
(1989) 05 OHC CK 0022

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1271 of 1981

Parimala Agencies

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-05-1989

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 2
Central Excises and Salt Act, 1944 — Section 2
Orissa Sales Tax Act, 1947 — Section 5, 6

Citation : (1990) 76 STC 319

Hon'ble Judges : J. Das, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : Y. Das, for the Appellant; The Additional Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

J. Das, J.—This is an application under Article 226 of the Constitution of India praying for issuing a writ of mandamus or any other suitable writ.

2. The facts in brief are that the petitioner is a registered dealer under the provisions of the Orissa Sales Tax Act, 1947, and amongst other articles it deals in Amrit Surti zarda. The petitioner treated Amrit Surti zarda as tax-free taking the view that the said zarda is nothing but chewing tobacco which is tax-free. The sales tax authority, however, did not accept the contention of the petitioner and assessed Amrit Surti zarda to sales tax for the assessment years 1974-75, 1975-76, 1976-77, and 1977-78. Ultimately the Sales Tax Tribunal held that the assessment of Amrit Surti zarda to sales tax, is correct. In these circumstances the petitioner has filed the writ application contending that Amrit Surti zarda is nothing but chewing tobacco and hence the said zarda should be exempted from the sales tax. The petitioner has further contended that treating zarda as a different commodity from chewing tobacco, is illegal and hence the Notification dated 5th February, 1968 and the notification of 1976 are illegal and ought to be

quashed.

3. Vide Notification No. 33925-CTA-130/57-F dated 30th December, 1957, tobacco and all its products were exempted from tax.

Vide Notification No. 3604-CTA-38/67-F dated 5th February, 1968, a new serial No. 5-A was inserted and as per that serial number chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff were assessed to sales tax at the rate of 3 per cent. Thus, all these commodities were made taxable.

4. Vide Notification No. 3609-CTA-38/67-F dated 5th February, 1968, there was a further amendment in serial No. 35(2) as follows :

"Tobacco and all its products other than chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff."

Thus, tobacco and all its products were made tax-free and other commodities including chewing tobacco and zarda were made taxable.

Again vide Notification No. 16925-CTA-46/68(Pt.)-F dated 14th May, 1968, the words "chewing tobacco" were deleted from serial No. 35(2) and as a result of that chewing tobacco was made tax-free. This position continued till 1976.

5. Vide Notification No. SRO 1206/76 dated 3rd December, 1976, entry No. 40-A was inserted and gudakhu, gundi, zarda, snuff and pan masala with mixtures of tobacco were made taxable at the rate of 4 per cent and as per entry No. 40-A tobacco and all its products other than gudakhu, pan masala, gundi, zarda and snuff were made tax-free.

6. The short point which arises for consideration is whether Amrit Surti zarda is chewing tobacco and whether the taxability of Amrit Surti zarda in one entry of the schedule is legal when the chewing tobacco has been made tax-free under a different entry.

7. The learned Advocate for the petitioner, Mr. Y. Das, strenuously argued that Amrit Surti zarda is nothing but chewing tobacco and hence the taxability of Amrit Surti zarda, is not legal when chewing tobacco has been made tax-free. He has cited the decisions reported in [1975] 35 STC 179 Ori (State of Orissa v. Samsuddin Akbar Khan & Co.), [1988] 68 STC 92 (SC) (State of Orissa v. Radheshyam Gudakhu Factory), Ayurveda Pharmacy and Another Vs. State of Tamil Nadu, and J. Shamdas Vs. State of Andhra Pradesh, .

8. [1975] 35 STC 179 (State of Orissa v. Samsuddin Akbar Khan & Co.) is a decision of the Orissa High Court. In this decision it has been held that "gudakhu" is "tobacco".

In this case a reference was made by the Tribunal on the following question :

"Whether gudakhu is covered by the expression "tobacco" as defined in Section 2(c) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, which was substituted with effect from 1st July, 1967, by Notification No. 21278-

CTA-38/67-F dated 6th June, 1967, and is exempted from tax under the Orissa Sales Tax Act, 1947 ?"

