M/s. K. M. Mohamad Abdul Khader Firm

Vs

State of Tamil Nadu and Others

Writ Petitions (Civil) Nos. 4358 of 1978, 212-213 and 760 of 1979 and 6449 of 1980

(V. D. Tulzapurkar, V. Balakrishna Eradi, D. P. Madon JJ)

16.10.1984

JUDGMENT

BALAKRISHNA ERADI, J. –

1. In these writ petitions, the petitioners have challenged the constitutional validity of the provisions of Tamil Nadu Additional Sales Tax Act, 1976 (Act 2 of 1976). By the said Act Section 2 of the Tamil Nadu Additional Sales Tax Act, 1970 was amended by substituting a new provision in the place of what existed before. Section 3 was omitted and Section 3-A was newly introduced to the Act. As the points raised in all these writ petitions are identical, they were heard together and are disposed of by this common judgment.

2. Before we proceed to set out the provisions of the impugned Act, it is necessary to narrate in brief the legislative history that preceded its enactment. The basic statute providing for the levy of sales tax in the State of Tamil Nadu is the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act of 1959"). In the year 1970, the State Legislature enacted the Tamil Nadu Additional Sales Tax Act - Act 14 of 1970 (hereinafter called the 1970 Act) - which was brought into force with effect from May 28, 1970. The said Act provides for the levy of an additional tax on the sale or purchase of goods. Section 2 of the Act which is the charging section was in the following terms :

> 2. Levy of additional tax in the case of certain dealers. - (1) The tax payable under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959) (hereinafter in this section referred to as the said Act), shall, in the case of a dealer whose total turnover for a year exceeds ten lacs of rupees, be increased by an additional tax at the rate of (ten per cent.) of the tax payable by that dealer for that year and the provisions of the said Act shall apply in relation to the said additional tax as they apply in relation to the said tax payable under the said Act :
>
> Provided that where in respect of declared goods as defined in clause (h) of Section 2 of the said Act, the tax payable by such dealer under the said Act together with the additional tax payable under this sub-section, exceeds (four per cent.) of the sale or purchase price thereof, the rate of additional tax in respect of such goods shall be reduced to such an extent that the tax and the additional tax together shall not exceed (four per cent.) of the sale or purchase price of such goods.

3. It will be noticed that the scheme of this section was to levy the additional tax by the process of increasing the tax payable under the Act of 1959 by ten per cent. the said increase representing the quantum of the additional tax. The proviso to the section stipulates for a concessional treatment in

respect of the declared goods. It is unnecessary for us to deal with the said proviso or with Section 3 of the said Act as these provisions have no relevance to the determination of the points raised in the cases now before us.

4. In September 1971, the State Legislature enacted the Tamil Nadu Sales Tax (Surcharge) Act, 1971 with retrospective effect from June 1971. Under Section 3 of that Act, every dealer liable to pay tax under the Act of 1959 was subjected to a further liability to pay a surcharge at the rate of five per cent. of such tax. The first proviso to the said section states that in the city of Madras the rate of surcharge shall be ten per cent. for the period commencing on June 19, 1971 and ending with June 28, 1971. The second proviso extended certain concessions in the rate of surcharge in respect of declared goods.

5. Thereafter followed the impugned statute namely, the Tamil Nadu Additional Sales Tax (Act 2) of 1976, which was brought into force with effect from April 1, 1976. Section 2 of the said Act amended Section 2 of the Tamil Nadu Additional Sales Tax Act, 1970 by substituting the following provision in replacement of the original section :

> 2. Levy of additional tax in the case of certain dealer. - (1)(a) The tax payable under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act I of 1959) (hereinafter in this section referred to as the said Act), shall, in the case of a dealer whose taxable turnover for a year exceeds three lacs of rupees, be increased by an additional tax calculated at the following rates, namely :
>
> # Rate of tax(i) Where the taxable turnover exceeds 0.4 per cent. of thethree lacs of rupees but does not taxable turnover.exceed five lacs of rupees.(ii) Where the taxable turnover exceeds 0.5 per cent. of thefive lacs of rupees but does not taxable turnover.exceed seven lacs of rupees.(iii) Where the taxable turnover exceeds 0.6 per cent. ofthe seven lacs of rupees but does taxable turnover.not exceed ten lacs of rupees.(iv) Where the taxable turnover exceeds 0.7 per cent. of theten lacs of rupees. taxable turnover.##

Provided that where in respect of declared goods as defined in clause (h) of Section 2 of the said Act, the tax payable by such dealer under the said Act, together with the additional tax payable under this sub-section, exceeds four per cent. of the sale or purchase price thereof, the rate of additional tax in respect of such goods shall be reduced to such an extent that the tax and the additional tax together shall not exceed four per cent. of the sale or purchase price of such goods.

