SUPREME COURT OF INDIA

Punjab Dairy Development Board

Vs.

Cepham Milk Specialities Limited

C.A.No.1741-1753 of 2002

(S. N. Variava and Arijit Pasayat JJ.)

20.08.2004

JUDGMENT

S. N. VARIAVA J

Leave granted.

These Appeals are against the Judgment of the Punjab and Haryana High Court dated 21st November, 2001.

Briefly stated the facts are as follows.

Prior to July 2000, Companies like the 1st Respondent-Company which are engaged in the production of milk products, like Ghee, Skimmed milk, Powder, Butter and Cream, were subjected to a purchase tax at 4% and a surcharge at 10% of the purchase tax. On 19th July 2000, the Governor of Punjab promulgated the Punjab Dairy Development Board Ordinance, 2000. The Ordinance provided for creation of Punjab Dairy Development Board inter alia for co-ordination between the organizations engaged in the dairy sector, to uplift professional standard of the dairy industry in the State and to develop modern dairy farming technology system. Under the Ordinance, cess was levied on milk plants by abolishing purchase tax on milk.

On 17th August, 2000, the Director, Dairy Development, Punjab, issued a notice to certain milk companies directing them to pay cess at 10 paise per litre of their licenced capacity for the period

19th July, 2000 to 30th September, 2000. Many dairy companies filed Writ Petitions in the High Court. While these Writ Petitions were pending, Act No. 20 of 2000 was promulgated. The Act was published in the Official Gazette on 20th October, 2000. All the Petitions were allowed to be amended challenging the provisions of the Act.

The challenge to the Act was on the ground: (a) that the substance of the levy was a tax on the licenced capacity of an Industry and that the State Legislature was not competent to levy tax under any Entry in List II of Schedule VII to the Constitution of India; and (b) that the impost on the licenced capacity was arbitrary and discriminatory.

The High Court has held that this levy was in effect a tax. The High Court so held following the principles laid down by this Court in the case of M/s Kishan Lal Lakhmi Chand & Ors. Vs. State of Haryana & Ors. [5]. The High Court held that there was no special service being provided to the milk plants in the milk-shed areas and that there was no evidence to show that the levy would be used for the benefit of the milk plants. The High Court notes that the principles laid down in M/s Kishan Lal Lakhmi Chand' case (supra) have been diluted in subsequent decisions but still prefers to follow the ratio laid down in that case. The High Court also holds the levy to be illegal and invalid as the State Legislature has impinged upon a field that was already occupied by a Central Legislation, namely, the Industries (Development and Regulation) Act, 1951.The High Court holds that both the Legislations are aimed at improvement in production and marketing by employing suitable equipments and materials. The High Court holds that both the Legislations are aimed at training personnel for running the facilities. The High Court holds that the functions of the Board are not, in pith and substance, any way different from those assigned to the Development Councils. The High Court also holds that as far as the milk plants are concerned, there is no direct benefit to them and that, therefore, the levy on only those milk plants having a capacity of more than 10, 000 litres is arbitrary and discriminatory. The High Court thus quashed the Act.

It must be mentioned that by the Punjab Dairy Development Board (Amendment) Act, 2004, with effect from 11th September, 2002 Section 12 of the Act has been deleted. We are told that after the deletion of the cess, purchase tax has again been levied on milk.

The relevant provisions of the Act need to be set out at this stage. They read as follows:-

"To provide for the creation of Punjab Dairy Development Board for coordination between the organizations engaged in dairy sector to uplift professional standard of the dairy industry in the State and to develop modern diary farming technology system and to levy cess on the milk plants by abolishing purchase tax on milk.

1. (1) This Act may be called the Punjab Dairy Development Board Act, 2000.

(2) It shall come into force at once.

2. In this Act, unless the context otherwise requires, --

(a)

(b)

(c)

(d) 'milk plant' means a milk handling, processing or manufacturing unit registered under the Milk and Milk Products Order, 1992 of the Government of India; and

(e)...." *

9. The Board shall be a nodal agency for coordinating, planning and organizing programmes of dairy development in consultation with the State Government so as to promote dairy sector on modern, scientific and commercially viable lines.

