

Deputy Commercial Tax Officer, Saidapet & Anr.

Vs

Enfield India Ltd., Co-Operative Canteen Ltd.

Civil Appeals Nos. 737 to 739 of 1966

(J. C. Shah, V. Ramaswami - I, V. Bhargava JJ)

23.11.1964

JUDGMENT

SHAH, J. -

The Enfield India Ltd. Co-operative Canteen Ltd. respondent herein was registered as a Co-operative Society under the Madras Co-operative Societies Act 6 of 1932. The object of the Society was to provide a canteen for the employees of Enfield India Ltd. The Society was assessed by the Deputy Commercial Tax Officer to pay sales tax for the years 1959-60 & 1960-61 on its turnover from refreshments supplied to its members. The respondent Society then moved in the High Court of Judicature at Madras three petitions under Art. 226 of the Constitution for orders quashing the proceedings of the Deputy Commercial Tax Officer, Saidapet assessing the Society to sales-tax in respect of its transactions. Srinivasan J., following a decision of the Madras High Court : Young Mens Indian Association (Regd.) Madras and Another v. Joint Commercial Tax Officer, Harbour Division II, Madras and Another [14 S.T.C. 1030] quashed the orders of assessment. In appeal to the High Court, the orders passed by Srinivasan J., were confirmed. With special leave, the Deputy Commercial Tax Officer has appealed to this Court.

Section 3 of the Madras General Sales Tax Act 1 of 1959 makes every dealer whose total turn-over for a year is not less than ten thousand rupees, and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, liable to pay a tax for each year at the rate of two per cent. of his taxable turnover. 'Dealer' is defined in s. 2(g) as meaning -

"any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes -

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Explanation. - A society (including a co-operative society), club or firm or an association which whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;"

Clause (n) of s. 2 defines 'sale' :

"sale" with all its grammatical variations and cognate expressions means every

transfer of the property in goods by one person to another in the course of business for cash or for deferred payment or other valuable consideration, and includes a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;

Explanation (1). - The transfer of property involved in the supply or distribution of goods by a society (including a co-operative society), club, firm, or any association to its members, for cash, or for deferred payment, or other valuable consideration, whether or not in the course of business shall be deemed to be a sale for the purposes of this Act.

Explanation (2). -

Explanation (3). -

Explanation (4). -

"Turnover" is defined in s. 2(r) and insofar as it is material it provides :

""turnover" means the aggregate amount for which goods are bought or sold, or supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided."

The High Court of Madras in the case of Young Mens' Indian Association [14 S.T.C. 1030] held that the Explanation to s. 2(g) and Explanation (1) to s. 2(n) of the Act were ultra vires the State Legislature, because they "created a fiction by which the concept of the word 'sale' was extended to include a transaction which properly speaking would not amount to sale". The Court held that within the meaning of the Act an incorporated members' club distributing refreshments to its members was not a 'dealer' and supply of food by it to its members for a price was not a 'sale', since the members of a club registered as a Company or as a Society merely utilise the services of the club for their needs and the members divide amongst themselves the total expenses. Essentially, in the view of the Court, the matter is not different from the case of a number of persons in a family purchasing jointly an article and later sharing the same amongst themselves. In such a case, it was said, there is no element of transfer of property from one to another, and the fact that the club helps its members in arranging to run a common mess will not make it the owner of the articles supplied to the members, for it is at best an agent or mandatory whose services are utilised by the members for obtaining their needs, and there is no transfer of property involved in the arrangement. The Court proceeded further to observe that the distinction between members' clubs unincorporated and incorporated is that in the former the distribution made by the club to one of its members is a release by all the members in favour of a joint owner who takes the goods, in the latter the supply of articles to a member is tantamount to delivery by an agent or trustee to the principal or beneficiary, and there is in either case no transfer of ownership by a person absolutely entitled to the property to another who acquires title thereto on such transfer.

In these appeals the Deputy Commercial Tax Officer contends that the transactions of the respondent Society are taxable and submits that the High Court was in error in holding that the Explanations to s. 2(g) and s. 2(n) are ultra vires the powers of the State Legislature. Entry 54 of the List II of the Seventh Schedule of the Constitution authorises the State Legislature to legislate on the

topic of tax on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I. This Court has consistently held that the expression "sale of goods" used in the legislative entries in the Constitution and the Government of India Act, 1935, bears the same meaning which it has in the Sale of Goods Act, 1930, and therefore the State Legislature may under Entry 54 List II legislate in respect of the series of acts beginning with an agreement of sale between parties competent to contract and resulting in transfer of property from one of the parties to the agreement to the other for a price, and matters incidental thereto, but cannot make a transaction which is not a sale within the Sale of Goods Act a sale by a statutory fiction and impose tax thereon : State of Madras v. Gannon Dunkerley & Co. Ltd. [[1959] S.C.R. 379] : New Indian Sugar Mills v. Commissioner of Sales Tax : [[1963] Supp. 2 S.C.R. 459] and Bhopal Sugar Industries v. Sales Tax Officer [[1964] 1 S.C.R. 481]. Consequently if the element of transfer of property from one person to another is lacking in any transaction, there is no sale and the Legislature cannot by treating it as a sale by a deeming clause bring it within the ambit of the taxing statute.

