Tika Ram & Sons Ltd. Etc.

Vs

The Commissioner of Sales Tax U.P., Lucknow

Civil Appeals Nos. 1682 to 1691 of 1967

(J. C. Shah, V. Ramaswami – I, G. K. Mitter JJ)

22.03.1968

JUDGMENT

RAMASWAMI, J.-

These appeals are brought, by special leave from the judgment of the Allahabad High Court dated November 30, 1962 in Miscellaneous Sales Tax Reference No. 144 of 1958 and other connected references.

The appellants are manufacturers and dealers of oil in the Province of Uttar Pradesh and they have their own depots outside the Province. For the financial year 1948-49 and the subsequent period from April 1, 1949 to January 25, 1950 the appellants had sent their goods to their depots outside the Province of Uttar Pradesh, for example, to Calcutta in the State of West Bengal before any contract of sale in respect of the goods was made. After the goods had reached the depots outside the Province of Uttar Pradesh, they were sold to various parties. The Sales Tax Officers of Uttar Pradesh assessed the outside sales of all the appellants to sales tax under the Uttar Pradesh Sales Tax Act 15 of 1948, hereinafter called the 'Act'. It appears that this category of sales roughly amounted to more than one crore of rupees in the case of the appellants and the sales tax was levied at the rate of 3 pies per rupee subject to a rebate under s. 5 of the Act, and certain other adjustments. Aggrieved by the assessments, the appellants took the matter in appeal under s. 9 of the Act. The appeals were heard by various Appellate Officers called Judge, Appeals. Some of the Appellate Officers held that the assessment was properly made, while some others took the view that the assessments made for outside sales were improper and the assessment order should be quashed. The parties aggrieved by the appellate orders filed revisions before the revising authority called Judge, Revisions under s. 10 of the Act. By his judgment dated July 10, 1957 the Judge, Revisions held that the out of State sales would be taxable (1) if the goods were in existence in the Province of Uttar Pradesh at the time when the contracts for sale were made, and (2) if the goods were manufactured after the contracts for sale were made in respect of them and were subsequently appropriated towards those contracts. He further held that sales of goods which were not only manufactured but also exported before any contracts for sale were made would not be taxable. Under s. 11 of the Act, the Commissioner of Sales Tax applied to the Revising Authority for making a reference of the case to the High Court. By its order dated January 23, 1958 the Revising Authority drew up a statement of the case and referred to the Allahabad High Court the following two questions of law for determination :

> "(1) Whether clause (ii) of the Explanation II to Section 2 (h) U.P. Sales Tax Act provides for taxing sales in which goods were manufactured or produced in U.P. but for which the contract for sale was made after the goods had left the State ?

(2) If the reply to the above is in affirmative, whether this provision is ultra vires ?"

But its judgment dated November 30, 1962, the High Court answered the first question in the affirmative and the second question in the negative.

It is necessary at this stage to refer to the relevant statutory provisions which were in force during the material period. Section 99 of the Government of India Act, 1935 authorised a Provincial Legislature, subject to the provisions of that Act, to make laws for the Province or for any part thereof. Section 100(3) of that Act provided that, subject to the two preceding sub-sections, the Provincial Legislature had, and the Federal Legislature had not, power to make laws for any Province or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule to that Act. The matter enumerated in Entry 48 in List II was "Taxes on the sale of goods and on advertisement." It was in exercise of this legislative power that the Uttar Pradesh State Legislature enacted Act 15 of 1948 which came into force on April 1, 1948. Section 3 of the Act provides as follows :

> "3. Liability to tax under the Act - Subject to the provisions of this Act, every dealer shall pay on turn-over in each assessment year a tax at the rate of 3 pies a rupee :
>
> Provided that -
>
> (1) the Provincial Government may, by notification in the official Gazette, reduce the rate of tax on the turnover of any dealer or class of dealers or on the turnover in respect of any goods or class of goods;
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> (ii) a dealer whose turnover in the previous year is less than Rs. 12,000/- or such larger amount as may be prescribed shall not be liable to pay the tax under this Act for the assessment year;
>
> # ....."##

Section 2(c) defines a "dealer" to mean "any person or association of persons carrying on the business of baying or selling and supplying goods in the United Provinces, whether for commission, remuneration or otherwise and includes any firm or Hindu joint family and any society, club or association which sells or supplies goods to its members but does not include any department of the Provincial Government or of the Indian Union (hereinafter called the 'Dominion Government')". Section 2(h) is to the following effect :

> "'sale' means, with its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration and includes forward contracts but does not include a mortgage, hypothecation, charge or pledge :
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> # ....."##

Explanation II - Notwithstanding anything in the Indian Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods -

> (i) which are actually in the United Provinces at the time when in respect thereof, the contract of sale as defined in section 4 of that Act is made,

(ii) or which are produced or manufactured in the United Provinces by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in the United Provinces.

