Mithan Lal

Vs

The State of Delhi & Another (with connected petition)

Petitions Nos. 15 & 16 of 1955

(CJI S. R. Dass, Vivin Bose, T. L. Venkatarama Ayyar, S. K. Das, A. K. Sarkar JJ)

07.04.1958

JUDGMENT

VENKATARAMA AIYAR J. -

The petitioners are building contractors carrying on business in Delhi, and they have filed the present applications under Art. 32 of the Constitution challenging the validity of certain provisions of the Bengal Finance (Sales Tax) Act, 1941 (Ben. VI of 1941), which had been extended to the State of Delhi by a notification dated April 28, 1951.

The impugned provisions of the Act may now be referred to. Section 2(d) of the Act defines "goods" as including "all materials, articles and commodities, whether or not to be used in the construction, fitting out improvement or repair of immovable property". "Sale" is defined in section 2(g) as including "any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract.....". Section 2(b) defines "contract" as meaning, omitting what is not relevant,

> "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." "Sale price" is defined in section 2(h) (ii) as meaning valuable consideration for "the carrying out of any contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract". "Turnover" is defined in section 2(i), and is as follows :
>
> ""Turnover" used in relation to any period means the aggregate of the sale-prices or parts of sale prices receivable, or if a dealer so elects, actually received by the dealer during such period after deducting the amounts, if any, refunded by the dealer in respect of any goods returned by the purchaser within such period."

Section 4, which is the charging section, provides, that "..... every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax under this Act on all sales effected after the date so notified."

The Bengal Finance (Sales Tax) Act, 1941, was a law passed by the Legislature of the Province of Bengal and applied only to sales effected within that Province, and after the partition of the Country, to sales effected within the State of West Bengal. Under the Government of India Act, 1935, Delhi was a chief Commissioner's province administered by the Governor-General, and under the

Constitution, it became a Part C State, and Art. 239 vested its administration in the President acting through a Chief Commissioner or a Lieutenant-Governor as he might think fit. Article 246(4) which is material for the present purpose is as follows :

> "Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule notwithstanding that such matter is a matter enumerated in the State List."

In exercise of the power conferred by this Article, Parliament enacted the Part C States (Laws) Act No. XXX of 1950, and section 2 thereof is as follows :

> "The Central Government may, by notification in the Official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the Notification....."

On April 28, 1951, the Chief Commissioner of Delhi issued a notification under this section extending the operation of the Bengal Finance (Sales Tax) Act, 1941, to Delhi as from November 1, 1951. Acting under the provisions of this Act, the Sales Tax Officer, Karolbagh, Delhi issued on June 12, 1952, notices to the petitioners calling upon them to submit returns of their receipts from building contracts and to deposit the taxes due thereon. In compliance with these notices, the petitioners were sending quarterly returns of their taxable turnover and assessment orders were also made in respect of their annual turnover for the years 1951-1952 and 1952-1953, and the amounts due thereunder had also been paid. For the year 1953-1954, the quarterly returns had been submitted and the tax due thereon deposited, and proceedings were pending for assessment of tax for that year. This was the position when the Madras High Court pronounced its decision in Gannon Dunkerley & Co. v. State of Madras ([1954] 5 S.T.C. 216), that the provisions of the Madras General Sales Tax Act, 1939, imposing tax on the supply of materials in construction works were ultra vires the powers of the Provincial Legislature under Entry 48 is List II, Sch. VII to the Government of India Act, 1935.

Basing themselves on this judgment, the petitioners who had been acting so far on the view that the provisions of the Bengal Finance (Sales Tax) Act, 1941, imposing tax on construction contracts were valid and had been paying tax in that belief, filed Civil Writs Nos. 244-D and 247 of 1954 in the Punjab High Court challenging the validity of those provisions on the ground that there was no sale of materials used in execution of a building contract, and that a tax thereon was not authorised by Entry 48. They accordingly prayed (a) for a writ of certiorari quashing the assessments for the years 1951-1952 and 1952-1953, (b) for a writ of prohibition restraining proceedings for assessment of sales-tax for the year 1953-1954 for realisation of any tax for that year, and (c) for a writ of mandamus directing the respondents to forbear in future from assessing the petitioners to sales-tax under the impugned provisions. Both these petitions were summarily dismissed by the High Court on October 18, 1954, and the orders of dismissal not having been challenged in appropriate proceedings have become final.

