

Buxa Dooars Tea Co. Ltd.

Vs

State of West Bengal and Others.

Writ Petitions Nos. 2687 and 5822 of 1983 and 4527 of 1981

(CJI R. S. Pathak, M. H. Kania JJ)

12.05.1989

JUDGMENT

R. S. PATHAK C.J.I. –

1. By these writ petitions and transferred cases, the petitioners challenge the validity of the levy of cess in respect of tea estates under the West Bengal Rural Employment and Production Act, 1976.

The West Bengal Rural Employment and Production Act, 1976 (shortly referred to as the "West Bengal Act"), is intended to provide additional resources for the promotion of employment in rural areas and for implementing rural production programmes. The additional resources are sought to be raised from two sources, a surcharge on land revenue under section 3 of the Act and a rural employment cess under section 4 of the Act. We are concerned here with the levy of the rural employment cess.

Originally, section 4 of the West Bengal Act provided as follows :

"4. (1) On and from the commencement of this Act, all immovable properties on which road and public work cesses are assessed according to the provisions of the Cess Act, 1880, shall be liable to the payment of rural employment cess :

Provided that no raiyat who is exempted from paying revenue in respect of his holding under clause (a) of sub-section (1) of section 23B of the West Bengal Land Reforms Act, 1955, shall be liable to pay rural employment cess.

(2) The rural employment cess shall be levied annually -

(a) in respect of lands, at the rate of six paise on each rupee of development value thereof;

(b) in respect of coal mines, at the rate of fifty paise on each tonne of coal on the annual despatches therefrom;

(c) in respect of mines other than coal mines and quarries, at the rate of six paise on each rupee of annual net profits thereof."

The West Bengal Taxation Laws (Amendment) Act, 1981, amended the West Bengal Act and by section 7(b) thereof, amendments were made in section 4(2) of the West Bengal Act with effect

from April 1, 1981. As a result, as from that date, section 4(2), in so far as it is material, read as follows :

"4(2). The rural employment cess shall be levied annually -

(a) in respect of lands, other than a tea estate, at the rate of six paise on each rupee of development value thereof :

(aa) in respect of a tea estate at such rate, not exceeding rupees six on each kilogram of tea on the despatches from such tea estate of tea grown therein, as the State Government may, by notification in the Official Gazette, fix in this behalf :

provided that in calculating the despatches of tea for the purpose of levy of rural employment cess, such despatches for sale made at such tea auction centres as may be recognised by the State Government by notification in the Official Gazette shall be excluded :

Provided further that the State Government may fix different rates on despatches of different classes of tea.

Explanation. - For the purpose of this section, 'tea' means the plant *Camellia Sinensis* (L) O. Kuntze as well as all varieties of the product known commercially as tea made from the leaves of the plant *Camellia Sinensis* (L) O. Kuntze, including green tea and green tea leaves, processed or unprocessed;"

Section 4 was also amended further by the insertion of sub-section (4) which provided :

"(4) The State Government may, if it considers necessary so to do, by notification in the Official Gazette, exempt such categories of despatches or such percentage of despatches from the liability to pay the whole or any part of the rural employment cess, or reduce the rate of the rural employment cess payable thereon, under clause (aa) of sub-section (2), on such terms and conditions as may be specified the notification : Provided that the State Government may, at any time, add to, amend, vary or rescind any such notification."

Thereafter, the West Bengal Taxation Laws (Amendment) Act, 1982, was enacted with effect from October 1, 1982. Section 4(2) of the West Bengal Act was amended and under clause (aa) thereof, the first provision was omitted.

Pursuant to the amendments in the West Bengal Act in 1981 and 1982, various notifications were issued by the State Government, which, for our purpose, broadly cover three different periods :

(a) First period : April 1, 1981, to September 30, 1982 -

Rural employment cess was levied at the rate of Rs. 5 per kg. on all despatches of tea, but in respect of despatches to two tea auction centres within West Bengal, the rate of duty was nil, and in respect of tea sold in West Bengal through registered dealers otherwise than through the two tea auction centres, the rate of tax was Rs. 2.50 per kg.

(b) Second period : October 1, 1982, to March 28, 1984 -

Rural employment cess was levied at the rate of Rs. 1.50 per kg. on all despatches of tea except that for despatches to the said two tea auction centres, the rate of levy was 30 paise per kg.

(c) Third period : March 29, 1984, onwards -

Rural employment cess was levied at the rate of Rs. 3 per kg. on all despatches of tea except that for despatches to the said two tea auction centres in West Bengal, the rate of tax was only 30 paise per kg.

Learned counsel for the petitioners contend that the levy of the cess under section 4(1) read with section 4(2)(aa) of the West Bengal Act as amended in 1981 and 1982 is ultra vires inasmuch as the statutory provisions violate article 14 and article 301 of the Constitution and also lie outside the legislative competence of the State Government. It seems to us that these cases can be disposed of on the short ground based on article 301 of the Constitution and want of legislative competence.

