REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1117 OF 2010

State of Maharashtra & Ors .... Appellant (s)

Versus

Subhash Arjundas Kataria .... Respondent(s)

WITH
CIVIL APPEAL NOs. 1118, 1120, 1121, 1122 AND 1123 OF 2010

WITH
CRIMINAL APPEAL NO. 118 OF 2010

J U D G M E N T

P. Sathasivam, J.

1) The principle question which arises in these appeals is as to what is the true scope and correct purport of the expression "**commodity in packaged form**" under Section 2(b) of the Standards of Weights and Measures Act, 1976 (in short 'the Act). In Civil Appeal No. 1117 of 2010, the specific question is

whether the sun glasses can be considered "**pre-packed commodity**" under Rule 2(l) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (in short 'the Rules). In the connected appeals, the product includes Titan watches, fixed wireless phones, sun glasses, electrical goods, home appliances, consumer electronics and Samsung Microwave Oven. The State of Maharashtra is the appellant in all these appeals.

2) For convenience, let us briefly state the facts in Civil Appeal No. 1117 of 2010. According to the respondent, he is engaged in the business of trading in sun glasses and has a counter on commission basis at Globus Stores, Bandra. On 17.10.2003, the Inspector of Legal Metrology/Appellant No. 2 herein visited the store and seized five Sun glasses belonging to the respondent and issued a seizure memo. At the time of search, it was explained to him that the sun glasses delivered to them were in polythene bags and some in individual openable pouches. According to them, sometimes, at the time of delivery, they are put in a pouch which is normally on display for the customers to identify for the purpose of purchase. It

was also explained that the package, therefore, is only a package for protection or safety of the article. The value of sun glasses whether inside the package or outside the package does not alter if the package is opened nor does it undergo a perceptive modification on the package being opened. The testing of the sunglasses by the customer is for the purpose of determining whether he should purchase the same considering various sizes, designs, colours, aesthetic value, makes and companies and after trying and ascertaining the suitability, quality etc.

3) It is the grievance of the respondent that in spite of proper explanation, the Inspector/Appellant No. 2 seized the sun glasses for allegedly not declaring name and address of the manufacturer/month and year of manufacturing which is in violation of provisions of the Act and the Rules. It is the claim of the respondent that by force they were compelled to write a letter to the authorities for compounding the offence and directing them to pay Rs. 3,000/- as compounding fee by order dated 30.10.2003.

4) Aggrieved by the action of the appellant, the respondent preferred Writ Petition No. 120 of 2004, *inter alia*, for quashing of the seizure memo dated 17.10.2003 and also for the order dated 30.10.2003 for the payment of compounding fee. By order dated 05.05.2006, the High Court, by appreciating the submissions made on behalf of the respondent, allowed the writ petition holding that the sun glasses, whether it be a frame or glass is not a **"pre-packed commodity"** within the definition of the expression **"pre-packed commodity"** under Rule 2(l) of the Rules. Aggrieved by the said order of the High Court, the appellant-State preferred the present appeal by way of special leave petition.

5) It is the stand of the respondent that the Act brings in its purview not all the items which are kept in the package to protect or for other reasons but is limited to packaged commodity as defined under the Act, which are being sold by weights or measures or numbers, and which are being sold in a packed form without unpacking such packaged commodities at the time of sale and the sun glasses do not come within the ambit of definition of **"commodity in packaged form"** in

terms of Section 2(b) of the Act nor under the purview of "pre-packed commodity" under Rule 2(l) of the Rules. It is also highlighted that sunglasses cannot be sold in the packaged condition without opening the packaging since the customer will buy only after comparing, trying it out for size and after checking its aesthetic value, the quality of glass and vision, looks etc and therefore, the sun glasses can never be and are not sold in packaged condition.

