

(2003) 02 AHC CK 0145

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No's. 912 of 1999, 20, 48, 101, 110, 281, 294 and
727 of 2000, 1060 of 2001 and 310 of 2002

Gujarat Co-operative
Milk Marketing
Federation Limited

APPELLANT

Vs

Assistant
Commissioner
(Assessment) Trade
Tax and Others

RESPONDENT

Date of Decision: Feb. 19, 2003

Acts Referred:

- Constitution of India, 1950 - Article 226
- Uttar Pradesh Trade Tax Act, 1948 - Section 21, 22, 35, 4A

Citation: (2004) 137 STC 307

Hon'ble Judges: Prakash Krishna, J; M. Katju, J

Bench: Division Bench

Advocate: Bharatji Agrawal and Piyush Agrawal, for the Appellant; S.P. Kesarwani, for the Respondent

Judgement

Prakash Krishna, J.

The petitioners are dealers of chocolates. The turnover of chocolate was subjected to four per cent of tax in the assessment proceedings. Subsequently on the basis of the judgment delivered by the Supreme Court in the case of Pappu Sweets and Biscuits v. Commissioner of Trade Tax [1998] 111 STC 425 : 1998 SC 97 notices u/s 22 of the U.P. Trade Tax Act, 1948, (hereinafter referred to as "the Act") have been issued in some of the writ petitions on the ground that the toffee is taxable as an unclassified item and is not sweetmeat. In some writ petitions notices under Sections 21 and 22 are under challenge. In other writ petitions provisional assessment notices and proceedings have been challenged on the ground that

toffee/chocolate is taxable as sweetmeat and not as unclassified item.

2. Since common questions of law are involved, all these writ petitions were heard together with the consent of counsel for both the parties and are being disposed of by the common judgment.

3. The petitioners are dealers of toffee. The matter was argued with reference to writ petition No. 101 of 2000 by the counsel for both the parties ; hence it is necessary to give the facts of that writ petition only. The petitioner, is a co-operative society having its registered office in the State of Gujarat and the petitioner has its principal place of business in the State of Uttar Pradesh. It appears that the original assessment for the assessment year 1996-97 was framed by the Assistant Commissioner (Assessment) by the order dated December 31, 1998, a copy whereof has been filed as annexure 1 to the writ petition. A perusal of the assessment order for the assessment year 1996-97 shows that the question of rate of taxability of chocolate was very much debated before the assessing officer. Reliance was placed upon an order passed by the Commissioner u/s 35 of the U.P. Trade Tax Act in the case of M/s. Hindustan Coco Products Ltd., wherein the Commissioner held that chocolate is a confectionary. Reference was also made to the judgment of the Supreme Court in the case of Pappu Sweets and Biscuits [1998] 111 STC 425 : 1998 SC 97 by the assessing officer in its assessment order. After considering the entire material, the assessing officer held that the petitioner has rightly accepted the tax liability on the turnover of chocolate at five per cent including surcharge. Its order became final. Subsequently, the impugned notice dated December 29, 1999 was issued u/s 22 of the Act for the assessment year 1996-97 on the ground that the tax was wrongly imposed at the rate of four per cent while it should have been imposed at the rate of 10 per cent. A copy of the notice has been filed as annexure 2 to the writ petition. Challenging the validity of the said notice, the present writ petition was filed for quashing the notice issued u/s 22 of the Act. It also appears that for the assessment year 1994-95 notice u/s 21, filed as annexure 9 to the writ petition, was issued on identical facts, namely that in view of the judgment of the Supreme Court in the case of Pappu Sweets and Biscuits [1998] 111 STC 425 : STI 1998 SC 97 toffee/chocolate should be taxed as unclassified item and not as sweetmeat. Hence the writ petition.

4. A counter-affidavit has been filed by the department justifying the issuance of notice under Sections 21 and 22 of the Act on the ground that toffee is unclassified item in view of the judgment of the Supreme Court in the case of Pappu Sweets and Biscuits [1998] 111 STC 425 : STI 1998 SC 97. Since the tax was imposed at a lower rate, the action under Sections 21 and 22 against the petitioner has been sought to be justified in the counter-affidavit.

