A. Hajee Abdul Shakoor and Company

Vs

State of Madras

Writ Petition Nos. 201 to 203 of 1963

(Raghuvar Dayal, J. R. Mudholkar, K. Subha, J. C. Shah, M. Hidayatullah JJ)

07.05.1964

JUDGMENT

RAGHUBAR DAYAL J. –

These are three petitions under art. 32 by the petitioners, which is a partnership firm, praying for a declaration that s. 2 of the Madras General Sales Tax (Special Provisions) Act, 1963 (Act No. 11 of 1963) hereinafter called the Act, is ultra vires the Constitution and of no effect and for a writ of mandamus directing the State of Madras to refrain from enforcing any of the provisions of that section. Each of the petitions relates to a particular assessment year.

The petitioners are dealers in skin, carrying on business at Shenbakkam, Vellore, North Arcot District, in the State of Madras. They purchase raw skins from places both within and outside the State of Madras, tan the same and sell them through their agents in Madras. They were assessed to a certain amount of sales-tax, in accordance with the provisions of the Madras General Sales Tax Act 1939 (Madras Act IX of 1939) and r. 16(2)(ii) of the rules framed thereunder viz., the Madras General Sales Tax (Turnover and Assessment) Rules, on the turnover of hides and skins purchased in the untanned condition outside the State, but tanned within the State, with respect to each of the assessment years 1955-56, 1956-57 and 1957-58. The tax was assessed at 3 pies per rupee on the price of tanned hides and skins for the years 1955-56 and 1956-57 and at the rate of 2 per cent on the turnover for the year 1957-58.

The petitioners challenged earlier the validity of r. 16 on the ground that it contravened Art. 304 of the Constitution. Their contentions were negatived by the Sales Tax Authorities. The petitioners then filed writ petition No. 148 of 1959 in this Court against the assessment of tax for the year 1957-58. This Court allowed it as it had held on November 22, 1962 in Firm Mehtab Majid and Co. v. State of Madras [(1963) Supp. 2 S.C.R. 435] that r. 16(2) of the rules was invalid as it discriminated against the imported hides and skins which had been purchased or tanned outside the State. Subsequently, the validity of r. 16(1) of the rules was challenged in this Court in writ petitions Nos. 43 and 44 of 1963 by M. J. Jamal Mohideen & Co. Those writs were filed on March 5, 1963 and it was contended that sub-rule (1) standing by itself was ultra-vires the Constitution as it had the effect of selecting for discriminatory taxation only raw hides and skins and leaving un-taxed sales of tanned hides and skins in Madras.

On June 10, 1963, the Governor of Madras promulgated Madras Ordinance No. 3 of 1963. The explanatory statement attached to the Ordinance stated :

"The decision of the Supreme Court (in W.P. 147 of 1959 - Firm ATB Mehtab Majid

& Co. v. The State of Madras) will result in claims for refund of tax being preferred by dealers in hides and skins already assessed under the impugned rule thereby resulting in huge loss of revenue and will also result in administrative complications. It is therefore considered necessary to avoid these difficulties by removing the discrimination in the matter of levy of tax on hides and skins pointed out by the Supreme Court and to provide for the assessment or reassessment and collection of the tax from the dealers in hides and skins without any discrimination by levying the tax in all cases on the basis of the purchase price of the hides and skins in the untanned condition."

The relevant provisions of the Ordinance read :

"2. Special provisions in respect of tax on sale of hides and skins in certain cases :-

(1) Notwithstanding anything contained in the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939) (hereinafter referred to as the said Act), or in the rules made thereunder (hereinafter referred to as the said rules), the following provisions shall apply in respect of tax on sale of hides and skins during the period commencing on the 1st April 1955 and ending on the 31st March 1959.

(i) In the case of raw hides and skins, the tax under the said Act shall be levied from the dealer who is the last purchaser in the State and not exempt from taxation under sub-section (3) of s. 3 of the said Act at the rate of two percent of the amount for which they are bought by him.