> (b) The provisions of the said Act shall apply in relation to the additional tax payable under clause (a) as they apply in relation to the tax payable under the said Act.
>
> (2) Notwithstanding anything contained in the said Act, no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable under the said sub-section.
>
> (3) Any dealer who collects the additional tax payable under sub-section (1) in contravention of the provisions of sub-section (2) shall be punishable with fine which may extend to one thousand rupees, and no court below the rank of a Presidency Magistrate or a Magistrate of the First Class shall try any such offence.

While under the provisions of Section 2 as they stood prior to the amendment, the additional sales

tax was to be calculated and levied at a certain percentage of the tax assessed on the dealer under the Act of 1959, the scheme of the amended section is to adopt the taxable turnover of the dealer as the base for the levy of the additional tax, the rate or percentage to be applied for calculation of the additional tax depending upon the quantum of the taxable turnover and the slab into which the case of a particular dealer will fall on the basis of the specification of the slab limits indicated in the section.

6. On receipt of notices of demand issued consequent upon assessments to additional sales tax under the provisions of the section as amended by the impugned Act the petitioners have come up to this Court challenging the constitutional validity of the impugned Act of 1976 and seeking to quash the assessment orders and the notices of demand issued to them.

7. The first contention urged on behalf of the petitioners is that since the State Legislature had already provided for the levy of a tax on sales by the Act of 1959 and had also enacted a further statute authorising the levy and collection of a surcharge which is in truth and substance the imposition of an additional sales tax, it could not legally go on legislating further enactments providing again for levy of additional sales tax. On this basis it is contended that the provisions of the impugned Act, 1976 are ultra vires and devoid of legislative competence. We see no substance in this contention. The impugned enactment has merely amended the 1970 Act. It has not introduced a new tax; what it has done is only to amend the 1970 Act by providing for a different method of computation of the additional tax leviable under that Act. The validity of the 1970 Act has been upheld by a Constitution Bench of this Court in the case of S. Kodar v. State of Kerala ((1975) 1 SCR 121 : (1974) 4 SCC 422 : 1974 SCC (Tax) 272 : 1974 Tax LR 2220 : (1974) 34 STC 73). Hence there is no longer any scope for the petitioner to contend that the State Legislature had no competence to provide for the levy of additional sales tax. The nature and identity of the additional sales tax imposed by the 1970 Act have not been in any way altered by the impugned Act. As already pointed out what has been done by the impugned Act is only to provide for a different mode of computation of the additional sales tax by linking the rate of levy to the taxable turnover instead of to the amount of tax assessed under the Act of 1959. The constitutional validity of the levy of additional tax is not in any manner affected by the said change brought about in the mode of levy and computation as a result of the amendments effected by the impugned Act.

8. It was strongly contended on behalf of the petitioners that the prescription of different rates of additional sales tax depending upon the quantum of turnover of the different assesses is totally repugnant to the concept of levy of tax on sales. Another argument advanced by counsel for the petitioners was that since under the amended provisions of Section 2, two dealers selling the same commodity will be liable to pay additional tax at different rates depending upon their respective annual turnover, there is a clear violation of Article 14 of the Constitution as dissimilar treatment is meted out to persons similarly situated. A further contention urged on behalf of the petitioners was that the levy in its present form is really a tax on 'gross income' and not a tax on 'sales' and hence it is ultra vires the State Legislature as it has no competence to levy a tax on income other than agricultural income. Another ground of attack pressed by counsel was that the levy of additional sales tax under the impugned Act is confiscatory in nature, that it imposes unreasonable restrictions on the petitioners' right to carry on business and offends Article 19 of the Constitution, particularly in view of the prohibition contained in sub-section (2) of Section 2 against collection of additional tax from the consumers. Yet another point taken in the writ petitions but not very seriously urged at the time of hearing is that the levy of additional tax under the impugned Act offends Article 301 of the Constitution since the imposition of the additional liability would seriously affect the business of the petitioners and on account of their inability to bear the heavy burden their right to carry on

freely trade, commerce and intercourse within the territory of India will be adversely affected.

