

IN THE HIGH COURT OF DELHI

+ Writ Petition (Civil) No. 11689-90/2006

% Date of decision : 15th April, 2009

Delhi Gymkhana Club Limited Petitioner
Through : Mr. Jagat Singh, Advocate

VERSUS

Union of India Respondent
Through : Ms. Monica Garg, Advocate
for Union of India/respondent no.1
Ms. Sujata Kashyap, Adv. for
Government of National Capital
Territory of Delhi/respondent no. 2
Mr. P.R. Rajhans, Adv. for the
respondent no. 3

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. The Delhi Gymkhana Club Ltd. - petitioner no. 1 has brought the present writ petition seeking a declaration that the provisions of the Standard of Weights and Measures Act, 1976 do not apply to it inter alia for the reason that it is at par to a 'hotel' and a 'restaurant'. A further declaration is prayed to the effect that the action of the Consumer Dispute Redressal Forum – VI (New Delhi) considering application no. CC/462/06 filed by respondent no. 3 issuing notice and directing the petitioners to file written statement is illegal, null and void.

2. The factual matrix giving rise to this writ petition is in a narrow conspectus. Sh. Harish Tripathi, respondent no. 3 herein is stated to be a member of the Delhi Gymkhana Club Ltd. - petitioner no. 1 herein. The grievance of the respondent no. 3 was that the cost of overheads of the club was being recovered from the members by the monthly subscription of Rs.200/- per month and that the charge of service charges levelled on credit sales by the jumbo shop of the club as well as sale of any item above the printed maximum retail price by the club was in contravention of the rules. The respondent no. 3 was aggrieved by the action of the petitioner no. 1 in supplying food and beverages at rates above the maximum retail price of the commodities. According to the respondent no. 3, the petitioner no. 1 charges a monthly subscription of significant amount from its members which according to him would be sufficient for meeting expenses including salaries of staff and maintenance etc of the club making a complaint that the petitioner no. 1 had charged more than the maximum retail price on a bottle of coca cola and on credit sales of all items, the respondent no. 3 firstly made representations dated 27th February and 28th April, 2004 to the respondent no. 1. Upon failure to receive relief, the respondent no. 3 filed an application dated 12th June, 2006 before the Consumer Dispute Redressal Forum – VI (New Delhi) making a complaint against the said actions of the petitioners which was registered as case no.

CC/462/06. The respondent no. 3 prayed that the petitioners be restrained from continuing with the practice of charging in excess of the MRP written on the cold drink bottles.

3. On this complaint, the Consumer Dispute Redressal Forum issued notice under section 13 of the Consumer Protection Act, 1986 requiring the petitioner no. 1 to appear before the forum in person or through a duly authorised agent. The petitioner no. 1 was further directed to place its written statement of the case before the forum in the hearing fixed for 7th August, 2006. Aggrieved by the action and order of the Consumer Dispute Redressal Forum in entertaining the complaint and issuing notice, the present writ petition has been filed seeking the aforementioned declarations.

4. The writ petition came up for hearing on 24th July, 2006 when an interim order prohibiting the respondents from enforcing the provisions of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 against the petitioner in respect of loose food and beverages article was granted.

5. The petitioner contends that the price charged by the clubs, hotels and restaurants depends upon the quality of level of establishment, location and the facilities provided by it. In addition to the sale of food, drink items for consumption other facilities and services such as air conditioning of the dining room and other areas, interior decoration, hiring of trained staff, etc are

also provided. Sale of such commodities by them is incidental to the real service rendered by them. The elected body of the club fixes the rate of articles to be served in the restaurants and parties of the club. The members are taxed over and above the MRP values of articles only to the extent that expenses of the club, as salaries of staff, maintenance etc can be met from the membership fee and the income derived by offering and providing services to the members and their guests. Only members and their guests are permitted to avail the facilities provided by and at the club.

6. The petitioners contend that they cannot be called dealers, wholesale dealers or retail dealers either under the Act of 1976 or the Act of 1985 or the Rules framed thereunder since they are not doing the business of selling, buying, distributing, delivering of goods in packaged form. The charges of packed food and beverages are included in the menu and bill in a composite price. The amount charged by the clubs, hotels, restaurants includes the service charges provided in the form of seating arrangement, pleasant atmosphere, trained staff, etc. It is urged that there is no retail sale of such food and beverages in their premises and hence the two statutes as well as the rules are not applicable to them.

7. The writ petition is separately opposed by the respondents on various grounds.

8. The respondents contend that the provisions of Standards of

Weights and Measures Act, 1976 and (Packaged Commodities) Rules, 1977 apply to the petitioner club. The respondents have urged that these Acts and the Rules thereunder are consumer protection legislations which are meant to protect the interests of consumers with regard to commodities sold in a pre-packed form. Any person carrying a pre-packed commodity to the ultimate consumer for consumption, which may be individual or group of individuals or any other consumer is a retail dealer. The submission is that therefore the commodities sold by the Delhi Gymkhana Club are covered under the statutory provisions and that the proceedings before the Consumer Protection Act are maintainable.