(ii) In the case of dressed hides and skins (which were not subjected to tax under the said Act as raw hides and skins), the tax under the said Act shall be levied from the dealer who in the State is the first seller in such hides and skins not exempt from taxation under sub-section (3) of section 3 of the said Act at the rate of two percent of the amount for which such hides and skins were last purchased in the untanned condition.

#* * * * * *##

Explanation II - For the removal of doubts it is hereby declared that in respect of sales to which sub-section (1) applies, nothing in rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, shall apply or shall be deemed ever to have applied.

(2) Any dealer in hides and skins who has been finally assessed under the provisions of the said Act and the said rules, may within a period of ninety days from the date of the commencement of this Ordinance apply to the authority or officer concerned for reassessment under the provisions of this Ordinance along with the correct and complete return;

#* * * * * *##

(3) Subject to the provisions of sub-section (1), the provisions of the said Act and the said rules shall be deemed to be in force for the purpose of assessment or re-assessment and recovery of the tax on sale of hides and skins during the period

mentioned in sub-section (1) and, notwithstanding any provision regarding limitation in the said Act and the said rules, it shall be competent for the authority or officer concerned to assess or reassess and recover the tax on sale of hides and skins during the period mentioned in sub-section (1) as if this Ordinance had been in force at the relevant time.

(4) The amount of tax on sale of hides and skins during the period mentioned in sub-section (1) already collected from any dealer shall be adjusted towards the tax due from him on such sale as a result of assessment or re-assessment in accordance with the provisions of this Ordinance and if the tax on such assessment or reassessment -

(i) is in excess of the amount of tax on such sale of hides and skins already collected from such dealer, such excess shall be recovered from him; or

(ii) is less than the amount of tax on such sale of hides and skins already collected from such dealer, the difference shall be refunded to him.

#* * * * * *##

On July 12, 1963, the Sales Tax Appellate Tribunal, Madras dealt with the appeals of the petitioners against the assessment for the year 1955-56 and 1956-57, and in view of s. 2(3) of the Ordinance, set aside the orders of assessment and remanded the matter for re-assessment in accordance with the provisions of the aforesaid Ordinance.

On August 28, 1963, the Act received the assent of the Governor. Sub-s. (2) of s. 1 provided that the Act would be deemed to have come into force on June 10, 1963. Sub-section (1) of s. 2 of the Act reads :

"(1) Notwithstanding anything contained in the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939) (hereinafter referred to as the said Act), or in the rules made thereunder (hereinafter referred to as the said rules), during the period commencing on the 1st April, 1955 and ending on the 31st March 1959, in respect of sale of dressed hides and skins (which were not subjected to tax under the said Act as raw hides and skins), the tax under the said Act shall be levied from the dealer who in the State is the first seller in such hides and skins not exempt from taxation under sub-section (3) of section 3 of the said Act at the rate of two per cent of the amount for which such hides and skins were last purchased in the untanned condition.

Explanation I. - The burden of proving that a transaction is not liable to taxation under this sub-section shall be on the dealer.

Explanation II. - For the removal of doubts it is hereby declared that in respect of sales to which sub-section (1) applies, nothing in rule 16(2) of the Madras General Sales Tax (Turnover & Assessment) Rules, 1939, shall apply or shall be deemed ever to have applied."

It is to be a noticed that s. 2(1) of the Act is in respect of tax on sale of dressed hides and skins and not in respect of tax on sale of raw hides and skins with which clause (i) of s. 2(1) of the Ordinance dealt. Consequently the other provisions of the other sub-sections of s. 2, though practically the same as those of the Ordinance, have been suitably modified. They are therefore not set out.

It is the validity of s. 2 of the Act that is challenged in these petitions, on the ground that it violates the provisions of Arts. 14, 19(i)(f) and (g), 31,286(2), 301 and 304 of the Constitution for the following reasons :-

1. Persons who had purchased raw hides and skins in the State of Madras in the years 1955-56 and 1956-57 paid sales tax at 3 pies per rupee and paid no further tax when those hides, after being tanned, were sold. The petitioners having purchased raw hides and skins from outside the State, did not at the time pay tax at that rate on the purchase price of the raw hides and skins but were now liable, under the impugned provision, to pay tax at the rate of 2 per cent of the amount for which such hides and skins were last purchased in untanned condition. Thus the petitioners would pay a higher tax than what was paid by the seller of dressed hides and skins purchased in the State in the raw condition and then tanned and sold and that therefore s. 2(1) discriminates against imported untanned hides and skins.