9. We are spread the necessity of dealing with any of the aforesaid points in depth because everyone of them is fully covered by the pronouncement of a Constitution Bench of this Court in S. Kodar v. State of Kerala ((1975) 1 SCR 121 : (1974) 4 SCC 422 : 1974 SCC (Tax) 272 : 1974 Tax LR 2220 : (1974) 34 STC 73) aforecited.

10. The connection that the additional sales tax levied under Tamil Nadu Additional Sales Tax Act, 1970 was not a tax on sales but was in reality a tax on the income of the dealers was rejected by the Constitution Bench which observed thus : [SCC para 9, p. 426 : SCC (Tax) p. 276]

As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. The object of the Act, as is clear from its provisions, is to increase the tax on the sale or purchase of goods imposed by Tamil Nadu General Sales Tax Act, 1959 and the fact that quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that additional tax is to be imposed only if the turnover of a dealer exceeds Rs 10 lacs. It is in reality a tax on the aggregate of sales affected by a dealer during a year. The additional tax, therefore, is an enhancement in the rate of the sales tax when the turnover of a dealer exceeds Rs 10 lacs a year and it is a tax on the aggregate of the sales affected by the dealer during the year. The decision in Ernakulam Radio Company v. State of Kerala ((1966) 18 STC 445, 449 (Ker)), which was affirmed by a Division Bench of the Kerala High Court in Kilikar v. Sales Tax Officer ((1968) 21 STC 252 (Ker)), took that view. The same view was taken by the Andhra Pradesh High Court in A.S. Ramachandra Rao & Co. v. State of Andhra Pradesh ((1969) 24 STC 133 (AP)). This is the correct view. Entry 54 in List II authorities the state legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis.

11. The further plea that the levy of additional tax was confiscatory in nature and the prohibition against passing on the burden to the consumers was an unreasonable restriction was also negatived by this Court by stating : [SCC paras 10-15, pp. 426-27]

As regards the second contention that the provisions of the Act are violative of the fundamental rights of the appellants under Article 19(1)(f) and 19(1)(g), as the tax is upon the sale of goods and is not shown to be confiscatory, it cannot be said that the provisions of the Act impose any unreasonable restrictions upon the appellants' right to carry on trade. It is, no doubt, true that every tax imposes some restriction upon the right to carry on a business; but it would not follow that the imposition of the tax in question is an unreasonable restriction upon the appellants' fundamental right to carry on trade. Generally speaking, the amount or rate of a tax is a matter exclusively within the legislative judgment and as long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness is outside the judicial ken.

But it was contended that as the dealer is prohibited from passing on the incidence of tax to the purchaser, the additional tax, unlike sales tax, is a tax on income of the dealer which he must pay whether he makes any profit or not and is, therefore, an unreasonable restriction on his fundamental rights under Article 19(1)(g).

The legal incidence of tax on sale of goods under the Tamil Nadu General Sales Tax Act, 1959 falls squarely on the dealer. It may be that he can add the tax to the price of the goods sold and thus pass

it on to the purchaser. But it is not necessary that the dealer should enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sales of goods.

In J.K. Jute Mills Co. Ltd. v. State of U.P.((1962) 2 SCR 1, 13 : AIR 1961 SC 1534 : (1961)12 STC 429), this Court said, although it is true that sales tax is, according to accepted notions, intended to be passed on the buyer, and provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation, it is not an essential characteristic of the sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers.

In Konduri Buchirajalingam v. State of Hyderabad ((1958) 9 STC 397 : AIR 1958 SC 756) this Court said :

> It is then said that the sales tax is essentially an indirect tax and therefore it cannot be demanded of the appellant without allowing him to recoup himself by collecting the amount of the tax from the persons with whom he deals. This Court has already decided in the case of Tata Iron & Steel Co. Ltd. v. State of Bihar ((1958) 9 STC 267 : 1958 SCR 1355 : AIR 1958 SC 452), that in law a sales tax need not be an indirect tax and that a tax can be a sales tax though the primary liability for it is put upon a person without giving him any power to recoup the amount of the tax payable, from any other party.

