
(2006) 08 OHC CK 0032
In the Orissa High Court

Satyanarayan Bhandar

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-08-2006

Acts Referred:

Central Sales Tax Act, 1956 — Section 14

Citation : (2007) 5 VST 83

Hon'ble Judges : I. Mahanty, J;A.K. Ganguly, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—Since both the tax revision cases involve identical facts and raise identical questions, they were heard together and are being disposed of by this common judgment.

2. In both the tax revision cases, two questions of law were raised for consideration of this Court and out of those two questions, the learned Counsel for the petitioner argued only one. The question on which both the tax revision cases were argued is as under:

Whether, in the facts and circumstances of the case, the Tribunal is justified in holding that Robinson barley is not covered under SI. No. 33 vide notification dated June 30, 1990 and is not taxable at the first point of sale ?

3. The material facts of the case which gave rise to the aforesaid question are narrated below:

M/s. Satyanarayan Bhandar, the petitioner in both the cases, is a registered partnership firm and carries on business in grocery, stationery, manohary goods, ayurvedic medicines, pan masala and salt, etc. The petitioner is a registered dealer. The assessment of the petitioner-firm was made u/s 12(4) of the Orissa Sales Tax Act, 1947 (hereinafter, referred to as "the OST Act") for the years 1990-91 and 1991-92. After completion of assessments and on the basis of

information that the turnover of the petitioner for the aforesaid years has escaped assessment in view of the wrongful grant of exemption, orders for reopening of assessments were passed by the concerned Sales Tax Officer u/s 12(8) of the OST Act.

4. In course of such assessment proceeding, the Sales Tax Officer held that the petitioner had sold barley to the tune of Rs. 29,138.88 and Rs. 1,04,571.16 respectively for the years referred to above and claimed exemption of tax thereon on the ground of first point tax-paid goods and it was also claimed by the petitioner that purchase of Robinson barley was made inside the State of Orissa on payment of tax at the rate of four per cent. In the original assessment the exemption was allowed. But consequent upon reassessment, the Sales Tax Officer held that Robinson barley is not a medicine nor it is a cereal and is exigible to tax at the last point of sale at the rate of 12 per cent. Accordingly, demand at the rate of 12 per cent was raised in the assessment for both the years.

5. Against such assessment orders, the petitioner filed first appeal before the Assistant Commissioner of Sales Tax, Cuttack-II Range (hereinafter referred to as "the ACST"). Various contentions were raised before the ACST by the parties. Ultimately, the ACST set aside the orders of the assessment passed by the Sales Tax Officer and allowed the appeal holding thereby that Robinson barley being barley, was to be taxed at the first point of sale at the rate of four per cent. Against the said order of the ACST, the Revenue filed an appeal before the Sales Tax Tribunal in second appeal. The Sales Tax Tribunal allowed the appeal holding therein that Robinson barley is not the same as barely in the form of cereal and it cannot be taxed at the first point of sale at the rate of four per cent. Against the said judgment of the Tribunal, the petitioner has filed the present two revisions and both the cases were argued on the point indicated hereinabove.

6. Assailing the judgment of the Tribunal, a large number of decisions were cited by the learned Counsel for the petitioner. Before examining those decisions, this Court thinks it would be worthwhile to examine the notification in question. The Notification No. 21987-CTA-98/90-F., dated June 30, 1990, has been issued by the appropriate authority in exercise of its power under Sub-section (1) of Section 5 of the OST Act, 1947 as amended by the Orissa Sales Tax (Amendment) Act, 1990 and in the said notification the rate of sales tax of various goods have been notified. The particulars of the serial number and the rate of sales tax on which reliance was placed by the petitioner run as follows:

SI. No. 16. Cereals other than wheat, paddy, rice/broken rice, jowar, suan, gurji, kangu, ragi and maize.

In respect of all these items 4 per cent is the rate of taxation.

7. Learned Counsel for the petitioner has also relied upon the notification dated January 9, 2002 in order to contend that in the list which is subjected to first point sales tax against item No. 52, cereals have been included as follows:

Item No. 52. Cereals, i.e., bazra, kodon, barley, kutki.