9. The respondents have contended that the petitioner club is not entitled to seek any extra charges over and above the maximum retail price declared on the packaged as part of the price of any item which is sold. The respondent nos. 1 and 2 have urged that the facilities, amenities and ambiance provided to the members or other benefits as brand names, facilities for meetings, entertainment etc are concerned, the petitioner would be required to examine other avenues to recover the expenditure on this count.

10. The respondent no. 3 has contended that the clubs serve a restricted, select private group of members who pay their monthly fees and subscription. The amount of the subscription paid by the

members is of significant amount and must be sufficient to meet expenses of the club which include salaries for staff and maintenance etc. The contention on the part of all the respondents that charging any amount above the maximum retail price for the service is an unfair trade practice.

11. I find that the Standards of Weights and Measures Act, 1976 was enacted with the object of establishing standards of weights and measures to regulate inter state trade or commerce in weights, measures and other goods which are sold or distributed by weights, measures or number and to provide for matters connected therewith or incidental thereto. The statutory provisions relevant for the purposes of the present adjudication deserve to be considered in extenso and are set down hereafter:-

“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(c) “dealer”, in relation to any weight or measure, means a person who, or a firm or a Hindu undivided family which, carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration, and includes -

(i) a commission agent who carries on such business on behalf of any principal,

(ii) an importer who sells, supplies, distributes or otherwise, delivers any weight or measure to any user, manufacturer, repairer, consumer or any other person

but does not include a manufacturer who sells, supplies, distributes or otherwise delivers any weight or measure to any person or category of persons referred to in this clause.

Explanation – for the removal of doubts, it is hereby declared that a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure to any person other than a dealer, shall be deemed to be a dealer;”

12. In exercise of powers under section 83 of the Act, the Central Government framed the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (hereinafter referred to as the “Rules”). By virtue of sub-section 3 of section 1 the applicability of the rules is confined to the following :-

“(3) They shall apply to commodities in the packaged form which are, or, are intended or likely to be, -

- (i) sold, distributed or delivered or offered or displayed for sale, distribution or delivery, or
- (ii) stored for sale, or for distribution or delivery, in the course of inter-state trade and commerce”

13. The examination of the rules would show that the expression dealer is defined under rule 2(d) thus :-

“dealer” in relation to any commodity in packaged form, means a person who, or a firm or a Hindu undivided family which, carries on directly or otherwise, the business of buying, selling, supplying or distributing any such commodity, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration, and includes a commission agent who carries on such business on behalf of any principal, but does not include a manufacturer who manufactures any commodity which is sold or distributed in a packaged form except where such commodity is sold by such manufacturer to any other person other than a dealer;

14. The Rules define a “retail dealer” in rule 2(o), in relation to any commodity in packaged form, as a dealer who

directly sells such packages to the consumer and includes, in relation to such packages as are sold directly to the consumer and a “wholesale dealer” who makes such direct sale;

15. The expression “wholesale dealer” is defined under rule 2(w), in relation to any commodity in packaged form as meaning a dealer who does not directly sell such commodity to any consumer but distributes or sells such commodity through one or more intermediaries.

The rule clearly explains that nothing in this clause shall be construed as preventing a wholesale dealer from functioning as a retail dealer in relation to any commodity, but where he functions in relation to any commodity as a retail dealer, he shall comply with all the provisions of these rules which a retail dealer is required by these rules to comply.

16. Rule 23 of the Rules is also relevant and states thus :-

“23. Provisions relating to whole sale dealer and retail dealers :- (1) no wholesale dealer or retail dealer shall sell, distributes, deliver, display or store for sale any commodity in the packaged form unless the package complies with, in all respects, the provisions of the Act and these rules.

(2) No retail dealer or other person including manufacturer, packer and wholesale dealer shall make any sale of any commodity in packaged form at a price exceeding the retail sale price thereof.

Explanation – for the removal of doubts, it is hereby declared that a sale, distribution or delivery by a wholesale dealer to a retail dealer or other person is a “retail sale” within the meaning of this sub-rule.

(4) where, after any commodity has

been pre-packed for sale, any tax payable in relation to such commodity is revised, the retail dealer or any other person shall not make any retail sale of such commodity at a price exceeding the revised retail sale price, communicated to him by the manufacturer, where the manufacturer is not the packer and it shall be the duty of the manufacturer or packer, as the case may be, to indicate by not less than two advertisements in one or more newspapers and also by circulation of notices to the dealer and to the Director in the Central Government and Controllers of Legal Metrology in the States and Union Territories, the revised prices of such packages but the difference between the price marked on the package and the revised price shall not, in any case, be higher than the extent of increase in the tax or in the case of imposition of fresh tax higher than the fresh tax so imposed;

Provided that publication in any newspaper, of such revised price shall not be necessary where such revision is due to any increase in, or in imposition of, any tax payable under any law made by the State Legislatures;

Provided further that the retail dealer or other person shall not charge such revised prices in relation to any packages except those packages which bear marking indicating that they were pre-packed in the month in which such tax has been revised or fresh tax has been imposed or in the month immediately following the month aforesaid:

(5) Nothing in sub-rule (4) shall apply to a packaged which is not required under these rules to indicate the month and the year in which it was pre-packed.

