Firm A. T. B. Mehtab Majid and Co.

Vs

State of Madras and Another

Petition No. 147 Of 1959

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

22.11.1962

JUDGMENT

RAGHUBAR DAYAL, J. –

This petition under Art. 32 of the Constitution raises the question of the validity of r. 16 of the Madras General Sales Tax (Turnover & Assessment) Rules, 1939, hereinafter called the rules. The impugned rule was published on September 7, 1955, and was substituted in the place of old r. 16. The new rule was to be effective from April 1, 1955.

The petitioner is a dealer in hides and skins. He sells hides and skins tanned outside the State of Madras, as well as those tanned inside the state. The Deputy Commercial Tax Officer, I, Moore Market Division, Madras, assessed the petitioner to sales tax for the year 1955-56 on a turnover of Rs. 29,89,624-15-11. Out of this a turnover of Rs. 28,10,625-2-0 represented sales of tanned hides and skins which had been obtained from outside the State of Madras.

Sales tax was levied on hides and skins under the provisions of the Madras General Sales Tax Act, 1939 (Act IX of 1939), hereinafter called the Act. Section 3 is the charging section and its relevant portions read :

> "3. (1) Subject to the provisions of this Act, -
>
> (a) every dealer shall pay for each, year a tax on his total turnover for such year; and
>
> (b) the tax shall be calculated at the rate of three pies for every rupee in such turnover :-
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> #X X X X X"##

Section 5 of the Act provides for exemptions and reductions of tax in certain cases. Clause (vi) thereof provides that the sale of hides and skins, whether tanned or untanned, shall be liable to tax under section 3, sub-section (1), only at such single point in the series of sales by successive dealers as may be prescribed.

Section 19 empowers the State Government to make rules to carry out the purposes of the Act.

The new rule 16, whose validity is challenged for the petitioner, reads :

> "16. (1) In the case of untanned hides and/or skins the tax under section 3(1) shall be

levied from the dealer who is the last purchaser in the State not exempt from taxation under section 3(3) on the amount for which they are bought by him.

2 (i) In the case of hides or skins which have been tanned outside the State the tax under section 3(1) shall be levied from the dealer who in the State is the first dealer in such hides or skins not exempt from taxation under section 3(3) on the amount for which they are sold by him.

(ii) In the case of tanned hides or skins which have been tanned within the State, the tax under section 3(1) shall be levied from a person who is the first dealer in such hides or skins not exempt from taxation under section 3(3) on the amount for which they are sold by him :

Provided that, if he proves that the tax has already been levied under sub-rule (1) on the untanned hides and skins out of which the tanned hides and skins had been produced, he shall not be so liable.

(3) The burden of providing that a transaction is not liable to taxation under this rule shall be on the dealer."

It is contended for the petitioner that the effect of this rule is that tanned hides or skins imported from outside the State and sold within the State are subject to higher rate of tax than the tax imposed on hides or skins tanned and sold within the State, inasmuch as sales tax on the imported hides or skins tanned outside the State is on their sale price while the tax on hides or skins tanned within the State, though ostensibly on their sale price, is, in view of the proviso to cl. (ii) of sub-r. (2) or r. 16. really on the sale price of these hides or skins when they are purchased in the raw condition and which is substantially less than the sale price of tanned hides or skins. Further, for similar reasons, hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State are also subject to higher taxation than hides or skins purchased in the raw condition in the State and tanned within the State, as the tax on the latter is on the sale price of the raw hides or skins. Such a discriminatory taxation is said to offend the provisions of Art. 304(a) of the Constitution. Similar are the contentions for the interveners in the case.

