SUPREME COURT OF INDIA

Pandit Banarsi Das Bhanot

Vs.

State of M.P.

C.A.No.253 to 255 of 1955

(S. R. Das, C.J.I., T. L. Venkatarama Ayyar, S. K. Das, A. K. Sarkar and Vivian Bose, JJ.)

03.04.1958

JUDGEMENT

T. L. VENKATARAMA AIYAR, J.:

1. These are appeals against the judgment of the High Court of Nagpur in writ applications filed by the appellants impugning the validity of certain provisions of the Central Provinces and Berar Sales Act No. XXI of 1947, hereinafter referred to as the Act, imposing sales-tax on materials used in construction works.

2. It will be convenient to refer to these provisions at this stage. Section 2 (b) of the Act defines "contract" as including "any agreement for carrying out for cash or deferred payment or other valuable consideration the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the installation or repair of any machinery affixed to a building or other immovable property." Section 2 (c) of the Act defines "dealer" as including a person who carried on the business of supplying goods. In S. 2 (d), "goods" are defined as including "all materials, articles and commodities whether or not to be used in the construction, fitting out, improvement or repair of immovable property." Section 2 (g) defines "sale" as follows :

"Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods made in course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge; and the word 'purchase' shall be construed accordingly."

Section 2 (h) defines "sale price" as including the amount payable to a dealer as valuable consideration for the carrying out of any contract, less such portion, representing the proportion of the cost of labour to the cost of materials, used in carrying out such contract, as may be prescribed. "Turnover" is defined in S. 2 (j) as including the aggregate amount of the sale price received or receivable by a dealer in respect of the supply of goods in the carrying out of any contract. The charging section is S. 4 (a), and it provides that dealers whose turnover exceeded certain limits shall be liable to pay tax in accordance with the provisions of the Act on all sales effected after the commencement of the Act. Rule 4 of the Sales Tax Rules, 1947, provides that "in calculating the sale price for the purpose of sub-cl. (ii) of Cl. (h) of S. 2, a dealer may be permitted to deduct from the amounts payable to him as valuable consideration for carrying out a contract, a sum not exceeding such percentages as may be fixed by the Commissioner for different areas subject to the following maximum percentages," and then follows a scale of percentages to be allowed in respect

of different classes of contracts.

3. Acting on these provisions, the authorities constituted under the Act called upon the contractors within the State to furnish returns in respect of their receipts from contract works for the purpose of assessment of sales-tax, to which the appellants replied by instituting the proceedings, out of which the present appeals arise. The appellant in Civil Appeal No. 253 of 1955 is a contractor doing business in the construction of buildings and roads for the Military and Public Works Department in the State in Madhya Pradesh, and he filed M. P. No. 245 of 1954 challenging the validity of the assessment which the respondents proposed to make, on two grounds. He contended firstly that the Provincial Legislature had authority under Entry 48 of List II, Sch. VII of the Government of India Act, 1935, to impose tax only on sale of goods, that the supply of materials in works contracts was not a sale within that Entry, and that the provisions of the Act, which sought to impose a tax thereon treating it as a sale, were therefore ultra vires; and secondly that he was entitled to exemption under item 33 in Sch. II to the Act as enacted by Act XVI of 1949, and that the notification of the Government dated 18-9-1950 withdrawing that exemption was unconstitutional and void. To appreciate this contention, it is necessary to refer to Sec. 6 of the Act, which is as follows :

6 (1) "No tax shall be payable under this Act on the sale of goods specified in the second column of Schedule II, subject to the conditions and exceptions, if any, set out in the corresponding entry in the third column thereof.

(2) The State Government may, after giving by notification not less than one month's notice of their intention so to do, by a notification after the expiry of the period of notice mentioned in the first notification amend either Schedule, and thereupon such Schedule shall be deemed to be amended accordingly."

Item 33 in Schedule II as originally enacted was "Goods sold by the Crown" This was amended by Act No. XVI of 1949 by substituting for the above words "Goods sold to or by the Crown" By an Adaptation Order of 1950, the words "State Government" were substituted for "Crown," and item 33 became "Goods sold to or by the State Government." In exercise of the power conferred by S. 6 (2) of the Act, the State issued a notification on 18-9-1950 amending Item 33 by substituting for the words "Goods sold to or by the State Government" the words "Goods sold by the State Government." The resultant position is that the appellant who was entitled to exemption under Act No. XVI of 1949 in respect of goods sold to the Government could no longer claim it by reason of the notification aforesaid. Now, the ground of his attack was that it was not open to the Government in exercise of the authority delegated to it under S. 6 (2) of the Act to modify or alter what the Legislature had enacted. The appellant accordingly claimed that the proceedings which the respondents proposed to take for assessment of sales-tax were, incompetent, and prayed that an appropriate writ might be issued restraining them from proceeding with the same.