A reference is made to the Notification No. 21278-CTA-38/67-F dated 6th June, 1967. As per this notification, column (2) against serial No. 35 of the Schedule as it existed then was substituted as follows :

"Tobacco as defined in Section 2(c) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957."

This amendment took effect from the 1st July, 1967, and remained in force for three quarters, i.e., up to 31st March, 1968. The registered dealers did not pay sales tax on gudakhu during these three quarters and ultimately it was assessed to sales tax. This Court held that during the relevant period gudakhu came within the definition of "manufactured tobacco" and as such was tax-free. Such a conclusion was arrived at on the basis of the definition of "tobacco" as given in the Central Excises and Salt Act, 1944. The Additional Duties of Excise (Goods of Special Importance) Act, 1957, adopted the definition given in the Central Excises and Salt Act, 1944, which is as follows :

"Tobacco means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth."

Thus the definition is very wide and comprehensive and it includes any form of tobacco whether cured or uncured and whether manufactured or not.

Again the definition of "manufacture" in Section 2(f) of the Central Excises and Salt Act, 1944, is as follows :

"In this Act, unless there is anything repugnant in the subject or context--

(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product ; and

(i) in relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, bins, cigarette or pipe or hookah tobacco, chewing tobacco or snuff."

Thus the definition of "tobacco" is very wide and includes within its ambit all products of tobacco. It was observed by the High Court of Orissa :

"It is to be noticed that the definition of "manufacture" in relation to tobacco is an inclusive one. Words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. It would be inappropriate to put a restrictive interpretation upon terms of wider denotation."

9. The Orissa Sales Tax Act adopted the definition of "tobacco" as defined in Section 2(c) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, and consequently the definitions of "tobacco" and "manufacture" as given in the Central Excises and Salt Act came in aid. So the definition of "tobacco"

included all types of tobacco products. As a result of this, "gudakhu" which has been held not to be different from hookah gudakhu was held to be covered by the expression "tobacco".

10. The above decision of the Orissa High Court was questioned in the Supreme Court of India and in the decision reported in [1988] 68 STC 92 (State of Orissa v. Radheshyam Gudakhu Factory), the views expressed in the decision of the Orissa High Court in [1975] 35 STC 179 (State of Orissa v. Samsuddin Akbar Khan & Co.) were confirmed.

11. It appears from Section 2(f)(i) of the Central Excises and Salt Act that the meaning of "tobacco" is extended and it includes within its definition other preparations and commodities such as cigarettes, cigars, cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff. It appears from the definition that the Act treated chewing tobacco in a separate category from hookah tobacco or pipe tobacco used for hookah and other products mentioned in the definition, although by the extended meaning of "tobacco" all the products are included within the definition of "tobacco".

The provisions of the Sales Tax Act as it stood at the relevant time treated chewing tobacco in a separate category.

Vide Notification No. 3604-CTA-38/67-F dated 5th February, 1968, Notification No. 33925-CTA-130/57-F dated 30th December, 1957, was amended and a new serial number 5-A was inserted and against that serial number chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff were made taxable and the rate of tax was 3 per cent.

Vide Notification No. 3609-CTA-38/67-F dated 5th February, 1968, there was an amendment of serial No. 35 and in place of the previous entry the following entry was substituted :

"Tobacco and all its products other than chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff."

Thus, by this amendment tobacco and all its products were made tax-free, whereas chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff were made taxable under serial No. 5-A.

Again vide Notification No. 16925-CTA-46/68(Pt.)-F dated 14th May, 1968, Notification No. 33925 dated 30th December, 1957, was further amended and "chewing tobacco" was deleted from serial No. 35 of the Schedule and hence chewing tobacco was made tax-free.

