State of Madhya Pradesh

Vs

Bhailal Bhai & Ors

Civil Appeals Nos. 362 - 377 of 1962

(CJI B. P. Gajendragadkar, J. C. Shah, K. N. Wanchoo, J. C. Shah, N. Rajgopala Ayyangar JJ)

20.01.1964

JUDGMENT

DAS GUPTA J. –

These 31 appeals by the State of Madhya Pradesh are against the orders made by the High Court of Madhya Pradesh in 31 applications under Art. 226 of the Constitution by dealers in tobacco. All these petitioners carried on business in Madhya Bharat which later became part of the state of Madhya Pradesh. They were assessed to sales tax on their sales of tobacco in accordance with the notification issued by the State Government in exercise of powers under s. 5 of the State Sales Tax Act and large amounts were collected by the Madhya Bharat Government and later by the Madhya Pradesh Government. The petitioners contended that the taxing provisions under which the tax was assessed and collected from them was unconstitutional as it infringed Art. 301 of the Constitution and did not come within the special provision of Art. 304(a). Accordingly, they prayed for appropriate writs or orders for refund of all the taxes that has been collected from them. In resisting these applications the Madhya Pradesh Government contended, first, that the taxing provisions did not offend Art. 301 of the Constitution and that in any case, they satisfied the requirements of Art. 304(a). It was further contended that even if the taxing provision was unconstitutional and the assessment and collection of tax had been without any legal authority the petitioners were not entitled to the order for refund prayed for.

The High Court was of opinion on a consideration of the notification under which the tax was assessed that it imposed a tax only on imported tobacco and not on home grown tobacco and so it did not come within the special provisions of Art. 304(a) of the Constitution and consequently the infringement of Art. 301 of the Constitution which resulted from the imposition of a tax on import of goods made the provisions void in law. The prayer for refund was allowed in the applications out of which C.A. Nos. 362 - 377, C.A. Nos. 861 - 867 of 1962 and C.A. No. 25 of 1963 have arisen. The prayer was rejected in the remaining applications.

In the present appeals the State of Madhya Pradesh challenges the correctness of the High Court's decision that the taxing provision was unconstitutional and void and also the orders for refund made in some of the petitions mentioned above.

The liability to pay tax arose under s. 3 of the Madhya Bharat Sales Tax Act. This Act came into force from the 1st day of May 1950. As originally enacted it provided that (a) every dealer who imports goods into Madhya Bharat shall be liable to pay tax on his taxable turnover in respect of sales or supplies of goods effected from the 1st day of May 1950 if his total turnover in the previous year in respect of sales or supplies of goods exceeded Rs. 5,000; (b) similarly every manufacturer or

processor whose turnover in the previous year exceeded Rs. 5,000 was made liable to pay tax on his taxable turnover in respect of sales or supplies of goods effected from the 1st day of May 1950; (c) every other dealer was made liable to pay tax on his taxable turnover in respect of sales or supplies of goods effected from the 1st day of May 1950, if the total turnover in the previous year exceeded Rs. 12,000. By later amendments the word "processor" was deleted from cl. (b) of the section and the meaning of the words "any other" in cl. (c) was made clearer by substituting the words "any goods of a dealer not falling in cl. (a) or cl. (b)". There was also an amendment in 1950 making it clear that the taxable turnover on which the tax liability arose was in respect of sales or supplies of goods effected in Madhya Bharat.

Section 5 of the Act provides that the tax payable by a dealer shall be at a single point and shall not be less than Rs. 1/9/- per cent or more than 6 1/4 per cent of the taxable turnover, as notified from time to time by the Government by publication in the Official Gazette. This is subject to a proviso that the Government may in respect of a special class of goods charge tax upto 12 1/2% on the taxable turnover. The second sub-section of s. 5 empowers the Government to notify at the time of notifying the tax payable by a dealer, the goods and the point of their sale at which the tax in payable. The legal position therefore is that unless there is a valid notification under s. 5 no tax can be levied. The contention of the petitioners-dealers which has succeeded in the High Court is that the notifications on the strength of which the tax was assessed on them were invalid.