5. We have heard Sri Bharatji Agrawal, Senior Advocate, assisted by Sri Piyush Agrawal for the petitioners and Sri. S.P. Kesarwani, Standing Counsel for the respondents. Before considering the case on merits, at this stage it is relevant to

consider the preliminary objections raised by the learned Standing Counsel. Sri Kesarwani has submitted that the writ petition is liable to be dismissed and the averments made in the counter-affidavit have to be treated as correct as no rejoinder-affidavit has been filed. Suffice it to say that the controversy involved in the present writ petition is a legal one and it depends upon the interpretation of the judgment of the Supreme Court in the case of Pappu Sweets [1998] 111 STC 425 : 1998 SC 97 and as such non-filing of the rejoinder-affidavit will not in any way affect the merits of the case.

6. He further submitted that since some of the writ petitions have been filed against the notices issued under Sections 21 and 22 of the Act while in some writ petitions orders passed under Sections 21 and 22 have been challenged, which are appealable, the writ petitions are not maintainable on the ground of alternative remedy. He has submitted that the writ petition against the show cause notice is not maintainable and in support of this submission he has placed reliance upon [Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others,](#)

7. Existence of alternative remedy is not an absolute bar. It is a self-imposed restriction by the courts not to exercise their discretion under Article 226 in appropriate cases. Since in the present case questions of law are involved as well as the interpretation of the judgment of the Supreme Court in Pappu Sweets [1998] 111 STC 425 : STI 1998 SC 97 we have rejected the arguments of the learned Standing Counsel and proceeded to hear the case on merits.

8. Sri Bharatji Agrawal, Senior Advocate, submits that jurisdiction u/s 22 of the Act is confined to the rectification of a mistake apparent on the face of record of the assessment. The mistake must be a mistake which appears upon a glance on the record and not a mistake which emerges after prolonged deal on the merit of the question. The assessee was carrying on the business of selling toffee/ chocolate. The question of applicability of rate of tax on toffee/chocolate was very much debated before the assessing officer during the assessment proceedings. The assessing officer on the basis of the relevant material placed before him as well as upon the interpretation of the judgment of the Supreme Court in the case of Pappu Sweets [1998] 111 STC 425: 1998 SC 97 came to the conclusion that toffee is sweetmeat and is liable to be taxed as such at the rate of four per cent plus one per cent surcharge. He further submitted that when there is a dispute regarding the applicability of the appropriate rate of tax, the question being debatable, cannot be the subject-matter of either rectification u/s 22 of the Act or of reopening of assessment u/s 21 of the Act. On the other hand, it was submitted by Sri S.P. Kesarwani that it is always open to the department to rectify the mistake u/s 22 of the Act and to reopen the assessment u/s 21 of the Act if a wrong rate of tax has been applied by the assessing officer while framing assessment order. He further submitted that in the case of Pappu Sweets [1998] 111 STC 425 ; STI 1998 SC 97, the Supreme Court clearly held that toffee/ chocolate are not sweetmeat and are thus liable to be taxed as

unclassified items ; hence action of the department is perfectly justified.

9. Having considered respective submissions of counsel for both the parties we are of the opinion that the action of the respondents under Sections 21 and 22 of the Act on the basis of the judgment of the Supreme Court is not justified on the facts and in the circumstances of the present case.

10. The judgment of the Supreme Court in the case of Pappu Sweets [1998] 111 STC 425 : STI 1998 SC 97 should be read in the context of the issues involved. The Supreme Court in the aforesaid case was considering a notification issued u/s 4-A of the Act. It was considering the entry at Sl. No. 18 of the list of excluded industries contained in the notification for the purposes of Section 4-A of the Act. The judgment of the Supreme Court is prefaced with a view to step up automatic growth by promoting development of certain industries in the State, the Uttar Pradesh Government decided grant of exemption from payment of sales tax to new industrial units and to units undertaking expansion, diversification or modernisation. To achieve that object it issued a notification on July 27, 1991 u/s 4-A of the Act. Annexure 2 to the said notification contains the list of industries not entitled to the facility of exemption or reduction in rate of tax. In that connection the Supreme Court was considering the matter. The observations made by the Supreme Court should be read in that light. The learned Standing Counsel has submitted that the Supreme Court has declared in the aforesaid judgment that toffee is liable to be taxed as unclassified item and now there is no further scope for arguments. To our mind, such an interpretation put by the learned Standing Counsel on the judgment of the Supreme Court is reading the judgment totally out of context in which the questions arose for decision in that case. It has been held in [Commissioner of Income Tax Vs. M/s. Sun Engineering Works \(P.\) Ltd., :](#)

"A decision of this Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In [H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another,](#) this Court cautioned :

"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment".