12. Vide Notification No. 20206-CTA-14/76-F as per serial No. 38 tobacco and all its products other than gudakhu, pan masala, gundi, zarda and snuff were made tax-free and vide entry No. 40-A, gudakhu, gundi, zarda, snuff and pan masala with mixture of tobacco were made taxable and the tax is at the rate of 4 per cent.

13. Thus the definition of "tobacco" in its extended and inclusive meaning as per the provisions of the Central Excises and Salt Act was given up vide Notification No. 3604 dated 5th February, 1968, and Notification No. 3609 dated 5th February, 1968, and the restricted meaning of tobacco and all its products of different categories such as chewing tobacco, gudakhu, pan masala, zarda and snuff was accepted in the Orissa Sales Tax Act in their ordinary meaning. Hence, the circumstances which prevailed during the quarters ending 30th September, 1967, to 31st March, 1968, which is also the relevant period under consideration in the decisions of the Orissa High Court and the Supreme Court referred to above has ceased to exist and so the above two decisions are not applicable to the present case.

14. The learned counsel for the petitioner submitted a xerox copy of the decision of the Supreme Court in Civil Appeal No. 1868 of 1974 (with Civil Appeal No. 2037 of 1980). This decision appears to have been reported in (1989) 1 SVLR(T) 158 (Arya Vaidya Pharmacy v. State of Tamil Nadu) and in no other journal. As per this decision the Tamil Nadu Government levied 30 per cent tax on the sale of arishtams and asavas under one entry and other ayurvedic medicinal preparations are subjected to tax at 7 per cent under another entry. The Supreme Court held that although the legislature or the State Government if it is authorised in that behalf by the legislature, is to select different rates of tax for different commodities, still commodities belonging to the same class or category should be taxed at the same rate. The Supreme Court further held that there should be a rational basis for discriminating between one commodity and another for the purpose of imposing tax.

It appears from the Supreme Court decision that as per the provisions of the Tamil Nadu General Sales Tax Act, 1959, ayurvedic medicines of all classes were levied to sales tax at the rate of 7 per cent, whereas arishtams and asavas which are also admittedly ayurvedic medicines were taxed at 30 per cent. The Government of Tamil Nadu took the plea that the high rate of sales tax was levied on arishtams and asavas with a view to curb the abuse of medicinal preparations for their alcoholic content by drink addicts. It was however, found that there are 130 allopathic medicines containing alcohol whereas those medicines are subjected to tax of 7 per cent. There was no rational basis for imposition of tax of 30 per cent on two other medicinal preparations and hence the Supreme Court struck down the relevant entry and directed that arishtams and asavas should be levied to sales tax as other medicinal preparations.

The Supreme Court decision is distinguishable as two medicinal preparations were discriminated as against various other medicinal preparations and levied with excessive sales tax, whereas the sales tax levied for other medicinal preparations was much lower. Such discrimination did not have any rational basis. In any case no medicinal preparation was exempted from payment of tax. In these circumstances the Supreme Court held that all medicinal preparations except two were levied to tax at 7 per cent. There was no rational basis for

levying much higher tax for two other medicinal preparations, as there must be a rational basis for discriminating between one commodity and another for the purpose of imposing tax, where the commodities belonged to the same class or category.

In this case tobacco, gudakhu, pan masala, gundi, zarda and snuff have been taken in their ordinary meaning and as understood by the customers. Although gudakhu, pan masala, gundi, zarda and snuff contain tobacco, still each item is understood differently and as different commodity by any customer and no customer whether literate or illiterate would confuse gudakhu, pan masala, gundi, zarda and snuff for tobacco. In these circumstances, each commodity has separate identity and separate use and hence each commodity may be treated as separate goods for the purpose of sales tax.

15. Another decision which is also important in this case is the one reported in [1967] 19 STC 412 (Shamdas v. State of Andhra Pradesh), It is a decision of the Andhra Pradesh High Court. In this decision it has been held that the zarda is nothing but a variety of chewing tobacco. The decision was in a different context. It appears that in the Andhra Pradesh General Sales Tax Act there is a provision in Section 8 of the Act which reads as follows :

"Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees, a dealer who deals in the goods specified in the Fifth Schedule shall be exempt from tax u/s 5 in respect of such goods."