2. In the case of sale of dressed hides and skins, s. 2(i) levies a tax at the rate of 2 per cent of the amount for which hides and skins in the untanned condition were last purchased by a dealer himself outside the State. S. 2(i) creates discrimination between the case of a local merchant selling locally dressed hides and skins and the case where the dealer who is the first seller in the State and who purchased only dressed hides and skins outside the State and then sold them in the State for in his case he had not purchased such hides and skins in the untanned condition and has therefore not become liable to be assessed under s. 2(1)

3. Parliament had by The Essential Goods (Declaration & Regulation of Tax on Sale or Purchase) Act 52 of 1952 declared hides and skins essential for the life of the community. The Act provided for taxation on the sale of hides and skins during the period such declaration was in force, i.e., between 1-4-1955 and 11-9-1956 and therefore required the assent of the President, in view of Art. 286(3) of the Constitution as it stood prior to its repeal in September, 1965. As no such assent had been received, the Act cannot affect the sales prior to September 11, 1956 and so no tax can be levied in respect of those sales.

4. Rule 16(1) became invalid when this Court held r. 16(2) invalid. Rule 16(1) has not been revived by the new Act. It follows that no tax on sale of raw hides and skins during the period 1955-57 is valid and that therefore the imposition of a tax under sub-section (1) of s. 2 of the impugned Act imposes a tax on the imported hides and skins when sold in the State in the tanned condition while no tax is to be levied on the sale of the hides and skins purchased in the State in the raw condition, then tanned and sold.

These contentions are sought to be met for the respondent State on the following grounds :

1. It is open to the legislature to treat dressed hides and skins as a separate category from raw hides and skins. They are in fact commercially different commodities and that therefore different rates of tax for the two different categories of goods can be legally levied.

No discrimination is made between locally tanned goods and outside-tanned goods as in both cases

tax is levied on the first sale of such goods within the State. It does not matter that the hides and skins tanned locally do not attract that liability on the first sale in view of their having been taxed earlier at the untanned stage because of the special provision of exemption.

> 2. It is not correct that s. 2(1) will not apply to a dealer purchasing tanned hides and skins outside the State and selling them within the State. It is not necessary that the seller of the tanned hides and skins in the State be himself the last purchaser of the untanned hides and skins for the purpose of his liability under s. 2(1).
>
> 3. Art. 286(3) as it stood prior to the amendment in 1956 imposed fetters only on post-Constitutional law and therefore it could not operate on the Madras General Sales Tax Act, 1939, which had been enacted much earlier. S. 2(1) of the impugned Act simply lay down the machinery for the assessment and collection of tax imposed by s. 3 as modified by s. 5 of the 1939 Act which did not require Presidential assent.
>
> 4. The decision of this Court in Firm A. T. B. Mehtab's Case (1) does not affect the validity of r. 16(1). Sub-rule (1) and sub-rule (2) of r. 16 are severable.

We are of opinion that the first contention for the petitioners is sound.

The effect of sub-section (1) of s. 2 of the Act is the same as was the effect of sub-rule (2) of r. 16 of the Turnover and Assessment Rules, 1939, and which was held to be invalid by this Court in Mehtab's Case [(1963) Supp. 2 S.C.R. 435]. The impugned sub-section provides for the assessment of tax on the sale of dressed hides and skins which were not subjected to tax under the 1939 Act as raw hides and skins and thus exempts from taxation, in accordance with the provisions of sub-section (1) of s. 2 of the Act the sale of tanned hides and skins with respect to which tax had been paid on their sale in the raw condition. Such tanned hides and skins had been exempted from taxation under sub-clause (ii) of r. 2 of the Turnover and Assessment Rules. The same is the position in the present case. The present rule therefore is discriminatory and invalid for the same reasons which led this Court to hold sub-rule (2) of r. 16 invalid in Mehtab's Case [(1963) Supp. 2 S.C.R. 435.]. There is no escape from this conclusion.

