Pooja Milk Foods (P) Ltd. Vs State of Kerala

Court: High Court Of Kerala

Date of Decision: Aug. 4, 2003

Acts Referred: Kerala General Sales Tax Act, 1963 â€" Section 10, 9

Citation: (2003) 3 ILR (Ker) 255 : (2003) 3 KLT 1063 : (2006) 143 STC 467

Hon'ble Judges: Jawahar Lal Gupta, C.J; A.K. Basheer, J

Bench: Division Bench

Advocate: N. Muraleedharan and R. Muraleedharan, for the Appellant; Raju Joseph, Government Pleader, for the Respondent

Final Decision: Allowed

Judgement

Jawahar Lal Gupta, C.J.
Is "pasteurised milk" not "fresh milk" as contemplated under Entry 23 of the Third Schedule to the Kerala

General Sales Tax Act, 1963 so as to be exempted from the levy of tax? This is the short question that arises in these two writ petitions. The

Counsel for the parties have referred to the facts in O.P. No.5975 of 2002. These may be briefly noticed.

2. The petitioner is a private limited company, It is engaged in the processing of milk. It is running a small-scale industrial unit. It is registered as a

dealer under the K.G.S.T. Act. The petitioner is selling pasteurised milk, curd and ghee etc. The petitioner filed its return for the assessment year

1996-97. It showed a total turnover of Rs. 35,51,706.65 on account of the sale of milk. It claimed exemption from payment of sales tax. Vide

order dated March 21, 2001, the Assessing Authority accepted the petitioner"s claim and finalised the assessment ""as a case of nil demand"".

3. The petitioner had also filed its return for the assessment year 1997-98. It had a total turnover of Rs. 3,24,64,241.52. Out of this, the sale of

milk was for an amount of Rs. 2,95,10,412.82. Exemption was claimed in respect of the sale of milk.

4. On January 18, 2002, the Assessing Authority issued a notice u/s 17(3) of the Act informing the petitioner that the sale of pasteurised milk for

the year 1997-98 was exigible to the levy of tax. A copy of the notice is Ext.P2. Reliance was placed on the decision of a Division Bench of this

Court in Ernakulam Regional Cooperative Milk Producers Union Ltd. v. State of Kerala 2001 9 KTR 459. Thereafter, on January 19, 2002, a

notice was issued to the petitioner u/s 19 informing him that in view of the decision in Ernakulam Regional Co-operative Milk Producers Union

(supra), it was proposed ""to revise the assessment for the year 1996-97 u/s 19 of the Act....."" The tax was proposed to be levied at the rate of

10 per cent on the total turnover of Rs. 35,51,706.65. It was also proposed to levy surcharge. A copy of the notice is Ext.P8.

5. The petitioner challenges the notices dated January 18 and January 19, 2002. It alleges that pasteurised milk is fresh milk. The Judgment of this

Court in the case of Ernakulam Regional Co-operative Milk Producers Union (supra) is not applicable. In any case, the Government had vide

notification dated March 22, 2001 issued an order u/s 10 granting ""exemption in respect of the tax payable under the said Act on the sale of

pasteurised milk, homogenised milk, toned milk, standardized milk, skimmed milk, full cream milk and recombined or reconstituted milk sold by

co-operative societies including Kerala Co-operative Milk and Marketing Federation Limited"". This notification was made effective from January

1, 1994. A copy of this notification is at Ext.P3. It is also pointed out that by order dated December 10, 1998 the Principal Secretary, Department

of Taxes had informed the Commissioner of Commercial Taxes that ""the process pasteurisation does not amount to manufacturing activity so as to

convert fresh milk into a commodity commercially different from fresh milk. Pasteurised milk has always been included in the term "fresh milk" and

pasteurised milk and fresh milk amount to the same commodity exempted from sales tax"". A copy has been produced as Ext.P4. Even the Sales

Tax Appellate Tribunal had expressed similar views by different orders. A copy of the order dated November 26, 1999 has been produced as

Ext.P5. On these premises, the petitioner maintains that the action of the respondents in proceeding to reopen the assessment for the year 1996-97

or to levy tax for the year 1997-98 is ""wholly illegal. Thus, it prays that the impugned notices, copies of which have been produced as Exts.P2 and

P8, be quashed.

6. The Writ Petition was posted for hearing on November 26, 2002 before a learned Single Judge of this Court. The Government Pleader had

accepted notice for the respondents. Thereafter, it was posted for hearing on different dates. However, no counter-affidavit has been filed. The

factual position as pleaded in the petition has not been controverted.

