

M/s. William Jacks & Co. Ltd.

Vs

The State of Bihar

Civil Appeal No. 112 to 113 of 1962

(S. K. Das, J. L. Kapur, A.K. Sarkar, M. Hidayatullah, Raghuvar Dayal JJ)

21.11.1961

JUDGMENT

SARKAR, J. –

The appellant is a company dealing in various kinds of machinery. It has its place of business in Calcutta, in the State of West Bengal. Between January 26, 1950 and September 30, 1951, it sold diverse machinery to various parties in the State of Bihar. In respect of these sales the appellant was assessed to sales tax under the Bihar Sales Tax Act, 1947. These appeals arise out of such assessments but, as will be seen later, the dispute now is much narrower than what it was in the beginning.

Before proceeding further we may briefly refer to the procedure of the sale. The price payable for the goods was F.O.R. Calcutta and it is not in dispute that the property in them passed to the purchaser as soon as the appellant put the goods on the railway at Calcutta. It has however been found and is no longer in dispute, that the actual delivery of the goods was given to the purchasers in Bihar for consumption there. The argument in this Court has proceeded on the basis accepted by both sides, that the sales were in the course of inter-State trade and were of the kind contemplated in the explanation in Art. 286(1) of the Constitution before its amendment by the Constitution (Sixth Amendment) Act, 1956. In this judgment we shall be concerned with Art. 286 as it stood before the amendment.

The contention of the appellant before the Superintendent of Sales Tax, Patna, who was the assessing authority, was that the sales were inter-State sales and, therefore, the Bihar Act could not tax such sales in view of cl. (2) of Art. 286 though they were within the explanation to cl. (1) of that Article. It was contended that so far as the Bihar Act purported to tax such sales, it was invalid. The Superintendent of Sales Tax rejected this contention relying on the case of Bengal Immunity Company Ltd. v. The State of Bihar [(1952) I.L.R. 32 Pat. 19.] which held that sales of the variety described in the explanation to cl. (1)(a) of Art. 286 could be taxed by the law of the legislature of the State where the goods were actually delivered for consumption in spite of the ban imposed by cl. (2) of that Article on State legislatures taxing sales made in the course of inter-State trade. He, therefore, held that the Bihar Act could validly tax the appellant's sales even though they were inter-State sales. The appellant appealed from this decision to the Deputy Commissioner of Sales Tax, Bihar. By the time that authority heard the appeal the judgment of this Court in the State of Bombay v. The United Motors [[1953] S.C.R. 1069.] had been delivered. This judgment confirmed the view taken in the Patna case earlier mentioned. It said that cl. (2) of Art. 286 does not affect the power of the State in which delivery of goods is made for consumption there to tax inter-State sales or purchases and that the effect of the explanation was that the transactions mentioned in it were

outside the ban imposed by Art. 286(2). In view of this judgment, the Deputy Commissioner dismissed the appeal. A further revision application by the appellant to the Board of Revenue, Bihar, also failed. Before the decision by the Board of Revenue, however, this Court had decided in the appeal from the judgment in the Patna case, earlier mentioned, that the United Motors case [[1953] S.C.R. 1069.] had been wrongly decided and that the until Parliament by law made under Art. 286(2) provided otherwise, a State could not impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases took place in the course of inter-State trade or commerce notwithstanding that the goods under such sales were actually delivered in that State for consumption there : see Bengal Immunity Company Ltd. v. State of Bihar [[1955] 2 S.C.R. 603.]. Curiously however this case escaped the attention of the learned member of the Board of Revenue, Bihar, for if he had noticed it he would not have based himself on the United Motors case [[1953] S.C.R. 1069.] as he had done. The appellant thereafter moved the Board of Revenue under s. 25 of the Bihar Act for referring two questions to the High Court for decision and a reference was accordingly made. The present appeal is against the judgment of the High Court given on the reference.

There are two appeals before us. They arise out of two assessment orders made in respect the two different periods. The High Court heard the two reference together and dealt with them by one judgment. The questions framed in each case were in identical terms and perhaps, therefore, were not confined to the period with which each case was concerned.

As we have said earlier, two questions had been referred to the High Court but the appellant had not in this Court challenged the answer given by the High Court to the second question. We are, therefore, concerned in these appeals only with the first question which is in these terms :

"Whether the sales by the petitioner of (sic.) goods which were actually delivered in Bihar as a direct result of such sales for the purpose of consumption in Bihar during the period January 26, 1950 to September 30, 1951, were sales which took place in the course of inter-State trade or commerce within the meaning of Article 286(2) of the Constitution of India (as it stood prior to the passing of the Constitution (Sixth Amendment) Act, 1956) and as such were not liable to the levy of Bihar Sales Tax, or whether in view of the subsequent passing by Parliament of the Sales Tax Laws Validation Act, 1956 (Act VII of 1956) such sales became liable to the levy of Bihar Sales Tax for any part of the above period, say from April 1, 1951, up to September 30, 1951."