(6) No retail dealer or other person shall obliterate, smudge or alter the [retail sale price], indicated by the manufacturer or the packer, as the case may be, on the package or on the label affixed thereto.

(7) the manufacturer or packer shall not alter the price on the wrapper once printed and used for packing.

17. The expression “sale” is defined in rule 2(v) as “sale”, with its grammatical variations and cognate expressions and means

transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by installments, but does not include a mortgage or hypothecation of, or a charge or pledge on such weight, measure or other goods.

18. The respondent nos. 1 and 2 have pointed out that the Apex Court in the judgment pronounced in Crl.A.No. 963-965/1999 in the State of Kerala vs. Flora & Ors. and in Civil Appeal No. 5310/1990 in India Photographic Company v. H.D. Shourie has upheld the validity of the Packaged Commodities Rules and issued orders for implementing the provisions of this consumer protection legislation.

There can be no dispute at all with the binding principles laid down by the Apex Court in this pronouncement. Undoubtedly, the provisions of consumer protection legislation deserve to be implemented in right earnest. However, there is no issue raised in the present writ petition with regard to the validity of the rules. A fundamental question with regard to the applicability of the statutory provisions and the rules framed thereunder to the services rendered by a club has been raised.

It was observed by the Supreme Court that acceptance of “such a plea would result in frustrating the provisions of the 1986

Act and thereby encourage the retailers or distributors of foreign-made goods to charge prices according to their convenience without letting the consumer know the actual price of the commodity. The Apex Court has articulated a summation of the Act that it enjoins a declaration of weight, measure, number and price. It imposes punishment where a declaration has not been made or has been incorrectly made.

19. The whole object and purpose of setting out standards in weights and measure is for protection of the consumer who should be fully informed of the price of the products to enable them to choose from a sufficient number of alternatives to ensure competitive prices and quality when purchasing a packaged commodity from wholesalers or retailers. Further the rules have been made as to the manner of declaration of contents of the package and specification of the unit, weight, measure or number along with the maximum sale price which are to be declared on the packaged commodity.

20. In order to adjudicate on the issue raised, it is necessary to first consider what is the definition of the expression 'club' and the nature of activities undertaken therein. There does not appear to be any statutory definition of the expression 'club' in the statutes under consideration. The same would therefore derive its meaning from the meaning given or associated with it in common parlance. This expression has however been incorporated into the

Finance Act (19 of 2005), .88(a)(vii) by virtue of an amendment to the statute titled Finance Act (32 of 1994). As a result of this amendment, sub-section 25a has been inserted into section 65. In this enactment 'a club or association' is defined in Section 65 thus:--

“65. xxx

(25a) “club” or association” means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members, but does not include -

(i) any body established or constituted by or under any law for the time being in force; or

(ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or

(iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or

(iv) any person or body of persons associated with press or media;”

21. It is noteworthy that Section 2(24) of the Bombay Shops & Establishment Act, 1948 defines a 'residential hotel' in the following terms :-

“(24) “Residential hotel” means any premises used for the reception of guests and travelers desirous of dwelling or sleeping therein and includes a [residential club];”

22. A 'club' has also been defined in the Halsbury's Laws of England, 3rd Edn., Vol.5, page 252 as a society of persons associated together for social intercourse, for the promotion of politics, sport, art, science, or literature, or for any purpose except the acquisition of gains.

So far as the definition of “*club*” is concerned, in the Black's Law Dictionary (Revised Fourth Edn 1968) it is described as '*a voluntary, incorporated or unincorporated association of persons for purposes of a social, literary, or political nature, or the like. A club is not a partnership.*'

23. In 75 Fla. 792, 78 So. 693, 695, L.R.A. 1918E, 639 Van Pelt v. Hilliard, an unincorporated members club has been described as “*a society of persons each of whom contributes to the fund out of which the expenses of conducting the society are paid*”. In the same judgment, an unincorporated proprietary club was described as “*one the property and funds of which belong to a proprietor who usually conducts the club with a view to profit.*”

Wikipedia describes a “*club*” as “*an association of two or more people united by a common interest or goal.*” It is further explained that “*a service club, for example, exists for voluntary or charitable activities; there are clubs devoted to hobbies and sports, social activities clubs, political and religious clubs, and so forth.*”

The Longman's Contemporary English (International Edn 2004 page 213) describes a “*club*” as “*an organisation for people who share a particular interest or enjoy similar activities, or a group of people who meet together to do something they are interested in for instance play rugby, golf, squash etc. Longman cited other examples, for instance, a jazz club, a sports club,*

professional sports club”.

24. The expression “*association*” refers to “*an act of a number of persons in uniting together for some special purpose or business. This expression appears to have an indefinite and vague meaning and indicates a collection of persons who have joined together for a similar object and purpose*”.