Now, the present attempt of the petitioners is to reopen the question which had been answered against them by the High Court of Punjab by resort to proceedings under Art. 32 of the Constitution. It is therefore not surprising that the learned Solicitor-General appearing for the respondents should have taken preliminary objections of a serious character to the maintainability of these petitions. He contended that the petitioners having filed petitions under Art. 226 claiming the very reliefs which

they have now prayed for and on the very grounds now put forward, and those petitions having been dismissed and no appeals having been filed against the orders of dismissal, they had no right to invoke the jurisdiction of this Court under Art. 32 for obtaining the same reliefs. He further contended that the claim of the petitioners that the assessments in question, being unauthorised, constituted an interference with their fundamental right to carry on business under Art. 19(1)(g) could not be maintained inasmuch as assessment proceedings had been completed and the tax realised. He also argued that even if the petitioners were right in their contention that the assessments were unauthorised, their remedy was to sue for refund of the taxes paid, and that the applications of writ of certiorari to quash the orders of assessment were misconceived. It was further contended that the payments having been made by the petitioners voluntarily - it might be under a misconception of their rights - they had no right to claim refund of the amounts even by action. These contentions raise questions of considerable importance; but it is unnecessary to express our opinion thereon, as the petitioners also pray for a writ of mandamus directing the respondents to forbear from imposing sales-tax in future, and it will be more satisfactory to decide the case on the merits.

The contention of the petitioners based on the decision of the Madras High Court in Gannon Dunkerley & Co. v. State of Madras ([1954] 5 S.T.C. 216) is that the State legislatures acting under Entry 48 have no competence to enact laws imposing tax on the supply of materials in execution of works contract, as there is no sale of those materials by the contractor. The decision in Gannon Dunkerley & Co. v. State of Madras ([1954] 5 S.T.C. 216) was taken on appeal to this Court in Civil Appeal No. 210 of 1956, and by our judgment, The State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd. ([1959] S.C.R. 379) pronounced on April 1, 1958, we have affirmed it, and if the present case is governed by that judgment, the petitioners would clearly be entitled to succeed. But it is contended by the learned Solicitor-General that decision has no application to the present petitions, because the impugned law was enacted not by a State Legislature in exercise of the power conferred by Entry 54 in List II but by Parliament by virtue of the authority granted by Art. 246(4) of the Constitution, and that it was within the competence of Parliament acting under that Article to impose a tax on the supply of materials in building contracts, even though there was no sale of those materials within Entry 54.

In our opinion, this contention is well-founded. Art. 246, Cls. (2) and (3), of the Constitution confer on the Legislatures of the States mentioned in Parts A and B the power to make laws with respect to the matters enumerated in Lists II and III of Sch. VII, and one of those matters is "Tax on the sale of goods", Entry 54 in List II. It is with reference to the corresponding Entry in the Government of India Act, 1935, Entry 48 in List II, that we have held in The State of Madras v. Gannon Dunkerley & Co., Madras Ltd. ([1959] S.C.R. 379) that the power to tax sale of goods conferred by that Entry has reference only to sales as defined in the Indian Sale of Goods Act, 1930. But here, we are concerned not with a law of a State mentioned in Part A or Part B but with that of a State in Part C. Under Art. 246(4) it is Parliament that has the power to legislate for Part C States, and that power is untrammelled by the limitations prescribed by Art. 246, Cls. (2) and (3), and Entry 54 of List II, and is plenary and absolute, subject only to such restrictions as are imposed by the Constitution, and there is none such which is material to the present question. It would therefore be competent to Parliament to impose tax on the supply of materials in building contracts and to impose it under the name of sales-tax, as has been done by the Parliament of the Commonwealth of Australia or by the Legislatures of the American States. The decision in The State of Madras v. Gannon Dunkerley & Co., Madras Ltd. ([1959] S.C.R. 379) which was given on a statute passed by the Provincial Legislature under the Government of India Act, 1935, has therefore no application to the present case.

It is argued that though Parliament has the power under Art. 246(4) to make a law imposing tax on construction contracts, that power is subject to the limitation contained in Art. 248, that under that Article it is Parliament that has the exclusive power to enact laws in respect of matters not enumerated in the Lists, including taxation, and that such a power could properly be exercised only by Parliament itself imposing a tax and not by its extending the operation of a taxation law passed by the Legislature of a State; and that section 2 of the Part C States (Laws) Act must be held to be bad as being repugnant to Art. 248(2) in so far as it conferred on the Government authority to extend a taxation law to Part C States. This argument proceeds on a misapprehension of the true scope of Art. 248. That Article has reference to the distribution of legislative powers between the Centre and the States mentioned in Parts A and B under the three Lists in Sch. VII, and it provides that in respect of matters not enumerated in the Lists including taxation, it is Parliament that has power to enact laws. It has no application to Part C States, for which the governing provision is Art. 246(4). Moreover, when a notification is issued by the appropriate Government extending the law of a Part A State to a Part C State, the law so extended derives its force in the State to which it is extended from section 2 of the Part C States (Laws) Act enacted by Parliament. The result of a notification issued under that section is that the provisions of the law which is extended become incorporated by reference, in the Act itself, and therefore a tax imposed thereunder is a tax imposed by Parliament. There is thus no substance in this contention.