7. Learned Counsel for the parties have been heard. On behalf of the petitioners, Mr. N. Muraleedharan Nair contended that pasteurisation

produces no new product. It is only a means to preserve the freshness of milk. Thus, the impugned notices cannot be sustained. On the other hand,

Mr. Raju Joseph, learned Counsel for the respondents submitted that the statute grants exemption only in respect of the sale of fresh milk. Sale of

pasteurised milk was not exempted from the levy of the tax till the Entry was amended with effect from January 1, 2000. He also submitted that

even while granting exemption vide notification dated March 22, 2001, the benefit was confined to the sale by the co-operative societies and was

not given to the other dealers. The sequence of events is indicative of the legislative intent. Thus, the sale of pasteurised milk is not exempted from

the levy of tax and the notices issued to the petitioner are legal and valid.

8. In view of the contentions raised by the learned Counsel, the short question that arises for consideration is - Does pasteurised milk fall outside

Entry 23 in the Third Schedule to the Act?

9. Section 5 provides for the levy of tax on sale or purchase of goods. Sale under the statute means ""transfer of property in goods by one person

to another in the course of trade or business....."" Thus, every sale would be exigible to the levy of tax unless it is specifically exempted.

10. Section 9 of the Act provides that ""a dealer who deals in the goods specified in the Third Schedule shall not be liable to pay any tax under this

Act in respect of sale or purchase of such goods"". Thus, the sale of any article covered by an Entry in the Third Schedule is not subject to the levy

of tax under the Act. At the relevant time, Entry 23 in the Third Schedule was - "Fresh Milk". It may be added that various milk products were

specifically mentioned under Entries 49, 84 and 124(a) in the First Schedule. To illustrate, curd and buttermilk were mentioned in Entry 49. Milk

products were mentioned in Entries 84 and 124(a). At present, the corresponding Entries are 49, 92 and 141. The sale of these products is

subjected to tax at different rates. However, the exemption was in the case of sale of "fresh milk" only. Thus, the true ambit and scope of Entry 23

alone has to be examined.

11. According to Black"s Law Dictionary, "fresh" means ""immediate; recent; flowing without any material interval"". In its ordinary sense and

especially in the context of food products, fresh would imply that which is not stale or decayed. Similarly, pasteurization is a process of heating and

cooling. The purpose is to eliminate the pathogenic or disease-producing organism so as to make the product safe for human consumption. It

improves the shelf life. It does not alter the physical or chemical characteristics of the product. Thus, it is a method of maintaining the freshness of

milk.

12. According to the plain language of the statute, the taxable event is the passing of property in goods. Under the provision, the sale of "Fresh

Milk is not taxable. If the Entry is literally construed, milk may be treated as fresh only at the moment it is "drawn from the cow". Thus, even when

it is sold after an hour, it may be contended that it was already an hour-old. It was not fresh at the time of sale. Such could not be the intention of

the Legislature. In fact, while granting exemption in respect of the sale of fresh milk, the obvious intention was that the benefit shall be admissible if

the milk was fresh at the time of its reaching the consumer. It is to ensure freshness that the dealer has to subject milk to a process of heating and

cooling. Pasteurisation only preserves the product and does not let milk go sour or stale before it reaches the customer. Since the process of

heating and cooling does not result in a new product, the milk continues to be "fresh milk" and its sale cannot be subjected to the levy of tax.

13. Even the respondents have accepted this position continuously. In this behalf, it deserves mention that vide letter dated December 10, 1998 the

Principal Secretary, Department of Taxes had written to the Commissioner of Commercial Taxes that "the process of pasteurization does not

amount to a manufacturing activity. It does not convert fresh milk into a commercially different commodity. Pasteurised milk is the same thing as

fresh milk". Similarly, even the Assessing Authority had accepted the petitioner"s claim vide its order dated March 21, 2001 and granted

exemption u/s 9, In fact, the Sales Tax Appellate Tribunal had even gone to the extent of exempting milk prepared after adding water to the

skimmed milk powder.

14. Mr. Raju Joseph, learned Counsel for the Revenue, pointed out that the matter had been considered by a Division Bench of this Court in

Ernakulam Regional Cooperative Milk Producers Union Ltd, v. State of Kerala (supra). It was held that the pasteurised milk is not exempted from

the levy. Thus, the action of the Department in reopening the assessment or proposing to levy the tax by the impugned notices is legal and valid.