In the earlier case, discrimination was brought about on account of sale price of tanned hides and skins to be higher than the sale price of untanned hides and skins, though the rate of tax was the same, while in the present case, the discrimination does not arise on account of difference of the price on which the tax is levied as the tax on the tanned hides and skins is levied on the amount for which those hides and skins were last purchased in the untanned condition, but on account of the fact that the rate of tax on the sale of tanned hides and skins is higher than that on the sale of untanned hides and skins. The rate of tax on the sale of tanned hides and skins is 2 per cent on the purchase price of those hides and skins in the untanned condition while the rate of tax on the sale of raw hides and skins in the State during 1955 to 1957 is 3 pies per rupee. The difference in tax works out to 7/1600th of a rupee, i.e. a little less than 1/2 nayepaise per rupee. Such a discrimination would affect the taxation up to the 1st of August 1957 when the rate of tax on the sale of raw hides and skins was raised to 2 per cent of the sale price.

The second contention has no force. There is nothing in sub-section (1) of s. 2 of the Act to suggest that the seller of the tanned hides and skins in the State, should himself be the purchaser of those hides and skins in the raw condition from outside the State. An importer can import tanned hides and skins as well as untanned hides and skins from outside the State. If he imports tanned hides and

skins, he need not necessarily be the last purchaser of those hides and skins in the untanned condition. In that case, it may be difficult to assess the tax on the basis laid down in sub-section (1) of s. 2, as the importer may not be able to inform about the price at which those hides and skins were last purchased. Such a price may then have to be determined by estimate. In case the importer himself purchases the untanned hides and skins, and then imports them either in the same condition or in the tanned condition, there would be no such difficulty. The difficulty existing in the former case does not necessarily mean that the importer of tanned hides and skins when he himself is not the last purchaser, cannot be taxed under sub-section (1) of s. 2 of the Act.

The next question is whether sub-rule (1) of r. 16 became invalid when this Court declared sub-rule (2) invalid in Mehtab's Case [(1963) Supp. 2 S.C.R. 435.]. The contention for the petitioner is that it became invalid because hides and skins, whether tanned or untanned, constituted one commodity and that therefore tax cannot be levied on the sale of hides and skins in the raw condition when no tax is levied on the sale of hides and skins in the tanned condition. It is contended for the State that they are different commodities, and constitute two separate categories for purposes of taxation. We are inclined to the view that they form different categories.

Hides and skins in the untanned condition are undoubtedly different as articles of merchandise than tanned hides and skins.

It is urged for the petitioners that tanning is only a preservative process which makes no change in the nature of the article itself.

The question whether tanned skins and hides are different commodities from raw skins and hides has been considered by Courts a few times.

In Government of Andhra v. Nagendrappa [7 S.T.C. 568, 573.] is the observation :

> "The tanning of raw hides and skins is a manufacturing process as a result of which the product that emerges is different from the raw material."

In State of Andhra Pradesh v. M. A. Abdul Bari and Co. [9 S.T.C. 231, 237.] is also an observation to the same effect, it being :

> "The stage of collection is also appropriate as, after the tanning, the hides and skins become different commodities.....".

In Encyclopaedia Britannica, Vol. 13, p. 845, it is stated, in connection with 'leather' :

> "Leather is manufactured from the hides and skins of various animals. ....The object of tanning (or the manufacture of leather) is the conversion of the putresible skin into a material which under ordinary conditions of use does not putrefy, and which can be wetted and subsequently dried without becoming hard or horny."

Reference may also be made to State of Travancore Cochin v. Shanmugha Vilas Cashew Nut Factory [(1954) S.C.R. 53.] in which it was held that raw cashewnuts become a different commodity commercially after the application of certain processes as a result of which they are converted into edible kernels.

