

M/S. Kasturi Lal Harilal

Vs

State of U. P. and Others

Civil Appeal No. 1862(NT) of 1971

(CJI P. N. Bhagwati, V. Khalid, Ranganath Misra, G. L. Oza, M. M. Dutt JJ)

29.10.1986

JUDGMENT

BHAGWATI, C.J. -

1. This appeal by certificate raises a short question as to the constitutional validity of Section 29-A of the U.P. Sales Tax Act, 1948. This section, which was introduced in the U.P. Sales Tax Act, 1948 by Section 17 of the U.P. Taxation Laws (Amendment) Act, 1969, has been held to be constitutionally valid by a Division Bench of the Allahabad High Court on July 13, 1970. The appellants question the correctness of this view taken by the High Court.

2. The appellants carry on business as dealers in coal and they are registered as such under the U.P. Sales Tax Act, 1948. Prior to October 1, 1965, there was no sales tax levied on sale of coal and for the first time on October 1, 1965, coal became a taxable commodity under the U.P. Sales Tax Act, 1948. The appellants, proceeding on the footing that sales tax was payable by them on sale of coal from and after October 1, 1965, collected amounts by way of sales tax from the purchasers and submitted their returns for the assessment year 1965-66 after depositing a sum of Rs. 10,073.86 representing the amount of tax payable by them in accordance with their returns. It was, however, found as a result of the assessment order made by the Sales Tax Officer on March 28, 1970 that no sales tax was payable by the appellants on sales of coal under the U.P. Sales Tax Act, 1948. The appellants thereupon claimed refund of the sum of Rs. 10,073.86 but the Sales Tax Officer rejected the claim made by the appellants on the ground that by reason of Section 29-A, no refund was claimed by the appellants and the only persons entitled to claim refund were those from whom the appellants had collected the tax. This order made by the Sales Tax Officer was challenged by the appellant by filing a writ petition in the High Court of Allahabad and the principal ground on which the correctness of this order was challenged was that Section 29-A was ultra vires as being outside the legislature competence of the State Legislature. The High Court negatived this challenge and upheld the constitutional validity of Section 29-A and on this view, sustained the order made by the Sales Tax Officer. The appellant thereupon preferred the present appeal after obtaining certificate of fitness from the High Court.

3. It is necessary at this stage to set out the relevant provisions of the U.P. Sales Tax Act, 1948 as they stood at the material time. Sub-section (4) of Section 8-A made the following provision :

(4) Without prejudice to the provisions of clause (f) 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.

Sub-Section (5) was added in Section 8-A by Section 11 of the U.P. Taxation Laws (Amendment) Act, 1965 and it reads as follows :

(5) Where a dealer is found not liable to be assessed to tax by reason of his turnover being less than the amount specified in or under section 3, or sub-section (1) or (2) of Section 18, but has realised any tax as such in respect of such turnover, he shall, notwithstanding anything contained in this Act, be liable to pay the same to the State Government and shall deposit it into the Treasury within 30 days of the date of the order by which he was found not so liable, unless it has already been so deposited.

Since, having regards to the judgment of this Court in *R. Abdul Quader v. STO* [(1964) 6 SCR 867 : AIR 1964 SC 922 : 15 STC 403] it was doubtful whether sub-sections (4) and (5) of Section 8-A, standing by themselves, would fall within the legislative competences of the State legislature, Section 29-A was inserted in the U.P. Sales Tax Act, 1948 by Section 17 of the U.P. Taxations Laws (Amendment) Act, 1969 :

29-A. 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 Section 8-A, 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.

The question is whether this section, as it stood at the material time in the form in which it was introduced by Section 17 of the U.P. Taxation Laws (Amendment) Act, 1969, was within the legislative competence of the State legislature.