25. It is, therefore, clearly evident that a club is not constituted or created for the purposes of sale or trade or commercial activities in any goods or services. It is a forum where a group of persons having common interest are able to get together to share, develop or indulge in the same. It is set up to enable pursuit of such objects that the members of the club may decide and to provide additional facilities and special ambiance which may include refreshments, meals, beverages etc for the duration of the time spent in pursuit of such activity at the club.

26. The next question which requires to be answered is what is the nature of the act of service of refreshment and beverages to its members by the club and whether the same tantamounts to a sale. It is the respondent no. 3's case itself that a club is not in the business of supplying packaged foods and beverages etc as that of the hotels and restaurants to their customers on commercial basis. The respondent no. 3 has himself dwelt at length in his counter affidavit with the submission that foods and beverages provided by the club for comfort and relaxation of its

members.

27. Interestingly, the complainant – respondent no. 3 has drawn a distinction between the objects for establishment of a hotel and restaurant vis-a-vis those for a club. It has been contended that hotels and restaurants are establishments engaged in commercial activities to do business for earning profits with an aim to distribute such profits among the promoters, entrepreneurs and investors whereas clubs are established not to engage themselves in any such commercial activities but are formed for the promotion of social, cultural, educational and sports activities which are run and managed by club members through contributions by way of fees and subscriptions.

Based on these averments, the respondent no. 3 would contend that there can be no comparison between supplying packaged foods and beverages by the hotels and restaurants to their customers on commercial basis and the supply of the same by the club to the members, subscribers for their comfort and relaxation. The respondent no. 3 has also pointed out yet another difference between a club and a hotel. It has been urged that clubs serve a restricted, select, private group of members who pay their fees and subscriptions whereas hotels and restaurants serve the public at large.

28. The petitioner has however equated clubs to hotels and restaurants while submitting that all three are not engaged in the

business of selling packaged commodities as in the case of retail sale agencies or wholesalers. The further submission is that the pre-dominant business of clubs, hotels and restaurants is to provide hospitality services to the members of club.

29. In view of the aforenoticed admissions by the respondent no.3 it may not have been necessary to examine this issue any further. The issue raised before this court is very basic and deserves to be examined from the aspect of the test of 'pre-dominant activity' in which clubs are engaged to ascertain the intent, character and nature thereof as to whether the activity of a club fulfills the character of a retail seller and as to whether the sale by a club qualifies as a 'retail sale' to invite the applicability of the Standards of Weights and Measures Act, 1976 as amended and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 framed thereunder.

30. As per the memorandum of association of the Delhi Gymkhana Club Ltd. - petitioner no. 1 herein, it was formed to promote polo, hunting, racing, tennis and other games, athletic sports and pastimes. For these activities, it is further stated in its objects that it is founded to provide courses and grounds at Delhi or elsewhere and to lay out, prepare and inter alia maintain the same for the purposes of the club and to provide club houses, pavilions, lavatories, kitchens, refreshment rooms, work shops, stables, sheds and other conveniences in connection therewith

and to furnish and maintain the same and to permit the same and the property of the company to be used by members and other persons either gratuitously or for payment. The other aims and objections of the club would indicate that all purchases, staff engagements and acquisitions by the petitioner club were for the purposes of advancement of the sports and pastimes noticed heretofor. Sub-clause (d) of clause 3 of the objects of the petitioner no. 1 specifically stipulates as follows :-

“(d). to buy, prepare, make apply, sell, deal in all kinds of apparatus used in connection with any sport, game or pastime and all kinds of provisions and refreshments required to be used by members of the company or other persons frequenting the courses, grounds, club houses or premises of the company.”

The petitioner is clearly not in the business of buying, selling, supplying or distributing any weight or measure or commodity and is therefore outside the purview of 'dealer' as defined in sub-section (c) of Section 2 of the Standards of Weights and Measures Act, 1976 or under sub-rule (d) of Rule 2 of the Packaged Commodities Rules, 1977.

31. It is evident that in order to best utilise and derive the maximum satisfaction that the provision of refreshments which are used by members of the petitioner no. 1 club or other persons frequently take the courses, club houses or premises of the club is only so as to enhance the enjoyment while engaging in the sports and other facilities for promotion of which the club has been

created.

32. It is important to note that sale or trading of food, refreshments or beverages is not the stated object for which the petitioner no. 1 club has been founded. The provision of the refreshments or beverages is clearly an activity which is in furtherance of the main object of promoting sporting activities. The provision of these facilities is akin to providing hospitality services to the members of the club, or their guests.

33. The petitioners have also pointed out that a packaged commodity when purchased by the club for consumption by the members or guests is not for the purposes of enabling the member or the guest to take the same away in the packaged form from the club. Such packaged commodity is attended with many services which are way beyond a mere sale of the commodity across the counter. Thus, a beverage may require heating or cooling; a packaged snack may involve opening of the packet, arranging it in a serving dish; garnishing the same and may involve provision of additional condiments. The same would be required to be served by a waiter employed by club for the purpose. The same would be served in the ambiance of the club house which may be air-conditioned or not.

