Messrs. Kurapati Venkatasatyanarayana and Others

Vs

State of Andhra Pradesh

Civil Appeal No. 1451 of 1968

(CJI J. C. Shah, A. N. Grover, V. Ramswami-I, J)

01.08.1969

JUDGMENT

RAMASWAMI, J. -

1. This appeal is brought by certificate from the judgment of the High Court of Andhra Pradesh, dated March 11, 1965 in A.S. Nos. 93 and 169 of 1957.

2. The appellant was a firm of dealers in pulses at Vijayawada. It was sending pulses like green gram and black gram to other States, viz : Bombay, Bengal, Madras and Kerala by rail in the course of their business. The consignments were addressed to 'self' and the railway receipts were endorsed in favour of Banks for delivery against payments. The purchasers obtained the railway receipts after payments and took delivery of the goods. the total turnover of the business of the appellant for the year 1949-50 was Rs. 17,05,144-2-2. Of the said turnover a sum of Rs. 3,61,442-7-3 represented the turnover of sales effected outside the then Madras State. For the assessment year 1949-50 the Deputy Commercial Tax Officer collected sales tax on the total turnover without exempting the value of the sales effected outside the State. The appellant was permitted to pay sales tax under Rule 12 of the Madras General Sales Tax (Turnover and Assessment) Rules. The appellant submitted monthly returns and paid sales tax without claiming any such exemption till the end of January, 1950. But in the returns for the months of February and March, 1950, the appellant claimed exemption on sales effected outside the State. The appellant submitted a consolidated return Ex. A-18 to the Deputy Commercial Tax Officer on March 30, 1950 claiming exemption in respect of a sum of Rs. 10,37,334-7-9 being the value of the sales effected outside the State for the period commencing from April 1, 1949 and ending January 31, 1950. The Deputy Commercial Tax Officer fixed the taxable turnover of the appellant at Rs. 17,05,144-2-2 and issued a notice Ex. A-23, dated October 24, 1950 to show cause why the appellant should not be assessed accordingly. The appellant was thereafter held liable to pay tax amounting to Rs. 26,642-14-0 on a net turnover of Rs. 17,05,144-2-2. The appellant preferred an appeal to the Commercial Tax Officer and a revision petition to the Board of Revenue, Madras but was unsuccessful. The appellant, therefore, brought a suit for the recovery of Rs. 21,270-13-0 being the amount of tax illegally collected from him together with interest, contending that the sales effected outside the State could not be taxed under Article 285(1)(a) of the Constitution of India. The State of Madras contested the suit on the ground that the sales were taxable as they fell within the purview of Explanation 2 to Section 2(h) of the Madras General Sales Tax Act, 1939 (hereinafter referred to as the Act). The Subordinate Judge held that for the period from April 1, 1949 to January 25, 1950 the appellant was not entitled to impeach the assessment on turnover relating to sales outside the State. As regards the period from March 26, 1950 to March 31, 1950 the Subordinate Judge took the view that the part of the turnover relating to outside sales was not liable to sales-tax but as there was a single order of assessment for

the entire period the entire assessment was illegal. Against the judgment of the Subordinate Judge both the appellant and the respondent filed appeals A.S. No. 93 of 1957 and A.S. No. 169 of 1957 to the High Court of Andhra Pradesh. But its order, dated April 18, 1960 in Appeal No. 169 of 1957 the High Court called for a finding from the trial court as to whether the appellant was able to prove the facts entitling him to invoke the explanation to Article 286(1)(a). By its order dated July 21, 1962 the trial court submitted a finding to the effect that in view of the decision of the Supreme Court in India Copper Corporation Ltd. v. The State of Bihar (12 STC 56) the burden of proof was not on the appellant and that the finding will have to be given in its favour. But by its order, dated March 5, 1963 the High Court directed the Subordinate Judge to record a finding after considering the evidence adduced by the appellant as to whether the goods in question were delivered for consumption within the delivery States. By its order dated March 22, 1963, the trial court, after considering the evidence given by the appellant's witnesses came to the conclusion within the delivery that the deliveries were not made for purposes of consumption within the delivery States only. The High Court by a common judgment, dated March 11, 1965 in A.S. Nos. 93 and 169 of 1957 held that the appellant could not claim the benefit under Article 286(1)(a) of the Constitution in the absence of evidence as to how the wholesalers disposed of the goods after obtaining delivery and therefore the entire turnover for the year 1949-50 would be assessable to tax. In the result A.S. No. 168 of 1957 filed by the respondent was allowed and A.S. No. 93 of 1957 filed by the appellant was dismissed.

3. The Madras General Sales Tax Act, 1939 was enacted in exercise of the legislative authority conferred upon the Provincial Legislatures by Entry 48 of List II, read with Section 100(3) of the Government of India Act, 1935. The explanation to Section 2(h) of this Act is as follows :

> "Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 the Sale or purchase of any goods shall be deemed, for the purpose of this Act, to have taken place in this province, wherever the contract of sale or purchase might have been made.
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> (a) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made or
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> (b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made."

