil is sought to be projected as a distinguishing feature as between coconut oil and other edible oils whether branded or not.

11. One another contention urged in the statement of objection is that the legislation also acts as a protective measure to protect small operators who market coconut oil not in a branded form but in a packed form or those dealers who did not have the capacity to market it under their own brand name vis-a-vis big players in the market who had established their brands and who still market coconut oil as edible oil though it could be used as a hair oil, i.e., as a toiletry article. The classification is sought to be justified as a valid classification as coconut oil can be distinguished from other edible oils having regard to the predominance of this oil as a hair oil whereas other edible oils are not suitable for being used as a hair oil and also to rationalise the levy of tax in respect of coconut oil being used as a hair oil on par with other toiletry articles.

12. It is averred in the statement of objections that it is common knowledge that coconut oil with brand name is normally used for applying to the hair and an ordinary person purchases coconut oil in packed condition with an intention of using it as hair oil.

13. It is also averred that the particular brand marketed by the petitioner is not used for edible purpose by majority of people in the State of Karnataka except

persons living in coastal area who may use it for such purpose. It is also averred that when it is used for edible purpose, it is normally unbranded and sold in large tins or in loose form rather than in small packets, sachets or cans.

14. The petitioner had rejoined the issue specifically on the plea of the respondents that 95 per cent of coconut oil marketed in the State of Karnataka in branded form is used as hair oil and that only five per cent is used as edible oil by pointing out that the version is not supported by any facts and figures nor is the version the correct version.

15. It is averred in the rejoinder statement filed by the petitioner that such figures are projected only to defend the validity of the legislation and is not based on either material which was available or gathered or was that the factual position.

16. It is the version of the petitioner that the coconut oil by and large is being used only as edible oil and that when the petitioner markets coconut oil for the purpose of being used as hair oil or as toiletry article, it is specifically so mentioned on the container and the petitioner also has been paying tax on such part of coconut oil sold by it for use as a toiletry article at the rate of tax as is applicable to toiletry articles under entry 10 of Part "T" of the Second Schedule to the Act.

17. An additional statement of objection is also filed on behalf of the respondent-State though very belatedly and on the verge of completion of arguments, to support the stand that the legislation is a valid piece of legislation; that the effort was to ensure that the levy of tax on coconut oil which was being used for toilet purposes was maintained on par at the rate of tax on toilet articles, i.e., in terms of entry No. 10 of Part "T" to the Second Schedule to the Act being on par with entry No. 17-A of Part "C" of this Schedule and therefore the classification is justified and valid. In this regard, as part of the statement of objections filed on behalf of the respondents, a proposal by the Commercial Taxes Department as a prelude to the legislation has been extracted and placed before the court which is quoted as under :

To provide for levy of tax at higher rate on coconut oil used for toilet purposes (amendment of Second Schedule):

Use of coconut oil as edible oil has come down considerably owing to availability of more economically priced alternate edible oils and also for change in cooking culture. Presently coconut oil especially the branded variety is predominantly used as hair oil, that is for toilet purposes. However, the manufacturers/traders of coconut oil for use as hair oils/toilet article have been paying lower tax rate (four per cent) as applicable to edible oils as against higher rate (twelve per cent) applicable to toilet articles, on the ground that it is of edible grade. Though the sale price of such coconut oil for use a hair oil/toilet article is much higher as compared to the edible oil variety, the department is unable to legally enforce the higher tax rate on this commodity. Hence, it is suggested to exclude

"branded" coconut oil from the edible oil entry and insert a new entry for branded coconut oil with a tax rate of twelve per cent on par with the other toilet articles.

18. It is also averred that the exercise was part of the budget proposal for the year 2001-02 and to ensure that coconut oil which was predominantly used as a toilet article does not escape tax at the rate as is applicable to toilet articles by being marketed as an edible oil. The accent is on coconut oil being used as hair oil while other edible oils are not suitable nor are being used as hair oil in the State of Karnataka.

19. It is in the background of such versions, the present writ petition is required to be examined to pronounce on the validity of the impugned legislation, i.e., Act No. 5 of 2001.

20. I have heard Sri Sarangan, learned Senior Counsel instructed by Sri Rabinathan learned Counsel on behalf of the petitioner and Sri Vedamurthy, learned Government Pleader appearing on behalf of the respondents.

21. Submission of Sri Sarangan, learned Senior Counsel appearing for the petitioner is that introduction of entry No. 17-A by Act No. 5 of 2001 is a glaring instance of discriminatory act; that discrimination is writ large on the face of it; that product which formed part of the group, namely, "edible oils" in terms of entry No. 1 of Part "E" of the Second Schedule to the Act has been carved out/taken out from this group and named as entry No. 17-A in Part "C" of the Second Schedule to the Act; that coconut oil alone being subjected to differential treatment in itself is an act of discrimination and until and unless the State is able to defend such action on justifiable reasons and grounds and is able to show that there exists a valid intelligible classification having nexus to the object of legislation, the Act should be declared as unconstitutional by looking at the very history of this legislation.