The High Court answered this question in these words :

"As regards the first question, it is clear that for the period from the January 26, 1950, to March 31, 1951, the assessment is covered by the Sales Tax Continuance Order, 1950, promulgated by the President, and the assessment of the tax for this period is not liable to be attacked on the ground that there is a violation of the provisions of Article 286(2) of the Constitution. For the second period, namely, from April 1, 1951 to September 30, 1951, the assessment is covered by the provisions of the Sales Tax Laws Validation Act, 1956, and the imposition of sales-tax for this period also is legally valid."

The question in this appeal is whether the High Court was right in its view that the assessment between January 26, 1950 to March 31, 1951 is covered by the Sales Tax Continuance Order, 1950.

There is no dispute now that the Sales Tax Validation Act, 1956 validated the collection of the tax on sales made during the period from April 1, 1951 to September 30, 1951.

In view of the judgment of this Court in the Bengal Immunity Company case [[1955] 2 S.C.R. 603] a dispute as to whether the sales by the appellant could be taxed by a Bihar law was no longer open. It was because of this that the dispute took a different turn and was based on the Sales Tax Continuance Order, 1950.

The contention of the appellant is this : The Sales Tax Continuance Order, 1950 was made in exercise of the powers conferred by the proviso to cl. 2 of Art. 286 of the Constitution. That proviso was in these terms :

"Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March 1951."

Clause (2) of the Sales Tax Continuance Order, 1950 reads as follows :

"Any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution of India shall, until the thirty-first day of March, 1951, continue to be levied notwithstanding that the imposition of such tax is contrary to the provisions of clause (2) of the Article 286 of the said Constitution."

Clause (2) of Art. 286 of the Constitution, it will be remembered, prohibited a State law from taxing a sale in the course of inter-State trade.

Now, a tax which can be legitimately levied under the Order of 1950 must be a tax which was being lawfully levied by a State Government immediately before January 26, 1950. It is said by the appellant that before this date neither the Bihar Sales Tax Act nor any other Act purported to tax a sale of the kind with which we are concerned. If no Act did so, then no question of its lawfully levying a tax on such sales could at all arise. There was no tax as contemplated by the Order and none, therefore, the levy of which the Order continued.

Learned counsel for the appellant drew our attention to the definition of sale in the Bihar Act as it stood at the relevant time. It was only a sale which came within the definition that the Act purported to tax. Learned counsel's contention is that the sales in this case do not come within the definition and, therefore, were not taxed by the Bihar Act at all.

Now the definition of sale in the Act is in these terms :

"sale" means, with all its grammatical variations and cognate expressions, 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 contract but does not include a mortgage, hypothecation, charge or pledge :

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of price,

be deemed to be a sale :

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods -

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, of

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof,

shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar :

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery.

It is obvious that the sales with which this case is concerned did not come within this definition at all nor even under the last proviso in it and these sales were not taxed by the Bihar Act.

Then there is s. 33. That section provided as follows :

S. 33. (1) Notwithstanding anything contained in this Act, -

(a) a tax on the sale or purchase of goods shall not be imposed under this Act -

(i) where such sale or purchase takes place outside the State of Bihar;

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(2) The explanation to clause (1) of Article 286 of the Constitution shall apply for the interpretation of sub-clause (i) of clause (a) of sub-section (1).

Now, it has been held by this Court in *M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh* [[1958] S.C.R. 1422] that an enactment of this kind did in fact impose a tax on the class of sales covered by the explanation to Art. 286(1)(a) but that the imposition was conditional on the ban mentioned in Art. 286(2) being lifted by law of Parliament as provided therein. We do not think that the respondent State can derive any advantage from this provision. It was inserted in the Bihar Act by the Adaptation of Laws (Third Amendment) Order, 1951, and was brought into force from January 26, 1950. Even though on the ban being lifted it might have been possible under this provision to tax the explanation sales, that is, the sales of the kind with which this case is concerned, that cannot assist the respondent State in this case for since s. 33 only came into force from January 26, 1950, s. 33 could not be a law levying a tax on any sales immediately before the commencement of the Constitution and the levy of tax under it, therefore, could not have been continued under the provisions of the Sales Tax Continuance Order, 1950.

It follows that the sales were not taxed by the Bihar Sales Tax Act, 1947 before the Constitution came into force. It is not contended that the Government of Bihar had been taxing these sales before January 26, 1950, under any other provision. We, therefore, think that the High Court was in error

in holding that the levy of the tax on the sales by the appellant between January 26, 1950, and March 31, 1951, with which this case is concerned, was covered by the Sales Tax Continuance Order, 1950. We will set aside the judgment of the High Court in so far as it so holds and answer the question which we have earlier set out in so far as it is outstanding, in the negative. In our view, these sales were not liable to tax.

We think it right here to point out that the question as framed might suggest that the Court was asked to decide whether the sales were sales within the meaning of Art. 286(2) of the Constitution. But as we have said earlier, that was not the point of the question. The courts below have held that the sales were in the course of inter-State trade in which the goods were actually delivered in Bihar for consumption there and that view has not been disputed in this Court.

The appeal will, therefore, be allowed. We do not make any order as to costs as the appellant abandoned in this Court its contest to one of the two questions that had been referred and as it had not in the High Court contended that the Sales Tax Continuance Order, 1950, did not apply to the sales for the reason on which it based itself in this court.

Appeal allowed.

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