Under Entry 48 of List II of the Government of India Act, 1935 the Provincial Legislatures could tax sales by selecting some fact or circumstance which provided a territorial nexus with the taxing power of the State even if the property in the goods sold passed outside the Province or the delivery under the contract of sale took place outside the Province. Legislation taxing sales depending solely upon the existence of a nexus, such as production or manufacture of the goods, or presence of the goods in the Province at the date of the contract of sale, between the sale and the legislating Province could competently be enacted under the Government of India Act, 1935. (See Tata Iron and Steel Co. Ltd. v. The State of Bihar (1958 SCR 1355) and Poppatlal Shah v. The State of Madras. (1953 SCR 677).

4. By Article 286 of the Constitution certain fetters were placed upon the legislative powers of the States as follows :

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place -

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation. - For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) 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."

Therefore, by incorporating Section 22 of the Madras Act, read with Article 286, notwithstanding the amplitude of the power otherwise granted by the charging section read with the definition of 'sale', a cumulative fetter of triple dimension was imposed upon the taxing power of the State. The Legislature of the Madras State could not since January 26, 1950, levy a tax on sale of goods taking place outside the State or in the course of import of the goods into, or export of goods out of, the territory of India, or on sale of any goods where such sale took place in the course of inter-State trade or commerce. By the explanation to Article 286(1)(a) which is incorporated by Section 22 of the Madras Act a sale is deemed to take place in the State in which the goods are actually delivered as a direct result of such sale for the purpose of consumption in that State even though under the law relating to sale of goods the property in the goods has by reason of such sale passed in another State. In the State of Bombay and Another v. The United Motors (India) Ltd. (1953 SCR 1069) it was held that since the enactment of Article 286(1)(a) a sale described in the explanation which may for convenience be called an "Explanation sale" is taxable by that State alone in which the goods sold are actually delivered as a direct result of sale for the purpose of consumption in that State.

5. With a view to impose restriction on the taxing power of the States under the pre-Constitution statutes, amendments were made in those statutes by the Adaptation of Laws Order. As regards the Madras Act the President issued on July 2, 1952, the Fourth Amendment inserting a new section,

Section 22__ in that Act. It runs as follows : "Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place - (a) (i) outside the State of Madras, or (ii) in the course of import of the goods into the territory of India or of the export of the goods out of such territory, or (b) except in so far as Parliament may by law otherwise provide, after the 31st March, 1951, in the course inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.

> Explanation. - For the purposes of clause (a)(i) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

By this amendment the same restrictions were engrafted on the pre-Constitution statutes as were imposed by Article 286 of the Constitution upon post-Constitution statutes.

6. As regards the sales for the period from April, 1949 to January 25, 1950 it was admitted before the Deputy Commercial Tax Officer that the goods were actually in the Madras State at the time the contract of sale was concluded. It was for this reason that the Deputy Commercial Tax Officer negatived the claim which the appellant made in respect of those sales. It appears that in the trial court the appellant challenged the constitutional validity of explanation to Section 2(h) of the Act. But in view of the decision of this Court in the Tata Iron & Steel Co.'s case (supra) and Poppatlal Shah's case (supra) counsel on behalf of the appellant did not seriously dispute the validity of the assessment in regard to sales from April 1, 1949 to January 25, 1950.

7. With regard to the period from January 26, 1950 to March 31, 1950 the contention of the appellant is that the High Court was in error in holding that the burden of proof was on the appellant to show that there was not only delivery of goods for consumption within the delivery States but there was actual consumption of the goods in those States. In our opinion the argument is well-founded and must be accepted as correct. In India Copper Corporation's case (supra) it was pointed out by this Court that if the goods were as a direct result of a sale delivered outside the State of Bihar for the purpose of consumption in the State of first delivery, the assessee would be entitled to the exemption from sales-tax by virtue of the explanation to Article 286(1)(a) of the Constitution and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

8. In the present case the Subordinate Judge has, upon a consideration of the evidence adduced by the parties, stated in his report dated June 27, 1962 that the intention of the appellant was that the sale and delivery should be for the purpose of consumption in the delivery States. It is true that in his subsequent report, dated March 22, 1963, the Subordinate Judge gave a different finding. But it is obvious that the subsequent report of the Subordinate Judge is vitiated because the principle laid down by this Court in Tata Iron and Steel Co.'s case (supra) has not been taken into account. Having regard to the evidence adduced by the appellant in this case we are satisfied and hence that part of the turnover which related to sale from January 26, 1950 to March 31, 1950 was not liable to sales tax and the levy of sales tax from the appellant to this extent is illegal.