4. The only entry under which Section 29-A was sought to be brought was entry 54 in List II of the Seventh Schedule to the Constitution. Clause (3) of Article 246 read with this entry empowers the State legislature to make laws with respect to taxes on the sale or purchase of goods. It is now well settled that an entry in a legislative List must be read in its widest amplitude and the legislature must be held to have power not only to legislate with respect to the subject-matter of the entry but also to make ancillary or incidental provision in aid of the main topic of legislation. Can Section 29-A be justified as exercise of an ancillary or incidental power of legislation under Entry 54 ? Now, this question is no longer *res integra*. It stands concluded by the decision of this Court in *R.S. Joshi v. Ajit Mills Ltd.* [(1978) 1 SCR 338 : (1977) 4 SCC 98 : 1977 SCC (Tax) 536 : AIR 1977 SC 2279 : (1977) 40 STC 497]. It is no doubt true that the decision of this Court in *Ashoka Marketing Ltd. v. State of Bihar* [(1970) 3 SCR 455 : (1970) 1 SCC 354 : AIR 1971 SC 946 : (1970) 26 STC 254] does seem to indicate that a provision such as Section 29-A would not be justifiable as an exercise of incidental or ancillary power. There also, the impugned legislative provision, namely, Section 20-A of the Bihar Sales Tax Act was very similar to Section 29-A and this Court held that it fell outside the legislative competence of the State legislature. The Court in *Ashoka Marketing Ltd. case* [(1970) 3 SCR 455 : (1970) 1 SCC 354 : AIR 1971 SC 946 : (1970) 26 STC 254] did not follow the decision in *Orient Paper Mills Ltd. v. State of Orissa* [(1962) 1 SCR 549 : AIR 1961 SC 1438 :

(1961) 12 STC 357] where a similar provision was attacked on the same ground but the attack was repelled by the court. If the decision in Ashoka Marketing Ltd. case [(1970) 3 SCR 455 : (1970) 1 SCC 354 : AIR 1971 SC 946 : (1970) 26 STC 254] were to be regarded as good law, Section 29-A would have to be struck down as being outside the legislative competence of the State legislature. But this Court in R.S. Joshi case [(1978) 1 SCR 338 : (1977) 4 SCC 98 : 1977 SCC (Tax) 536 : AIR 1977 SC 2279 : (1977) 40 STC 497] clearly and categorically disapproved of the decision in Ashoka Marketing Ltd. case [(1970) 3 SCR 455 : (1970) 1 SCC 354 : AIR 1971 SC 946 : (1970) 26 STC 254] and reaffirmed the view taken in Orient Paper Mills case [(1962) 1 SCR 549 : AIR 1961 SC 1438 : (1961) 12 STC 357]. The Court held that the taking over of sums collected by dealers from the public under guise of tax solely with a view to return them to the buyers so deprived in necessarily incidental to 'tax on the sale and purchase of goods'. Such a provision is manifestly a consumer protection measure since (SCC p. 112, para 22) "while suits against dealers to recover paltry sums by a large number of customers would lead to endless and expensive litigation, a similar process of returning those sums on application by the relevant purchasers would protect the common buyer while depriving the dealers of their unjust gains". This Court in a subsequent decision in State of Orissa v. Orissa Cement Ltd. [1985 Supp SCC 608 : 1986 SCC (Tax) 118] also took the same view and pointed out that the decision in Ashoka Marketing Ltd. case [(1970) 3 SCR 455 : (1970) 1 SCC 354 : AIR 1971 SC 946 : (1970) 26 STC 254] was expressly dissented from by the decision in R.S. Joshi case [(1978) 1 SCR 338 : (1977) 4 SCC 98 : 1977 SCC (Tax) 536 : AIR 1977 SC 2279 : (1977) 40 STC 497]. The decision in R.S. Joshi case [(1978) 1 SCR 338 : (1977) 4 SCC 98 : 1977 SCC (Tax) 536 : AIR 1977 SC 2279 : (1977) 40 STC 497] must, therefore, be regarded as laying down the correct law on the subject and if that be so, it is obvious that Section 29-A must be held to fall within the legislative competence of the Sales legislature and its constitutional validity must be upheld.

5. The appeal must, therefore, be dismissed, but since it was filed at a time when the position in law was nebulous and had not been finally settled by the decision in R.S. Joshi case [(1978) 1 SCR 338 : (1977) 4 SCC 98 : 1977 SCC (Tax) 536 : AIR 1977 SC 2279 : (1977) 40 STC 497] we would direct that there shall be no order as to costs.

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