Marikar (Motors) Limited, Trivandrum

v.

Sales Tax Officer, Special Circle, Trivandrum

(Supreme Court Of India)

HON'BLE MR. JUSTICE J.C. SHAH HON'BLE MR. JUSTICE VAIDYNATHIER RAMASWAMI HON'BLE MR. JUSTICE V. BHARGAVA

Civil Appeal No. 1099 And 1100 Of 1965 | 27-09-1966

RAMASWAMI, J.

1. These two appeals are brought by special leave from the judgment of the Kerala High Court dated 30th June, 1964, in Writ Appeals Nos. 101 and 103 of 1964.

2. The appellant was dealer in cars, trucks and radios in Trivandrum and Always and other places in the State of Kerala. The appellant was registered dealer under the Kerala General Sales Tax Act, 1125. For the assessment year 1960-61, the appellant filed a return showing a net turnover of Rs. 3, 76, 554.66 taxable at 2 nP., Rs. 703.79 at 4 nP., 1, 06, 45, 113.66 at 7 nP. and Rs. 467.79 at 6 nP. After perusing the books of accounts of the appellant, the respondent issued a notice pointing out that a turnover of Rs. 33, 25, 728 had not been included in the return. The appellant replied that the said amount represented transactions of hire-purchase entered into by the appellant-company with its customers and that these transactions were not taxable under the Kerala General Sales Tax Act, 1125. Notwithstanding the objection of the appellant, the respondent proceeded to assess the appellant on a turnover inclusive of the disputed amount of Rs. 33, 25, 728. The respondent also made a levy of surcharge at 5 per cent. of the tax for the assessment year 1960-61. Similarly, for the assessment year 1961-62, the appellant filed a return showing a net turnover of Rs. 4, 49, 224.66 taxable at 2 nP., Rs. 390.47 at 4 nP., Rs. 16.62 at 6 nP. and Rs. 1, 05, 48, 247.60 at 7 nP. On perusing the books of accounts of the appellant, a notice was issued by the respondent that a turnover of Rs. 29, 71, 310.25 had not been included in the return. The appellant replied that the said amount represented transaction of hire-purchase entered into by the appellant-company with its customers and that these were not taxable under the Kerala

General Sales Tax Act, 1125. Notwithstanding this objection, the respondent proceeded to assess the appellant on a turnover inclusive of the disputed amount of Rs. 29, 71, 310.25. A levy of surcharge at 5 per cent. was also made by the respondent in the order of assessment made for the year 1961-62. The appellant thereafter applied to the Kerala High Court for the grant of a writ under Article 226 of the Constitution to quash the assessment made by the respondent of both the assessment years. The contention of the appellant was that the levy of sales tax on the hire-purchase transactions was illegal and that explanation No. 1 to section 2(j) of the Kerala General Sales Tax Act, 1125, was beyond the competence of the State Legislature. This contention was rejected by the High Court relying upon the decision of this Court in M/s. Damodar Valley Corporation v. The State of Bihar ([1961] 2 S.C.R. 522; 12 S.T.C. 102). The appellant also challenged the imposition of surcharge on the ground that the provision of Kerala Surcharge on Taxes Act, 1957, as amended by Act 12 of 1960 was discriminatory in character and violated the guarantee under Article 14 of the Constitution. This contention was also negatived by the Kerala High Court.So far as the transaction of hire-purchase was concerned, the case of the appellant was that any person proposing to enter into a transaction of hire-purchase with the appellant-company presented a hire-purchase proposal form of which the terms are reproduced in exhibit P-2. On accepting the proposal form, the appellant-entered into an agreement with the hire stipulating the conditions under which the proposal was accepted by the appellant. The conditions of the agreement were all embodied in the deed of agreement itself, marked exhibit P-3. In respect of all the transactions covered by the disputed turnover, the agreement was in the said form. The appellant relied upon clause (3) in the agreement and also clause (1-b) in the conditions and pointed out that the nature of the agreement was such that the option was with the hirer to terminate the hire-purchase agreement at any time by surrendering the vehicle. It was not open to the owner to insist that the hirer should continue to be in possession of the vehicle and to be under the obligation to pay the hire moneys payable under the agreement. Nor was it open to the appellant to compel the buyer to purchase the vehicle at the end of the hire period. Under the agreement, therefore, the option to purchase the vehicle was entirely at the discretion of the purchaser and a sale took place only when the buyer exercised his option to purchase.