9. The next question arising in this appeal is whether the assessment order of the Deputy Commercial Tax Officer for the year 1940-50 is illegal in its entirety notwithstanding the fact that the State Government had a right to levy sales tax on outside sales which were effected prior to

January 26, 1950. It was argued for the appellant that the assessment must be treated as one and indivisible and if a part of the assessment is illegal the entire assessment must be deemed to be infected and treated as invalid. In support of this argument reference was made to the decision of this Court in Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax (6 STC 627 at 637) in which this Court observed as follows :

> "The necessity for doing so is, however, obviated by reason of the fact that the assessment is one composite whole relating to the pre-Constitution as well as the post-Constitution periods and is invalid in toto. There; is authority for the proposition that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it if certain items of property which by virtue of a provision of law were expressly exempted from taxation renders the assessment invalid in toto."

The Court cited with approval a passage from the judgment of the Judicial Committee in Bennett & White (Calgary) Ltd. v. Municipal District of Sagar City No. 5. ((1951) AC 736 at p. 816).

> "When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissible as 'de minimis') is on any view not assessable and wrongly included it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In Montreal Light, Heat & Power Consolidated v. City of Westmount ((1926) SCR (Can) 515), the Court (see especially per Anglin, C.J.) in these conditions held that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid in toto."

Applying the principle to the special facts and circumstances of the case following the principle from the facts of that case the Court set aside the orders of assessment and directed that the case should be remanded to the Assessment Officer for re-assessment of the appellants in accordance with law. The same principle was applied but with a different result in the later case the State of Jammu & Kashmir v. Caltex (India) Ltd., (17 STC 612) in which the question arose as regards the validity of an assessment of sales tax of all retail sales of motor spirit. The Petrol Taxation Officer assessed the respondent to pay sales tax for the period January 1955 to May, 1959 under Section 3 of the Jammu and Kashmir Motor Spirit (Taxation of Sales) Act, 2005. The respondent applied under Section 103 of the Constitution of Jammu & Kashmir and a single Judge of the High Court held that the respondent was liable to pay sales tax only in respect of the sales which took place during the period January to September, 1955 and issued a writ restraining the appellants from levying tax for the period October, 1955 to May, 1959. On appeal a Division Bench of the High Court quashed the assessment for the entire period. On appeal to this Court it was held that though there was one order of assessment for the period January 1, 1955 to May 1959 the assessment could be split up and dissected and the items of sale could be separated and taxed for different periods. It was pointed out that the sales tax was imposed in the ultimate analysis on receipts from individual sales or purchase of goods effected during the entire period, and, therefore, a writ of mandamus could be issued directing the appellant not to realise sales tax with regard to transaction of sale during the period from September 7, 1955 to May, 1959.

10. A similar question arose for determination in an American case (Frank Ratterman v. Western Union Telegraph Co.). (127 US 411). The question in that case was "whether a single tax, assessed under the Revised Statutes of Ohio, Section 2778, upon the receipts of a telegraph company which receipts were derived partly from inter-State commerce and partly from commerce within the State but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that the said receipts were derived from inter-State commerce". It was held unanimously by the Supreme Court of the United States in that case that the assessment was not wholly invalid but it was invalid only in proportion to the extent that such receipts were derived from inter-State commerce. It was observed that where the subjects of taxation can be separated so that that which arises from inter-State commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax on inter-State commerce, while permitting the State to collect that upon commerce wholly within its own territory. The principle of this case has been consistently followed in American cases : see Bowman v. Continental Company (250 US 642). This case has been cited with approval by this Court in The State of Bombay v. The United Motors (India) Ltd. (1953 SCR 1069 at 1097). wherein it was observed that the same principle should be applied in dealing with taxing statutes in this country also.

11. In the present case we are of opinion that though there is a single order of assessment for the period from April 1, 1949, to March 31, 1950, the assessment could be split up and dissected and the items of sale separated and taxed for different periods. It is quite easy in this case to ascertain the turnover of the appellant for the pre-Constitution and post-Constitution periods for these figures are furnished in the plaint by the appellant himself. It is open to the Court in these circumstances to sever the illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void. For these reasons we hold that the appellant should be granted a declaration that the order of assessment made by the Deputy Commercial Tax Officer for the year 1949-50 is invalid to the extent that the levy of sales-tax is made on sales relating to goods which were delivered for the purpose of consumption outside the State for the period from January 26, 1950 to March 31, 1950. The result is that the appellant is entitled to a refund of the amount illegally collected from him for the period from January 26, 1950 to March 31, 1950. The trial court has already found that the appellant is entitled to claim exemption with regard to turnover for this period to the extent of Rs. 3,34,107-15-6 and the tax payable on this sum is Rs. 5,220-7-0. The appellant is, therefore, entitled to a decree for the refund of Rs. 5,220-7-0. The appellant is also entitled to interest at 6% per annum from the date of suit till realisation of this amount.

12. For these reasons we allow this appeal and set aside the judgment of the Andhra Pradesh High Court, dated March 11, 1965 in A.S. Nos. 93 and 169 of 1957 and allow this appeal to the extent indicated above.

There will be no order with regard to costs.

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