4. In Civil Appeal No. 254 of 1955 the appellants are the Jabalpur Contractors' Association, which is a registered body and certain contractors, and they filed M. P. No. 279 of 1954 questioning the validity of the proposed assessment on the same grounds as in M. P. No. 245 of 1954. The appellant in Civil Appeal No. 255 of 1955, is the Madhya Pradesh Contractors' Association, Nagpur which is again a registered body, and it filed M. P. No. 305 of 1954 challenging the legality of the proceedings for assessment on the same grounds as in M. P. No. 245 of 1954.

5. All these three petitions were heard together , and by their judgment dated 30-11-1954, the learned Judge held that the expression "sale of goods" in entry 48 was wide enough to cover all

transactions in which property in the movables passed from one person to another for money, and that, accordingly, in a building contract there was a sale within Entry 48 of the materials used therein, and that the provisions of the Act imposing tax thereon were valid. But the learned Judges also held that the tax could be levied only on the actual value of the materials to be determined on an enquiry into the matter, and that the definition of "price" in S. 2 (h) (ii) and R. 4 framed pursuant thereto were ultra vires in that they laid down artificial rules for fixing the same by deducting certain percentages from out of the total receipts on account of labour. As regards the notification dated 18-9-1950, the learned Judges held that it was within the authority conferred by the statute and was valid. In the result, the impugned provisions of the Act were held to be valid except as to the definition of "price" in S. 2 (h) (ii) and R. 4 of the Sales Tax Rules, 1947. It is against this judgment that the above appeals have been preferred on a certificate granted by the High Court under Art. 132 (1) of the Constitution.

6. Two contentions have been urged in support of the appeals : (1) that the Provincial Legislature has no authority in exercise of its power under Entry 48 to impose a tax on the supply of materials in works contracts, as such supply cannot be said to be a sale of those materials within that Entry; and (2) that the notification dated 18-9-1950, is bad as being an unconstitutional delegation of legislative authority.

7. As regards the first contention, the question is now concluded by the decision of this Court in State of Madras v. Gannon Dunkerley and Co. Ltd., Civil Appeal No. 210 of 1956 : AIR 1958 SC 560 (A), in which it has been held that the expression "sale of goods" in Entry 48 has the same meaning which it has in the Sale of Goods Act, 1930, that in a building contract there is no sale of materials as such, and that it is therefore ultra vires the powers of the Provincial Legislature to impose tax on the supply of materials. Mr. B. Sen appearing for the respondents has argued that even if the expression "sale of goods" in Entry 48 is construed in the sense which it has in the Sale of Goods Act that might render the impugned provisions of the Act ultra vires only in respect of a building contract which is one and indivisible, that there might be contracts which might consist of two distinct agreements, one for the sale of materials and another for work and labour and that in such a case, it would be competent to the State to impose tax on the sale of materials even construing that word in its narrow sense, and that these are matters which must be left to be investigated by the appropriate authorities. That undoubtedly is the correct legal position as observed in Civil Appeal No. 210 of 1956 : (AIR 1958 SC 560) (A), and accordingly, when a question arises as to whether a particular works contract could be charged to sales-tax, it will be for the authorities under the Act to determine whether the agreement in question is, on its true construction a combination of an agreement to sell and an agreement to work, and if they come to the conclusion that such is its character, then it will be open to them to proceed against that part of it which is a contract for the sale of goods, and impose tax thereon.

2. We have next to consider the contention that the notification dated 18-9-1950, is bad a constituting an unconstitutional delegation of legislative power. In the view which we have expressed above that there is in a works contract no sale of materials as such, it might seem academic to enter into a discussion of this question; but as there may be building contracts in which it is possible to spell out agreements for the sale of materials as distinct from contracts for work and labour, it becomes necessary to express our decision thereon. Mr. Chatterjee appearing for the appellant in Civil Appeal No. 253 of 1955 contends that the notification in question is ultra vires, because it is a matter of policy whether exemption should be granted under the Act or not, and a decision on that question must be taken only by the Legislature, and cannot be left to the determination of an outside authority. While a power to execute a law, it was argued, could be