The contentions for the respondents are; (1) Sales tax does not come within the purview of Art. 304(a) as it is not a tax on the import of goods at the point of entry. (2) The impugned rule is not a law made by the State Legislature. (3) The impugned rule, by itself, does not impose the tax, but fixes the single point at which the tax imposed by ss. 3 and 5 of the Act is to be levied. (4) The impugned rule was not made with an eye on the place of origin of the goods but as a matter of necessity, in view of the requirements of the statutory provisions to the effect that hides or skins, raw or tanned, came within one category and that the tax on them could be levied at a single point only. The impugned rule, therefore, fixed that single point with respect to the sale of raw hides or skins at the last purchase by the dealer in the State and with respect to the sale of tanned hides or skins at the first sale of such tanned hides or skins by the dealer in the State. In the former case, the tax was levied on the price the purchaser paid while in the latter case it was on the price at which the seller sold.

Article 301 of the Constitution which provides for trade, commerce and intercourse throughout the territory of India to be subject to the other provisions of Part XIII, has been construed by this Court in Atiabari Tea Co. Ltd. v. The State of Assam and Others [[1961] 1 S.C.R. 809.] and in

Automobile Transport (Rajasthan) Ltd. etc. v. The State of Rajasthan and Ors [[1963] 1 S.C.R. 491.].

The majority view in the Atiabari Tea Co. Case [[1961] 1 S.C.R. 809.] which has been accepted in the Automobile Transport Case [[1963] 1 S.C.R. 491.] is, as expressed by Gajendragadkar, J., at p. 860 :

> "Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Art. 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Art. 301. ..... We are therefore satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Art. 301 a rational and workable test to apply would be : Does the impugned restriction operate directly or immediately on trade or its movement ? .... Our conclusion therefore is that when Art. 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Art. 301, and its validity can be sustained only if it satisfies the requirements of Art. 302 or Art. 304 of Part XIII."

In the majority judgement in the Automobile Transport Case [[1963] 1 S.C.R. 491.] it was said at p. 1424 :

> "The interpretation which was accepted by the majority in the Atiabari Tea Co. Case is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301."

Earlier on the judgement it was observed, at p. 1422 :

> "Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Art. 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them."

Subba Rao J., concurred in this view and said at p. 1436 :

> "(1) Art. 301 declares a right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State, or other impediments operating as such barriers. (2) The said freedom is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, wharfs etc., with or without compensation."

It is therefore now well settled that taxing laws can be restrictions on trade, commerce and

intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offered against Art. 301 and will be valid only if it comes within the terms of Art. 304(a).

Article 304(a) enables the Legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similiar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from others States. This means that if the effect of the sales-tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to sub-rule of r. 16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down.

We do not agree with the contentions for the respondents. The contention that Art. 304(a) is attracted only when the impost is at the border i.e., when the goods enter the State on crossing the border of the State, is not sound. Art. 304(a) allows the Legislature of a State to impose taxes on goods imported from other States and does not support the contention that the imposition must be at the point of entry only.

Section 5(vi) provides that the sale of hides or skins, whether tanned or untanned, shall be liable to tax under s. 3(1) only at such single point in the series of sales by successive dealers as may be prescribed. 'Prescribed' means 'prescribed by rules made under the Act.' Rule 16 prescribes such single point. This rule was made by the Governor in the exercise of rule was made by the Governor in the exercise of power conferred on him under s. 19 of the Act and would therefore have statutory force. In fact, sub-s (5) of s. 19 provides that the rules shall have effect as if enacted in the Act. We therefore do not agree that r. 16 is not a law which would fall within a law made by the State Legislature.

It is true that the impugned rule, by itself, does not impose the tax, but fixed the single point at which the tax imposed by ss. 3 and 5 is to be levied. What the rule provides is a step necessary for the imposition of the tax, in view of ss. 3 and 5 and therefore the impugned rule is a part of the enactment which imposes the tax.

The fact that the impugned rule was made in order to prescribe the single point in the series of sales by successive dealers at which the tax on sale of hides or skins was to be levied, in view of ss. 3 and 5 of the Act, does not justify the making of such a rule which discriminates between the tax imposed on goods imported from outside the State and the goods produced or manufactured in the State.

Now, the only question that remains for consideration is whether this rule discriminates between hides or skins imported from outside the State and those manufactured or produced in the State.