6) We are concerned about Section 2(b) of the Act and 2(l) of the Rules which read as under:-

> "2(b) "Commodity in packaged form" means commodity packaged, whether in any bottle, tin, wrapper or otherwise, in units suitable for sale, whether wholesale or retail."
>
> "2(l) "pre-packed commodity", means a commodity, which without the purchaser being present, is placed in a package of whatever nature, whether sealed or opened, so that the commodity contained therein has a pre-determined value and includes those commodities which could be taken out of the package for testing or examining or inspecting the commodity;
>
> Explanation I - Where, by reason merely of the opening of a package no alteration is caused to the value, quantity, nature or characteristic of the commodity contained therein, such commodity shall be deemed, for the purposes of these rules, to be a pre-packed commodity, for example, an electric bulb or fluorescent tube is a pre-packed commodity, even though the package containing it is required to be opened for testing the commodity.
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> Explanation II. ……"

7) Considering the above definition, the High Court observed that the expression **"pre-packaged commodity"** would be applicable to:-

(i) commodities which are packed, and

(ii) the commodity packaged has a pre-determined value and

(iii) that value cannot be altered without the package sold being opened at the time of sale, or

(iv) the product undergoes a modification on being opened.

8) As rightly argued by Mr. Shekhar Naphade, learned senior counsel for the respondent, in the case of sun glasses, whether they come in a box or not, insofar as the retailer is concerned, at the time when they are being sold to the consumer, are not in packaged form. Even if we hold that they come in a packaged form, before they are sold to the consumer by removing them from the box, the value does not alter nor does the product undergo a perceptive modification and as such the provisions, particularly, under Section 2(b) of the Act are not applicable. Further, as rightly observed by the High Court, the explanation to the said Rule is also not attracted because the package is not opened for the purpose of testing as in the case

of electric bulbs. It was asserted by the learned senior counsel for the respondent that the sun glasses are tested by the buyer for his suitability.

9) Similar arguments were advanced by the respective counsel relating to their respective products. On careful scrutiny of the provisions referred above, it is clear that the expression **"pre-packed commodity"** would be applicable to commodities which are packed and the commodity packaged has a pre-determined value and that value cannot be altered without the package sold being opened at the time of sale or the product undergoes a modification on being opened. We are also of the view that the Explanation I to Rule 2(l) of the Rules is not attracted because the package is not opened for the purpose of testing as in the case of electric bulbs. We fully agree that the sun glasses are tested by the buyer for his suitability, and therefore, sun glasses, whether it be a frame or glass is not a pre-packed commodity within the definition of the expression **"pre-packed"** under Rule 2(l) of the Rules, hence, the High Court is fully justified in quashing the notice and allowing the writ petition filed by the respondent. We also agree with the

similar arguments advanced relating to other products mentioned above.

10) Learned counsel appearing for the appellant-State submitted that the very same Rules fell for interpretation before this Court in the case of ***Whirlpool of India Ltd***. vs. ***Union of India and Ors***. (2007) 14 SCC 468. Heavily relying on the said decision, the learned counsel submitted that sun glasses are **"pre-packed commodity"** within the meaning of the Act and the Rules. He also submitted that the other products also would come within the above mentioned definition and by applying the ratio in that decision prayed for setting aside the impugned order of the High Court.

11) In order to consider the stand of the State, let us consider the factual position and the ratio laid down in ***Whirlpool (supra)***. The short question in that matter was as to whether 'refrigerator' is a "packaged commodity" or not. The appellant-Whirlpool was engaged in manufacturing refrigerators. The Central Government issued Notification No. 9 of 2000 dated 01.03.2000 under Sections 4-A(1) and (2) of the Central Excise Act and specified the goods mentioned in

Column 3 of the said notification. Entry 48 pertains to the refrigerators whereby the refrigerators invited valuation under Section 4-A of the Central Excise Act with the abatement of 40%. Sections 4-A(1) and (2) of the Central Excise Act require that any goods included in the notification shall be valued on the basis of the maximum retail price (for short "MRP") which is required to be printed on the packages of such goods. The five conditions for inclusion of the goods are:

"(*i*) The goods should be excisable goods;

(*ii*) They should be such as are sold in the package;

(*iii*) There should be requirement in the Act or the Rules made thereunder or any other law to declare the price of such goods relating to their retail price on the package;

(*iv*) The Central Government must have specified such goods by notification in the Official Gazette;

(*v*) The valuation of such goods would be as per the declared retail sale price on the packages less the amount of abatement."