The first notification was issued on April 30, 1950. This provided that with effect from the 1st day of May 1950 sales tax shall be collected in respect of goods specified in column 2 of the schedule that was attached to the notification at the point of sale mentioned in column 3 at the rates mentioned in column 4. The relevant portion of the Schedule ran thus :-

> #----------Sl. Name of commodity The point of sale Rate of taxNo. by dealers---------- ---------- * * *9. Tobacco leaves, Importer 6-4-0 per cent manufactured Sales Tax tobacco (for eating and smoking) and tobacco used for Bidi manufacturing.---------##

This was followed by another notification dated May 22, 1950 under which a lower rate was prescribed for tobacco used for Bidi manufacturers. But the point at which the tax was payable remained unaltered. The relevant portion of the Schedule to this notification was in these words :

> #----------Sl. Name of commodity Point of sale Rate per centNo. by the dealers of tax in M.B.----------10. Tobacco leaves and Importer 6-4-0 manufactured tobacco (for eating, smoking and snuffing)11. Tobacco used for Bidi Importer 1-9-0 manufacturing.----------##

For a short period, i.e., from the 1st January 1954 to the 21st January 1954 these two notifications remained inoperative in consequence of a notification dated the 24th October, 1953, under which from the 1st January 1954 the point of sale at which the tax was payable was altered to "on a sale by a dealer direct to a consumer or to a dealer who does not hold a licence or registration certificate under the Sales Tax Act". This last notification was again superseded by a notification dated the 21st January, 1954 in consequence of which the old position was restored with effect from January 22, 1954. That is, with effect from 22nd January 1954 the point at which the tax was payable, again became a sale by an importer.

There can be no doubt that the tax payable at the point of sale by the importer in Madhya Bharat directly impeded the freedom of trade and commerce guaranteed by Art. 301 of the Constitution. It is true that the import by itself would not bring in the liability to tax and that if the imported goods were not sold in Madhya Bharat no tax would be payable. Quite clearly however by far the greater part of the tobacco leaves, manufactured tobacco (for eating and smoking) and tobacco used for Bidi manufacturing that would be imported into the State would be sold in Madhya Bharat. That a very considerable amount was so sold is clear from the very assessment orders made in these several cases. There can be no doubt therefore that even though it is the sale in Madhya Bharat of the imported goods that creates the liability to tax and not the import by itself, the trade and commerce as between Madhya Bharat and other parts of India is directly impeded by this tax. On the authority of this Court's decision in Atiabari Tea Co., Ltd. v. State of Assam ((1961) 1 S.C.R. 809) it must therefore be held that the tax contravenes the provisions of Art. 301 of the Constitution. It may be mentioned that the later decision of this Court in Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan ((1963) 1 S.C.R. 491) which slightly modified the majority decision in Atiabari Tea Co.'s case does not alter this position. If the tax could have been claimed to be regulatory or compensatory it would have got the benefit of the latter decision. There is, however, no scope for such a claim (See Firm Mehtab Majid & Co. v. State of Madras. (A.I.R. 1963 S.C. 928)).

The tax could still be good if even though it contravened the provisions of Art. 301 it came within the saving provisions of Art. 304(a) of the Constitution. That Article provides in its cl. (a) that notwithstanding anything in Article 301 or Art. 303 the legislature of a State may by law impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject so however as not to discriminate between goods so imported and goods so manufactured or produced. An attempt was made on behalf of the State before the High Court and also before us to construe the notification mentioned above to mean that not only the tobacco imported from other States but also similar goods manufactured or produced in Madhya Bharat were subject to this tax and at the same rate. It was argued that a dealer in these goods who was an importer and so sold gods imported by him into Madhya Bharat would also be selling goods not so imported but manufactured and produced in the State. We are prepared to agree that may well be so. What we are unable to see, however, is that in respect of sales of such other goods this person would be liable to any tax under the notification. We are informed that in fact where importers dealt with goods other than imported goods the sales of such other goods were in fact excluded from tax. The learned Advocate-General of Madhya Pradesh who appeared before us in support of these appeals suggested that was done by the State Sales Tax Authorities on a mistaken interpretation of the law. We do not think so. In our opinion, the only reasonable interpretation of the notification as it stands, viz., that tax on tobacco leaves, manufactured tobacco and tobacco used for Bidi manufacturing would be payable at the point of sale by the importer, is that only the sale of goods which the importer had imported would be liable to tax and not sale of any other goods by him. If the intention had been as suggested by the learned Advocate-General that though the tax is payable at the point of sale by an importer the sale by the same person of goods manufactured or produced in Madhya Bharat would also be liable to tax, the word "importer" would not have been used in column 3 but the word "dealer" would have been used and the point of sale would have been indicated by some other words as the "first sale in Madhya Bharat" or "the sale to the retailer in Madhya Bharat" as the rule-making authority chose.

