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SooperKanoon Citation : sooperkanoon.com/728260

Court : Kerala

Decided On : Aug-26-2003

Reported in : 2003(3)KLT507; [2004]137STC82(Ker)

Judge : G. Sivarajan and; Kurian Joseph, JJ.

Acts : Kerala General Sales Tax Act, 1963

Appeal No. : T.R.C. Nos. 95, 134, 135 etc. of 2001

Appellant : State of Kerala

Respondent : Jose

Advocate for Def. : N. Muraleedharan Nair and; R. Muralidharan (Aroor), Advs.

Advocate for Pet/Ap. : Georgekutty Mathew, Government Pleader

Disposition : Tax revision dismissed

Judgement :

Kurian Joseph, J.

1. What is yeast? A living organism or a chemical? The Revenue, for the purpose of taxation under the Kerala General Sales Tax Act, 1963 (for short the Act), wants to classify it as a chemical whereas to the assessee it is not a chemical, but a living organism and hence an unclassified item. This is the only dispute to be

resolved in these cases. Therefore, it is not necessary to extensively refer to the factual position and yet for the purpose of understanding the background we may state the short facts.

2. The State is the revision petitioner in all these cases. The assessment years are 1989-90 to 1995-96. Till 31.3.1992 chemicals including caustic soda, caustic potash, soda ash, sodium sulphate and other chemicals not elsewhere classified were classified under Entry 42 to the First Schedule to the Act. From 1.4.1992 they are under Entry 29. Entry 156 for unclassified items was also introduced with effect from 1.4.1992. Till 31.3.1992 those items were treated under Section 5(1)(ii) of the Act.

3. In T.R.C. Nos. 95, 142, 143 and 153 of 2001 the assessing authority as well as the appellate authority treated yeast as a chemical and hence the respondents in those cases were the appellants before the Tribunal. In T.R.C. Nos. 134, 141, 150 and 154 of 2001 the assessing authority treated yeast as an unclassified item and in suo motu revision the Deputy Commissioner reversed the findings of the assessing authority and directed assessments in those cases to be made treating yeast as a chemical and therefore, respondents/assessees were the appellants before the Tribunal. In T.R.C. Nos. 135 and 204 of 2001 the assessing authority treated yeast as a vegetable preparation coming under Entry 56; but the first appellate authority reversed the finding of the assessing authority and treated yeast as an unclassified item and therefore State was the appellant before the Tribunal in those two cases. The Tribunal held that yeast is not a chemical, but a micro living organism which is not classified and hence directed the assessments to be completed treating yeast as an unclassified commodity. Aggrieved, the State has filed all these revisions.

4. The questions of law raised in all these revisions are the same. One set is extracted below:-

'(a) Applying the common parlance theory and the functional test in the matter of ascertaining the fact that a commodity would fall under which entry, is the Tribunal correct in law in holding that yeast is not a chemical and that it would fall only under the residuary entry?

(b) Is not yeast has the properties of a chemical and should not the same fall under the category 'chemical' for the purpose of taxation, irrespective of the fact that the same being a micro living organism?

(c) Is not the Tribunal in error in distinguishing the decision reported in 83 STC 347?'

5. Sri. Georgekutty Mathew, learned Government Pleader, placing heavy reliance on the decision of the Gujarat High Court in State of Gujarat v. Bhagwati General Agency (Import) ((1981) 83 STC 347) contends that yeast is not a living organism but a chemical. It is the further contention that yeast being mainly used for fermentation, which is a chemical process, yeast has to be classified as chemical. Still further it is contended that there is chemical property in yeast and hence it has to be treated as chemical for the purpose of taxation under the Act. Sri. Muraleedharan Nair, on the other hand, extensively referring to the definition and meanings attributed to yeast and chemical and quite a few decisions of the Apex Court contends that yeast is a living organism and therefore, not a chemical. It is not necessary to refer to the entire materials referred by both sides since what is essentially to be decided is as to whether yeast is a living organism or a chemical. Once that is answered, it will be easy to tackle the rest of the contentions raised by the State.

6. Yeast was discovered in the year 1835 by the Scientists Caignard De Laptour, Schwann and Kutsing. In the book 'Bread & Bread Making' prepared for use by the Australian Baking Industry, 10th Edition it is stated that these Scientists have concluded that yeast is a living organism.