Amongst other things "tobacco and all its products" were included in the Fifth Schedule and the exemption of "tobacco and all its products" continued to remain. It is further seen that the Union Government imposed additional duties of excise on tobacco under the provisions of Additional Duties of Excise (Goods of Special Importance) Act, 1957, and in order to avoid double taxation the State Government of Andhra Pradesh in exercise of its powers u/s 9 issued a notification exempting from payment of tax on goods in respect of which additional duties of excise were levied. Only unmanufactured and manufactured tobacco had been subjected to additional duties and zarda did not fall within any category enumerated in item No. 9 of the First Schedule. In the Andhra Pradesh Act "tobacco and all its products" were exempted from tax. Zarda is a product of tobacco and at the same time it did not fall within any category enumerated under item No. 9 of the First Schedule as stated above. In such circumstances, zarda was held to be tobacco.

In the Orissa Act there is no provision like Section 8 of the Andhra Pradesh General Sales Tax Act and the other matters covered by the above decision of Andhra Pradesh High Court are also quite distinguishable. In the Orissa Act as per serial No. 35 of the Schedule it has been clearly mentioned "tobacco and all its products other than chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff". Thus chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff are

excluded from the exemption and other than these commodities, tobacco and all other products of the same are exempted from sales tax. As per Notification dated 5th February, 1968, serial No. 5-A "chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff" have been taxed and the rate of tax is 3 per cent. In the notification of 1976, the two entries were written in serial Nos. 38 and 40-A and the rate of tax on gudakhu, gundi, zarda, snuff and pan masala with mixture of tobacco has been raised from 3 per cent to 4 per cent.

As per Section 6 the State Government is empowered to exempt from tax the sale or purchase of any goods. The section reads as follows :

"6. Tax-free goods.--The State Government may, by notification, subject to such conditions and exceptions, if any, exempt from tax the sale or purchase of any goods, or class of goods and likewise withdraw any such exemption."

The above section clearly gives the discretion to the State Government to exempt any goods or class of goods from payment of tax. u/s 6, the State Government is empowered to levy tax on different goods from time to time by notification. From the relevant entries in the Schedule, it is clear that the State Government has accepted "chewing tobacco, gudakhu, pan masala, gundi, zarda and snuff" to be a different class from tobacco and all its products. Subsequently chewing tobacco was also exempted from payment of tax.

16. In the above circumstances, the provisions in the Orissa Act are quite different from the Andhra Pradesh Act and the circumstances are also quite different and hence the decision of the Andhra Pradesh High Court referred to above is not applicable.

17. The next question is whether the classification made by the State Government and treating gudakhu, pan masala, gundi, zarda and snuff in a different class from tobacco and all its products is reasonable or artificial. In this case we are concerned with zarda. The price of zarda is too high in comparison to tobacco. The price of a certain quantity of zarda may be 10 to 50 times or even 100 times more than the same quantity of tobacco. Thus, zarda is meant for the affluent class of citizens who can afford to spend. A person who can purchase goods at such a high price can also easily spend a little more money on taxation. Tobacco is, however, meant for the poor and lower middle class citizens. Added to this, the manufacturing process of zarda is quite different and also complicated. Although tobacco is a constituent of zarda, still after manufacture "the zarda" is quite distinguishable and it has an identity of its own. In the above circumstances, there is no difficulty in treating zarda as being of a different class of goods from tobacco. It has also been stated earlier that any customer either literate or illiterate knows the difference between tobacco and zarda. Hence, this is also a circumstance which makes zarda a distinct goods from tobacco. In these circumstances, the classification is quite reasonable. Hence, there is no reasonable ground to strike off "zarda" from the relevant entry and treat the same as tobacco so as to make it tax-free.

18. In the result, the writ petition is dismissed. There will be no order for costs.

G.B. Patnaik, J.

19. I agree.