10. Subject to the provisions of this Act and the rules made thereunder, the Board shall exercise the following powers and perform the following functions, namely :--

(i) to effect coordination between all organizations engaged in dairy sector viz., the Directorate of Dairy Development, the Directorate of Animal Husbandry, the Punjab Milkfed and other agencies, such as milk plants in the joint sector as well as in the private sector;

(ii) to uplift professional standards of the dairy industry in all its aspects through the Directorate of Dairy Development, Punjab, the Directorate of Animal Husbandry, the Punjab Milkfed and milk plants in the joint sector as well as in the private sector;

(iii) to coordinate formulation of policies in regard to production of milk and milk products;

(iv) to develop modern dairy farming technologies and systems for meeting the local demand of high quality milk and for promotion of the dairy industry for socio- economic uplift of milk producers;

(v) to establish centres in rural areas for demonstration in the manner in which programmes can be taken up;

(vi) to plan and formulate policies for quick genetic upgradation and development of milk animals, where necessary, by arranging for transfer of technology from abroad with Government of India's prior approval;

(vii) to arrange and import new varieties of fodder seeds to increase the yield and nutrition of fodder crops and also equipment or machinery for their harvesting and conservation;

(viii) to take requisite measures to increase consumption of drinking milk and milk products through proper advertisement and other related channels of media;

(ix) to provide assistance of any kind to enhance the scope of export of dairy products;

(x) to plan and execute programmes of high level education, research and training in dairy technology and husbandry;

(xi) to secure funds from the State Government and the other agencies; and

(xii) to exercise the necessary authority in respect of all matters which are incidental and ancillary to the aforesaid for attaining the objectives of the Board.

11. (1) The Board may, with the prior approval of the State Government, create such posts and appoint such officers and other employees thereon, as it may consider necessary for the efficient discharge of its functions.

(2) The conditions of service of the officers and other employees referred to in sub-section (1), and their functions and duties shall be such, as may be determined by the regulations made by the Board under this Act.

12. (1) Subject to the rules made under this Act, there shall be levied for the purpose of this Act, a cess at the rate of ten paise per litre of the licenced capacity of a milk plant by abolishing the purchase tax being charged on milk.

(2) The cess levied under sub-section (1), shall be paid by the owner of the milk plant in such manner and to such person or officer as may be prescribed.

(3) The arrears of the cess levied under sub-section (I), shall be recoverable as arrears of land revenue.

13. (1) There shall be constituted a Fund to be called the 'Punjab Dairy Development Fund', which shall vest in the Board.

(2) The Fund constituted under sub-section (I), shall be administered by the Member- Secretary of the Board.

(3) The amount of cess paid to the person or officer prescribed under sub-section (2) of Section 12, shall be credited to the Fund within such period as may be prescribed and grants from this State Government and local authorities shall also be credited to this Fund.

(4) The accounts of the Fund shall be audited annually by the Examiner, Local Fund Accounts, Punjab.

Before us lengthy arguments have been made on whether the levy was a tax or a fee. Large numbers of authorities were cited by both sides in support of their respective contentions. On behalf of the Appellants, it was submitted that the levy was a fee, which had been imposed under Entries 15 and 27 of List II of the Constitution of India and was imposed in order to preserve, protect and improve stock and prevent animal diseases and give veterinary training and practice and for improving production, supply and distribution of goods. It was submitted that Section 10, which laid down the powers of the Board, clearly indicated that the cess was being levied under the above mentioned Entries. It was submitted that Entry 66 of List II permitted fees to be levied in respect of such items. It was further submitted that the ratio set out in M/s Kishan Lal Lakhmi Chand's case (supra) has been held by this Court to be obiter and that the High Court was wrong in relying upon the ratio laid down in that case. In support of this, reliance was placed upon a case of Krishi Upaj Mandi Samiti & Ors. Vs. Orient Paper & Industries Ltd. [5].

Reliance was also placed upon in B.S.E. Brokers' Forum, Bombay & Ors. Vs. Securities and Exchange Board of India & Ors. [71]. Reference was made to the cases of Sreenivasa General Traders & Ors. Vs. State of Andhra Pradesh & Ors. [ ], City Corporation of Calicut Vs. Thachambalath Sadasivan & Ors. [ ], and Sirsilk Ltd. Vs. Textiles Committee & Ors. [ ].

On the other hand, on behalf of the 1st Respondent it was submitted that the High Court has

correctly held it to be a tax and not a fee. Reliance was placed upon in The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005], M.P.V. Sundararamier & Co. Vs. The State of Andhra Pradesh & Anr. 1958 SCR 1422] and Municipal Corporation of Delhi & Ors. Vs. Mohd. Yasin [.

It was submitted that on the basis of the principles laid down in these cases the High Court has correctly held that the levy was a tax.

In our view, the law is quite well settled. As the High Court has itself noticed the principles laid down in M/s Kishan Lal Lakhmi Chand's case (supra) have been diluted by subsequent decisions. It has been held that the observations in the above case are obiter. This being the position, the High Court was not correct in following the principles laid down in M/s Kishan Lal Lakhmi Chand's case (supra).