7. Yeast is described in the Concise Oxford Dictionary (10th Indian Edition) as 'a microscopic single-celled fungus capable of converting sugar into alcohol and carbon dioxide'. The dictionary further gives the biological description of yeast as 'any unicellular fungus that reproduces vegetatively by budding or fission'. The Medical Dictionary also attributes the same meaning to yeast. Encyclopaedia Britannica describes yeast as 'any of certain economically important single-celled fungi'. It is further stated that 'in food manufacture yeast is used to cause fermentation and leavening. The fungi feed on sugars, producing alcohol (ethanol)

and carbon dioxide; in beer and wine manufacture the former is the desired product, in baking, the latter. In sparkling wines and beer some of the carbon dioxide is retained in the finished beverage. The alcohol produced in bread making is driven off when the dough is baked.' Encyclopaedia Americana describes yeast as 'a tiny living plant'. 'It makes the bread light and tender; it also adds flavour.' Sri. S.C. Dubey, a Baking Technician of repute of U.S.Wheat Associates, New Delhi has done an extensive research on yeast and its functions. It is profitable to refer to the following passage:-

'Yeast is unicellular microscopic plant. Its structure consists of cell wall, protoplasm, and vacuole. It requires food (in the form of simple sugar), moisture and temperature climate for its growth and reproduction. Yeast multiplies by budding. When yeast cell is placed in a liquid medium at optimum temperature (80-85F) containing simple sugar (dextrose or fructose), then the cell starts growing buds on its cell wall which keep on growing until daughter cells acquire the same size as mother's cell. Then the buds separate from mother cell and start producing other buds.

The protoplasm of yeast contains certain enzymes by which fermentation activity of yeast is made possible. Enzymes are very minute substances produced by living organisms, which, by its mere presence, are capable of bringing about or speeding up certain chemical changes. For example, food is digested through the action of certain enzymes, starch is converted into sugar by the action of enzymes. Although an enzyme does affect chemical changes, a very small quantity of enzyme is capable of converting a very large quantity of substance from one form to another form, but enzyme itself is neither destroyed nor changed. Hence, enzymes are known as catalytic agents.'

Bakers Handbook on Practical Baking complied by U.S.Wheat Associates, New Delhi describes yeast as follows:-

'Yeast is a microscopic one-celled plant belonging to the fungus order, which ordinarily multiplies by a process known as budding and which causes fermentation when placed under suitable conditions.

Fermentation is a general term which covers aerobic and anaerobic changes brought about by micro-organisms and includes the production of carbon dioxide gas, alcohols, acids and some other by-products.'

It is further stated in the compilation that 'yeast is a very potent source of supply of enzymes. An enzyme is produced by living cells, either animal or vegetable............The important enzymes in yeast are Invertase, Maltase and Zymase.'

8. 'Chemical' according to the Oxford Dictionary means 'relating to or belonging to chemistry and obtained by chemistry'. Another contextual meaning given is a 'substance obtained by or used in chemical operation'. Websters 3rd new International Dictionary describes chemical as 'relating to application of chemistry as acting or operated by chemical means, or synthasised from chemicals, suitable for use in or used for operation in chemistry, having reference to or relating to the science of chemistry.'

9. In Concise Oxford Dictionary the meaning attributed to Chemistry is 'the science of the properties, of substances, elementary and compound and the laws of their combination and action one upon another.' Chemical is that which is 'relating to chemistry'. The Dictionary further attributes the meaning to chemical as 'a substance obtained by chemical means or use in chemical operations'.

10. Though dictionaries are not generally meant for resolution of legal issues, yet it is one source of information relating to an issue. It may be seen that the expression chemical is generally attributed to mean a substance obtained in or used for chemical operation. Necessarily the substance is a chemical. It is one thing to say that a substance is a chemical and yet another thing to say that an organism is capable of chemical operation. A chemical process may be there in fermentation since the fungi feed on sugars and produce alcohol and carbon dioxide. But it is to be noted that the organism that is used in the process is fungus. It needs no research to understand that fungus is a non-green plant and includes such forms as mushroom, mould, rust and puffball. As we have already noted above yeast is a uni-cellular fungus. All the authorities referred to above have in unmistakable terms expressed that fungus is a living organism, aplant

which has its own mode of multiplication mainly by budding and occasionally by fission. It is not a lifeless substance, but a living organism. Merely because a living organismis used in a chemical process, it cannot be held that that living organism is a chemical substance. It retains its characteristic as a living organism even in the process.

11. It is also profitable to refer to yet another material made available by learned counsel for the respondents. It is a letter dated 24.1.2000 bearing No. FT/FMBCT/198(6)/99 from the Central Food Technological Research Institute, Mysore, wherein it is stated that '........... yeast is a living organism added to bread dough to convert sugar into carbon-di-oxide which helps in leavening of bread. Yeast is not a chemical as suggested'. Hence it cannot even be remotely suggested that yeast is a chemical substance. It is a living organism.