22. It is not in dispute that coconut oil sold under brand name did form part of entry No. 1 of Part "E" of the Second Schedule to the Act and when it was carved out from the group of edible oils occurring in this entry which was separately put into entry No. 17-A of Part "C" and therefore there is a deliberate intention and desire on the part of the State to treat coconut oil differently.

23. Placing reliance on the following decisions of the Supreme Court :

(a) George, Accused v. State of Travancore-Cochin AIR 1954 TRA-Co. 34.

(b) Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, .

(c) A.B. Abdul Kadir and Others Vs. State of Kerala, .

(d) Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, .

(e) Firm A.T.B. Mehtab Majid and Co. v. State of Madras [1963] 14 STC 355 (SC).

- (f) *Weston Electroniks v. State of Maharashtra* [1988] 70 STC 57 (SC).
- (g) *Arya Vaidya Pharmacy v. State of Tamil Nadu* [1989] 73 STC 346 (SC).
- (h) *Federation of Hotel and Restaurant Association of India v. Union of India* [1989] 74 STC 102 (SC).
- (i) *Andhra Steel Corporation v. Commissioner of Commercial Taxes in Karnataka* [1990] 78 STC 243 (SC).
- (j) *State of Assam v. Shri Naresh Chandra Ghose* [2001] 121 STC 294 (SC).

submission of learned Counsel for the petitioner is that the action on the part of the State in introducing entry No. 17-A by Act No. 5 of 2001 fails to pass the test of classification in terms of the principles enunciated in these decisions; that the State has not made good its version that it has justifiable ground to make a distinction; that the very defence falls to ground as the version of the State that coconut oil is used mainly as a toilet item or as hair oil is not made good by placing before the court supporting material by way of facts and figures; that the version has merely remained the opinion or the view of the officers or the persons managing the Government and not made good by the State by placing before the court relevant material and actual facts and figures to support that version.

24. learned Counsel has submitted that the classification is not a reasonable classification; that the State has not justified the levy of higher rate of tax on sale of branded coconut oil alone and therefore the Act No. 5 of 2001 should be inevitably declared as unconstitutional.

25. Sri Vedamurthy, learned Government Pleader appearing on behalf of the respondents, has sought to defend stoutly the validity of the legislation. Submitting on line with the statement of objections, learned Government Pleader has urged that it was the experience of the State that coconut oil was being essentially used as hair oil in large part of the State by the people in the State; that it is only a small fraction of the citizens of the State who were using coconut oil as a cooking media; that coconut oil even when used for cooking media is normally purchased by such users in loose form and not in the form of contents in containers, bottles or plastic cans; that to the extent coconut oil is used as a cooking media and purchased in loose or in forms other than any branded forms, coconut oil was treated on par with other edible oils; that it was being subjected to levy of tax on par with other edible oils but only when it was sold in a branded form in containers and as the user when sold in branded form and in containers being mainly as a toiletry article, the rate of tax was sought to be altered to bring it on par with the rate of tax as applicable to other toiletry articles by introduction of entry No. 17-A by Act No. 5 of 2001 and therefore the classification is fully justified; that coconut oil when sold in branded form having distinct and separate use than from other edible oils, formed a class of its own and if so the Legislature is not only justified in making a distinction by classifying

coconut oil under entry No. 17-A but also in levying this particular item under this entry at a higher rate of tax, the rate of tax on par applicable to other toiletry articles under entry No. 10 of the Second Schedule to the Act.

26. Learned Government Pleader has also submitted that the State enjoys a wide discretion in the matter of picking and choosing class of persons, articles and events for levy of tax at different rates; that a classification need not be precision like or an accurate classification to the hilt but a classification which is a probable classification, in the sense, if it can be broadly accepted, that persons who are grouped together from those left out have distinguishing features and for that matter any distinguishing feature is good enough for a valid classification and if such test is applied, the classification of coconut oil when sold in a branded form passes this test and therefore it should be held that the legislation is a valid piece of legislation.

27. In this regard, learned Government Pleader has placed reliance on the following decisions :

(a) Khadi and Village Soap Industries Association v. State of Haryana reported in [1994] 95 STC 355 (SC), and has placed particular stress on the following paragraph :

The principles for determining the validity of classification in taxing statutes are well-settled and so also the limits of judicial review in testing the validity thereof on the touchstone of equality under article 14. The test applicable for striking down a taxing provision on this ground is one of palpable arbitrariness in the context. It has also been held that a classification is permissible in a taxing statute of dealers on the basis of different turnovers for levying varying rates of sales tax.

(b) The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another, .