3. Section 2(j) of the Kerala General Sales Tax Act, 1125, states as follows :

"(j) '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 trade or business for cash or for deferred payment or other valuable consideration and includes also transfer of property in goods involve in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;Explanation (1) - A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale."

4. The argument of the appellant is that explanation (1) to section 2(j) of the Kerala General Sales Tax Act, 1125, is beyond the legislative competence of the State Legislature, and that the assessment order made by the respondent is liable to be quashed on this account. In support of this argument learned counsel relied upon the decision of this Court in K. L. Johar & Company v. Deputy Commercial Tax Officer ([1965] 2 S.C.R. 112; 16 S.T.C. 213). The argument put forward on behalf of the appellant is well-founded and must be accepted as correct. A hire-purchase agreement has two elements : (1) the element of bailment and (2) the element of sale in the sense that it contemplates an eventual sale. The element of sale in the transaction fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and the option is exercised a sale takes place of the goods which till then had been hired. When this sale takes place it will be liable to sales tax under the Act for the taxable event under the Act is the taking place of the sale, the Act providing for a multipoint sales tax at the relevant time. As the taxable event is the sale of goods the tax can only be levied when the option is exercised after fulfilling all the terms of the hire-purchase agreement. The tax is not exigible at the time when the hire-purchase agreement is made for at that time the taxable event has not taken place. It has been pointed out by this Court in K. L. Johar & Company's case ([1965] 2 S.C.R. 112; 16 S.T.C. 213), that the State Legislature when it proceeds to legislate under Entry 48 of List I of the Seventh Schedule to the Government of India Act, 1935, or under Entry 54 of List II of the Seventh Schedule to the Constitution, can only tax a "sale" within the meaning of that word as defined in the Sale of Goods Act. The essence of a sale under the Sale of Goods Act is that the property shall pass from the seller to the buyer when the contract of sale is made except in a case of conditional sale. Hire-purchase agreements are not conditional sales, and therefore any legislation by the State Legislature making an agreement or transaction, in which property does not

pass from the seller to the buyer, a sale, would be beyond its legislative competence. The statutory provision which was challenged in K. L. Johar & Company's case ([1965] 2 S.C.R. 112; 16 S.T.C. 213), was the explanation (1) of section 2(h) of the Madras General Sales Tax Act (9 of 1939) the language of which is almost in identical terms with the explanation (1) of section 2(j) of the Kerala General Sales Tax Act, 1125. The ratio of the decision of this Court in K. L. Johar & Company's case ([1965] 2 S.C.R. 112; 16 S.T.C. 213) applies to the present case and it must, therefore, be held that explanation (1) to section 2(j) of the Kerala General Sales Tax Act, 1125, is beyond the competence of the State Legislature and is invalid.On behalf of the respondent, the Solicitor-General referred to the decision of this Court in Instalment Supply (P.) Ltd. and Another v. The Union of India and Others ([1962] 2 S.C.R. 644; 12 S.T.C. 489], but the material facts of that case are different. The question which arose for consideration in that case was the constitutional validity of section 24 of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi State which provided as follows :-

"'Sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.

Explanation 1. - A transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale."