12. In State of Gujarat v. Bhagwati General Agency (Import) ((1991) 83 STC 347) the question that was considered by the Division Bench of the Gujarat High Court was whether 'yeast sold in the form of powder and granules by M/s. Bhagwati General Agency (Import) .... is a chemical and is covered by the expression 'dyes and chemicals' used in Entry 9 in Schedule II, Part A to the Gujarat Sales Tax Act, 1969.' If it is included in the entry 'dyes and chemicals' it was exigible to 3% tax and if unclassified 5%. The Bench analysed the chemical property of yeast and it was found that 'yeast powder is manufactured by a chemical process involving the use of molasses and ammonia. It is, therefore, clear that yeast is composed of constituents which are chemicals.' The court further found that 'yeast is capable of bringing about a chemical reaction or chemical effect.' It may be seen that the Bench was analysing the question as to whether yeast powder is manufactured by a chemical process, when it was found that in the process molasses and ammonia is used. There is no quarrel that ammonia is a chemical substance and if such a chemical substance is used in the production of any substance, that substance obtained in the chemical operation using chemical can also be classified as a chemical. It is also significant to note that the Division Bench in the said decision has specifically observed that 'we are called upon to decide as to whether yeast is a chemical and not the question as to whether yeast can be appropriately classified as living micro-organism.' Thus the decision though

heavily relied on by the learned Government Pleader, is distinguishable on those two major counts: Firstly the court was considering whether yeast powder obtained by a process using molasses and ammonia is a chemical. We have already held that there cannot be any quarrel that any substance obtained by using a chemical substance can be termed as chemical. Secondly it has to be seen that the court was not deciding the question as to whether yeast is a living micro-organism whereas in the instant case the question which we have been analysing is as to what is yeast. In other words, what we have tried to analyse is as to what is yeast and not what is there in yeast. For the purpose of understanding an entry in a taxing statute it is sufficient to understand as to what is the item.

13. An article to be taxed may be capable of producing different results in different operations. But it is not proper to take into consideration all those processes or effects or results for the purpose of levying tax on that item. For that purpose it is only sufficient to understand as to what that them is.

14. As far as yeast for the purpose of the Act is concerned, it cannot be understood as included in the category of chemicals for simple reason that yeast is a living organism. Entry 29 (originally Entry 42) obviously deals with chemicals. The entry reads as follows:-

'Chemicals including caustic soda, caustic potash, soda ash, sodium sulphate, sodium silicate, sulphur, chemical components and mixtures not elsewhere classified in this Schedule.'

Therefore, it has to be seen that in order that yeast is to be brought under Entry 29 it should primarily be a chemical. If the Legislature intended any particular item to be taxed taking note of its particular use in a process or its chemical components, it would have clearly classified so. Since yeast is not a chemical, whatever may be the process in which it is used and whatever may be the chemical effects it produces or is capable of producing, it cannot be termed as a chemical for the purpose of a taxing statute. That would be patently unreasonable.

15. Having analysed, understood and held that yeast cannot be classified as chemical, it is not actually necessary to consider various other contentions. Yet in

view of the question framed by the State that yeast, inspite of being a living organism, should be classified as chemical by 'applying the common parlance theory and functional test,' we shall refer to some of those contentions. At the outset it has to be seen that such a research is warranted only if there is any ambiguity in an entry. As far as Entry 29 is concerned, it is meant for chemicals. Since yeast is not a chemical but a living organism, no further explanation is required to hold that yeast cannot be classified under Entry 29. In Indo International Industries v. Commissioner of Sales Tax ((1981) 47 STC 359) the Supreme Court considered the question as to whether clinical syringes could be regarded as glassware. The Apex Court held that though the syringe is made of glass, it cannot be treated as a glassware since in common parlance and commercial sense glassware would never comprise of articles like clinical syringes, thermometers, lactometers and the like, which have a specialised significance and utility. It has to be seen that there was no dispute that syringes were made of glass. However, the court in unmistakable terms made it clear that an entry if otherwise unambiguously clear, it must be understood in that sense.

'If any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted.'

16. The contention of the learned Government Pleader is that even assuming that yeast is not a chemical, applying the common parlance theory and functional test it should be treated as a chemical. That contention cannot be accepted. For the mere fact that an article can be used for different purposes cannot mean that the assessing authority shall have wide discretion to tax it under one or other entry. The discretion of the assessing authority shall essentially be limited by the entry. It is also a settled position that the provisions of a fiscal statute have to be strictly construed. On these aspects also sufficient authentic guidance is available in many decisions of the Supreme Court. In Mukesh Kumar Aggarwal & Co. v. State of Madhya Pradesh ((1988) 68 STC 324) the Supreme Court considered whether eucalyptus wood-heaps could be treated as timber for the purpose of the Madhya Pradesh General Sales Tax Act. At paragraph 4 of the said decision it is stated as

follows:-

'4. In a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance, i.e., 'that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it'. Such words must be understood in their 'popular sense'. The particular terms used by the Legislature in the denomination of articles are to be understood according to the common commercial understanding of those terms used and not in their scientific and technical sense 'for the Legislature does not suppose our merchants to be naturalists or geologists or botanists'.