....."##

Section 10 states :

"Power of revision - (1) The Provincial Government shall appoint as Revising Authority a person qualified under sub-section (3) of section 220 of the Government of India Act, 1935, for appointment as Judge of a High Court.

(2) The appellate authority appointed under section 9 shall be under the superintendence and control of the Revising Authority.

(3) The Revising Authority may in its discretion at any time suo motu or on being moved by the Commissioner of Sales Tax or on the application of any person aggrieved, call for and examine the road of any order made or proceedings recorded by any appellate or assessing authority under this Act for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such proceedings and may pass such order as he thinks fit.

(4) The Revising Authority shall not pass any order under sub-section (3) adversely affecting any person unless an opportunity has been given to such person to be heard.

(5) If the amount of assessment is reduced by the Revising Authority under sub-section (3) it shall order the excess amount of tax if already realized to be refunded."

Section 11 is to the following effect :

"Statement of case to High Court - (1) Within sixty days from the passing by the Revising Authority of any order under sub-section (3) of section 9 or sub-section (1) of section 10 affecting any liability of any dealer to pay tax under this Act, such dealer may, by application in writing accompanied by a fee of one hundred rupees, require the Revising Authority to refer to the High Court any question of law arising out of such order.

(2) If, for reasons to be recorded in writing, the Revising Authority refuses to make such reference, the applicant may, within thirty days of such refusal, either -

(a) withdraw his application (and if he does so, the fee shall be refunded), or

(b) apply to the High Court against such refusal.

(3) If upon the receipt of an application under clause (b) of sub-section (2), the High Court is not satisfied that such refusal was justified, it may require the Revising Authority to state a case and refer it to the High Court and on receipt of such requisition the Revising Authority shall state and refer the case accordingly.

(4) If the High Court is not satisfied that the statement in a case referred under this

> section is sufficient to enable it to determine the question raised thereby, it may refer the case back to the Revising Authority to make such additions thereto or alterations therein as the High Court may direct in that behalf.
>
> #....."##

By the Amending Act of 1954 (U.P. Act VIII of 1954) which came into force on April 1, 1954 the following provisions were substituted in place of sub-sections (1), (3) and (4) :-

> "(1) Within one hundred and twenty days from they date of service of the order under sub-section (3) of section 10, the person aggrieved, may, by application in writing..... require the Revising Authority to refer to the High Court any question of law arising out of such order.....
>
> (3) The provisions of sub-section (1) shall also be applicable to the Commissioner of Sales Tax with the modification that it shall not be necessary for him to deposit any fee.
>
> (4) If on any application being made under sub-section (1) or (3) the Revising Authority refuses to state the case..... the person aggrieved or the Commissioner of Sales Tax as the case may be, may..... apply to the High Court....."

It was argued by Mr. Chagla in the first place that cl. (ii) of Explanation II to s. 2(h) of the Act means that the goods should have been manufactured and produced in Uttar Pradesh for sale to the person who had contracted to buy them. In other words, there must be a contract for the sale before manufacture or produce. It was pointed out that in the present case the contract was entered into after the goods were manufactured and exported out of Uttar Pradesh. It was contended that as a matter of construction Explanation II does not cover these sales and the deeming provision will not make the appellants liable to pay sales-tax in regard to such sales. We are unable to accept this argument as correct. There is nothing in the language or context of Explanation II to suggest that the goods should be produced or manufactured in Uttar Pradesh after the contracts for sale had been entered into. There is hence no warrant for the argument that for attracting the tax liability the goods must have been manufactured or produced after and not before the agreement for sale. In other words, it is only necessary for the application of Explanation II that the goods must have been sold by the person who produced or manufactured them but there is no requirement that he must have manufactured or produced them after the agreement for sale. It is admitted position in these appeals that the goods were manufactured or produced in Uttar Pradesh by the appellants carrying on business in Uttar Pradesh in those goods and therefore the appellants are liable to pay the tax on their sales irrespective of where and when the contracts for sale were entered into and also irrespective of the fact that the contracts were entered into after the goods had been exported out of Uttar Pradesh. We accordingly hold that the first question was rightly answered by the High Court.