Further, the same principle has been reiterated by the Supreme Court in the case of State of Punjab v. Baldeo Singh (1999) 3 AWC 2546. The judgment given by the Supreme Court in the case of Pappu Sweets [1998] 111 STC 425 : STI 1998 SC 97 is relevant insofar as the notification issued u/s 4-A of the Act is concerned. The

Supreme Court has not held that toffee or chocolate is not sweetmeat and is liable to be taxed as unclassified item anywhere. The Supreme Court has taken precaution in the aforesaid judgment by observing as follows :

"Toffee is a confection of sugar and other materials and being rich in sugar would be "sweetmeat" in its wider sense. But for deciding whether toffee is "sweetmeat" as contemplated by the exemption notification, what is required to be considered is the object of the notification and the context in which that word is used in the notification."

11. It is very relevant to state here that toffee was treated as sweetmeat even by the Trade Tax Department. The Commissioner u/s 35 of the Act held that toffee is a sweetmeat as referred to in the assessment order filed as annexure 1 to the writ petition. Further the Government issued G.O. No. 818 dated March 19, 2000 which has been circulated by the circular of the Commissioner dated March 21, 2000 in which it has been mentioned that the entire tax which has been imposed for the period prior to October 6, 1998 in excess of five per cent is to be waived and neither any tax nor interest can be realised. The circular issued by the Commissioner is binding upon the authorities vide [2001] 122 STC 100 (SC) : [2001] 248 ITR 338 : 2000 UPTC 472 (Commissioner of Sales Tax v. Indra Industries). A perusal of the letter of the State Government dated February 13, 2002, issued to the Commissioner, Trade Tax, shows that a representation was made by the dealers of toffee to the State Government that toffee was always treated as sweetmeat by the department prior to January 16, 2000 and the tax was imposed and realised accordingly. On the representation of the dealers of toffee the State Government directed by the aforesaid letter dated February 13, 2002 for the waiver of tax and interest in excess of five per cent on toffee.

12. Reliance was also placed upon a single Judge judgment of this Court in Commissioner of Sales Tax U.P., Lucknow v. Babani & Company 1984 UPTC 81. In the said case it was held that sweetmeat in its wider scope takes in confectionery also.

13. Power u/s 22 of the Act is very limited. The assessing officer is empowered to issue notice under the aforesaid section only when there is an error apparent on the face of record. Now it is well-settled that an error apparent on the face of record does not include in its scope the debatable questions of law and fact. An erroneous judgment does not come within the scope of phrase "error apparent on the face of the record". From the perusal of the assessment orders it is clear that the assessing officer was very much conscious about the applicability of the correct rate of tax on toffee. He applied his mind on the said issue in the assessment order and considered the submissions of the dealer on this issue. After considering the judicial pronouncements as well as the order passed by the Commissioner u/s 35 of the Act and the judgment of the apex Court in the case of Pappu Sweets [1998] 111 STC 425 : STI 1998 SC 97, he concluded that the correct rate of tax on the turnover of toffee is five per cent including surcharge. In view of this, it cannot be said that the

assessment order suffered from an error apparent on the face of the record. The learned Standing Counsel has placed reliance upon *Narain Chemical Industries v. Sales Tax Officer, Moradabad 1970 UPTC 605* and *Commissioner of Sales Tax v. Chetmani Abhushan Bhandar 1970 UPTC 178* for the proposition that mistake in applying the correct rate of tax by the assessing officer at the time of assessment can be rectified u/s 22 of the Act. A close perusal of the aforesaid judgments shows that there the assessing officer had accepted the rate of tax as disclosed by the dealer without any discussion on the subject. The relevant paragraph is quoted below :

"In the present case the petitioner in its return declared the turnover of sodium silicate at a particular figure and also indicated that it was taxable at two per cent. The Sales Tax Officer accepted the turnover as well as the rate of tax without any discussion on the subject. A perusal of the assessment orders would show that there was no debate on the question of rate."

14. The aforequoted observations made in the case of *Narain Chemical Industries 1970 UPTC 605* clearly distinguishes the present case.

The Standing counsel further placed reliance upon a judgment of the Supreme Court in *Karam Chand Thapar and Bros (Coal Sales) Limited v. State of Uttar Pradesh [1976] 38 STC 593 : 1976 UPTC 671* for the proposition that an assessment order can be rectified on the basis of later decision of the High Court declaring correct law on the point. The said ruling is not applicable to the facts of the present case as the Supreme Court in the case of *Pappu Sweets [1998] 111 STC 425 : 1998 ITR 97*, has not declared that for the purposes of rate of tax, toffee is not sweetmeat and is liable to be taxed as unclassified item. At the cost of repetition the Supreme Court was considering the matter for grant of exemption from trade tax to new industries u/s 4-A of the Act.