We are however unable to hold that the transactions of the respondent Society of supplying refreshments to its members for a price paid or promised were not taxable under the Madras General Sales Tax Act, 1959. By the definition in s. 2(g) a 'dealer' is a person who carries on the business of buying, selling, supplying or distributing goods, whether for cash, or for deferred payment, or for other valuable consideration. The expression 'business' is defined in s. 2(d) as meaning any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern. A scheme for supplying goods to its members by a Society for price may partake of the activity of the nature of adventure or concern in the nature of trade, even if the activity is not actuated by a profit motive. The respondent Society which has according to its object of incorporation made arrangements for the supply and distribution of refreshments to its members without a profit motive may be regarded as carrying on trade and would on that account fall within the definition of a 'dealer' within the meaning of s. 2(g). A Co-operative Society registered under the Madras Co-operative Societies Act 6 of 1932 is by virtue of s. 20 of that Act a body corporate with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it was constituted. Such a co-operative society which carries on the business of supplying goods to its members for cash or deferred payment falls within the definition 'dealer' in s. 2(g). We are unable to hold that by the Explanation to s. 2(g) it was intended to overstep the limits of legislative power. By the Explanation the State Legislature has merely clarified that a taxable entity will be regarded as a dealer within the meaning of the Act even though it buys, sells, supplies or distributes goods from or to its members, whether in the course of business or not : it is not intended by the Explanation to declare all transactions of the taxable entity with its members to be transactions of sale or purchase. The Explanation is a part of the definition of "dealer" and not of "sale". For the purpose of levying sales tax it was open to the Legislature to devise a definition of the word "dealer" and further to provide that certain bodies shall be deemed to be dealers within the meaning of the Act. We are unable, therefore, to agree with the High Court that the Explanation to s. 2(g) is ultra vires the State Legislature.

For turnover from a transaction to be taxable under the Act, the transaction must have four constituent elements, viz. (1) parties competent to contract; (2) mutual assent; (3) thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) price in money paid or promised. When a Co-operative Society supplies to its members for a price refreshments in the canteen maintained by it the four constituent elements of sale are normally present; the parties are competent to contract, there is mutual assent; refreshments which belonged absolutely to the Society

stand transferred to the buyer and price is either paid or promised.

There is nothing on the record of the case which shows that the Society is acting merely as an agent of its members in providing facilities for making food available to the members. From the mere fact that the Society supplies refreshments to its members only and claims to make no profit, it cannot be inferred that in preparing refreshments, and making them available to its members it is acting as an agent of the members. Nor can it be said that the Society is holding its property including refreshments prepared by it for supply to its members as a trustee for its members. A registered Society is a body corporate with power to hold property and is capable of entering into contracts. It cannot be assumed that property which it holds is property of which its members are owners. The property in law is the property of the Society. The members are undoubtedly entitled to compel the Society to act according to its constitution and to apply the property for the purposes for which it is held, but on that account the property of the Society cannot be treated as the property of the members. The Society is a person : the property in the refreshments which it supplies to its members is vested in the Society and when refreshments are supplied for a price paid or promised transfer of property in the refreshment results. In the case of an unincorporated Society, club or a firm or an association ordinarily the supply and distribution by such a Society, club, firm or an association of goods belonging to it to its members may not result in sale of the goods which are jointly held for the benefit of the members by the Society, club, firm or the association, when by virtue of the relinquishment of the common rights of the members the property stands transferred to a member in payment of a price, and the transaction may not prima facie be regarded as a 'sale' within the meaning of the Act. By providing that a transfer of property in goods from a corporate body to its members for a price, the Legislature does not over-step the limits of its authority, and it cannot on that account be held that the first Explanation to s. 2(n) is in its entirety ultra vires the State Legislature. It is, however, unnecessary in this case to say more, for, the case of the respondent Society falls within the definition of 'sale' and no assistance need be sought from the first Explanation to s. 2(n).