8. From this notification it appears that barley is an item which is subjected to first point sales tax and is treated as a cereal which is subjected to four per cent of sales tax. Learned Counsel for the petitioner also relied on Section 14 of the Central Sales Tax Act, 1956 in order to contend that under the said Section 14, a list of certain goods of special importance for inter-State trade and commerce is mentioned and barley is included against entry (x) in the list of items in Section 14(i) of the Act.

9. Learned Counsel for the petitioner submits that the Tribunal has erred in law by reversing the judgment of the first appellate authority and in doing so misconstrued the notification and the provisions of the Sales Tax Act as pointed out hereinabove. It has also been submitted by the learned Counsel for the petitioner that Robinson barley is nonetheless barley and the Tribunal should have held that since it is nobody's case that Robinson barley is not barley, the finding of the first appellate authority that it should be treated as first point tax-paid goods and in respect of which four per cent tax is payable should not have been interfered with.

10. Reliance has been placed by the learned Counsel for the petitioner on the judgment in the case of M. N. Nilugal v. District Manager, Food Corporation of India, District Office, Hubli/Raichur reported in [2005] 142 STC 229 (Karn). The question in that case was whether (a) damaged wheat to be used as cattle/poultry feed, is "wheat", (b) damaged rice to be used as cattle/poultry feed, is "rice", (c) damaged rice/wheat to be used as cattle/ poultry feed is "cereals", and (d) whether damaged wheat/rice would fall under entry 15 of the Fifth Schedule or u/s 5(1) of the Karnataka Sales Tax Act, 1957. The court found on facts that the petitioner was buying and selling damaged foodgrains, wheat and rice from the Food Corporation of India. The court found on admitted facts of that case that what was sold by FCI is not a processed commodity. The court held that in order to fall under entry 6 of Part A of the Second Schedule, animal feed should be processed commodity but damaged wheat/rice sold by FCI is not a processed commodity and as such does not fall under entry 6, Part A of the Schedule though such damaged wheat/rice is intended to be used as cattle/ poultry feed.

11. In the instant case, admittedly Robinson barley is a processed commodity and is an item which comes through various processes of chemical treatment and is fortified with iron and calcium. This fact has not been disputed by the learned Counsel for the petitioner. So the decision in the case of M. N. Nilugal [2005] 142 STC 229 (Karn), does not help the petitioner's contention. Learned Counsel for the petitioner also placed reliance on the decision in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, . In that case the question was whether pineapple fruit is consumed for the purpose of manufacturing pineapples slices. The court held that when pineapple is sliced and filled in cans and then sold after being added with sugar as a preservative, pineapple is not consumed in the manufacture of

pineapple slices. But pineapple is consumed in the manufacture of pineapple jam, pineapple squash or pineapple juice and in those cases Section 5A(1)(a) of the Kerala General Sales Tax Act, 1963 will be attracted. The ratio of that decision is not attracted to the facts of the instant case. Here barley and Robinson barley are admittedly not the same commodity commercially and barely goes through a series of changes till it reaches the market as Robinson barely. Possibly it cannot be disputed that Robinson barley is regarded as a new commodity in the market and the same is different from the original commodity namely, barley. This court, therefore, is of the opinion that the decision in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, does not help the petitioner.

12. Reliance was placed by the learned Counsel for the petitioner in the judgment of the Supreme Court in the case of Alladi Venkateswarlu v. Government of Andhra Pradesh reported in [1978] 41 STC 394. In that case the question was whether atukulu (parched rice) and muramaralu (puffed rice) are rice within the meaning of entry 66(b) of the First Schedule to the Andhra Pradesh General Sales Tax Act, 1957. The said question arose in the context of Section 5(2) of the said Act which provides a concessional rate of tax on rice and it also provides for a single point tax. In that case the High Court came to the conclusion that parched and puffed rice not being rice does not fall within the meaning of entry 66 (b) of the First Schedule to the Andhra Pradesh General Sales Tax Act.