The matter becomes even more clear if in column 3 we read for "importer" the definition of "importer of goods" in s. 2(i) of the Act. Reading this we fin that the point of sale in Madhya Bharat at which the tax is payable is the sale "by the dealer who brings or causes to be brought into Madhya Bharat any goods from outside for the purpose of processing, manufacturing or sale" or "who

purchases goods in Madhya Bharat for the purpose of sale from a dealer who does not ordinarily carry on business in Madhya Bharat." When only such a sale is being made the point at which the tax is payable, there is hardly any scope for a serious argument that the notification was intended to make sales by that same dealer of goods manufactured or produced in Madhya Bharat liable to tax.

It may not be out of place to notice in this connection the distinction made by s. 3 of the Madhya Bharat Sales Tax Act between sales by a dealer who imports goods (cl. (a)) and other dealers (cls. (b) and (c)). It is not unreasonable to think that the Act itself contemplated the sales by an importer of goods as meaning only sales by him of goods imported by him into Madhya Bharat. Apart from this, it has to be noticed that admittedly the notification did not make dealers who dealt only in home grown or home produced tobacco liable to pay the tax. That by itself would be sufficient to bring in the vice of discrimination which is the purpose of Art. 304(a) to prevent.

There can, therefore, be no escape from the conclusion that similar goods manufactured or produced in the State of Madhya Bharat have not been subjected to the tax which tobacco leaves, manufactured tobacco and tobacco used for Bidi manufacturing, imported from other States have to pay on sale by the importer. This tax is, therefore, not within the saving provisions of Art. 304(a). As already pointed out it contravenes the provisions of Art. 301 of the Constitution. The tax has therefore been rightly held by the High Court to be invalid. It is clear that the assessment of tax under these notifications was thus invalid in law.

A portion of the tax thus assessed has been already has been already paid by the petitioners. It cannot now be disputed that this payment was made under a mistake within s. 72 of the Indian Contract Act and so the Government to whom the payment has been made by mistake must in law repay it. The question is whether the relief of repayment has to be sought by the tax-payer by an action in a civil court or whether such an order can be made by the High Court in exercise of its jurisdiction under Art. 226 of the Constitution. The jurisdiction conferred by Art. 226 is in very wide terms. This Article empowers the High Court to give relief by way of enforcement of fundamental rights and other rights by issuing directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. According to the petitioners a writ in the nature of mandamus can be appropriately used where money has been paid to the Government by mistake to give relief by commanding repayment of the same. That in a number of cases the High Courts have used the writ of mandamus to enforce such repayment is not disputed. In a recent case in Firm Mehtab Majid & Co., v. The State of Madras (A.I.R. 1963 S.C. 928) this Court made, in a petition under Art. 32, an order for refund of tax illegally collected from the petitioner under Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The question whether the Court has this power to order refund was not however raised there. In sales Tax Officer, Banaras v. Kanhaiya Lal Mukundlal Saraf ((1959) S.C.R. 1350) the appellants disputed the correctness of the High Court's order made in an application under Art. 226 of the Constitution directing refund of taxes that had been paid under the U.P. Sales Tax Act on the respondent's forward transactions in silver bullion. After the levy of sales tax on such transactions was held to be ultra vires by the High Court under Art. 226 of the Constitution for a writ of certiorari for quashing the assessment orders and a writ of mandamus requiring the appellants to refund the amount illegally collected. The order made in this case by the High Court for refund was affirmed by this Court in appeal. In this case also the power of the High Court to order such refund was not challenged either before the High Court or before this Court.

We see no reason to think that the High Courts have not got this power. If a right has been infringed - whether a fundamental right or a statutory right - and the aggrieved party comes to the court for

enforcement of the right it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. Where there has been only a threat to infringe the right, and order commanding the Government or other statutory authority not to take the action contemplated would be sufficient. It has been held by this Court that where there has been a threat only and the right has not been actually infringed an application under Art. 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. It will hardly be reasonable to say that while the court will grant relief by such command in the nature of an order of injunction where the invasion of a right has been merely threatened the court must still refuse, where the right has been actually invaded, to give the consequential relief and content itself with merely a declaration that the right exists and has been invaded or with merely quashing the illegal order made.

