

State of U.P. and Anr.

Vs

M/s. Annapurna Biscuit Mfg. Company

Civil Appeal No. 1716 (NT) of 1972

(K.S. Hegde, H.R. Khanna JJ)

16.04.1973

JUDGEMENT

KHANNA, J. -

1. This appeal by certificate is directed against the judgment of Allahabad High Court whereby that court held the provisions of section 29A of the U.P. Sales tax Act (Act 15 of 1948) hereinafter referred to as the principal Act) inserted by section 15 of the U.P. Sales Tax (Amendment and Validation) Act, 1971 (Amendment Act of 1971) hereinafter referred to as the (Amending Act) as well as section 17 of the Amending Act to be unconstitutional.

2. This Court in the case of Commissioner of Sales Tax vs. Ganga Sugar Corporation Ltd (1) held that section 8A (4) of the principal act was ultra vires the State of Legislature. Section 8A (4) reads as under :

"8A(4) Without prejudice to the provisions of clause (g) of sub- section (2) of section 14, the amount realised by any person as tax on sale of any goods shall, notwithstanding anything contained in any other provisions of this Act, be deposited by him in a Government treasury within such period as may be prescribed, if the amount so realised exceeds the amount payable as tax in respect of that sale or if no tax is payable in respect thereof."

The Court in that context relied upon the decision in Abdul Quader & Co. vs. Sales Tax Officer, Hyderabad (2). It was held in Abdul Quader's case that the State Legislature in making a similar provision, viz., section 11(2) in the Hyderabad General Sales Tax Act, could not be regarded as having directly legislated for the imposition of sales and purchase tax under entry 54 list II in the seventh Schedule of the Constitution because the amount though collected by way of tax was not exigible as tax under the law. It was observed :

"We do not think that the ambit of ancillary or incidental power goes to the extent of permitting Legislature to provide that though the amount collected may be wrongly by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to the Government, as if it were a tax."

3. In 1969 the Uttar Pradesh Taxation Amendment Act, 1969 (U.P. Act II of 1969) was passed. Section 17 of that Act inserted section 29A which read as under :

"29A. Refund in special cases :

Notwithstanding anything contained in this Act or in any other law for the time being in force or in any judgment decree or order of any court, where any amount is either deposited or paid by any dealer or other person under sub-section (4) or sub-section (5) of sec. 8A such amount or any part thereof shall on a claim being made in that behalf in such form and within such period as may be prescribed, be refunded to the person from whom such dealer or the person had actually realised such amount or part, and to no other person."

On August 22, 1971 the Amending Act was published. A number of amendments were made by the amending Act in the principal Act. By section 10 of the Amending Act, sub-section (4) and (5) of section 8A were omitted. Section 15 of the Amending Act was an under :

"15. For section 29A of the principal Act, the following section shall be substituted, namely :-

29A(1) where any amount is realised from any person by any dealer purporting to do so by way of realisation of tax on the sale of any goods to such person, such dealer shall deposit the entire amount so realised into the Government treasury, within such period as may be prescribed, notwithstanding that the dealer is not liable to pay such amount as tax or that only a part of it is due from him as tax under this Act.

(2) Any amount deposited by any dealer under sub-section (1) shall, to the extent it is not due as tax, be held by the State Government in trust for the person from whom it was realised by the dealer, or for his legal representatives, and the deposit shall discharge such dealer of the liability in respect thereof to the extent to the deposit.

(3) Where any amount is deposited by any dealer under sub-section (1), such amount or any part thereof shall, on a claim being made in that behalf in such form as may be prescribed, be refunded, in the manner prescribed, to the person from whom such dealer had actually realised such amount or part, or to his legal representatives, and to no other person.

Provided that no such claim shall be entertained after the expiry of three years from the date of the final order on appeal, revision or reference, if any, in respect thereof, whichever is later.

Explanation. - The expression "final order on appeal, revision or reference" includes an order passed by the Supreme Court under Article 32, Article 132, Article 133, Article 136 or Article 137, or by the High Court under Article 226 or Article 227 or the Constitution.

Section 17 contains transactional provisions for deeming and validation consequent upon the deletion of sub-sections (4) and (5) of section 8A and the substitution of sec. 29A in the principal Act.

4. The dispute relates to the amount which a dealer wrongly realises as sales tax from the customer and the question which arises for consideration is whether a State legislative has the legislative competence to pass a law for the deposit of that amount in the Government Treasury. In other words, is there any entry in List II of List III of the Seventh Schedule to the Constitution under which the State Legislature could make such a law ? So far as section 17 of the amending Act is

concerned, the High Court observed that this section was dependent upon and interrelated with section 15 of the Amending Act. Section 17 provides that the amount already deposited under section 8A (4) of the principal Act shall be deemed to be under section 29A as substituted by section 15 of the Amending Act. Section 15 is the principal provision, while section 17 is an ancillary provision. If section 15 was unconstitutional, section 17 would also share the same fate and would have to be struck down as unconstitutional because it is linked with section 15 and cannot exist independently of that section.