Reference may briefly be made to the judgment in *Trebanog Working Men's Club and Institute Ltd. v. Macdonald and Monkwearmouth Conservative Club Ltd. v. Smith* [[1940] 1 K.B. 576], on which the High Court strongly relied. In a members' club incorporated under the Industrial and Provident Societies Acts, the shareholders and the members were identical. The club purchased intoxicating liquor and supplied it from time to time to individual members for payment as in an ordinary club. The Society was convicted of selling by retail, contrary to s. 65 of the Licencing (Consolidation) Act, 1910, certain intoxicating liquor without a justices' licence. The Court of Appeal quashed the conviction holding that the incorporated society was a legal entity distinct from the members, and could act as their agents or trustees, the real interest in the liquor being in the members, and the Society was not obliged to take out a licence, for sale of liquor by retail. The principle of that case has, in our judgment, no application to the case before us. There was a long course of authorities in the Courts in England dealing with the liability of the clubs supplying intoxicating liquors to their members to obtain the justices' licence. In *Graff v. Evans* [[1882] 8 Q.B.D. 373], Graff, the manager of an unincorporated club, the property of which was vested in trustees, and the committee of management whereof arranged to supply liquor to its members at a fixed percentage above its cost, supplied liquor to a member, and he was prosecuted for selling by retail intoxicating liquor without a licence. It was held that there was no sale by retail, for the member was as much a co-owner of the liquor supplied as any other member of the club. Any member of the club was entitled to obtain liquor on payment of the price and since there was no bargain, nor any contract with the manager in respect of the liquor supplied, and the member to whom the liquor was supplied was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of

association by which he subscribed a sum to the funds of the club, and on that account he became entitled to have liquor supplied to him as a member at a certain price.

In *Metford v. Edwards* [[1915] 1 K.B. 171] a working men's club was registered under the Friendly Societies Act, 1896. It was held that liquor kept on the premises of the club by the members who are owners of the liquor and intended for consumption by the members, is distributed to the members by one of them in return for payment, is not sold by retail within the meaning of the Licencing (Consolidation) Act, 1910.

In *National Sporting Club Ltd. v. Cope* [82 L.T. 353] it was held that a member's club formed into a joint stock company, of which shares were held by persons who were not members, was guilty of breaches of s. 17 of the Beerhouse Act, 1834, and s. 19 of the Refreshment Houses Act, 1860, when in carrying on the club retail intoxicating liquors and tobacco were supplied to the members of the club. The Court held in that case that the Company was a separate legal entity from the members, and the sale of intoxicating liquors to members was not a distribution of the common property of the members among themselves. Channell J., observed at p. 354 :

"Now the law with reference to purely members' clubs may be taken to be settled, namely, that in the cases of purely members' clubs a licence is not required, that the form that is gone through in the coffee room or in other parts of the club house where refreshments are sold is in one sense not a selling of liquors so as to make the licencing laws applicable, but that it is merely a mode of distributing common property."

The question was again raised before the Court of Appeal in *Trebanog Working Men's Club and Institute Ltd. v. Macdonald* [[1940] 1 K.B. 576]. Hewart, C.J., delivering the judgment of the Court observed that the principle of the decision in *Graff v. Evans* [[1882] 8 Q.B.D. 373] applied even though the clubs before the Court were incorporated either under the Industrial and Provident Societies Acts or the Companies Act. The learned Chief Justice observed at p. 582 :

"Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquor remains, as in this case it clearly does, in the members of the club. There is no magic in this connection in the expressions "trustees" or "agent". What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not holding antagonistic to, the members of the club."

The Courts in these cases were dealing with case of quasi-criminal nature, and the substance of the transaction rather than the legal form in which it may be clothed had to be determined. It was held that if in substance the property in the liquor held by the club - whether incorporated or unincorporated - was vested in the members, when a member received and paid for it, there was no sale within the meaning of the Licensing Act, but was a transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid.

We are not dealing in this case with liability criminal or quasi-criminal. The question is one of

liability under a taxing statute and the Court in determining the liability of the Society to pay tax cannot ignore the form and look at what is called the "substance of the transaction". Ex facie, the transaction is one in which the legal owner of property transfers it to another pursuant to a contract for a price, and that transaction must be regarded as a sale. Whether by appropriate provisions in the Articles of Association or Rules, a scheme may be devised under which the goods supplied may be treated as belonging to the members of the Society, and the Society merely acts as an agent in supplying the food to its members, need not be considered in the present case. It will suffice to state that it cannot be urged as a proposition of law that when a Co-operative Society supplies to its members refreshments for a price under a scheme for distribution or supply of refreshments, the transaction can in no event be regarded as a sale of the refreshments supplied for a price.

We are not called upon in this case to decide whether an unincorporated club supplying goods for a price to its members may be regarded as selling goods to its members.

We are of the view that Explanation to s. 2(g) of the Madras General Sales Tax Act 1 of 1959 is not ultra vires the Legislature. Whether any part of the Explanation (1) of s. 2(n) is ultra vires the Legislature does not fall to be determined in this case, for, we are of the view that the transactions of the respondent Society fell within the substantive part of the definition of the expression "sale", and on that account those transactions are taxable under the Madras General Sales Tax Act 1 of 1959.

The appeals must therefore be allowed, and the petitions filed by the Society dismissed. In view of the order passed by this Court on August 12, 1965, when leave was granted to appeal to this Court, the appellant will pay costs of these appeals to the respondent. There will be one hearing fee in the three appeals.

Appeals allowed.

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