For the reasons given above, we are clearly of opinion that the High Court have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law.

At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Court rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution.

The prayer for refund has been allowed by the High Court in the applications out of which Civil Appeal Nos. 362 - 377 of 1962 and Civil Appeal Nos. 861 - 867 of 1962 and Civil Appeal No. 25 of 1963 have arisen. It appears that the tax provisions under which these taxes had been assessed and paid was declared void by the High Court of Madhya Pradesh in their decision in Mohammad Siddique v. The State of Madhya Pradesh on January 17, 1956. Later, on August 27, 1957 the Appellate Authority, Sales Tax, in Madhya Bharat made an order relying on the High Court's decision mentioned above. The petitioners claim to have discovered their mistake in making the payments after they came to know of these decisions. It is reasonable to think however that the petitioners must have discovered their mistake as soon as the High Court's decision in the case of

Mohammad Siddique v. The State of Madhya Pradesh dated January 17, 1956 become known to them. All these 16 applications were made within less than three years from the 17th January, 1956. The High Court has taken the view that this was not unreasonable delay and in that view has ordered refund. This appears to us to be a sound and judicial exercise of discretion with which this Court ought not to interfere. It may be added that no triable issue as regards the availability of this consequential relief was raised before the High Court nor has any been suggested before us. The Order of refund made by the High Court in these cases cannot therefore be disturbed.

The position in Civil Appeal Nos. 861 to 867 of 1962 is however different. The applications out of which these appeals have arisen were made in September 1959, i.e., about three years and eight months after January 17, 1956 when the High Court of Madhya Pradesh gave their decision declaring the tax provisions in question to be void.

It was necessary for the High Court to consider this question of delay before any order for refund was made. It does not appear however that any attention was paid to this question. In making the orders for refund in each of these cases the High Court merely said this :-

> "The present case is governed by Bhailal Bhai's Case (1960 M.P.C. 304). Learned Government Advocate formally raised the question of the remedy open to the petitioner for refund of tax in order to keep the point open in the Supreme Court. We accordingly allow this petition and issue a writ directing the opponents to refund to the applicant firm the amount of tax collected from it during the above-mentioned period."

The learned Judges appear to have failed to notice that the delay in these petitions was more than the delay in the petition made in Bhailal Bhai's case out of which Civil Appeal No. 362 of 1962 has arisen. On behalf of the respondents-petitioners in these appeals (C.A. Nos. 861 to 867 of 1962) Mr. Andley has argued that the delay in these cases even is not such as would justify refusal of the order for refund. He argued that assuming that the remedy of recovery by action in a civil court stood barred on the date these applications were made that would be no reason to refuse relief under Art. 226 of the Constitution. Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act is three years from the date when the mistake is known. If the mistake was known in these cases on or shortly after January 17, 1956 the delay in making these applications should be considered unreasonable. If, on the other hand, as Mr. Andley seems to argue, the mistake was discovered much later, this would be a controversial fact which cannot conveniently be decided in writ proceedings. In either view of the matter we are of opinion the orders for refund made by the High Court in these seven cases cannot be sustained.

The application out of which Civil Appeal No. 25 of 1963 has arisen was also made in 1958, that is, within less than three years from the date of the High Court's decision in Mohammad Siddique v. The State of Madhya Pradesh. The High Court was therefore right in stating in its judgment in this case that it is governed by Bhailal Bhai's case. We see no reason to interfere with the order for

refund made by the High Court in this case.

In the result, Civil Appeals Nos. 861 to 867 of 1962 are allowed in part and the orders for refund made in those cases are set aside. The petitioners will be at liberty to seek such relief as they may be entitled to in a civil court, if it be not barred by limitation. There will be no order as to costs in these cases. In two other appeals, viz., Civil Appeal Nos. 28 and 29 of 1962, the respondents have not appeared; so there will be no order as to costs in them. In the other appeals which are dismissed, the appellant will pay costs to the respondents. One hearing fee for all these appeals.

Appeals Nos. 861 - 867 partly allowed, other appeals dismissed.

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