Sub-rule (1) of the rule deals with the sale of raw hides and skins. The tax is levied from the dealer who is the last purchaser in the State. Its vires is not challenged. Clause (i) of sub-r. (2) provides for the levying of tax on the sale of hides and skins which had been tanned outside the State. The tax is levied from the dealer who, in the State, is the first seller of such hide or skins. The result is that a dealer in hides or skins which have been tanned outside the State has to pay the tax on the amount for which such hides or skins are sold by him. Clause (ii) of this sub-rule is in indentical terms with

respect to the sale of tanned hides or skins which have been tanned within the State. The tax is to be levied from the person who is the first dealer in such hides or skins and is levied on the amount for which they are sold. The discrimination it is argued, comes in on account of the proviso to this sub-cl. (ii). The proviso is to the effect that if the dealer of hides or skins which had been tanned within the State proves that tax had already been levied on those hide or skins in their raw condition, in accordance with sub-r. (1), he will not be liable to the tax under sub-cl. (ii) of sub-r. (2). The result therefore is that the sale of hides or skins which had been purchased in the State and then tanned within the State is not subject to any further tax. Hides and skins tanned within the State are mostly those which had been purchased in their raw condition in the State and therefore on which tax had already been levied on the price paid by the purchaser at the time of their sale in the raw condition. If the quantum of tax had been the same, there might have been no case for grievance by the dealer of the tanned hides and skins which had been tanned outside the State. The grievance arises on account of the amount of tax levied being different on account of the existence of a substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the some under s. 3(1)(b) of the Act. If the dealer has purchased the raw hide or skin in the State, he does not pay on the sale price of the tanned hides or skins, he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales-tax on the sale price of the tanned hides or skins. He too will have to pay more for tax even though the hides and skins are tanned within the State, merely on account of his having imported the hides merely on account of his having imported the hides and skins from outside, and having not therefore paid any tax under sub-r. (1). It is true that dealers, through few, selling hides and skins which had been tanned within the State will also have to pay similar tax if no tax had been paid previously, they having not purchased the raw hides and skins at all as they were from the carcasses of animals owned by them; but this does not affect the discriminatory nature of the tax as already indicated.

It is urged for the respondent State that to consider discrimination between the imported goods and goods produced or manufactured in the State, circumstances and situations at the taxable point must be similar and that the circumstance of hides or skins tanned within the State and on which tax had been paid earlier at the time of their purchase in the raw condition is sufficient to consider such hides or skins to be different from the hides or skins which had been tanned outside the State. We do not consider that the mere circumstance of a tax having been paid on the sale of such hides or skins in their raw condition justifies their forming goods of a different kind from the tanned hides or skins which had been imported from outside. At the time of sale of those hides or skins in the tanned state, there was no difference between them as goods and the hides or skins tanned outside the State as goods. The similarity contemplated by Art. 304(a) is in the nature of the quality and kind of the goods and not with respect to whether they were subject of a tax already or not.

We are therefore of opinion that the provisions of r. 16(2) discriminate against the imported hides or skins which had been purchased or tanned outside the State and that therefore they contravene the provisions of Art. 304(a) of the Constitution.

It has been urged for the respondent that if the impugned rule be held to be invalid, old r. 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.

Lastly, we may refer to the Preliminary objection raised on behalf of the respondent to the maintainability of this petition, in view of the decision of this Court in Ujjam Bai v. State of Uttar

Pradesh [[1963] 1 S.C.R. 778.]. This petition does not come within that decision. This is not a case in which the tax has been levied by the Deputy Commercial Tax Officer by mis-construing certain provisions of valid Act, but is a case where the taxing officer had no jurisdiction to assess the tax on account of the invalidity of the rule under which the tax was assessed.

We therefore allow this petition with costs holding the impugned rule 16(2) invalid and order the issue of a writ of mandamus to the State of Madras and the Sales Tax Authorities under the Act to refrain from enforcing any of the provision of r. 16(2) and direct them to refund the tax illegally collected from the petitioner.

Petition Allowed.

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