34. It is pointed out that the clubs do not compel members or guests to consume bottled water and the consumer is free to ask for normal treated water served free by the club. The prices are

indicated on the menu which is provided at the time of placing of the order by the member or the guest and all members/guests are well aware that the price indicated on the menu includes the component towards the price for the comfort, facilities and ambiance enjoyed by the consumer. The price indicated on the menu is the maximum retail price of the product and the additional amount for the facilities and services. The person placing the order is not expected to visit the club as a buyer of goods, commodities or services but is expected to visit the club in order to partake in its activities.

35. The issue as to whether supply of food and beverages and other articles to members or the guests by a club would amount to sale has arisen for consideration in several cases under the Sales Tax Act. Any food, snack and other articles by the clubs to its members or their guests would constitute a sale. In a judgment reported at **MANU/SC/0472/1970 Joint Commercial Tax Officer v. Young Men's Indian Association**, this question arose under the Madras General Sales Tax Act, 1959. In this case, the Apex Court held that if there is no transfer of property from one to another there is no sale which would be eligible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in the matter of supply of various preparations to them no sale would be involved as the element of transfer would be completely absent. The High Court has held that the case of each

club was analogous to that of an agent or mandatory investing his own monies for preparing things for consumption of the principal, and later recouping himself for the expenses incurred. The Supreme Court agreed with this conclusion by referring to earlier decided cases by the courts in India as well as by courts in England and concluded that as no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparations by each one of the clubs to its members.

36. Again in a judgment reported at **MANU/SC/0570/1972** ***State of Himachal Pradesh v. Associated Hotels of India Ltd.***, the Supreme Court adopted the concept of the English Law that “there is no sale when food and beverages are supplied to guests residing in hotels”. It was pointed out that supply of meals was essentially in the nature of service provided to them and could not be identified as a transaction of sale. The contention of the Revenue that such transaction can be split into two parts ; one of the service and other of sale on food stuffs was rejected. The Apex Court has been of the view that the essential elements of sale of goods that is to transfer any goods for value received or receivable is absent in service of foodstuffs of hotel to its residents.

37. This principle has been extended and reiterated in respect of supply of foodstuffs in restaurants in the judgment reported at

MANU/SC/0339/1978 : 1997 1 SCR 557 Northern India Caterers India Ltd. v. Lt. Governor of Delhi. The discussion by the Apex Court in **Northern India Caterers India Ltd. v. Lt. Governor of Delhi** on the issue as to whether provision of the services and supply of food by a hotelier or a restaurateur amounts to a sale would throw valuable light on the consideration in the present case. The relevant observations of the court read thus :-

“Like the hotelier, a restaurateur provides many services, in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The view taken by the English law found acceptance on American soil, and after some desultory dissent initially in certain states it very soon became firmly established as the general view of the law. The first edition of American Jurisprudence sets forth the statement of the law in that regard, but we may go to the case itself, *Electa B. Merrill v. James W. Hodson*, from which the statement has been derived. Holding that the supply of food or drink to customers did not partake of the character of a sale of goods, the Court commented:-

The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is cared for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other

purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire – ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered.”

38. So far as more recent action taken by the respondent no. 1 against hotels and restaurants was concerned, aggrieved by complaints against its members which were similar to those made against the petitioner, the Federation of Hotels and Restaurants Association of India assailed the same by way of a writ petition bearing no. 6517/2003 entitled the Federation of Hotels & Restaurants Association of India & Ors. v. UOI in this court. Other writ petitions being W.P.(C) No. 9528/2003 and W.P.(C) Nos. 13775 and 14702/2005 National Restaurants Association of India v. UOI were filed in this court contending that it was permissible for the petitioners to charge their customers/guests a price above the maximum retain price mentioned on the packaging and bottles by third parties. An interim order of stay

against punitive action was granted by this court on 14th October, 2003 in favour of the members of the petitioners.

These writ petitions have been finally allowed by a judgment dated 5th March, 2007. The observations of the court in this pronouncement deserve to be considered in extenso and read thus:-

“8. In view of the decisions rendered in ***Associated Hotels*** and ***Northern India Caterers*** the SWM Act should necessarily have contained a deeming definition calculated to bring within its statutory sweep services and supplies offered even in hotels and restaurants in the context of the catering or lodging services offered on their premises to its customers. However, it does not do so. Nevertheless, Rule 23 of the SWM Rules proceeds to proscribe retail dealers, manufacturers, packers and wholesale dealers from making any sale of a commodity in packaged form at a price exceeding the retail sale price thereof. Significantly, an Explanation has been subsequently inserted in Rule 23(2) declaring that the sale, distribution or delivery by a wholesale dealer to a retail dealer or other person is a retail sale within the meaning of that sub-rule. However, even at this stage the Legislature did not consider it expedient to specifically include supplies made in hotels and restaurants. It is, therefore, logical as well as reasonable to conclude that the Competent Authority refrained from doing so fully mindful of the law laid down by the Supreme Court in ***Associated Hotels*** and ***Northern India Caterers***. It is equally logical to assume that the Competent Authority did not do so since it was alive to the fact that no sane man would walk into an expensive and exclusive hotel or restaurant only to purchase foodstuff or drinks otherwise readily available in the market. No doubt, a simple sale may transpire in shops and hotels or in Take-Aways with which the petitions are not concerned. It is in this context that Mr. Bhasin has vehemently argued that the Rules are ultra vires the Act. Since the latter only mandates that prices be mentioned on the package

cannot be charged therefore, Rule 23(2), if it seeks to regulate the supply of foodstuff and drinks in hotels and restaurants, must be struck down.