13. Negating the said contention, the Supreme Court held that rice is wide enough to include rice in its various forms whether edible or inedible. The Supreme Court further held that rice in the form of grain is not edible but parched rice and puffed rice are edible. (see page 397 of the report). The learned Judges held that the case before the Lordship was not a case of prepared rice or cooked rice in the form of "pulao" or "biryani" or any other type of rice which had undergone some changes in character by addition of some other materials or by chemical transformation. Therefore, the learned Judges held that rice as ordinarily understood in English language would include both parched and puffed rice and reversed the judgment of the High Court. But in the instant case between the barely as a cereal and Robinson barley as a commercial entity substantial chemical transformation has taken place and it is not in dispute that Robinson barley is a distinct commercial entity and before it is tinned and sold as Robinson barely, barley is processed and added with iron and calcium. Therefore, Robinson barley and barley are not the same items. So the decision in the case of Alladi Venkateswarlu and Others Vs. Govt. of Andhra Pradesh and Another, does not help the petitioner.

14. The next decision which was cited by the learned Counsel for the 14 petitioner was delivered by the Calcutta High Court in the case of Rasoi Products v. Commercial Tax Officer, Shyambazar reported in [1982] 51 STC 248. In that case the question was whether white pepper and black pepper which are whole

or broken become a new notified commodity after they were powdered. The learned Judge held that once these items are powdered it does not become a new notified commodity. Therefore, the petitioner who had paid taxes on all these commodities at the time of local purchase cannot be again made liable to pay taxes when he resold the goods after powdering the same. Apart from that on the question of reopening of assessment the learned Judge made certain observations with which we are not concerned. In the instant case, it is not the petitioner's stand that barley in powder form becomes Robinson barley. Therefore, the present case is factually distinguishable from the case of Rasoi Products and Another Vs. Commercial Tax Officer and Others, .

15. Similarly the decision in the case of Ram Bhadur Takkur Takkur (P) Ltd. 15 v. Coffee Board, Bangalore reported in [1991] 80 STC 199 (Mad.), is not applicable in the facts of the present case. In that case the Madras High Court held that once coffee seeds are roasted and ground and made into powder it does not become a new article after such conversion. On the aforesaid finding the Madras High Court held that company is entitled to exemption. In the instant case as pointed out earlier it is not urged by the petitioner that the distinction between barley and Robinson barley is only a conversion of barley in a powder form in Robinson barley. Here it cannot be disputed that these two items are distinct and different commercial entities.

16. On the question of common parlance, learned Counsel for the petitioner 16 relied on several judgments for consideration of this Court. Reliance was placed on the judgment of the apex court in the case of Filterco v. Commissioner of Sales Tax, Madhya Pradesh reported in [1986] 61 STC 318. In that case, the question was whether only those varieties of felt which satisfy the test of pliability will constitute "cloth" so as to fall within the scope of entry 6 of Schedule I of the Madhya Pradesh General Sales Tax Act, 1958. The apex court found that the appellant Filterco manufactured varieties of woollen felts. Twenty-six varieties of such items of different hardness, density and thickness were produced before the Commissioner along with an application u/s 42-B of the Madhya Pradesh General Sales Tax Act, 1958, for determination of tax on such goods. The Commissioner after hearing the parties held that the expression "cloth" in item 6 of the Schedule I would include non-woven material inclusive of "felt" but pliability must be an essential attribute of such "cloth" and since only five out of those twenty-six varieties satisfy pliability test, they could be classified as "cloth" and granted exemption and held that the remaining twenty one varieties would not fall within the exemption but were taxable at the rate of 10 per cent. This finding of the Commissioner was challenged unsuccessfully before the High Court. When the matter was taken up before the apex court, it confirmed the finding of the Commissioner.

17. Relying on two old decisions on common law principles in the case of Grenfell v. Inland Revenue Commissioners [1876] 1 Ex D 242 and in the case of Two hundred Chests of tea [1824] 9 Wheaton (US) 430 the learned Judges of the

apex court held in *Filterco* [1986] 61 STC 318 that the particular words used by the Legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used, and not in their scientific or technical sense. Following that principle and going by the common parlance test, the apex court held that a piece of pliable woven or felted stuff would come within the meaning of expression "cloth". Here also adopting the same common parlance test we have to hold that Robinson barley is different from barley and the two are two different commodities. Therefore, the decision in the case of *Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another*, runs counter to the contention of the learned Counsel for the petitioner.

18. To the same is the effect of the judgment of the division Bench of the Bombay High Court in the case of *Commissioner of Sales Tax v. Agarwal & Co.* reported in [1983] 52 STC 117. The question which came up for consideration before the High Court was whether u/s 5 of the Bombay Sales Tax Act, 1959, the sale and purchase of goods specified in Schedule A was free from all taxes and entry 36 of Schedule was the relevant entry. The said entry runs as follows:

Milk, whole or separated or reconstituted.