The Apex Court also dealt with the user test in the said decision in the following words:-

'The 'user-test' is logical; but is, again, inconclusive. The particular use to which an article can be applied in the hands of a special consumer is not determinative of the nature of the goods. Even as the description of the goods by the authorities of the forest department who called them varyingly as 'eucalyptus fuel-wood' 'eucalyptus wood-heap', etc., is not determinative, the fact that the purchasers were dealers in timber is also not conclusive.'

It was in the said decision that the Apex Court held that 'if the wood is not 'fire-wood', it need not necessarily and for that reason alone be 'timber'. All wood is not timber as, indeed, all wood is not 'fire-wood' either though perhaps it may not be incorrect to say that both 'fire-wood' and 'timber' are 'wood' in its generic sense.' Therefore, it has to be seen that the nature of the goods cannot be determined by the test of the use to which they are capable of being put. It is also to be noted that yeast is not understood as chemical in common or commercial parlance and it is not from chemical shop that people buy it.

17. In Rallis India Ltd. v. State of Tamil Nadu ((1999) 112 STC 203) the Supreme Court considered the question whether gelatine is a chemical. In that case the Appellate Tribunal constituted under the Tamil Nadu Genera] Sales Tax Act, 1959

on the basis of some material produced before it, held that gelatine is not a chemical. However, the Madras High Court, without examining or adverting to the findings of the Tribunal and without any additional material before it, took the view that gelatine fell within the description of chemical. The Apex Court did not approve of the approach of the High Court. It was held that the High Court was not justified in interfering with the decision of the Tribunal, the last fact finding body, in the absence of any additional material and unless it is found by the High Court that the finding of the Tribunal was either based on no evidence or irrelevant evidence or incorrect principles. It is significant in this context to note that the Apex Court took note of the materials relied on by the Tribunal regarding the nature and composition of gelatine and the process undertaken to manufacture it. (Gelatine is a protein obtained from collagen which originates from animal kingdom mainly from skin and bones with suitable pressure.) In the instant case, as already seen yeast, a living organism, is multiplied either by budding or fission and is not chemically manufactured. Looking at the issue in that angle also it cannot be said that yeast is a chemical for the purpose of taxation under the Act.

18. A Division Bench of this Court in Southern Veneers and Wood Works Ltd. v. State of Kerala ((1997) 5 KTR 437) held that for the purpose of taxation 'what is relevant is the article which is subject to levy of tax. There is no difficulty in identifying the article. It is attempted to be understood in terms of its use, which is not permissible. In a taxing statute what is taxable is the article referred to in the entry and it cannot be understood in the context of its use.' The article being yeast, which is a living organism, cannot therefore, be classified under Entry 29 'chemicals'.

19. For the purpose of taxation of an article the approach should be what is an article and not what is in it or what is it capable of. Yeast may be capable of a chemical operation. But yeast is not a chemical. It is a living organism. Hence by no stretch of imagination a living organism can be classified as a chemical substance for the purpose of taxation under the Act. 83 STC 347 does not apply in the facts and circumstances of the case. The question as to whether yeast is a living organism was not considered at all in the decision.

20. In T.R.C. Nos. 135 and 204 of 2001 (arising out of Appeals 1050/97 and 1125/98 before the Tribunal) the assessing authority classified yeast under Entry 56 of the First Schedule with 12.5% as tax. The entry reads as follows:-

'Food including vegetative or animal preparations sold in airtight containers and food colours, essences of all kinds and powders or tablets used for making food preparations.'

It needs no elaborate discussion to hold that yeast is not food. Even the State does not have such a case before us. Their attempt is only to bring it under Entry 29 'chemicals'. Even otherwise it has to be seen that yeast by itself is not food and it is not any one of those inanimate objects used for making food preparation, but it is a living organism. Therefore, yeast cannot be classified under Entry 56.

The Tribunal has properly understood as to what is yeast for the purpose of taxation under the Act and has correctly held that it is not a chemical and hence cannot be classified as chemical. We answer all the questions against the revenue and in favour of the assessee and hold that yeast cannot be classified under Entry 29 (previously 42) or under Entry 56.

The Tax Revision Cases are dismissed.