(1976) 02 KL CK 0012

In the High Court Of Kerala

Case No : O.P. No. 5433 of 1974

Vimala Cold Storage APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 16-02-1976

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226

Citation : (1976) 38 STC 217

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Advocate : N.K. Varkey, for the Appellant; The Government Pleader, for the Respondent

Judgement

T. Chandrasekhara Menon, J.—Questions, interesting but not altogether free from difficulty, have arisen in this case.

2. Section 10 of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the Act), enables the Government, if they consider it necessary in the public interest, by notification in the Gazette to make an exemption or reduction in respect of any tax payable under the Act, (i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers, or (ii) by a specified class of persons, in regard to the whole or any part of their turnover. By S.R.O. 342/63 in exercise of the powers conferred by Section 10 of the Act, the Government of Kerala having considered it necessary in the public interest made an exemption in respect of the tax payable under the Act on the sale or purchase of goods specified in Schedule I thereto appended and by persons specified in Schedule II also thereto appended in regard to the turnover on the sales of goods specified therein subject to the conditions also specified therein. In Schedule I of the appendix to this notification item 23 is fresh fish and item 25 is meat except meat, which is cured or frozen. The main questions raised in the O.P. are :

3. What are the meanings of the expressions "fresh fish" and "frozen meat", and

whether meat and fish preserved by the petitioner-firm in its cold storage by refrigeration would be liable to the incidence of sales tax in the light of the notification concerned.

4. The petitioner-firm is carrying on the business of selling meat and fish among other things like honey, vinegar and frog ghee. The petitioner is registered as a dealer under the Act and holds a licence from the Central Government for the purpose of running a cold storage. The petitioner has a cold storage which keeps intact meat and fish for a few days. According to the petitioner, the temperature in the cold storage is maintained at a level not lower than 0?C by means of a cooling machine.

5. The petitioner was assessed to sales tax for the years 1971-72, 1972-73, 1973-74 and provisionally for 1974-75 and the taxes were paid according to the assessments for the periods 1971-74. They are also paying the advance tax by instalments for the period 1974-75. In the assessments, as originally made, the firm was not assessed to sales tax in respect of the amounts realised by them by sale of meat and fish. The petitioner, however, received notices Nos. V. 122/71-72 dated 18th November, 1974 ; V. 122/72-73 dated 18th November, 1974 ; V. 133/73-74 dated 18th November, 1974, and V. 133 dated 18th November, 1974, for the assessment year 1974-75, wherein it was stated that the assessments made for the said years wrongly allowed exemption for the turnover of frozen meat and it was, therefore, proposed to assess the petitioner u/s 19 of the Act for such turnover as escaped turnover. The petitioner was, therefore, called upon to file objections to the said notices which are marked in this proceeding as exhibits P-1(a), P-l(b), P-l(c), P-l(d) and P-l(e) respectively. In their objections marked as exhibit P-2 in this petition, the petitioner stated that amounts realised by way of sale of meat was not liable to be included in the taxable turnover as meat was specifically exempted in Notification No. S.R.O. 342/63. The petitioner pointed out that they did not keep or sell cured or frozen meat. The meat which they sell is fresh meat which is neither cured nor frozen. It was further pointed out that the petitioner''s cold storage was not a freezing unit and that it was incapable of freezing meat or fish. According to the objections, the lowest temperature that can be maintained in the cold storage is 0?C and meat or fish cannot be frozen unless the temperature can be lowered very much below 0?C. Additional objections were also filed as per the original of exhibit P-3 marked herein dated 8th December, 1974, pointing out that the turnover stated in exhibit P-1 notices was incorrect and the same exceeded the actual amount.

6. It may be noted that as per the notices issued to assess the turnover that has alleged to have escaped assessment [under Section 19 of the Act in respect of the years 1971-72, 1972-73 and 1973-74 and u/s 18(3) in respect of the provisional assessment for the year 1974-75] by the second respondent, the Additional Sales Tax Officer, what was stated in the text of the notices was that the turnover of meat was wrongly exempted. But the figures given in the notices

indicating the turnover alleged to have escaped assessment, included the turnover relating to the sale of fish and the rent for keeping the stuff in the cooler. The petitioner-firm had forwarded to the second respondent the statements dated 29th January, 1975, showing the breakup wise sales turnover of meat and fish and the rent collected for keeping the stuff in the cold storage for the years 1971-72, 1972-73, 1973-74 and 1974-75.