9. There is a plethora of precedents prescribing the parameters of delegated legislation, such as the Rules before us, which precedents unequivocally state that the frontiers of Rules cannot be wider further or broader than those established by the statute or Act under whose umbrella the Rules have been created. Attention has rightly been drawn by Mr. Bhasin to ***Bharathidasan University vs. All-India Council for Technical Education***, (2001) 8 SCC 767 in which the Supreme Court has opined that where powers to make rules and regulations are confined by the statute to certain limits, rules and regulations which are not within those limits must be ignored by the Court."

These very principles apply to provision of the food, refreshment and beverages by a club. Certainly title in the commodity served does not pass in any of the items before consumption and as observed by the Apex Court, after consumption, there remains nothing to be the subject of title.

39. A question akin to that arising in this case arose before the High Court at Madras in ***AIR 1964 Madras 63 Young Men's Indian Association (Regd.) vs. Jt. Commercial Tax Officer, Harbour Town***. The court was required to consider an issue as to whether there can be said to be a sale when an incorporated club prepares refreshments by investing its moneys in the first instance and recouping the same from the members to whom the products are supplied. The court placed reliance on the definition of club as contained in the Halsbury's Laws of England and described the different kind of clubs which are in existence. In

this regard, it was observed thus :-

“Though in this country there have always existed literary, cultural and philosophical associations, men generally found relaxation in his family, and clubs are more or less a foreign concept. For a true understanding of the character of such an institution and its relation to its members, it is therefore necessary to study its features in the country of its origin.

30. In England there are five different kinds of clubs, namely, (1) unincorporated members' club; (2) unincorporated proprietary clubs; (3) clubs incorporated under the Companies Act; (4) working men's clubs registered under the Friendly Societies Act; and (5) shop clubs. It will be necessary for the purpose of understanding the cases to which we have to refer hereafter to know something about the first three types of clubs,

31. An unincorporated members' club is a society of persons each of whom contributes to the fund out of which the expenses of conducting the society are paid. But such club not being a partnership or a legal entity, can neither sue nor be sued in the club name, unless the property of the club is vested in trustees. The club property will be the property of all the members for the time being. But the property being devoted for the purpose of the club, the individual interest of the members therein will become capable of realization only upon dissolution. Till then the members will have only a right to use the club premises and enjoy the privileges of the society, in accordance with the rules, so long as they pay the subscriptions. The rights and duties of the members of such a club as between themselves will depend on the rules (vide Halsbury's Laws of England, 3rd Edn. Vol. V, pages 253-4).

32. An unincorporated proprietary club is one where the property and the funds of the club are owned not by the members but by some other person. It will be open to the person owning the club to conduct it with a view to earn profits. The members will be entitled to use the club property as licensees under the terms of the contract between themselves and the owner of the club. The right of the member is purely personal and

contractual. It may also happen that the proprietor of such a club is an incorporated company. It is not necessary in such a case that the members of the company should be members of the club.

33. An incorporated members' club retains the characteristics of an unincorporated members' club and at the same time, being incorporated under the Companies Act, would obtain the advantage of suing and being sued as a legal entity independent of its individual members. As a members' club is not one run with a view to earning profits, the convenient method adopted is to register the club as a company limited by guarantee, the members for the time being constituting the shareholders of the company. Section 26 of the Indian Companies Act 1913, (which corresponds to the present Section 25) enables the associations run not for profit like a club to be registered as a company. On such registration the club acquires the status of a legal entity.

34. The true relationship between a club and its members came up for consideration in England with respect to licensing provisions under the Liquor Licensing Laws. The Licensing Act in that country prohibited the sale of liquor in unregistered clubs. Questions arose whether the supply of intoxicating liquor by an unregistered club to its members amounted to a sale. Briefly stated the consensus of opinion in England appears to be, that supply for a price by a bona fide members' club to its members of intoxicating liquor will not contravene the provisions of the Licensing Act, as the transaction does not constitute a sale by retail within the meaning of the Act but is one in the nature of a release by the members of their shares in the property supplies. This was held to be the case even in the case of an incorporated members' club. But that principle was however not applied in the case of a proprietary club inasmuch as the members would have no interest in the property which belonged to the proprietor (be it a company or an individual), the supply by the latter constituting a sale and unless the premises were duly licensed, there would be a contravention of the Act.