12) The appellant felt aggrieved by the fact that the refrigerators were covered and included in the aforementioned Notification dated 01.03.2000 as, according to the appellant, the refrigerator is not such a commodity which is sold in a package. Significantly, the appellant is not aggrieved by its valuation being under Sections 4-A(1) and (2) of the Act. The only complaint that the appellant made is that the appellant should not be required to print MRP on the package of the refrigerator manufactured by it. The appellant, therefore, filed a writ petition before the High Court of Punjab and Haryana praying, *inter alia*, for a writ of certiorarified mandamus restraining the authorities for taking any coercive measures against the appellant or its Directors, officers, servants or agents for not declaring MRP on the refrigerators manufactured and cleared by the appellant from its factory. The Notification dated 01.03.2000 was challenged to this limited extent only. Before the High Court, the appellant pleaded that refrigerator is not such a commodity which can be termed to be a "packaged commodity" and further the provisions of the Act or the Rules made thereunder are not

applicable to the refrigerator at all. It was, therefore, prayed that the notification was liable to be quashed only to the extent that it included the refrigerator and the requirement of declaring MRP on the refrigerator.

13) The respondent authorities, however, maintained that the refrigerator was in fact sold in a package of polythene cover, thermocol, hardboard cartons, etc. and thus it falls in the category of "pre-packed commodity". On that basis it was contended that since every packaged commodity was included in the Act and the Rules made thereunder, there can be no escape from printing MRP on the package. The High Court rejected the contention and dismissed the petition filed by the appellant.

14) It was vehemently contended before a three-Judge Bench by the counsel for the appellant that a 'refrigerator' is not sold in a "packaged form". It was further contended that even if it is sold in the packaged form, when it is displayed by the dealers, it is not in the packaged form and the customers can take the inspection of the refrigerator and at least for that purpose the package has to be opened and, therefore, there

would be no question of the refrigerator being included in the Act or the Rules made thereunder. Rejecting the said submission as incorrect, this Court concluded as under:-

> **"5.** It was not disputed before the High Court and also before us that the appellant manufacturer has to sell the refrigerators which are packed in polythene cover, thermocol, etc. and placed in hardboard cartons. In fact the appellant had so pleaded before the High Court in para 3 to which a reference has been made by the High Court. Once that position is clear, then the refrigerator clearly becomes a commodity in the packaged form. The use of the term "or otherwise" in the definition would suggest that a commodity if packed in any manner in units suitable for sale, whether wholesale or retail, becomes a "commodity in packed form…"

15) After adverting to Rule 2(l) **"pre-packed commodity"** and Explanation I, their Lordships have held that refrigerator is covered under the term **"pre-packed commodity"** and concluded that:

> **"6.** ….Even if the package of the refrigerator is required to be opened for testing, even then the refrigerator would continue to be a "pre-packed commodity". There are various types of packages defined under the Rules and ultimately Rule 3 specifically suggests that the provisions of Chapter II would apply to the packages intended for "retail sale" and the expression "package" would be construed accordingly.
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> **7.** It is not disputed before us that the sale of the refrigerator is covered under the "retail sale". Once that position is clear Rule 6 would specifically include the refrigerator and would carry along with it the requirements by that Rule of printing certain information including the sale price on the package. Thus it is clear that by being sold by the manufacturer in a packaged

form, the refrigerator would be covered by the provisions of the SWM Act and the SWM (PC) Rules and it would be imperative that MRP has to be printed in terms of Rule 6 which has been referred to above.