15. Now we take up individual cases.

Civil Misc. Writ Petition No. 101 of 2000.

16. An additional issue has been raised by the assessing officer in the notice u/s 21 of the Act. The assessing officer has sought to reopen the assessment of the turnover of mustard oil. It has been mentioned in the said notice that the mustard oil and refined mustard oil are two different commodities. The refined mustard oil in original proceedings has been taxed as mustard oil, which is different from mustard oil. Refined mustard oil comes into existence after processing mustard oil and as such it should be taxed at the rate of 8+2 per cent and not at the rate of 2.5 per cent including surcharge. However, the reasons given above with regard to toffee and chocolate hold good so far as they concern the refined mustard oil also. Moreover, this Court in *I.T.C. Agro-Tech Limited v. Commissioner of Trade Tax [2000] 120 STC 402 : 2000 UPTC 262* has held that refined mustard oil continues to be mustard oil. Hence no proceeding can legally be taken for reopening the assessment on this

ground with regard to the turnover of refined mustard oil.

17. In this petition the petitioners have challenged the notice dated December 29, 1999 for the assessment year 1996-97 issued u/s 22 of the Act and the notice dated January 25, 2000 for the assessment year 1994-95 issued u/s 21 of the Act. Notices issued for provisional assessment (annexure 3 to the writ petitions) have also been challenged. For the reasons given above, the writ petition is allowed in part and the notices issued under Sections 21 and 22 of the Act (annexures 2 and 9 respectively to the writ petition) are quashed. Notices issued for provisional assessment (annexure 3 to the writ petition) are not quashed. It is for the assessing authority to consider the question as to whether the toffee is sweetmeat or not. We have not decided the issue that toffee/chocolate is sweetmeat or not. The answer to this question depends upon necessary facts which have to be investigated by the assessing authority during the course of assessment proceedings.

Writ Petition No. 110 of 2000.

18. This writ petition has been filed for prohibiting the respondent from imposing tax on the turnover of toffee in excess of five per cent as applicable to sugar products/sweetmeat. Orders passed u/s 30 of the Act have also been challenged. Toffee is sweetmeat or not is a question of fact which requires to be investigated by the assessing authority. The petitioner has an alternative remedy of challenging the order passed u/s 30 of the Act by way of filing an appeal u/s 9 of the Act. In view of this, the writ petition is dismissed.

Writ Petitions Nos. 20, 281 and 294 of 2000.

19. These writ petitions have been filed against the show cause notices and the notices for provisional assessment. In view of the facts given in the connected writ petitions, these writ petitions are dismissed.

Writ Petition No. 48 of 2000.

20. Notice u/s 22 of the Act for the assessment year 1996-97 is quashed. The relief for quashing the assessment proceedings for the assessment year 1996-97, both under the U.P. Trade Tax Act and the Central Sales Tax Act is refused. The writ petition is allowed in part, accordingly.

Writ Petition No. 912 of 1999.

21. Notices u/s 22 of the Act for the assessment years 1993-94 and 1995-96 dated August 27, 1999 are quashed. However the relief for quashing the notice for the assessment year 1999-2000 is refused. The writ petition is allowed in part.

Writ Petition No. 727 of 2000.

22. Notice u/s 22 of the Act for the assessment year 1998-99 is quashed and the writ petition is allowed, accordingly.

Writ Petition No. 310 of 2000.

23. The petitioner has challenged the order passed u/s 22 of the Act levying tax on the turnover of toffee and the assessment order for the assessment year 1999-2000. The petitioner has an alternative remedy by way of filing appeal u/s 9 of the Act. The writ petition is dismissed on the ground of alternative remedy. If the petitioner files appeals within 15 days from today, the appeals shall be heard and decided on merits without taking any objection on the question of limitation.

Writ Petition No. 1060 of 2001.

24. Notice dated August 16, 2001 issued u/s 22 of the Act for the assessment year 1999-2000 is quashed. Rest of the relief is denied. The writ petition is allowed in part.

Writ Petition No. 727 of 2000 allowed.

Writ Petitions Nos. 912 of 1999, 101 and 48 of 2000 and 1060 of 2001 partly allowed.

Writ Petitions Nos. 110, 20, 281, 294 and 310 of 2000 dismissed.