19. The Bombay High Court held that milk would ordinarily include milk in all its forms including dehydrated milk or milk powder and, therefore, held that "skimmed milk powder" falls within the scope of the entry as it existed at the relevant point of time. But here the dispute is of a different nature. Here barley and Robinson barley are not items of the same nature though the basic ingredients of Robinson barley may be barley but when barley is transformed to Robinson barley, it goes through various technical process and various other ingredients like iron and calcium are added. This factual aspect has not been disputed by the learned Counsel for the petitioner. Therefore, even by common parlance they are not the same. Therefore, the ratio of the division Bench in the case of *Commissioner of Sales Tax Vs. Agarwal and Co.*, was totally based on different factual context.

20. Similarly, the ratio in the case of *Atlantis (East Limited) Vs. Additional Member, Board of Revenue*, is of no assistance to the contention of the learned Counsel for the petitioner. In that case, the division Bench of the Calcutta High Court held on a proper construction of item No. 2 of Schedule I of the Bengal Finance (Sales Tax) Act, 1941, as it stood before the amendment, that the word "flour" in item No. 2, did not include "barley powder" and, therefore, barley powder was not exempt from sales tax. It was therefore held that barley powder, not being covered by item No. 2, must be considered to be a kind of cereal included in item No. 1 and was taxable when sold in sealed containers. The division Bench further held that powdered barley in common parlance is never considered to be flour and flour in its popular sense never means powdered barley.

21. Reliance was placed by the learned Counsel for the petitioner on an unreported judgment rendered by the Supreme Court in the case of *Modi Inds. Ltd. v. State of Orissa* in Civil Appeal No. 620 of 2003 dated January 27, 2003. Since reported in [2005] 141 STC 155 (SC). In that case the question that came up for consideration was whether desiccated coconut is covered under serial No. 14 of Notification No. 12525-CTA-62/82/F dated March 22, 1982. The honourable apex court held that having regard to the notification issued u/s 3B of the Orissa Sales Tax Act, 1947, desiccated coconut manufactured by the appellant would come within the definition of coconut as contained in relevant Schedule, namely item 14 (vi) of the Schedule to the said notification. In coming to that conclusion, the apex court relied on the decision in the case of *State of Karnataka and Another Vs. Sri Lakshmi Coconut Industries*, . Relying on the said judgment the apex court found that what was manufactured by the appellant was desiccated coconut in powder form and further held that no distinction can be made between copra (whole) and copra in powder form since the notification does not define the word copra. The apex court further held that both copra (whole) and copra in powder form would serve the same purpose, namely, to yield oil as there is no material to the contrary. It is clear from the discussion that the decision of the apex court in the case of *Modi Inds. Ltd.* [2005] 141 STC 155 was arrived on a totally different basis which has no relevance to the facts of the present case.

22. In the instant case, reliance which was placed by the learned Counsel for the Revenue on the decision in the case of *Rajasthan Roller Flour Mills Association and another Vs. State of Rajasthan and others*, . In the case of *Brij Mohan and others Vs. State of Rajasthan*, the apex court held that flour, maida and suji even though are derived from wheat are not wheat and, therefore, flour, maida and suji cannot be treated as one of the declared goods under the Sales Tax Act. It was categorically held that flour, maida and suji even though are derived from wheat are not wheat and they are different cereals. In the instant case even if we accept that Robinson barley is derived from barley, they cannot be treated as the same goods and cannot fall under the classification of barley u/s 14(i)(x) of the Central Sales Tax Act. Therefore, as rightly contended by the learned Counsel for the Revenue, Robinson barley cannot be treated as a declared goods under the Central Sales Tax Act.

23. Therefore, considering the matter from all its angle and also considering the various judgments stated above, this Court does not discern any error in the order of the Tribunal. The order of the Tribunal is upheld and this Court finds that Robinson barley is not the same as barley in the form of cereals and Robinson barley cannot be taxed at the first point of sale at the rate of four per cent. Both the revision petitions, therefore fail and are dismissed. But in the circumstances of the case, there will be no order as to costs.

I. Mohanty, J.

24. I agree.