(c) Ramavatar Budhaiprasad v. Assistant Sales Tax Officer, Akola reported in [1961] 12 STC 286 (SC).

(d) Magaji Mhavarasa Kamakshi Bai Kalyana Soudha Samudaya Bhavan, Nanjangud v. Assistant Commissioner of Commercial Taxes, District Circle-1, Mysore reported in [2006] 146 STC 473 (Karn); [2003] 54 KLJ 208 (DB)-- Paragraphs 10 and 12.

28. The origin of the legislation, as indicated in the beginning of this order is the failed effort on the part of the State or the taxing authority to rope in to tax some part of the sale of branded coconut oil as a sale of toilet article and subject it to tax at a higher rate than the rate of tax applicable to an edible oil. It is not in dispute and cannot be disputed also that coconut oil is an edible oil as the Legislature has understood that to be so by its own conduct and the history of this legislation. This is so because the sale of coconut oil was being subjected to tax as an edible oil classified as non-refined, refined and hydrogenated oils and cooking medium under entry No. 1 of Part "E" of the Second Schedule to the Act.

It was only by Act No. 5 of 2001, this entry was modified to exclude coconut oil from within the scope of "other edible oils" figuring as part of this entry and a separate entry--entry No. 17-A--was carved out in Part "C" of the Schedule. Even here, the entry was originally introduced as coconut oil sold under brand name and at 15 per cent with effect from April 1, 2001, which rate had come to be enhanced to 20 per cent with effect from April 1, 2002 which rate held the field up to July 31, 2004 and on and after August 1, 2004 the entry is modified to read as "coconut oil sold in consumer sachets, bottles or tins of 200 grams or 200 milliliters each or less, including when such consumer containers are sold in bulk in a common container", by Amendment Act No. 26 of 2004. In between, by Notification No. FD 173 CSL 2002 (1), dated August 19, 2002, the levy of tax under entry No. 17-A for branded coconut oil was confined to such sales within the quantum of two litres and over and above two litres, it was treated on par with other edible oils and subjected to tax at four per cent.

29. A mere look at these legislative developments indicates that there is a definite intention to treat coconut oil sold under brand name differently from other edible oils. In fact even earlier, the entry was one which was for the purpose of levying tax on non-edible oil not falling under any other entry, which held the field from April 1, 1988 to March 31, 1994 and was altered by Act No. 6 of 1995, which alteration may not be very material for the present discussion. The challenge in this writ petition is confined to the validity of Act No. 5 of 2001 levying sales tax at 15 or 20 per cent on coconut oil sold under brand name and relevant for the period from April 1, 2001 to July 31, 2004.

30. The legal principles to be applied for testing the constitutional validity of statutory provisions on the touchstone of article 14 of the Constitution of India are by now fairly well-settled. There should be an intelligible criterion for making a differentiation in the sense separating a particular person or product or event or place from others in common; that the separated thing must have some distinguishing feature and the classification should have a nexus or correlation to the object of the legislation. In fiscal statutes, the object being only to raise revenue, any provision which seeks to levy tax so long it is within the competence of the enacting Legislature, it definitely has a nexus. But the further question will be whether that classification is based on any intelligible criterion in the sense as in the present case, separating coconut oil sold under brand name and putting it into a separate entry like entry No. 17-A and making a distinction as between this and other edible oils as they occur under entry No. 1 of Part "1" of the Schedule, is a justifiable and valid classification. Here again, in so far as levy of tax and laws providing for levy of taxes are concerned, it again is part of the sovereign power of the State.

31. The test is not an absolute test or a strict classification but one that can pass muster if it is a probable or even if it is a possible classification. It is no doubt true that the State is given a very wide amplitude particularly in the matter of taxation and in choosing whom to tax and at what rate. There is no denial on the

competence of the State to levy sales tax at 15 or 20 per cent on the sale of coconut oil sold under brand name as envisaged in entry No. 17-A as it occurred at the relevant point of time, but it is only in comparison with levy of lesser rate of tax under a different entry in respect of other edible oils, the question assumes importance. The distinct feature urged on behalf of the State is that coconut oil sold under brand name is not merely used as an edible oil, but in fact the counter goes on to say that it is almost exclusively used as a hair oil, i.e., to the extent of 95 per cent of the users and only a small portion of it used as an edible oil, i.e., only five per cent of the users use it for cooking purpose and therefore it is separated from the group of other edible oils.

