

**Philips Smith and ors. Vs. Additional Sales Tax Officer**

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**SooperKanoon Citation :** [sooperkanoon.com/722752](http://sooperkanoon.com/722752)

**Court :** Kerala

**Decided On :** Apr-06-1984

**Reported in :** [1984]56STC142(Ker)

**Judge :** K. Bhaskaran, Ag. C.J. and; M.P. Menon, J.

**Appeal No. :** O.P. Nos. 3730, 5171, 5290, 5442, 5533, 5938, 5939, 6496, 6677, 6678, 6886, 6887, 7033 and 7051 of

**Appellant :** Philips Smith and ors.

**Respondent :** Additional Sales Tax Officer

**Advocate for Def. :** The Government Pleader

**Advocate for Pet/Ap. :** N. Haridas and V. Sivarajan, Advs.

**Disposition :** Petition dismissed

**Judgement :**

**M.P. Menon, J.**

1. The petitioners are bakery owners; most of them are members of the All Kerala Bakery Owners' Association. They prepare and sell cooked food : bread, biscuits, cakes, puffs, laddoo, jilabee, halwa, samoza and the like. The methods of cooking include baking, frying, roasting, boiling and freezing. Under Section 9 of the Kerala

General Sales Tax Act, 1963, read with item 12 of the Third Schedule, cooked food sold by owners of hotels and restaurants are exempt from sales tax; but the articles of cooked food sold by the petitioners are not so exempt, it is complained. The scheme of exemption in item 12 is attacked as violative of the petitioners' fundamental rights under Articles 14 and 19(1)(g). It is also their case that the policy of the 'State is to exempt cooked food from tax so as to make them available at cheap rates to the consumers, and that item 12 falls short of this policy. The Bakery Owners' Association has requested the Government to amend the law, and the Government is bound to do so in the interests of equality and fairness, it is asserted.

2. Section 9 of the Act reads :

Exemption from tax.-Subject to such restrictions and conditions as may be prescribed, 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 the sale or purchase of such goods.

Item 12 of the Third Schedule is in the following terms :

12. Cooked food including coffee, tea and like articles served in a hotel, restaurant or any other place.

The First Schedule to the Act enumerates goods in respect of which single point tax is leviable, and items (8), (9) and (20) of this Schedule are also relevant :

8. Biscuits sold under brand names (Patented).

9. Biscuits not specified in item 8 and bakery products, excluding bread.

20. Confectionery, including toffees and chocolates.

3. It is clear from items 9 and 20 of the First Schedule that bakery products (excluding bread) and confectionery are not exempt from sales tax. But the same products, it is pointed out, get exemption from tax when sold in hotels and restaurants. Consumers who want to purchase these products therefore flock to hotels and restaurants, and the business of the petitioners is affected thereby, it is

alleged. Again, when a hotelier serves these articles, at a marriage party he need not pay sales tax; but when a bakery owner does the same thing, he does not get that benefit. This is another instance, according to the petitioners, where the exemption policy affects them as a class.

4. The basis of the entire argument is that biscuits, puffs, jilabee, laddoo, etc., are articles of 'cooked food' within the meaning of item 12 in the Third Schedule. That is a slender assumption in view of the decision of the Supreme Court in *Annapurna Biscuit Manufacturing Co. v. Commissioner of Sales Tax* [1981] 48 STC 254 (SC). The question there was whether biscuits could be treated as cooked food for the purpose of a notification issued under the U. P. Sales Tax Act, and their Lordships said :

It may be that biscuit is served at tea time and in its wider meaning 'cooked food' may include biscuit. But ordinarily biscuit is not understood as cooked food. If a person goes to a hotel or restaurant and ask for some cooked food or pakaya hua bhojan certainly he will not be served with biscuits in Uttar Pradesh. While it is not necessary to state in the present case as to what all items may be called as cooked food, we can definitely say that in the context and background of the notification biscuit cannot be treated as cooked food.

If this is the view to be taken about the meaning of 'cooked food' in the Third Schedule of our enactment also, almost all the contentions of the petitioners will have to fail. But it is not necessary to express a final opinion on the question for the present purposes.

5. The true position, as we see it, is that the exemption in item 12 of the Third Schedule does not depend on who sells the articles of food; it depends on how they are sold. Every seller, whether he be the owner of a bakery or of a hotel, is entitled to get the benefit so long as the articles are served for immediate consumption, and not sold for consumption at some other point of time at the convenience of the purchaser. Serving of articles of food involves a sale, but a special kind of sale, i.e., sale for consumption at the point of sale itself. Where the owner of bakery serves the articles, he too is eligible for tax exemption; and where a hotelier sells them otherwise than by way of serving, he is not entitled to the

exemption. The grievance of the petitioners that all purchasers flock to hotels and restaurants is founded on the wrong assumption that owners of hotels and restaurants get exemption for every kind of sale; they can claim exemption only for the food articles served, and not for the articles sold in any other manner. Where purchasers get their requirements for leisurely consumption at home or elsewhere, they will have to pay tax even if they get their supplies from a hotel or a restaurant. In the case of undertaking marriage parties also, there is no distinction under item 12 between a bakery owner and another. If the supply at the marriage party amounts to 'serving', the exemption is available to everyone who does so.

6. Counsel would submit that even in the case of out and out sale, as distinct from service, owners of restaurants and hotels are not charging tax and are thus able to undercut bakery owners. That is a matter pertaining to the enforcement of the law, and not to its validity. May be, even bakery owners are sometimes able to evade the law.

7. That there is no policy of exempting all food preparations from tax, except with reference to the nature of the sale (i. e., service) is clear from items 2, 3, 5 and 6 of the First Schedule, to make mention of only a few of them. Meat preparations, milk products, fish preparations, and preparations of eggs, prawns, etc., are chargeable to tax under these entries. Fruits and tapioca are chargeable under items 15 and 16. The legislative policy is not to exempt all food items, cooked or otherwise; the policy is to exempt cooked food and that too only when they are served or sold for immediate consumption. And in respect of this policy, the bakery owner has no special disadvantage.

8. There is therefore no question of discrimination between bakery owners on the one hand, and owners of hotels and restaurants on the other. Article 19(1)(g) is also out of the picture, because the exemption has no direct bearing on the business of the petitioners. That apart, the dealer is only an agent for collecting the tax payable by the customer; his obligation is only to collect from the purchaser and pay it over to the State. The incidence of the tax is on the customer, and not the dealer. If violation of Articles 14 and 19 are involved for any reason, the person who should complain is the customer and not the dealer.

9. We have already noticed that the object of item 12 in the Third Schedule is not to exempt all items of cooked food from sales tax with a view to make them available to consumers at cheap rates; the object is only to exempt sales of cooked food under certain conditions. If there is any larger policy for the State, and if the item in the Schedule has failed to give full effect to such policy, that is not a matter for the courts to rectify. After all, the Schedule is part of the statute and the entries therein are not the result of exercise of delegated legislative power. We are concerned only with the policy of the legislature as reflected in the statute, and not with anything else. We cannot direct the legislature to amend the Schedule as the association wants.

10. Items in the Third Schedule are exempted from tax under Section 9 subject to such restrictions and conditions as may be 'prescribed'. 'Prescribed' means prescribed by Rules made under the Act. The conditions and restrictions in item 12 are not conditions and restrictions imposed by the rules; they are part of the Act itself. The attack against them on the ground that they are outside the scope of Section 9 cannot also, therefore, succeed.

The original petitions are therefore without merit and are accordingly dismissed. No costs.

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