It is next contended for the petitioners that even assuming that Parliament was competent to impose a tax on the supply of materials in a building contract and that could be done by a notification extending the law of a Part A State, the notification dated April 28, 1951, is, in so far as it relates to the impugned provisions, in excess of the authority conferred by section 2, because that section limits the authority of the Central Government to extend laws of Part A Sates to Part C States, to "any enactment which is in force" at the date of the notification, and as the impugned provisions of the Bengal Finance (Sales Tax) Act, 1941, were ultra vires Entry 48 under which the Legislature of the province of Bengal derived its power to impose sales-tax, they were not "in force" in the State of West Bengal at the date of the notification, and could not therefore be extended to the State of Delhi. According to the petitioners, "enactment in force" in section 2 must be construed as meaning provisions of a statute which are valid and enforceable. We are unable to agree with this contention. Though the language of section 2 might, in the abstract, be susceptible of the construction which the petitioners seek to put upon it, in the context that is not, in our opinion, its true meaning. What is intended by that section is that with reference to different topics of legislation on which the several States in Part A had enacted different statutes, the authority acting under section 2 should have the discretion to extend that statute in any of the Part A States which is best suited to the conditions in the particular Part C State to which it is to be extended, and that, further, the authority should have the power to extend it with suitable "restrictions and modifications". It could not have been intended by this section that the authority concerned should take upon itself to examine the vires of each and every one of the provisions in the statute, and then extend only such of them as it considers to be valid. In our view, the expression "enactment which is in force in a Part A State" must be construed as meaning "statute which is in operation in a Part A State" as distinct from a statue which had been repealed and it cannot be interpreted as having reference to individual sections or provisions of a statute.

But even if we accept the narrow construction contended for by the petitioners, that would not make any difference in the result, as the authority conferred by section 2 on the Government to extend the enactments in force in Part A State includes a power to do so with restrictions and modifications, and it was within the competence of the Government acting on this provision to incorporate on its own authority the impugned provisions by way of modification of the Bengal Finance (Sales Tax)

Act, 1941. It is said that the notification does not, as a fact, purport to modify the Bengal Act, but merely extends the whole of it on a mistaken notion that it is all valid. But that does not affect the position. The notification in tends that all the provisions of the Bengal Finance (Sales Tax) Act, 1941, should operate in the State of Delhi, and if that could be effectuated by recourse being had to any of the powers of the Legislature, that should be done and the legislation upheld as referable to that power. Ut res magis valeat quam pereat.

It is lastly urged that section 2 of the Part C States (Laws) Act is bad for the reason that it confers on the Government a power to modify laws passed by State Legislatures, and that it is an unconstitutional delegation of legislative powers to authorise an outside authority to modify a law enacted by a Legislature on what are essentially matters of policy. Now, it should be noted that in In re The Delhi Laws Act, 1912 etc. ([1951] S.C.R. 747) one of the questions referred for the opinion of this Court related to the vires of this very provision, and the answer of the majority of this Court was that the first portion of the section, which is what is material for the present discussion, was valid. Counsel for the petitioners, however, relies on the decision of this Court in Rajnarain Singh v. The Chairman, Patna Administration Committee, Patna and another ([1955] 1 S.C.R. 290), wherein it was held than an executive authority could be authorised by a statute to modify either existing or future laws but not in any essential feature, and that a modification which involved a change of policy of the Act would be bad. It is argued that it is a question of policy whether taxes should be imposed on the supply of materials in building contracts, and that, therefore, the power conferred by section 2 on the Government to extend a law with modifications cannot be exercised so as to modify a provision of the Bengal Finance (Sales Tax) Act, 1941, relating to that matter. The answer to this contention is that the modification made by the Central Government, assuming that that is its true character, does to involve any change of policy underlying the Bengal Finance (Sales Tax) Act, 1941. Indeed, the modification gives effect to the policy of that enactment which was to bring construction contracts within the ambit of the taxation powers of the State, and which failed only for want of legislative authority. Whether we view the notification as one extending a subsisting statue to Delhi or as extending it with modifications so far as the impugned provisions are concerned, it is intra vires section 2.

All the contentions urged by the petitioners having failed, the petitions are dismissed with costs.

Petitions dismissed.

</html