5. Learned Advocate General appearing for the appellant State has not, and in our opinion, rightly challenged the correctness of the view taken by the High Court in this respect.

6. We may now deal with provisions of the section 15 of the Amending Act as a result of which section 29A was substituted in lieu of the old section 29A in the principal Act. Section 29A deals with amount wrongly realised by a dealer on sale of goods to any person. Sub-section (1) of section 29A of the principal Act makes it obligatory on the part of the dealer to deposit such amount into Government Treasury "notwithstanding that the dealer is not liable to pay such amount as tax or that only a part of it is due from him as tax under this Act." Sub-section (2) provides that the amount so deposited by a dealer shall to the extent it is not due as tax from him be held by the State Government in trust for the person whom it was realised by the dealer or for his legal representatives. It further provides that when a dealer has deposited the amount into the Treasury, he shall no longer be liable to the person from whom he has realised the amount. According to sub-section (3) of the section, the amount deposited into the Government Treasury by the dealer or any part thereof shall, on a claim being made in that behalf in such manner and form as may be prescribed, be refunded to the person from whom the dealer had actually realised the amount or part, or to his legal representatives. Section 29A thus seeks to ensure the deposit into the Government Treasury of the amount by a dealer as has been wrongly realised by him as sales tax. As the said amount does not constitute sales tax, it is not covered by entry 54 in list II of the Seventh Schedule to the Constitution which relates to taxes on sale or purchase of goods other than newspapers subject to the provisions of entry 92A of List I.

7. The argument that provision like section 29A is ancillary or incidental to the Collection of tax legitimately due under a law made under entry 54 has no force. Such an argument was rejected by this Court in Abdul Quader's case (supra) in the following words :

"The provision however is attempted to be justified on the ground that though it may not be open to a State Legislature to make provision for the recovery of an amount which is not a tax under entry 54 of list II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry."

The above observations were quoted with approval by a six judge Bench of this Court in the case of Ashoka Marketing Ltd. vs. State of Bihar & ors. (3). In that case the provisions of section 20A of the

Bihar Sales Tax Act which were substantially similar to with those of section 29A now impugned before us were assailed Shah, J. (as he then was) speaking for the Court observed :

"A Provision which enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales tax. But now we are unable to hold that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him on a representation express or implied that an equal amount is payable by him under the Bihar Sales Tax Act, is a provision incidental to the power to levy "tax on sale or purchase of goods" within the meaning of entry 54 List II of the Seventh Schedule. Entry 54, List II of the Seventh Schedule comprehends the power to impose tax, to prescribe machinery for collecting the tax, to designate officers by whom the liability may be imposed and to prescribe the authority, obligation and indemnity of the officers. The State legislature may under entry 54, List II be competent to enact a law in respect of matters necessarily incidental to "tax on the sale and purchase of goods". But a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State cannot, in our judgment, be regarded as necessarily incidental to entry 54, List II. In effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the constitution by clothing the claim in the form of a demand for depositing the money with the State with the dealer has collected, but which he was not entitled to collect."

In view of the above decision, the contention that the impugned Act would be covered by entry 54 in List II can plainly be not accepted.

8. Argument has been advanced before us on behalf of the appellant that the impugned law would be covered by entry 7 in List III which relates, inter alia, to contracts. A similar argument was advanced in the case of Ashoka Marketing Ltd. (supra) and was rejected in the following words :

"We fail to appreciate how power to legislate in respect of entries 6, 7 and 13 would authorise the State Legislature to legislate in respect of recovery from the dealer of an amount which the dealer was in law not entitled to collect, but which he has collected. The power to legislate in respect of sub-sections (3), (4) and (5) of section 29A does not fall under entries 6, 7 and 13 of List III expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in entries 6, 7, and 13 of List III expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in entries 6, 7, and 13 of List III."

9. Lastly, it has been argued that the law in question relates to trust and can be justified under entry 10 in List III we, however, fail to see as to how such a law can be said to relate to trusts. A trust is an obligation annexed to the ownership of property and arises out of confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another and the owner (see sec. 3 of the Indian Trusts, Act, 1882). It is plain that a law compelling deposit of money wrongly related as sales tax cannot in pith and substance be considered to be a law relating to trusts. The mere use of the word "trust" in sub-section (2) of section 29A would not make the impugned law to be one relating to trusts.

10. The appeal consequently fails and is dismissed with costs.

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