

(1991) 03 GUJ CK 0002
In the Gujarat High Court
Case No : Sales Tax Reference No. 2 of 1981

State of Gujarat

APPELLANT

Vs

Gokaldas Trading Co.

RESPONDENT

Date of Decision : 13-03-1991

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 62, 69(1)

Citation : (1991) 82 STC 248

Hon'ble Judges : S.D. Shah, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : Kamal M. Mehta, Assistant Government Pleader, for the Appellant;
R.D. Pathak, for the Respondent

Judgement

G.T. Nanavati, J.—The Sales Tax Tribunal has made this reference at the instance of the State of Gujarat u/s 69(1) of the Gujarat Sales Tax Act, 1969. It has referred to us the following question for our decision :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the opponent's disputed sale of Cadbury's Bournvita was not a sale covered by the expression "food-stuff and food provisions of all kinds" as used in entry 6 of Schedule III to the Gujarat Sales Tax Act, 1969, but was covered by the residuary entry 13 of Schedule III to that Act ?"

2. M/s. Gokaldas Trading Co. (hereinafter referred to as "the opponent") is a dealer registered under the Act. It wanted to know the rate of tax payable on the sales of an article sold in the market under the trade name of Bournvita. Therefore, it made an application u/s 62 of the Act to the Commissioner of Sales Tax to determine the rate at which such sales were liable to tax. The application was heard by the Deputy Commissioner of Sales Tax (Inspection). He held that Bournvita being food-stuff, sale of it would be covered by entry 6 of Schedule III to the Act and taxable accordingly.

3. Against this decision, the opponent filed an appeal before the Gujarat Sales

Tax Tribunal. Before the Tribunal, it was contended on behalf of the opponent that in common parlance Bournvita is not understood as food and it is normally taken by or advised for convalescing patients, nursing and expectant mothers and invalid and elderly persons as energy supplying drink. It was also submitted that the words "food-stuff and food provisions" are used in a restrictive sense and held by this Court in *State of Gujarat v. Sarabhai Chemicals* [1971] 27 STC 170 and applying the test laid down in that case, it cannot be regarded as food-stuff or food provision. On the other hand, it was contended on behalf of the State that the manufacturers of Bournvita themselves have advertised their product as valuable food for invalid and elderly persons, and if the ingredients of Bournvita are taken into account, then it can certainly be regarded as an article of food falling within entry 6 of Schedule III to the Act.

4. The Tribunal applying the test laid down by this Court in the case of *Sarabhai Chemicals* [1971] 27 STC 170, upheld the contention raised on behalf of the opponent, allowed the appeal and held that the sale of Bournvita would be covered by residuary entry 13 of Schedule III to the Act and not by entry 6 of Schedule III.

5. As the State felt aggrieved by the decision of the Tribunal, it applied to the Tribunal u/s 69(1) of the Act contending that a question of law did arise from its judgment and that it deserved to be referred to the High Court for its decision. The Tribunal has, therefore, referred the above stated question to this Court.

6. "Bournvita" is a product manufactured by Cadbury's India Limited. It is manufactured out of malt extract, sugar, cocoa powder, glucose, milk solids, sodium bicarbonate, emulsifying agents and salt. It is described by the manufacturer as a tastier food drink. It is recommended to be taken twice a day with milk for providing nourishment. It further appears from the judgment of the Tribunal that it is recommended for convalescing patients, nursing and expectant mothers and invalid and elderly persons as energy supplying drink. Though it was urged by the learned Government agent before the Tribunal that Bournvita is at times served along with breakfast or as a substitute for food, neither the judgment of the Deputy Commissioner nor that of the Tribunal discloses that any material in support of that contention was produced at any stage. Therefore, on admitted facts that Bournvita consists of malt extract, sugar, cocoa powder, glucose, milk solids, sodium bicarbonate, emulsifying agents and salt, and that it is to be taken with milk as a food drink, we have to decide whether it can be described as a "food-stuff or food provision" as contemplated by entry 6 of the Schedule III. In our opinion, the Tribunal rightly relied upon the decision of this Court in *Sarabhai Chemicals*" case [1971] 27 STC 170, for the purpose of deciding whether Bournvita can be said to be food-stuff or food provision falling within entry 6 of Schedule III to the Act. Though the nature of the product with which this Court was concerned in that case was a little different, the observations made in that case are very much helpful in deciding the question which has arisen in this case.

7. In *Sarabhai Chemicals*" case [1971] 27 STC 170, this Court was called upon to decide whether the product known as "Limical" is an article of food-stuff or food provision and was covered by entry 6 of Schedule E to the Bombay Sales Tax Act, 1959. It may be stated that entry 6 of Schedule III to the Act is almost the same as entry 6 of the Schedule E to the Bombay Sales Tax Act. The court found that Limited is described as a product containing vitamins, proteins, fat, etc., that it is sold either in the form of powder or in the form of biscuits; and that it is made for persons suffering from obesity and who intend to reduce their weight. The court also found that persons who want to reduce their weight are advised to sustain themselves only on the intake of this produce for a limited period, and during the period this product is consumed not to take any other food or substituted food provision. On these admitted facts, this Court held that though Limical is a product, which is not normally used by a normal man as an article of food, it cannot be considered as "food-stuff or food provision" as understood in common parlance. In that case, this Court heavily relied upon the decision of the Supreme Court in *The State of Bombay Vs. Virkumar Gulabchand Shah*, . Following that judgment, this Court has held that it is primarily the way in which the article is understood in common parlance which would decide the question whether a particular article falls within a particular entry of the Schedule. This Court further held that the expression "food-stuff" as used in entry 6 is limited to those articles which are "eaten as food". This Court also held that if the article in dispute is normally eaten, or if it can be offered as food to a normal person, who is found hungry, then it can well be regarded as food-stuff or food provision, but not otherwise.

8. Keeping in mind the interpretation of the words "food-stuff and food provision" and the test laid down by this Court in *Sarabhai Chemicals*" case [1971] 27 STC 170, we will have to decide whether Bournvita can be said be "food-stuff or food provision". Though it is described as a food drink it is not a substitute for food. Though Bournvita can be taken every day, it is not taken as a food but only as a nutritive element. It is not taken by a person who is hungry as food for the purpose of satisfying his hunger. It is not taken alone but is to be taken with milk. At the most, it makes a delicious food drink when it is taken along with milk. Merely because it supplies some nourishment and sustenance, it cannot be equated with food-stuff or food provision. It is not used by common people and is not normally taken as food by normal persons. It is, therefore, difficult to accept the contention of the learned Assistant Government Pleader appearing for the State that since it is described by the manufacturers themselves as a food drink, it should be regarded as a food-stuff or a food provision. We are, therefore, of the opinion that the Tribunal was right in holding that as Bournvita is neither a food-stuff nor a food provision, it would not be covered by entry 6 of Schedule III but by residuary entry 13 of Schedule III to the Act.

9. The question is, therefore, answered accordingly, i.e., against the State and in favour of the assessee. There shall be no order as to costs in this reference.

10. Reference answered in the affirmative.