

State of Orissa

Vs

Orissa Cement Ltd. and Others

Civil Appeal No. 434 (NT) of 1974

(V. D. Tulzapurkar, Sabyasachi Mukharji JJ)

10.09.1985

JUDGMENT

TULZAPURKAR, J. -

1. Having regard to the decision of the Constitution Bench of this Court in R. S. Joshi, STO, Gujarat v. Ajit Mills Ltd., Ahmedabad this appeal will have to be allowed.

2. Before the High Court the provisions of Section 9-B(3) and Section 14-A of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947) were challenged on the ground of lack of legislative competence by the assessee by way of a writ petition. The contention was while Entry 54 of List II of the Seventh Schedule) enables legislation imposing levy of tax on sale or purchase of goods, a provision that if a person (trader) realised any amount by way of tax when not exigible or realised any amount by way of tax in excess of the tax at the prescribed rate should make over to the State by way of penalty such collections and a further provision that a refund of such amount shall be made by the State to the person or persons from whom such collections were made provided a claim of such refund was made within the prescribed period of limitation did not fall within ancillary or incidental legislative powers to the State Legislature and hence would be beyond the Entry. Following its own earlier decision in Rameswar Prasad v. STO the High Court allowed the writ petition. It may be stated that in Rameswar Prasad case the High Court had followed two decisions of this Court one in R. Abdul Quader v. STO. and the other in Ashoka Marketing Ltd. v. State of Bihar. Both these decisions were reconsidered by the Constitution Bench in R. S. Joshi case and the provisions of the Maharashtra Sales Tax Act as applied to Gujarat State [similar to the provisions contained in section 9-B(3) and Section 14-A of the Orissa Act] have been upheld. The view in Ashoka Marketing Ltd. case has been expressly dissented from.

3. The crux of the question raised in all these decisions was whether a provision directing the trader to 'cough up' collections wrongly made by him from the purchasers otherwise than in accordance with the provisions of the Act and to make over the same to the Government as also the further provisions obliging the State to refund the amounts so collected to the person or persons from whom these had been collected would fall within the incidental and ancillary powers of the State Legislature while enacting a taxing statute under Entry 54 of List II of the Seventh Schedule and the final decision of the Constitution Bench has answered the question in the affirmative upholding the validity of such provisions. While doing so the Constitution Bench disagreed with the view taken in Ashoka Marketing Ltd. case. As regards Abdul Quader case this Court felt that the crucial ration of the decision was to be found in the following significant observation made in that judgment : "it (the law) does not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of

the taxing legislation" and the Constitution Bench observed that this significant observation demarcated the constitutional watershed between merely laying hands upon collections by way of tax by traders although they were not exigible from traders and the policing by penalizing, including forfeiting illegal exactions, the working of a taxing statute and inhibiting injury to the public and since the Maharashtra Act as applicable to the State of Gujarat contained a prohibition against collecting such amounts from purchasers, a penalty and forfeiture the impugned provisions were valid inasmuch as these properly fell within ancillary and incidental powers - ancillary and incidental to the power to levy a tax under Entry 54, List II.

4. At page 360 of the Report Krishna Iyer, J. has gone to the length of observing thus :

In strict legality, once the money is forfeited to the State, there is no obligation to make it over to the purchaser, but in the welfare orientation of our State and certain constitutional emanations we leave unexplored, such an obligation should be voluntarily undertaken.

In other words, even in the absence of provision being made in the enactment for refunding or returning the amount so wrongly collected by the trader to for refunding or returning the amount so wrongly collected by the trader to the person or persons from whom such collection has been made, the provision for forfeiture of such collections to the State was upheld as falling within the ancillary or incidental power under Entry 54, List II of the Seventh Schedule.

5. In the instant case, before us there is not merely a provision for making over such collections by the trader to the State but also a provision for refunding it by the State to the persons from whom such collection have been made. The impugned provisions will have, therefore, to be upheld as falling within the doctrine of ancillary or incidental legislative powers.

6. Counsel for the assessee made in vain attempt to urge that at the material time (prior to the enactment of Amendments) there was no prohibition and no penalty contained in the enactment so as to make the provision for forfeiture valid. After going through the relevant provisions of Section 9-B(3) and Section 25-AA it is not possible to accept this contention. The very fact that the provision requires trader to 'cough up' by making over such illegal collections to the State implies a prohibition that such collections should not and ought not to be made. The *raison d'etre* of such provision suggests an implied prohibition.

7. In our view the question raised before us squarely falls within the ratio of the decision of this Court in R. S. Joshi case the appeal is allowed. The impugned judgment and order of the High Court is set aside and the writ petition is dismissed. There will be no order as to costs.

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