5. It was argued that the explanation had the effect of extending the concept of "sale" to what, in law, was not a real sale, but only an incipient or inchoate sale, and that in so far as the law had extended the definition of "sale" it was unconstitutional. The argument was rejected by this Court. It was pointed out that under Article 246(4) of the Constitution it was Parliament which had the power to legislate for Part C States, that the power was untrammelled by the limitations prescribed by Article 246, clauses (2) and (3), and Entry 54 of List II, that the power of Parliament was plenary and absolute subject only to such restrictions as are imposed by the Constitution, and there was none material to the present question. It was, therefore, competent for Parliament to impose a tax on hire-purchase transactions and impose it under the name of sales tax. In

Mithan Lal v. The State of Delhi and Another ([1959] S.C.R. 445; 9 S.T.C. 417), a similar question arose whether Parliament can enact a law imposing tax on the supply of materials used in building contracts. It was held by this Court for the same reasons that it was within the competence of Parliament to impose such a tax and the decision in The State of Madras v. Gannon Dunkerley & Co. (Madras) ltd. ([1959] S.C.R. 379; 9 S.T.C. 353), was held inapplicable. That decision was given on a statute passed by the Provincial Legislature under the Government of India Act, 1935, and it was pointed out in that case that the power of the Provincial Legislature to impose a tax on sales under Entry 48 in List II so Schedule VII of the Government of India Act, 1935, did not extend to imposing a tax on the value of material in building contracts which are entire and indivisible.The second argument of the appellant was that the Kerala Surcharge on Taxes Act, 1957, as amended by Kerala Act 12 of 1960 was discriminatory in character and violated the provisions under Article 14 of the Constitution. It was stated that levy of surcharge on those whose turnover was above Rs. 30, 000 resulted in illegal discrimination against those whose turnover exceeded that amount, especially when the surcharge cannot be passed on to the consumer. It was contended that the classification was based on no intelligible criteria and there was no nexus with the objects sough to be be achieved by the Act. Section 3 of the Kerala Surcharge on Taxes Act, 1957 (Act 11 of 1957) states as follows :

"3. Levy of surcharge on sales and purchase taxes :

(1) The tax payable under the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, shall, in the case of a dealer whose turnover exceeds thirty thousand rupees in a year, be increased by a surcharge at the rate two and a half per centum of the tax payable for that year and the provisions of the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, shall, as the case may be, apply to the levy and collection of the said surcharge :

Provided that where in respect of declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956, the tax payable by such dealer under the Travancore-Cochin General Sales Tax Act, 1125, or the Madras General Sales Tax Act, 1939, together with the surcharge payable under this sub-section, exceeds two per centum of the sale or purchase price, the rate of

surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed two per centum of the sale or purchase price.(2) Notwithstanding anything contained in sub-section (1) of section 11 of the Travancore-Cochin General Sales Tax Act, 1125, or in sub-section (1) of section 8B of the Madras General Sales Tax Act, 1939, no dealer referred to in sub-section (1) shall be entitled to collect the surcharge payable under the said sub-section."

6. It is conceded that the 2 1/2 per cent. levy referred to in section 3(1) has been increased by section 2 of the Kerala Surcharge on Taxes (Amendment) Act, 1960 (Kerala Act 12 of 1960). After arguing the point for some time Mr. Niren De conceded that in the writ petitions necessary particulars with regard to challenge under Article 14 of the Constitution have not been pleaded and proper materials have not been placed before the High Court in support of this contention. Mr. Niren De ultimately said that he did not wish to press this argument in the present case.

7. For the reasons already given, we consider that the orders of assessment of sales tax made by the respondent for the two assessment years 1960-61 and 1961-62 are illegal in so far as the hire-purchase transactions are included in the computation of the taxable turnover of the appellant. We accordingly hold that these appeals should be allowed and a writ in the nature of certiorari should be granted for quashing the orders of assessment made by the respondent for the two assessment years in question and that a writ in the nature of mandamus should be issued ordering the respondent to make fresh assessments in accordance with law. There will be no order as to costs of these appeals.

8. Appeals allowed.