We proceed to consider the next, and more important, question arising in these appeals, namely, whether the deeming provision contained in s. 2(h) Explanation II(ii) of the Act was ultra vires the Government of India Act, 1935. It was argued by Mr. Chagla that the doctrine of nexus was not applicable to sales-tax legislation, because such legislation was concerned with the tax on the transaction of sale, that is to say, a completed sale and to break up a sale into its competent parts and to take one or more such parts and to apply the theory to it would mean that the State would be

entitled to impose tax on one or more of the ingredients or constituent elements of the transaction of sale which by itself will not amount to a sale. An identical question has been the subject-matter of consideration by this Court in The Tata Iron & Steel Co., Ltd. v. The State of Bihar [[1958] S.C.R. 1355.]. It was held in that case that the provisions of s. 4(1) read with s. 2(g) second proviso, of the Bihar Sales Tax Act, 1947 as amended by the Bihar Sales Tax Amendment Act, 1949 were within the legislative competency of the Provincial Legislature of Bihar. The second proviso added by the amending Act did not extend the meaning of the expression "sale" so as to include a contract of sale : what it actually did was to lay down certain circumstances in which a sale, although completed elsewhere, was to be deemed to have taken place in Bihar. The circumstances mentioned in the proviso to s. 2(g) of the Bihar Sales Act, namely, the presence of the goods in Bihar at the date of the agreement of sale or their production or manufacture there must be held to constitute a sufficient nexus between the taxing Province and the sale wherever that might take place. It is manifest that a transaction of sale is a composite transaction and consists of legal, ingredients like agreement of sale, passing of title and delivery of goods but it is not necessary for the purpose of legislative jurisdiction that all legal ingredients of sale or even the transfer of title should have taken place inside the Province. It is sufficient if there is a proper territorial nexus or connection between the taxing authority and the transaction sought to be taxed. The fact that the goods are manufactured in the Province constitutes a real and pertinent nexus or connection which confers jurisdiction upon the Provincial Legislature to impose the tax. In dealing with the question whether the production or manufacture of goods constituted a sufficient nexus to the subject-matter of taxation, S. R. Das, C.J., observed as follows :

> "For the purpose of the present case it is sufficient to state that in a sale of goods the goods must of necessity play an important part, for it is the goods in which, as a result of the sale, the property will pass. In our view the presence of the goods at the date of the agreement for sale in the taxing State or the production or manufacture in that State of goods the property wherein eventually passed as a result of the sale whereever that might have taken place, constituted a sufficient nexus between the taxing State and the sale. In the first case the goods are actually within the State at the date of the agreement for sale and the property in those goods will generally pass within the State when they are ascertained by appropriation by the seller with the assent of the purchaser and delivered to the purchaser or his agent. Even if the property in those goods passes outside the State the ultimate sale relates to those very goods. In the second case the goods, wherein the title passes eventually outside the State, are produced or manufactured in Bihar and the sale wherever that takes place is by the same person who produced or manufactured the same in Bihar. The producer or manufacturer gets his sale price in respect of goods which were in Bihar at the date when the important event of agreement for sale was made or which were produced or manufactured in Bihar. These are relevant facts on which the State could well fasten its tax."

The principle of this decision was reiterated by this Court in a subsequent case - Bharat Sugar Mills Ltd. v. The State of Bihar [11 S.T.C. 793.]. In The Tata Iron & Steel Co. Ltd. v. The State of Bihar [[1958] S.C.R. 1355.], the course of dealing between the manufacturers and the purchasers was described as follows :

> "The intending purchaser has to apply for a permit to the Iron and Steel Controller at Calcutta, who forwards the requisition to the Chief Sales Officer of the assessee working in Calcutta. The Chief Sales Officer thereafter makes a 'works order' and

> forwards it to Jamshedpur. The 'works order' mentions the complete specification of the goods required. After the receipt of the 'works order' the Jamshedpur factory initiates a 'rolling' or 'manufacturing' programme. After the goods are manufactured, the Jamshedpur factory sends the invoice to the Controller of Accounts who prepares the forwarding notes, and on the basis of these forwarding notes, railway receipts are prepared. The goods are loaded in the wagons at Jamshedpur and despatched to various stations, but the consignee in the railway receipt is the assessee itself and the freight also is paid by the assessee. The railway receipts are sent either to the branch offices of the assessee or to its bankers, and after the purchaser pays the amount of consideration, the railway receipt is delivered to him. These facts are admitted and the correctness of these facts are not disputed by the State of Bihar."