35. The leading case on the subject is Graff v.

Evans, 1882-8 QBD 373. In that case the manager of a bona fide unincorporated members' club was prosecuted for selling by retail intoxicating liquor without a proper licence under the Licensing Act, 1872. The club property was by the rules vested in certain trustees. There was a Committee of Management, which was in control of the general business of the club. The liquor was purchased by : the club and was supplied at a fixed percentage above the cost price to its members. The learned Judges held that there was no sale at all in the case, Field J. observed:

"The question here, is, did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section.

51. But from what we have stated earlier, it will be clear that in regard to the supply and distribution of refreshments by the Cosmopolitan Club to its members against payment it cannot be said that there has been a transfer of property by the Club as an absolute owner to its members as purchasers. The case is more analogous to that of an agent or mandatory investing his own monies for preparing things for consumption of the principal, the latter recouping himself for the

expenses incurred. The circumstance that a small margin of profit results occasionally in such a transaction can only be regarded as incidental to the transaction, as it is not always possible to fix the price of refreshments with exactitude. That cannot obviously convert the transaction into one of sale. It follows that the Club cannot be regarded as a dealer; nor can the supply of refreshments to its members be regarded as a sale within the meaning of the Act. A writ of mandamus will therefore issue in the terms prayed for. No order as to costs."

40. From the above, it would appear that the members of the club enter and use its premises, not to make simple purchases of commodities, the purpose of creation of the club is to create a place of activity for the members which they can use either gratuitously or for a payment. Other supporting activities are also encouraged and other conveniences are also provided.

41. Purchase of the packaged item by the club for providing to its members would therefore be in the nature of a purchase for the own consumption by the club. The respondent no. 3 has stated at length that only members have access to the facilities provided at the club and that they are not open to the members of the public.

42. The statutory provision clearly envisages transfer of property by one person to another for cash or for deferred payment or for any other valuable consideration.

43. The petitioners have also pointed out at great length that the refreshments are not provided in a packaged form and that the interest of the members/guests is fully taken care of as the price

at which the facilities provided is clearly indicated on the menu. In this factual background, there can be no manner of doubt that the provision of refreshments, bottled water or soft drinks or other products by the petitioner no. 1 to its members/guests is not akin to a sale effected by a retail dealer, wholesale dealer, manufacturer or packer to whom the Act of 1976 or 1985 and the rules framed thereunder would apply.

44. I find that the Oxford dictionary has defined the expression 'dealer' as "*one who sells*". A special meaning assigned to this expression therein is that "*one who sells articles in the same condition in which he bought them*".

In the light of the discussion hereinabove, it needs no elaboration that the petitioner no. 1 is not providing the article in the same condition in which it has purchased them to its members/guests.

I have hereinabove referred to sub-section (b) of section 2 which defines "commodity in packaged form". This definition also support the view that the statute and the rules thereunder referred to and relate to in that commodities in a packaged form.

45. A challenge was laid to the conviction of the petitioner under section 39 of the Packaged Commodities Act/Rules by the Magistrate in Crl.Rev.No. 385/1990 before the High Court of Gauhati by a judgment reported at **1992 Cri.L.J. 3073 Arun**

Singhvi v. State of Assam, the court held that mere sale of articles in packets does not amount to a contravention of the provisions of Section 39 of the Act so as to attract a conviction and penalty under section 63 of the statute. In order to attract these statutory provisions, the articles sold or intended to be sold must be in packaged form and must be in the course of inter-state trade or commerce.

46. When examined against the above binding principles laid down by the Apex Court and the statutory provisions, it has to be held that the service rendered by the club in making available to its members/guests food items and beverages, packaged or any other forms for their convenience and consumption in the comfortable atmosphere provided at the premises of the club cannot be treated as a 'sale' for the purposes of applicability of the legislations in question.

47. It appears that the respondents had taken a similar stand so far as provision of foodstuffs and beverages by hotels and restaurants was concerned. Representations were made by the Federation of Hotels and Restaurants of India to the respondents. It appears that the Director, Legal Metrology working under the Department of Consumer Affairs, Weights and Measures of the respondent no. 1 had issued a classificatory circular dated 24th January, 2002 to the Federation stating thus :-

“Subject : Selling of mineral water and soft drinks etc in pre-packed form in the Hotels and

Restaurants at a price higher than MRP declared on the package – regarding.

Sir,

Kindly refer to your letter no. MOCA/W&M/1/2001 dated 13.11.2001 addressed to the Secretary, Department of Consumer Affairs on the above subject.

In this regard it is stated that the provisions of the Standards of Weights and Measures (packaged Commodities) Rules, 1977 require selling of products in pre-packed form at a price not more than MRP declared on the package, irrespective of the place of transaction. It is therefore suggested that the member of the Association may be advised that packaged commodities sold to customers in hotels or restaurants may be charged only to the extent of the MRP declared on the package. For covering expenditures on other facilities provided in the premises, service charges could be levied additionally.

It is further clarified that products that are served in hotels and restaurants in loose form after opening a package do not attract the provisions of the Packaged Commodities Rules, 1977.”