32. If this is to be the fact-situation, there cannot be any doubt that it can definitely constitute a valid classification to subject coconut oil used for such purpose to tax at a different rate. Courts normally do not examine as to whether what percentage of the users or to what extent the product is used for a distinguishing purpose can constitute the criteria for making a valid classification. It is here that the precise test is not applied as in the case of a solution to a mathematical problem or with an arithmetical precision, the question is required to be answered. But, unfortunately, in the present case, the respondent-State has not made good its stand that coconut oil sold under brand name is essentially used as a hair oil by majority of the users by placing any material or facts or figure before the court. A mere lipsy mere lipsy that 95 per cent of the users use it for hair oil and only five per cent for cooking purpose, which is indicated to be the reason for ushering in the challenged legislation is not at all made good but the proposal on such premise alone is extracted as forming part of the additional statement of objections filed on behalf of the respondents on December 21, 2005 and supported by an affidavit of one M. Nagaraj, Joint Commissioner of Commercial Taxes (Legal), Bangalore. Though it is not required that the State has to demonstrate that even as high as 95 per cent of the users use the coconut oil sold under brand name for a toilet purpose in the sense as hair oil, as it is so averred in the statement of objections and indicated to be the basis on which the legislation has been brought about, it becomes the responsibility of the respondents to make good this plea. In the absence of supporting material, the plea fails. In fact the plea is not made good to any extent in the present case, except for indicating that it is a view or opinion of the department with which on a discussion with the Finance Minister, who was convinced with the same and efforts were taken for bringing about or ushering in a law in terms of the proposal placed by the Finance Department.

33. Placing a proposal before the Finance Minister or the fact that such a proposal satisfied the Finance Minister and therefore a law was brought about, are all, in my opinion, not relevant consideration for the purpose of testing the validity of the legislation on the touchstone of article 14 of the Constitution. The stand as taken, no doubt can constitute a good defence but only if it is demonstrated that it is so. The State having miserably failed in this regard and notwithstanding repeated opportunities given to the respondents even at the

stage of conclusion of the arguments, when the matter was adjourned and the State was given time for more than two weeks to place such materials to support the plea, particularly that the coconut oil sold under brand name is being substantially used by the users as hair oil, no material having been placed before the court, the defence of a different use attributed to coconut oil fails and falls to ground. If a mere opinion or view alone could sustain the validity of a legislation when tested from the angle of unfair action by the State, then it amounts to accepting any whimsical view or reason that can be put forth which can only usher in an era of arbitrariness. Any action on the part of the State can be justified if the State held the view that it is a fair and good law and in its opinion if the classification is valid, it should pass the test of article 14 of the Constitution, if accepted, can only negate the rule of law and open the floodgates to arbitrariness and permissiveness which is frowned upon by article 14 of the Constitution of India, as an act lacking in fairness in State action.

34. It is inevitable that the impugned legislation has to be declared as unconstitutional only for the reason that the State has miserably failed in defending the validity of the legislation by not placing relevant material to sustain its stand before the court. Though it was submitted by Sri T.K. Vedamurthy, learned Government Pleader, that inspite of his best efforts, the respondents have not come up with any better material to place the same before the court in which event, it only leads to an inference that no material at all is placed before the court, which again can only indicate that the classification made was based not on existing facts and figures or available material, but only because of the view taken by the officers of the department which, as discussed above, is not the answer to meet the challenge of discrimination on the touchstone of article 14 of the Constitution of India.

35. It is rather shocking that the respondents have not learnt their lessons as to the manner in which the validity of a legislation has to be defended, particularly when the challenge is on the touchstone of article 14 of the Constitution of India, and as to what material is required to be placed before the court which should have been in the first instance gathered for the purpose of ushering in such a legislation. It is not as though such suspect legislation against which the challenge is on the ground of discrimination is for the first time before the court. Day in and day out, particularly in the field of taxation laws, assesseees and dealers come up with all novel contentions and grounds to impugn the validity of an onerous legislation and invoking article 14 of the Constitution for such purpose is a most common feature in any such challenge. Levy of tax even in terms of article 265 of the Constitution of India can only be in the manner authorised by law and not otherwise and within the four corners of the constitutional limitations. It is not as though the State is unaware of its obligations towards citizens in the light of article 14 of the Constitution and even after 50 years of the constitutional functioning, if the State has not learnt the lessons as to in what manner such legislation has to be defended, it is only a poor reflection on either the ability and competence or the responsibility shown

by the State in defending such action before the court. In the present case, it is nothing but sheer callousness and the lukewarm attitude on the part of the respondents, which has made it inevitable to declare the law as unconstitutional. It is hoped, at least henceforth, when enacting such laws due attention is paid by the respondent-State not only before ushering in such law but also while defending the validity of such laws before courts.

36. In the result, this writ petition has to be allowed. A writ in the nature of declaration is issued, declaring that Act No. 5 of 2001 insofar as it relates to introduction of entry No. 17-A in Part "C" of the Second Schedule to the Act is unconstitutional being discriminatory and violative of article 14 of the Constitution of India. As the petitioner has sought for only the relief of declaration in this writ petition and has not placed any further material nor any other aspect being in challenge in this writ petition, the writ petition is disposed of with such declaration and nothing beyond. Rule made absolute.