In our opinion, the ratio of this decision applies to the present case and it must be accordingly held that Explanation II to s. 2(h) of the Act is not ultra vires as being outside the legislative competence of the State of Uttar Pradesh.

Reference was made in the course of argument to the recent decision of this Court in K. S. Venkataraman & Co. v. State of Madras [[1966] 2 S.C.R. 229.] in which it was held by the majority judgment that an authority created by a statute cannot question the vires of the statute or any of the provisions thereof under which it functions. The authority must act under the Act and not outside it and if it acts on the basis of a provision of that statute which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such on order made outside the Act would lie in a civil court. In this context it was pointed out by the majority judgment that the reasoning of the Judicial Committee in Raleigh Investment Co. [74 I.A. 50.] case was based upon the assumption that the question of ultra vires can be canvassed and finally decided through the machinery provided under the Income-tax Act. The Judicial Committee held that s. 67 of the Income-tax Act, 1922 was a bar to the maintainability of the suit. The argument on behalf of the assessee in that case was that an assessment was not an assessment "made under the Act" if the assessment gave effect to a provision which was ultra vires the Indian Legislature; that in law such a provision, being a nullity, was nonexistent; and that an assessment justifiable in whole or in part by reference to, or by such a provision was more aptly described as an assessment not made under the Act than as an assessment made under the Act. The argument was negatived by the Judicial Committee for the reason that the circumstance that the assessing officer had taken into account an ultra vires provision of the Act was immaterial in determining whether the assessment was "made under the Act". The main reason that persuaded the Judicial Committee to accept the construction they placed on s. 67 of the Income-tax Act may be stated in their own words as follows :

> "The absence of such machinery would greatly assist the appellant on the question of construction and, indeed, it may be added that, if there were no such machinery and if the section affected to preclude the High Court in its ordinary civil jurisdiction from considering a point of ultra vires, there would be a serious question whether the opening part of the section, so far as it debarred the question of ultra vires being debated fell within the competence of the legislature."

It was held by this Court in K. S. Venkataraman & Co. v. State of Madras [[1966] 2 S.C.R. 229.] that the assumption underlying the reasoning of the Judicial Committee was not correct and it was not open to the Income-tax Officer the Appellate Assistant Commissioner and the Appellate Tribunal to decide any question as to the ultra vires character of any provision of the Income-tax Act. In other words, the question of ultra vires could not be deemed to arise out of the Tribunal's

order and if an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the objection or to decide upon it. The High Court also cannot possibly give any decision on the question of ultra vires, because its jurisdiction under s. 66 is a special advisory jurisdiction and its scope is strictly limited. On behalf of the appellants it was suggested that in the present case the Revising Authority under the Act cannot, on a similar line of reasoning, refer to the High Court any question regarding the constitutional validity of Explanation II of s. 2(h) of the Act. It was, however, pointed out on behalf of the respondents that in a number of cases in which proceedings relating to taxation have reached the High Courts by way of a reference, appeal or revision, the question of constitutional validity of the statute under which the authority functioned was raised, entertained and decided. For instance, in Tata Iron & Steel Co. Ltd. v. State of Bihar [[1958] S.C.R. 1355.] a reference was made by the Board of Revenue raising questions as to the validity of certain provisions of the Bihar Sales-tax Act and decided by the High Court, and ultimately by this Court. Similarly, in Sardar Baldev Singh v. C.I. T., Delhi & Ajmer [[1961] 1 S.C.R. 482.] in an appeal from the order of the Income-tax Appellate Tribunal with special leave, the constitutional validity of s. 23A of the Indian Income-tax Act, 1922 was permitted to be challenged. Again in Navinchandra Mafatlal v. The C.I.T., Bombay City [[1955] 1 S.C.R 829.] in a reference under s. 66(1) of the Indian Income-tax Act, 1922 a question as to the vires of s. 12-B of the Income-tax Act was raised before the Income-tax Appellate Tribunal and was referred to the Bombay High Court. This Court in appeal from the opinion expressed by the High Court on the reference also considered that question. Also, in Gannon Dunkerley & Co. v. State of Madras [I.L.R. [1955] Mad. 832.], the proceeding reached the High Court of Madras in a revision petition under s. 12-B of the Madras General Sales Tax Act, 1939 and the High Court entertained the plea of ultra vires and decided it in favour of the tax-payer.