7. Overruling the objections the second respondent reopened the assessments and assessed to tax the alleged escaped turnover in respect of all the years concerned. Exhibits P-5(a) to P-5(e) are the true copies of the said assessment orders as marked in the case. The assessments took into account not only the turnover regarding meat but also that relating to fish and that of the rent collected by the petitioner-firm for keeping the stuff in the cooler.

8. The petitioner seeks to quash exhibit P-5 assessment orders on various grounds. It is said that the petitioner does not sell frozen goods. The petitioner-firm has no equipment to freeze meat. They sell only fresh meat, which does not come within the ambit of the expression "meat which is cured or frozen" and fish which comes within the meaning of fresh fish. Therefore, it is contended that meat and fish, which are sold by the petitioner-firm, are specifically exempted by S.R.O. 342/63 and no sales tax is payable by the petitioner on such sales. It is also alleged that exhibit P-5 series assessment orders were passed, so far as it relates to the turnover regarding the sale of fish, without notice to the petitioner-firm. Exhibit P-1 notice, it is stated, did not mention about fish or the rental amount and, therefore, the petitioner-firm could not file objections relating to the same. The assessment orders are, therefore, attacked as violative of the principles of natural justice. In respect of the rental, which the petitioner-firm collects for keeping the stuff in the cooler, it is also contended that the second respondent has no jurisdiction to levy sales tax on the same as no element of sale comes in there. I am not here referring to the contentions raised by the petitioner as regards alleged violation of their fundamental rights under articles 14 and 19 of the Constitution of India as they were not pressed in the case.

9. According to the revenue, as per the counter-affidavit filed on behalf of the second respondent, the petitioner is not entitled to exemption as per Notification No. S.R.O. 342/63. Meat or fish sold by the petitioner will not come within the said notification. The initiation of the proceedings to bring to tax the escaped turnover in the instant case is valid in law. So also the final assessments made, exhibit P-5 series. It is also asserted that goods sold by the petitioner will not come within item 23 or item 25 of S.R.O. 342/63. The recourse to this court by the petitioner under Article 226 without availing of the remedies provided under the Act is also attacked. It is said that the O.P. is, therefore, not maintainable. According to the counter-affidavit, only fresh meat as it comes out from the slaughter house and fresh fish as it comes out from the waters are exempt from tax obviously because both are perishable in the course of a few hours ; but meat and fish preserved by refrigeration or otherwise, which are not so quickly

perishable, are eligible to tax. The department contends that frozen means preserved by refrigeration as regards meat, fish, etc.

10. I have no hesitation in holding that the original petition is maintainable as such. In the circumstances of this case, especially in view of the fact that the Sales Tax Appellate Tribunal in Tribunal Appeal No. 729/73 has already taken a definite view on the main questions raised in this O.P., the alternative remedy provided by the statute will not be an equally efficacious remedy. Also if the petitioner''s contentions are acceptable, it cannot be denied that the assessing officer has clearly committed errors of law apparent on the face of the record which would invite the exercise of the extraordinary jurisdiction of this court under Article 226 of the Constitution of India.

11. The first question that I would deal with is whether the rental collected by the petitioner for keeping meat and fish in their cooler would invite the incidence of the tax. As no element of sale is involved therein, I think the second respondent has erred in imposing the sales tax with respect to the same.

12. Under S.R.O. 342/63 sale or purchase of fresh fish is exempted from the tax payable under the Act. Is fish preserved by the petitioner-firm in its cold storage by refrigeration fresh fish ? According to the petitioner, it continues to be fresh fish. According to the revenue, only fish that comes out from the waters and continues to preserve its freshness without the aid of refrigeration or other means can be called fresh fish. Such fish is perishable in the course of few hours. Fish preserved by refrigeration or otherwise is not fresh fish. Fresh, according to the department, means in effect "fresh from the waters". As the Supreme Court stated in Commissioner of Sales Tax, Madhya Pradesh v. Jaswant Singh Charan Singh 1967 19 S.T.C. 469 , while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense. The court referred to the decision of the Canadian Court in His Majesty the King v. Planters Nut and Chocolate Company Limited 1951 C.L.R. 122. The question there was whether salted peanuts and cashew-nuts fell within the category of either fruits or vegetables. A considerable expert opinion was led in that case, but the court ultimately found that the Parliament in enacting the Excise Tax Act, 1927, Part XIII and Schedule III, was not using words, which were applied to any particular science or art and, therefore, the words used are to be construed as they are understood in common language. It also held that what constitutes a "fruit" or "vegetable" within the meaning of the Excise Tax Act is what would ordinarily in matters of commerce in Canada be included therein and not what would be a botanist''s conception of the subject-matter. If a statute uses the ordinary words in every day use, such words should be construed according to their popular sense.