As we said, the additional tax is a tax upon sales of goods and not upon the income of a dealer and so long as it is not made out that the tax is confiscatory, it is not possible to accept the contention that because the dealer is disabled from passing on the incidence of tax to the purchaser, the provisions of the Act impose an unreasonable restriction upon the fundamental rights of the appellants under Article 19(1)(g) or 19(1)(f).

12. Dealing with the contention that since the provisions of the Act imposed different rates of tax on different dealers depending upon their turnover there was a violation of Article 14 of the Constitution, Mathew J. who spoke for the Court observed : [SCC paras 16, 17, pp. 427-28 : SCC (Tax) pp. 277-78]

The last contention namely that the provisions of the Act impose different rates of tax upon different dealers depending upon their turnover which in effect means that the rate of tax on the sale of goods would vary with the volume of the turnover of a dealer and are, therefore, violative of Article 14 is also without any basis. Classification of dealers on the basis of their respective turnover for the purpose of graded imposition so long as it is based on differential criteria relevant to the legislative object to be achieved is not unconstitutional. A classification, depending upon the quantum of the turnover for the purpose of exemption from tax has been upheld in several decided cases. By parity of reasoning it, can be said that a legislative classification making the burden of the tax heavier in proportion to the increase in turnover would be reasonable. This basis is that just as in taxes upon income or upon transfers at death, so also in imposts upon business, the little man, by reason of inferior capacity to pay, should bear a lighter load of taxes, relatively as well as absolutely, than is borne but the big one. The flat rate is thought to be less efficient than the graded on as an instrument of social justice. The large dealer occupies a position of economic superiority by reason of his grater volume of his business. And, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the

end at a more genuine equality. The economic wisdom of a tax is within the exclusive province of legislature. The only question for the Court to consider is whether there is rationality in the belief of the legislature that capacity to pay the tax increases, by and large, with an increase of receipts.

Certain it is that merchants have faith in such a correspondence and act upon that faith.... If experience did not teach that economic advantage goes along with larger sales, there would be an end to the hot pursuit for wide and wider markets.... In brief, there is a relation of correspondence between capacity to pay and the amount of business done. Exceptions, of course, there are. The law builds upon the probable, and shapes the measure of the tax accordingly.... At the very least, an increase of gross sales carries with it an increase of opportunity for profit, which supplies a rational basis for division into classes, at all events when coupled with evidence of a high degree of probability that the opportunity will be fruitful. (See the dismissing judgment of Justice Cardozo, Justice Brandeis and Justice Stone) (Stewart Dry Goods Company v. Lewis, 294 US 550).

The reasoning of the minority in that case appeals to us as more in consonance with social justice in an egalitarian state than that of the majority.

As we said, a larger dealer occupies a position of economic superiority by reason of his volume of business and to make the tax heavier on him both absolutely and relatively is not arbitrary discrimination but an attempt to proportion the payment to capacity to pay and thus arrive in the end at a more genuine equality. The capacity of a dealer, in particular circumstances, to pay tax is not an irrelevant factor in fixing the rate of tax and one index of capacity is the quantum of turnover. The argument that while a dealer beyond certain limit is obliged to pay higher tax, when others bear a less tax, and it is consequently discriminatory, really misses the point namely that the former kind of dealers are in a position of economic superiority by reason of their volume of business and form a class by themselves. They cannot be treated as on a part with comparatively small dealers. An attempt to proportion the payment to capacity to pay and thus bring about a real and factual equality cannot be ruled out as irrelevant in levy of tax on the sale or purchase of goods. The object of a tax is not only to raise revenue but also to regulate the economic life of the society.

13. The same principles have been recently reiterated by a three-Judge Bench of this Court in the case of Hoechst Pharmaceuticals Ltd. v. State of Bihar ((1983) 4 SCC 45 : 1983 SCC (Tax) 248).In the light of the aforesaid pronouncements, it is manifest that the contentions put forward by the petitioners that the impugned enactment is devoid of legislative competence inasmuch as it imposes not a tax on sales but a tax on income, that the adoption of a slabs system for determining tax liability is alien to the concept of sales tax and that the levy of additional tax under the impugned enactment violates Articles 14 and 19 of the Constitution are all totally devoid of merit. We do not also see any substance in the plea raised in the writ petitions that the provisions of the impugned Act are violative of Article 301 of the Constitution.

14. In the result, all these writ petitions fail and are dismissed with costs.

</html