8. The High Court has also made a reference to Rule 2(*l*) and more particularly, the Explanation to which we have referred to earlier. In our view the reliance by the High Court on Rule 2(*l*) is correct. Learned counsel tried to urge that every customer would like to open the package before finalising to purchase the refrigerator. He would at least get it tested and for that purpose the package would be destroyed. That may be so but it does not change the position as rightly observed by the High Court.

9. It was tried to be suggested that MRP would be different depending upon the area in which it is being sold. That may be so, however, that cannot absolve the manufacturer from displaying the price i.e. MRP on the package in which the refrigerator is packed. Whatever be the situation, it is clear that a refrigerator is a "packaged commodity" and thus is covered under the SWM Act and the SWM (PC) Rules and, therefore, the Notification dated 1-3-2000 cannot be faulted on that ground.... "

16) By heavily relying on the above dictum with reference to the very same provisions by this Court in the ***Whirlpool (supra),*** the appellant-State submitted that in view of substantive definition of the main section read with the Rules, the sun glasses are "pre-packed commodity" within the meaning of the Act and the Rules thereof. The appellant-State also submitted that similar analogy is to be applied for other products also.

17) Learned senior counsel appearing for the respondent vehemently submitted that the ratio of the judgment in ***Whirlpool (supra)*** is not at all applicable to these cases, firstly, because the issue in that case was in context of Central Excise Act and, secondly, because none of the aspects stated have been taken into consideration by this Court in the matter of ***Whirlpool (supra).*** It is also pointed out that the judgment is *sub silentio* because the provisions of the Act, specially the provisions of Section 2(v) of the Act, have not been taken into consideration in the said case. In the context of *sub silentio* reference is made to the judgment of this Court in ***Municipal Corporation of Delhi vs. Gurnam Kaur***, (1989) 1 SCC 101, which according to the counsel for the respondent, is that a *sub silentio* judgment does not have a binding precedent. By pointing out the same, the counsel for the respondent prayed that the case of ***Whirlpool (supra)*** requires reconsideration and, as a result, the present matter also would be required to be considered by a larger Bench.

18) Though it was pointed out that the decision in ***Whirlpool (supra)*** was made in the context of the Central Excise Act, we

have already extracted the question which fell for consideration, relevant provisions from the Act and the Rules, discussion as to the applicability, and the ultimate conclusion in para 9, namely, "whatever be the situation, it is clear that a refrigerator is a "packaged commodity" and thus is covered under the Act and the Rules." In view of the same, it cannot be claimed that the judgment in ***Whirlpool (supra)*** has no bearing on the issues in these appeals. Inasmuch as the said decision was rendered by a bench of three Hon'ble Judges with reference to the very same Act and Rules, we are of the view that the issue raised in all these appeals have to be heard by a larger Bench.

19) Accordingly, we direct the Registry to place all these appeals before Hon'ble the Chief Justice of India for listing before a larger Bench.

.....
.....J.
(P. SATHASIVAM)

.....J.
(H.L. GOKHALE)

NEW DELHI;
AUGUST 26, 2011.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1119 OF 2010

The State of Maharashtra & Ors .... Appellant (s)

Versus

Raj Marketing & Anr. .... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

1) This appeal by State of Maharashtra is directed against the judgment and order dated 08.12.2006 passed by the High Court of Judicature at Bombay in Writ Petition No. 2982 of 2006 whereby the High Court allowed the writ petition of the Ist respondent herein.

2) The issue involved in this appeal is whether Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta etc. can be considered as a **"wholesale package"** within the definition of the expression **"wholesale package"** under Rule 2(x) of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (hereinafter referred to as "the Rules").