delegated to the executive, the power to make it must be exercised by the Legislature itself, and reliance was placed on the observations in Hampton, Jr. and Co. v. United States (1928) 276 US 394 : 72 Law Ed 624 at p. 629 (B), Panama Refining Co. v. Ryan, (1935) 293 US 388 : 79 Law Ed 446 at p. 458 (C) and Schechter Poultry Corporation v. United States, (1935) 295 US 495 : 79 Law Ed 1570 (D), as supporting this position. It was also contended that the grant of a power to an outside authority to repeal or modify a provision in a statute passed by the Legislature was unconstitutional, and that, in consequence, the impugned notification was bad in that, in reversal of the policy laid down by the Legislature in Act No. XVI of 1949 that sales to Government should be excluded from the operation of the Act, it withdrew the exemption which had been granted thereunder. And the observations in In re The Delhi Laws Act 1912 etc., 1951 SCR 747 at pp. 787, 982, 984 : (AIR 1951 SC 332 at pp. 344, 399, 400) (E), and the decision in Rajnarain Singh v. Patna Administration Committee, Patna, 1955-1 S. C. R. 290 : (AIR 1954 SC 569) (F), were strongly relied on as establishing this contention. Mr. N. C. Chatterjee particularly relied on the following observations of Bose, J., at p. 301 (of SCR) : (at p. 574 of AIR) in Rajnarain Singh's case (F) (supra) :

"In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above; it cannot include a change of policy."

On these observations, the point for determination is whether the impugned notification relates to what may be said to be an essential feature of the law, and whether it involves any change of policy. Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like.

8. In Powell v. Appollo Candle Company Limited (1885) 10 AC 282 (G), the question arose as to whether S. 133 of the Customs Regulation Act of 1879 of New South Wales which conferred a power on the Governor to impose tax on certain articles of import was an unconstitutional delegation of legislative powers. In holding that it was not, the Privy Council observed :

"It is argued that the tax in question has been imposed by the Governor and not by the legislature who alone had power to impose it. But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. In these circumstances, their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring S. 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature."

9. In Syed Mohamed and Co. v. The State of Madras. 1952-3 STC 367: (AIR 1953 Mad 105) (H), the question was as to the vires of Rr. 4 and 16 framed under the Madras General Sales Tax Act. Section 5(vi) of that Act had left it to the rule-making authority to determine at which single point in the series of sales by successive dealers the tax should be levied, and pursuant thereto, Rules 4 and 16 had provided that it was the purchaser who was liable to pay the tax in respect of sales of hides and skins. The validity of the Rules was attacked on the ground that it was only the Legislature that was competent to decide who shall be taxed and that the determination of that question by the rule-making authorities was ultra vires. The Madras High Court rejected this

contention, and held on a review of the authorities that the delegation of authority under S. 5(vi) was within permissible Constitutional limits.

10. In Hampton Jr. and Co. v. United States (B) (supra), which was cited on behalf of the appellant, the question arose whether S. 315 (b) of the Tariff Act 1922 under which the President had been empowered to make such increases and decreases in the rates of duty as were found necessary for carrying out the policies declared in the statute was an unconstitutional delegation, and the decision was that such delegation was not unconstitutional. We are therefore of the opinion that the power conferred on the State Government by S. 6(2) to amend the schedule relating to exemption is in consonance with the accepted legislative practice relating to the topic, and is not unconstitutional.

11. The contention of the appellant that the notification in question is ultra vires must, in our opinion, fail on another ground. The basic assumption on which the argument of the appellant proceeds is that the power to amend the schedule conferred on the Government under S. 6(2) is wholly independent of the grant of exemption under S. 6(1) of the Act, and that, in consequence, while an exemption under S. 6(1) would stand, an amendment thereof by a notification under S. 6(2) might be bad. But that, in our opinion, is not the correct interpretation of the section. The two sub-sections together form integral parts of a single enactment, the object of which is to grant exemption from taxation in respect of such goods and to such extent as may from time to time be determined by the State Government. Section 6(1), therefore, cannot have an operation independent of S. 6(2), and an exemption granted thereunder is conditional and subject to any modification that might be issued under S. 6(2). In this view, the impugned notification is intra vires and not open to challenge.

12. But on our findings on the first question that the impugned provisions of the Act are ultra vires the powers of the Provisional Legislature under Entry 48 in List II in the seventh Sechdule, we should set aside the orders of the Court below, and direct that the respondents be restrained from enforcing the provisions of the Central Provinces and Berar Sales Tax Act, 1947 in so far as they seek to impose a tax on construction works. It should be made clear, however, in accordance with what we have already stated, that the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contracts which are a combination of distinct contracts for sale of materials and for work, and that nothing that we have said in this judgment shall bar the sales tax authorities from deciding whether a particular contract falls within one category or the other and imposing a tax on the agreement of sale of materials, where the contract belongs to the latter category. The parties will bear their own costs throughout.

13. BOSE, J. : I agree except that I prefer not to express an opinion about the validity of the power conferred on the State Government by S. 6(2) of the Central Provinces and Berar Sales Tax Act, 1947, to amend the schedule in the way in which it has been amended here. I would leave that open for future decision.

Appeals allowed.

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