It is therefore not correct to say that the process of tanning brings about no change in the raw hides

and skins and that therefore both types of hides and skins form one commodity.

The petitioners rely on two cases in support of their contention that the tanned and untanned hides and skins do not form different commodities but constitute one commodity.

In Abdul Subban and Co. v. State of Madras [11 S.T.C. 173, 184.] is the observation :

> "Section 14(3) of the Central Sales Tax Act, 1956 (Act 74 of 1956) also treats hides and skins, whether dressed or raw, as a single commodity..... Since skins tanned or untanned, constitute only one class of goods and the sale of that class of goods can be taxed only at a single point, obviously there can be no tax on a sale of tanned goods, if tax has already been paid on an earlier transaction when those skins were untanned."

No reason is given why the two kinds of hides and skins are treated as a single commodity.

The other case relied on is Raghbir Chand Som Chand v. Excise and Taxation Officer [11 S.T.C. 149.]. This case does not directly concern hides and skins. It however held that ginned cotton and un-ginned cotton constitute one commodity, as the process of ginning just separates the seeds as the character or identity of cotton is not altered thereby, and as ginning is not a manufacturing process. It was taken into consideration that the Constitution as well as the statutes dealing with the matter treat ginned and un-ginned cotton under the same head, indicating thereby that the legislature looked upon ginned and un-ginned cotton as one and the same thing.

The fact that certain articles are mentioned under the same heading in a statute or the Constitution does not mean that they all constitute one commodity. The inclusion of several articles under the same heading may be for a reason other than that the articles constitute one and the same thing.

In this connection we may refer to the Madras General Sales Tax Act, 1959. Section 4 of this Act provides that the sales tax on the sale or purchase of declared goods will be payable at the rate and only at the point specified against each article in the II Schedule.

The Second Schedule refers to raw hides and skins separately from dressed hides and skins against serial No. 7. The rate of tax is different and so is the point at which the tax is to be levied. This will indicate that in 1959 the legislature in Madras considered raw hides and skins a different commodity from dressed hides and skins. There is no good reason why the legislature be not attributed the same intention when it enacted the 1939 Act especially when there are other reasons also to point to the same conclusion.

We therefore hold that raw hides and skins and dressed hides and skins constitute different commodities of merchandise and they could therefore be treated as different goods for the purposes of the Act.

The provision of the Act at the relevant time for the levy of tax on the sale of hides and skins was s. 5, cl. (vi) which reads :

> "Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees.....
>
> (vi) 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."

In 1957 this provision was replaced by s. 5A(4) which read :

> "The sale of hides and skins, whether in a raw or dressed state, shall be liable to tax only at such single point in the series of sales by successive dealers as may be prescribed but at the rate of two percent on the turnover at that point."

The series of sales referred to in this provision, to our mind, meant the series of sales of each kind of hides and skins namely the series of sales of raw hides and skins and the series of sales of dressed hides and skins and do not mean a single series of sales which includes successive sales in the first instance of raw hides and skins and after tanning successive sales of tanned hides and skins.

The real question is whether these provisions treat raw hides and skins and dressed or tanned hides and skins as one class of goods for the purpose of taxation or as two different classes of goods. If they treat them as one class of goods, the contention for the petitioner loses force as taxing of hides and skins at the time of their sale in a raw condition meets the requirements of law as hides and skins could be taxed only at a single point. If the dressed or tanned hides and skins are not taxed at the time of their sale that does not offend against the statutory provisions. No question of discrimination arises as a sale of raw hides and skins of whatever origin, i.e., whether produced in the State or imported into the State would be equally liable to the levy of tax.

If the statute treats both these kinds of hides and skins as different commodities the provision of sub-rule (1) of r. 16 providing for the levy of tax on raw hides and skins at a certain point even in the absence of any provision for the taxation of dressed hides and skins cannot be said to be discriminatory and invalid. The articles to be taxed were not the same and the legislature could provide differently about their taxation.