It is, however, not necessary in the present case for us to decide the question as to whether the principle laid down in K. S. Venkataraman's case [[1966] 2 S.C.R. 229.] is applicable. The reason is that the appellants did not challenge the jurisdiction of the High Court to examine the question of law regarding the constitutional validity of Explanation II to s. 2(h) of the Act. Nor was any such challenge made in the Special Leave Petition to this Court or in the statement of the case. On the contrary, the appellant has itself applied to the Judge, Revisions under s. 10 of the Act contending the Explanation II to s. 2(h) was ultra vires. It is not therefore open to the appellants to deny the jurisdiction of the Revisional Authority to decide the question or to challenge the jurisdiction of the High Court to examine the question of law referred to it under s. 11 of the Act and to pronounce upon the constitutional validity of the impugned section. In other words, it must be taken that the appellants had voluntarily submitted to the jurisdiction of the Revisional Authority and of the High Court on the matter in issue and having submitted to the jurisdiction and having taken the chance of judgment in its favour, it is not right that the appellants should take exception to the jurisdiction of the High Court when the judgment has gone against it. We cannot therefore permit the appellants to canvass in this Court for the first time the question whether is was competent for the High Court to decide the question of law referred to it under s. 11 of the Act. We accordingly reject the argument of the appellants on this aspect of the case.

It was lastly submitted by Mr. Chagla that a reference to the High Court under s. 11 of the Act at the instance of the Commissioner of Sales-tax was incompetent as the Commissioner was neither a 'dealer' nor 'a person aggrieved' within the meaning of the section as it originally stood, and the amendment effected in sub-s. (3) of s. 11 by U.P. Sales-tax Act 8 of 1954 which came into force on April 1, 1954 was not retrospective in character and could not apply to proceedings which had been initiated earlier before Sales-tax authorities as well as before the Revising Authority. It was pointed out that the appellate order was made on January 4, 1952 and the revision application was filed

before the amending Act of 1954 came into force. It further appears that the revision application was disposed of on July 8, 1957 by the Revising Authority. The contention put forward on behalf of the appellants was that the Commissioner has no power to apply for a reference at the time the appellants had made the application for revision. It was conceded by Mr. Chagla that at the time the Commissioner applied for a reference under s. 11 of the Act the amending Act 1954 had already come into force and under the amended section the Commissioner was empowered to ask for a reference. The point taken was that the material date was the date on which the appellants made the application for revision and not the date on which the application was actually decided by the Revising Authority. We are unable to accept this argument as correct. The right to apply for a reference is conferred upon a person aggrieved by an order passed under s. 10 and this right exists regardless of when the application for revision was made. Only the existence of an order under s. 10 is required for the accrual of the right to make an application for a reference. It was suggested by Mr. Chagla that the Commissioner did not exist when the appellants had made the application for revision. But the right did exist on the date on which the Commissioner applied for a reference and there is nothing in the language or context of s. 11 of suggest that the Commissioner could exercise the right only if it existed on the date on which the application for revision had been made. On behalf of the appellants Mr. Chagla referred to the well-recognised rule that a statute should be interpreted, as far as possible, so as to respect vested rights. But this rule has no application to the present case for we do not think that amendment of s. 11 of the Act by enabling the Commissioner also to ask for a reference of a question to the High Court alters any vested or substantive right of the assessee. On the contrary, we consider that the amendment is merely a procedural matter and the present case falls within the general principle that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of courts. For "it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." (Gardner v. Lucas) [[1878] 3 A.C. 582, 603.]. We are accordingly of the opinion that Mr. Chagle is unable to make good his argument on this aspect of the case.

For these reasons we hold that there is no merit in these appeals which are accordingly dismissed with costs - there will be one hearing fee.

Appeals dismissed.##

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