Even otherwise we find that the High Court was wrong in concluding that the field was already occupied by a Central Legislation, namely, the Industries (Development and Regulation Act, 1951. As laid down in the case of Ch. Tika Ramji & Ors., etc. Vs. The State of U.P. & Ors. reported in 1956 SCR 393] and Belsund Sugar Co. Ltd. Vs. State of Bihar & Ors. reported in [4] repugnancy must exist as a fact and not as a mere possibility. In the absence of any specific order or provision the question of repugnancy cannot arise. Admittedly, the Central Legislation levies no cess or fee.

Thus, there can be no question of repugnancy if a fee were to be levied.

While the High Court was wrong in these conclusions, the question would still remains whether the levy was a tax or a fee. In the view which we are taking, and which is set out hereinafter, it is not necessary for us to decide this question. We leave the question open.

We find that the High Court was, however, right in concluding that the levy, even if it be a fee, is arbitrary and discriminatory. The levy is ostensibly for the purpose of co-ordination between organizations engaged in dairy sector and to develop modern dairy farming technology. However, the levy is on milk plants at the rate of 10 paise per litre of the licenced capacity. The term "milk plant" has been defined under Section 2(d) to mean a milk handling, processing or manufacturing unit registered under the Milk and Milk Products Order, 1992 of the Government of India. This Order has been issued under the Essential Commodities Act. Under this Order, only milk plants having an installed capacity for handling milk in excess of 10, 000 litres per day or milk products in excess of 500 tones per annum require registration. Thus, only such milk plants, i.e. milk plants which have an installed capacity to handle 10, 000 litres per day or who produce milk products in excess of 500 tones per annum have to pay cess. Further, the levy is not on the basis of actual production but on the licenced capacity of their plants. Thus if a milk plant had a licenced capacity of 40, 000 litres, even though the actual consumption was only 10, 000 litres, they would still have to pay cess at the rate of 10 paise per litre on 40, 000 litre. It could not be denied that milk production and consumption vary from month to month and from season to season. Irrespective of such variation and without any regard to the actual production or consumption, the levy is on the installed capacity only. The levy was for the purposes of uplifting the standards of the Dairy Industry. Yet there is no levy on the farmers or co-operative societies, who produces the milk, nor on plants whose installed capacity is less than 10, 000 litres per day. No rational explanation could be given as to why the levy was only on these plants. # The only explanation given was that these plants could apply for reduction of the installed capacity in case they were not capable of using their entire capacity. It was stated that on such an application being made they would be allowed to

reduce their installed capacity.

We are not impressed by this explanation. One fails to understand why a milk plant should apply for reducing its capacity. It may consume, as per its capacity in seasons when that quantity of milk is available, but it may not be able to consume, as per its capacity in seasons or at times when milk of that quantity is not available. Further, due to temporary closure of some machines for purposes of repairs or maintenance, they may be consuming less during a particular period. Further, even if there is no production/consumption and even if the plant is shut down the cess would still have to be paid.

This would be so even if the closure is for more than six months in any particular year. Irrespective of what their consumption/production is, these plants would have to continue to pay cess at the rate of 10 paise per litre of their installed capacity. We find that such a levy is arbitrary.

We also find that the levy is discriminatory. There is no levy on the farmers and co-operative societies, who produce the milk and/or milk plants whose capacity is less than 10, 000 litres per day. No explanation is given which justified this discrimination. # Faced with this situation, it was submitted that this Court could read down the Act. It was submitted that from the definition of the term "milk plant" in Section 2(d) of the Act, the words "which was registered under the Milk and Milk Products Order, 1992" be deleted. It was submitted that the words "licenced capacity" in Section 12 be also deleted. It was submitted that it is settled law that wherever it is possible to uphold legislation by reading it down the Court must do so.

There can be no dispute with the principle that if possible the provision of the Statute must be saved by, if necessary, reading them down. However, in this case, we are unable to accept this submission. As stated above, the Act has been amended in 2004. This levy is already abolished. At present, the purchase tax is again being levied. For the period during which the Act subsisted, it is not possible for us to read it down inasmuch as it would now affect persons, who never went to Court because during the period it existed it did not apply to them. Such parties are not before Court. We thus see no reason to delete the words as suggested on behalf of the Appellants.

It was next submitted that the ground that the Act is discriminatory and violative and, therefore, liable to struck down, has not been taken in the Writ Petitions. We are unable to accept this submission. In our view, the Writ Petitions contain the necessary averments and these have also been met in the reply of the Respondents.

Thus, even though the reasoning of the High Court may be erroneous, the ultimate result is that the levy of cess requires to be struck down as being arbitrary and discriminatory. In this view of the matter, we see no reason to interfere.

The Appeals shall stand dismissed with no order as to costs.