48. The petitioners have paid heavy reliance on this circular in support of the writ petition. The respondents have not disputed the correctness or the bindingness of this circular. It is therefore writ large on the face of the record that even according to the respondent's interpretation, service of products in a loose form after opening of a packet would not attract the provisions of the Packaged Commodities Rules, 1977. The provisions of services and facilities by the petitioner is clearly covered by the stand of the respondent in this circular and would certainly guide

adjudication in the instant case. The circular also envisages that the provision of commodities in a pre-packaged form declared on the packet in hotels or restaurants would include the maximum retail price of the commodity and an additional service charge covering the expenditure incurred on provision of other facilities in the premises.

49. The respondent no. 1 has assailed the maintainability of this writ petition placing reliance on several provisions including Section 24 of the Consumer Protection Act, 1986.

50. It is noteworthy that an issue with regard to decisions of the state commission under the Consumer Protection Act, 1986 holding that the charging of prices beyond the maximum retail price had been held to violate the statute were also considered by this court in the judgment in Federation of Hotels & Restaurants Association of India & Ors. v. UOI (supra) and it was held thus :-

“15. This discussion would not be complete without some reference to the decisions of the State Commission : Delhi under the Consumer Protection Act, 1986 ('CP Act' in brief) where the charging of prices beyond the MRP have been held to violate the statute. I had renotified these petitions for arguments on 2.3.2007. Mr. Bhasin, Mr. Sachtey and Mr. Midha have, however, stated that for the decision in these petitions the CP Act would not have to be considered. Prima facie, however, it appears to me that learned counsel for the parties had obviously not brought to the notice of the Commission the decisions of the Supreme Court in Associated Hotels and Northern India Caterers which leave no room for argument that supply or service of eatables and drinks in hotels

and restaurants does not partake of the nature of a 'sale' in common legal parlance. Hence, when a person goes to a hotel or restaurant and while he is there orders and consumes such commodities this does not fall within the definition of consumption as contained in Section 2(d) of the CP

Act. Forcing the provisions of CP Act in such circumstances would run counter to the law laid down in Associated Hotels and Northern India Caterers. These observations are obviously made en passant.

16. In the above analysis I hold that charging prices for mineral water in excess of MRP printed on the packaging, during the service of customers in hotels and restaurants does not violate any of the provisions of the SWM Act as this does not constitute a sale or transfer of these commodities by the hotelier or restaurateur to its customers. The customer does not enter a hotel or a restaurant to make a simple purchase of these commodities. I may well be that a client would order nothing beyond a bottle of water or a beverage, but his direct purpose in doing so would clearly be to enjoy the ambiance available therein and incidentally to the ordering of any article for consumption. Can there be any justifiable reason for the Court or commission to interdict the sale of bottled mineral water other than at a certain price, and ignore the relatively exorbitant charge for a cup of tea or coffee. The response to this rhetorical query cannot but be in the negative. Although the vires of Rule 23 have been assailed, I do not find it necessary to answer that challenge since the provision relates to sales between dealers and neither the hotels and restaurants of the one part and customers of the other falls within this categorisation."

51. In view of the binding principles laid down in this pronouncement, it has to be held that consumption of any refreshments or beverages by a member or a guest at a club would not bring him within the definition of consumer and is

defined in sub-section (d) of Section 2 of the Consumer Protection Act, 1986. The Consumer Dispute Redressal Forum would therefore have no jurisdiction in respect of such consumption and any intervention by them would be clearly without statutory authority and legal jurisdiction.

52. In view of the above discussion, it is apparent that the complaint filed by the respondent no. 3 under the provisions of the Consumer Protection Act is not maintainable. The Consumer Forum has no jurisdiction to take cognizance thereof or to proceed in the matter.

53. Inasmuch as the challenge which is laid by the petitioner is based on a pure question of law going to the root of the jurisdiction of the Consumer Forum, there would be no legal bar to challenging the order issuing notice by the consumer forum in proceedings at this stage itself which have no authority in law. The objection raised by the respondent no. 3 with regard to the maintainability of the present writ petition is devoid of legal merit and is hereby rejected.

54. I find that in the judgment dated 5th of March, 2007 in Federation of Hotels & Restaurants Association of India & Ors. v. UOI (supra), the court placed reliance on the pronouncement of the Supreme Court in *State of H.P. vs. Associated Hotels of India* AIR 1972 SC 1131 and *Northern India Caterers India Ltd. v. Lt. Governor of Delhi* 1979 1 SCR 557 to hold that consumption of

articles of food or drinks in hotels and restaurants do not constitute a sale (para 4) and further that no prohibition has been imposed by the statute to sell any commodity in excess of the price stated on its package. The statute merely required the price of the commodity to be stated on the package.

55. In view of the above, it is held that the provisions of the Standards of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 are not applicable to provision of refreshments and beverages by the petitioner no. 1 to its members and guests. It is further held that the proceedings before the Consumer Dispute Redressal Forum – VI (New Delhi) are without jurisdiction and are not maintainable.

Accordingly, the proceedings in CC/462/06 shall stand set aside and quashed. This writ petition is allowed in the above terms.

(GITA MITTAL)
JUDGE

April 15, 2009
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