We therefore hold that sub-rule (1) of r. 16 did not become invalid on this Court's declaring sub-rule (2) of that rule invalid in Mehtab's Case [(1963) Supp. 2 S.C.R. 435.].

The only question that now remains for consideration is whether the State legislature was competent to enact the provisions of sub-section (1) of s. 2 of the Act. Hides and skins had been declared under Act LII of 1952 to be essential for the life of the community. Art. 286(3) of the Constitution as it stood before its amendment by the Constitution VI Amendment Act of 1956, on September 11, 1956, read :

> "No law made by the Legislature of a State imposing or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

This provision, however, did not apply to the 1939 Act which had been enacted much earlier than the commencement of the Constitution. By August 28, 1963, when the Act was enacted by the Madras Legislature, Art. 286(3) had been amended and Act LII of 1952 had also been repealed. Consequently there was no Constitutional requirement for the Act being reserved for the assent of the President before it could be enforced. It is contended for the petitioner that the Act really enacted for a period, when if passed, it had to receive the President's assent for its enforcement and

that therefore the State Legislature could not even in 1963 enact this provision affecting the taxation law in respect of the sale or purchase of goods which were goods declared essential for the life of the community. We do not see why such a fetter be placed on the legislative power of the State legislature. The State legislature is free to enact laws which would have retrospective operation. Its competence to make a law for a certain past period, depends on its present legislative power and not on what it possessed at the period of time when its enactment is to have operation. We therefore do not agree with this contention.

The matter can be looked at in a different way. The 1939 Act required no assent of the President. The State Legislature was doing in 1963 what the legislature enacting the 1939 Act was supposed to have enacted and therefore its enactment was not governed by the Constitutional requirement for an Act to be enacted during the period Act LII of 1952 was in force.

Lastly, it has been urged for the petitioner that hides and skins have been declared to be of special importance in inter-State trade or commerce by s. 14 of the Central Sales Tax Act of 1956. The tax imposed by sub-section (1) of s. 2 of the Act is a tax on the sale of hides and skins in the course of inter-State trade or commerce and therefore fell within entry No. 92A of list I of Seventh Schedule and that therefore the State legislature was not competent to impose it. It could impose by virtue of entry No. 54 in List II of Seventh Schedule tax on the sale or purchase of goods subject to the provisions of entry No. 92A of List I. There is no force in this contention. The tax is imposed on the sale which took place within the State. The State legislature is competent to impose such a tax. The mere fact that the article sold in the State had been brought from outside the State does not make the sale of that article a sale in the course of inter-State trade or commerce. It is only when A, in State X, purchased through a commission agent in a State Y and receives the articles purchased through the commercial agency that the sale comes within the expression 'in the course of inter-State trade' : See State of Travancore Cochin v. Shanmugha Vilas Cashew Nut Factory [(1954) S.C.R. 53.]. (supra at p. 70).

It has been argued for the State that the Act is not affected by the provisions of Arts. 301 to 304 of the Constitution as they affect the legislative power with respect to Acts to operate in the future and not the power to enact Acts which would operate in the past. We do not consider the contention sound. The Act makes provision for a period subsequent to the commencement of the Constitution and therefore is to be subject to the provisions of the Constitution.

We therefore hold that sub-section (1) of s. 2 of the Act discriminates against imported hides and skins which were sold up to the 1st of August 1957 upto which date the tax on sale of raw hides and skins was at the rate of 3 pies per rupee or 19/16th percent. This however does not mean that the sub-section is valid with respect to the sales which took place subsequent to August 1, 1957. The sub-section being void in its provisions with respect to a certain initial period, we cannot change the provision with respect to the period as enacted to the period for which it could be valid as that would be re-writing the enactment. We have therefore to hold that sub-s. (1) of s. 2 void accordingly hold so.

In view of the provisions of sub-section (1) of s. 2 being invalid the other provisions of that section become unenforceable.

We therefore allow the petitions with costs, one hearing fee, and hold s. 2(1) of the Act 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 provisions of s. 2 of the Act.

Petitions allowed.

</html