15. The contention cannot be accepted. The Division Bench was considering a case where the dealer was receiving milk from farms, milk co-

operative societies or making milk by adding water to the skimmed milk powder. It was claimed by the assessee that there was no difference

between fresh milk and pasteurised milk or milk made using skimmed milk powder"". This claim was not accepted by the Court. However, such is

not the position in the present case. The petitioner is not adding anything to milk. It is not combining the fresh milk with milk prepared by adding

water to the skimmed milk powder and then pasteurising the whole product. Thus, the decision of the Division Bench is really not applicable to the

facts of the present case. Another fact, which deserves mention, is that the order of assessment in the petitioner"s case had been passed on March

21, 2001. The Division Bench had already decided the matter on October 25, 2000. Thus, the decision of the Division Bench was known to the

Department well before the assessment was finalised in the petitioner''s case. In this situation, it cannot be said that the sale had actually escaped

assessment or that the Authority was acting in ignorance of law. The order of assessment having been passed almost five months after the decision

of the Division Bench, the plea as now sought to be raised cannot be sustained.

16. Another fact, which deserves mention, is that a day after the assessment had been finalised in the petitioner''s case, the State Government had

issued a notification dated March 22, 2001 by which it had exempted the co-operative societies from the levy of tax on the sale of pasteurised milk

etc. The exemption was granted with retrospective effect from January 1, 1994. The obvious rationale was that hitherto for the dealers had not

collected tax on the sale of pasteurised or homogenised milk etc. The petitioners before us were also similarly placed. No reason for treating them

differently has been disclosed. In fact, it is clear from the record that the Government and the Assessing Authorities were clearly of the view that

there was no distinction between pasteurised milk and fresh milk. Thus, none of the dealers had collected tax. This being the factual position, the

impugned notices for the levy of tax at the rate of 10 per cent as well as the surcharge would clearly place an unbearable burden on the petitioners.

It is true that hardship is not a valid ground while considering the validity of a levy. It is also true that some distinction may be permissible in case of

co-operative societies. Yet, the arbitrariness of the respondents'' action cannot be over looked.

17. Even the precedents support the plea raised on behalf of the petitioners. In Tungabhadra Industries Ltd. v. Commercial Tax Officer, Kurnool

1960 11 STC 827 their Lordships of the Supreme Court were considering the question whether hydrogenated oil ceases to be groundnut oil. It

was held that even though after the process the ""relative proportion of the different types of fatty acids undergoes a slight change"", in its essential

nature, no change occurs and it remains oil. Thus, the assessee was held entitled to deduction. Similarly, in Alladi Venkateswarlu v. Government of

Andhra Pradesh 1978 41 STC 304 the issue was whether parched rice and puffed rice were ''rice'' and fell within the meaning of Entry 66(b) of

Schedule I to the Andhra Pradesh General Sales Tax Act, 1957? The claim of the assessee was upheld. While doing so, their Lordships had

followed the decision in Tungabhadra Industries (supra). In view of these decisions, it cannot be said that milk, which is subjected to the process of

heating and cooling, ceases to be ''fresh milk''.

18. Mr. Raju Joseph contended that Entry 23 was amended by the Legislature with effect from January 1, 2000. It now provides as under:

23. Fresh milk including pasteurised, toned or reconstituted milk.

On the basis of the above change, he contended that the modification in the Entry is a manifestation of the Legislative intent to grant relief only with

effect from January 1, 2000. Thus, the previous transactions are exigible to the levy of tax.

19. The contention cannot be accepted. In fact, the modification in the Entry is an affirmation of the view that the Government and the Authorities

in the Department had expressed earlier. This view was manifested in the orders and letters, some of which have been referred to above. In any

case, on the plain language of the "entry", We are of the view that pasteurised milk is fresh milk.

20. No other point was raised in either this or the connected case.

21. In view of the above, it is held that:

1. Pasteurisation is a process for preservation. It does not produce a new product. It controls the growth of pathogens. It does not alter the

composition. Thus, pasteurised milk is "fresh milk".

2. The decision in the case of Ernakulam Regional Co-operative Milk Producers Union (supra) is clearly distinguishable on facts. It is thus not

applicable to the facts of the present case.

3. The Department as well as the Government had clearly understood Entry 23 to mean that fresh milk included pasteurised milk. They had been

accepting the claim of the dealers. After the decision of the Division Bench in Ernakulam Regional Cooperative Milk Producers Union (supra), the

Government had proceeded to issue a notification granting retrospective exemption to the co-operative societies with effect from January 1, 1994.

This was a clear confirmation of the consistent view that the Department had been taking. Thus, no reason for reopening the assessment was made

out.

In view of the above, both the writ petitions are allowed. The impugned notices are set aside. However, in the circumstances, we make no order

as to costs.