13. The observations of Pollock, B., in Grenfell v. Inland Revenue Commissioners 1876 1 Ex. D. 242 at 248, are also quoted with approval, wherein it is stated

that:

...''if a statute contains language which is capable of being construed in a popular sense such statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words "popular sense", that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it''. But ''if a word in its popular sense and read in an ordinary way is capable of two constructions, it is wise to adopt such a construction as is based on the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers. In other words, the construction of the words is to be adopted to the fitness of the matter of the statute''.

14. The test that has to be applied is what would be the meaning which a person dealing with the goods concerned would give to that word. A sales tax statute, being one levying a tax on goods, must, in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term according to the meaning ascribed to it in common parlance. The word "fresh" will have slightly varying meanings in the context in which it is used. The word "fresh" as such means "new, novel, not previously known", etc. The words "fresh fish" or "fresh meat" or "fresh fruit" would indicate in common parlance fish, meat or fruit which is not stale, musty or vapid -- see the meaning of the word "fresh" in Concise Oxford Dictionary. No doubt the words "fresh meat" or "fresh fruit" in some context may also mean meat or fruit "not preserved" by salting, pickling, smoking, tinning, etc.

15. I think it would be far-fetched to say that "fresh fish" can only mean fish as it comes out from the water. More acceptable meaning as used in common parlance, according to me, would be fish, which is not stale, musty or vapid. When we say "fresh flowers", it means flowers not faded and not flowers immediately plucked. I certainly take note of the fact that the Sales Tax Appellate Tribunal has interpreted the meaning of the words "fresh fish" as fish fresh from the waters or lately come out from the sea or other waters. I do not think that by preserving fish in cold storage it ceases to be fresh fish as such. The purpose of keeping fish in cold storage is to preserve its freshness. Therefore, I agree with the contention of the petitioner that in respect of the turnover as regards fish is concerned the second respondent has acted without jurisdiction in imposing the sales tax on the said turnover.

16. The next question is, was the second respondent correct in imposing sales tax as regards the turnover regarding meat. According to the petitioner he does not sell frozen meat and he has no equipment for freezing meat. It is pointed out that the lowest temperature that can be maintained in the cold storage of the petitioner is 0?C and meat cannot be frozen unless the temperature can be lowered very much lower.

17. The word "freeze", the past participle of which is "frozen", means in ordinary parlance "be converted into or covered with ice, or become rigid as result of cold". In the Random House Dictionary of the English Language, the word "freeze" has been given the meaning "to subject something to freezing temperature, place something in a freezer or in the freezing compartment of a refrigerator". It might be noted here that what is exempted under the notification concerned is unlike in the case of fish not fresh meat as such but meat which is not cured or frozen.

18. Mr. Varkey, the learned counsel for the petitioner, invited my attention to certain observations in a Russian publication "fish curing and processing", where the word "frozen" is given a technical meaning as being kept at temperature very much below 0?C. It was pointed out by him that for properly freezing fish or meat the temperature should be far below 0?C and, therefore, keeping meat in a fresh state in cold storage where the minimum temperature cannot be less than 0?C would not amount to freezing the meat and the meat kept there cannot be said to be meant frozen.

19. It is pointed out that the petitioner''s cold storage is not a freezing unit and, therefore, incapable of freezing "meat" or "fish". Refrigeration is the process of lowering the temperature inside an insulated enclosure by extracting heat and rejecting it to the surroundings or some other external medium of higher temperature. "Freezing" in the ordinary parlance, as per the meaning given by the Concise Oxford Dictionary, would take in the meaning "preserve meat, etc., by refrigeration". Therefore, meat kept in the cold storage where the temperature would come to a minimum of 0?C for the purpose of preserving the same by refrigeration would certainly come within the expression "meat", which is frozen.

20. Therefore, I do not find anything illegal in the matter of the assessment made on the turnover regarding meat regarding which Section 19 notice had been issued to the petitioner. I see no reason to reject the contention of the department that meat preserved by refrigeration will also come under the term "frozen meat".

21. In view of the conclusion I have arrived at, I would direct the second respondent to reassess the turnover regarding meat afresh in the light of what I have stated above. Turnover regarding fish and rental of the cold storage cannot be made the subject of fresh assessment. I would dispose of the O.P. in the above manner; but I make no order as to costs.