3) **Brief facts:**

a) The respondent is a firm carrying on the business of buying and selling various products and they used to store these products in their godown at Gali No.8, Senior Tyre Compound, N.S.S. Road, Narayan Nagar, Ghatkopar (W) Mumbai.

b) On 31.10.2006, the second appellant/Inspector of Legal Metrology, Mumbai visited the first respondent's godown and seized various packages of packed commodities such as Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta etc. vide seizure memo bearing Nos. 0114769 and 0114770 dated 31.10.2006. The reason for seizure,

according to him, is that on the wholesale packets, the details regarding the name and addresses of the manufacturer, cost, month, year etc. has not been declared and also the retail sale price was not mentioned which is in violation of the Rules.

c) A show cause notice dated 06.11.2006 has been issued by the appellant to the respondent for the violation of Section/Rule 33 and 39 read with Rule 23(1) and 6 of the Rules. It was mentioned in the said notice that the offence is compoundable as per Section 73 of the Standards of Weights and Measures Act, 1976 and Section 65 of the Standards of Weights and Measures (Enforcement) Act, 1985.

d) On 18.11.2006, the respondents, vide their letter, replied to the notice dated 06.11.2006.

e) On 28.11.2006, the respondents filed Writ Petition being W.P. No. 2982 of 2006, *inter alia*, for quashing the seizure memo dated 31.10.2006 and notice dated 06.11.2006.

4) The High Court, by impugned order dated 08.12.2006 allowed the writ petition by holding that the packages containing Candy man, Minto-Fresh, Kitchens of India, Badam Halwa and Ashirvaad Atta are not wholesale package within

the definition of the expression **"wholesale package"** under Rule 2(x) of the Rules.

5) Questioning the said order of the High Court, the State filed the above appeal by way of special leave.

6) Heard Mr. Chinmoy Khaladkar, learned counsel for the appellant-State and Mr. Ravinder Narain for respondent No.1.

7) Rule 2(x) of the Rules define **"wholesale package"** to mean:

> "(x) "wholesale package" means a package containing-
>
> (i) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to a intermediary and is not intended for sale direct to a single consumer; or
>
> (ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities; or
>
> (iii) packages containing ten or more than ten retail packages provided that the retail packages are labeled as required under the rules."

8) Rule 29 of the Rules read as under:

> "**29. Declaration to be made on every wholesale package.-** Every wholesale package shall bear thereon a legible, definite, plain and conspicuous declaration as to,-
>
> (a) the name and address of the manufacturer or where the manufacturer is not the packer, of the packer;
>
> (b) the identity of the commodity contained in the package; and
>
> (c) the total number of retail packages contained in such wholesale package or the net quantity in terms of standard units of weights, measures or number of the commodity contained in wholesale package:

> Provided that nothing in this rule shall apply in relation to a wholesale package if a declaration similar to the declaration specified in this rule, is required to be made on such wholesale packages by or under any other law for the time being in force."

9) In order to attract violation of the Rules referred above, the package seized must fall within the expression **"wholesale package"**. A package used merely for protection during conveyance or safety would not be pre-packed commodity for the purpose of the Act and the Rules. As rightly observed by the High Court that for the package to be treated as a wholesale package, the package must not be a secondary package. In that event, we have to find out whether the secondary package is only for safety, convenience or the like. As demonstrated before the High Court, the counsel appearing for the Ist respondent placed all the above-mentioned products before us i.e. both the wholesale package as well as the retail package. The Department's only contention was that the secondary package in which the wholesale package was packed does not contain the said information. In the light of the provisions which we have referred above and on verification of the products which were shown to us, we are of

the view that the secondary outer packing for transportation or for safety of the goods being transported or delivered cannot be described as a wholesale package.

10) On going through the statutory provisions which we have adverted to in the earlier paras and on verification of the products which were shown to us during the course of argument, we fully agree with the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed with no order as to costs.

.....J.
(P. SATHASIVAM)

.....J.
(H.L. GOKHALE)

NEW DELHI;
AUGUST 26, 2011.