There can be no dispute that the rural employment cess is a tax. It cannot also be disputed that if the levy of a tax on goods has the direct and immediate effect of impeding the movement of goods throughout the territory of India, there is a violation of article 301 of the Constitution. If, however, the impact of the levy is indirect or remote, no valid complaint can be made in relation to article 301. In *Atiabari Tea Co. Ltd. v. State of Assam* [1961] 1 SCR 809; [1961] AIR 1961 SC 232, Gajendragadkar J. (as he then was), speaking for the majority in that case, held that tax laws would affect trade and commerce and could be violative of the freedom guaranteed by article 301, provided they directly or immediately affect the freedom of trade and commerce and not indirectly or in a remote manner. This principle was affirmed by this court in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* [1963] 1 SCR 491; [1962] AIR 1962 SC 1406, and again in *Firm A. T. B. Mehtab Majid and Co. v. State of Madras* [1963] Suppl. 2 SCR 435; [1963] 14 STC 355. But the declaration in article 301 that trade, commerce and intercourse throughout the territory of India shall be free is subject to article 304(b) which provides :

"304. Restrictions on trade, commerce and intercourse among States. -
Notwithstanding anything in article 301 or article 303, the Legislature of a State may be law -...

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

Therefore, there is no violation of article 301 if the case falls under article 304(b) and its proviso. In *Kalyani Stores v. State of Orissa* [1966] 1 SCR 865; [1966] AIR 1966 SC 1686, this court held that a restriction on the freedom of trade and commerce which is guaranteed by article 301 cannot be justified unless the procedure provided in article 304 is followed. That was also the view taken in *State of Mysore v. H. Sanjeeviah* [1967] 2 SCR 361; [1967] AIR 1967 SC 1189 and *Andhra Sugars Ltd. v. State of Andhra Pradesh* [1968] 1 SCR 705; [1968] 21 STC 212 (SC). In other words, if the Legislature of a State enacts a law which imposes such reasonable restrictions on the freedom of

trade, commerce or intercourse with or within that State as may be required in the public interest and further that the Bill or amendment for the purposes of clause (b) has been introduced or moved in the legislature of a State with the previous sanction of the President, such enactment will not offend article 301.

The question then is whether the impugned levy impedes the free flow of trade and commerce throughout the territory of India, and if it does, whether it falls within the exception carved out in article 304(b). If the levy imposes a cess in respect of tea estate, it may well be said that even though the free flow of tea is impeded in its movement throughout the territory of India, it is in consequence of an indirect or remote effect of the levy and that it cannot be said that article 301 is contravened. The contention of the petitioners is, however, that it is ostensibly only in respect of tea estates but, in fact, it is a levy on despatches of tea. If that contention is sound, there can be no doubt that it constitutes a violation of article 301 unless the legislation is brought within the scope of article 304(b). To determine whether the levy is in respect of tea estates or is a levy on despatches of tea, the substance of the legislation must be ascertained from the relevant provisions of the statute. It cannot be disputed that the subject of the levy the nature of which defines the quality of the levy, must not be confused with the measure of liability, that is to say, the quantum of the tax. There is a plenitude of case law supporting that principle, among the cases being *Union of India v. Bombay Tyre International Ltd.* [1986] 59 Comp Cas 460; [1984] 1 SCR 347.

But what is the position here ? The statute speaks of a levy "in respect of a tea estate", and it says that the levy will not exceed Rs. 6 on each kilogram of tea on the despatches from such tea estate of tea grown therein. The statute also provides that in calculating the despatches of tea for the purpose of levy of rural employment cess, the despatches for sale made at such tea auction centres as may be recognised by the State Government shall be excluded. And there is a proviso which empowers the State Government to fix different rates on despatches of different classes of tea. There is also section 4(4) which empowers the State Government to exempt such categories of despatches or such percentage of despatches from the liability to pay the whole or any part of the rural employment cess, or to reduce the rate of the rural employment cess payable thereon under clause (aa) of sub-section (2) on such terms and conditions as it may specify by notification. As from October 1, 1982, the position remained the same except that the first proviso to section 4(2)(aa) excluding the despatches for sale made at recognised tea auction centres was deleted. The remaining provisions continued as before. Now, for determining the true nature of the legislation, whether it is a legislation in respect of tea estates, and therefore of land, or in respect of despatches of tea, we must, as we have said, take all the relevant provisions of the legislation into account and ascertain the essential substance of it. It seems to us that although the impugned provisions speak of a levy of cess in respect of tea estate, what is really contemplated is a levy on despatches of tea instead. The entire structure of the levy points to that conclusion. If the levy is regarded as one in respect of tea estates and the measure of the liability is defined in terms of the weight of tea despatched from the tea estate, there must be a nexus between the two indicating a relationship between the levy on the tea estate and the criteria for determining the measure of liability. If there is no nexus at all, it can conceivably be inferred that the levy is not what it purports to be. The statutory provisions for measuring the liability on account of the levy throws light on the general character of the tax as observed by the Privy Council in *In re A Reference under the Government of Ireland Act, 1920*, section 51 and section 3 of the Finance Act (Northern Ireland), 1934, [1936] 2 All ER 111; [1936] AC 352. In *R. R. Engineering Co. v. Zila Parishad, Bareilly* [1980] 3 SCR 1; [1980] AIR 1980 SC 1088, this court observed that the standard on which the tax is levied was a relevant consideration for determining the nature of the tax, although it could not be regarded as conclusive in the matter. Again in *Hingir Rampur Coal Co. Ltd. v. State of Orissa* [1961] 2 SCR 537; [1961] AIR 1961 SC

459, this court observed that the method of determining the rate of levy would be relevant in considering the character of the levy. All these cases were referred to in *Bombay Tyre International Ltd.* [1986] 59 Comp Cas 460, 476; [1984] 1 SCR 347, where, in the discussion on the point at page 367, this court said :

"Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy."

It is apparent that the standards laid down for measuring the liability under the levy must bear a relationship to the nature of the levy. In the case before us, however, we find that the nexus with the tea estate is lost altogether in the provisions for exemption or reduction of the levy and that throughout the nexus is confined to despatches of tea rather than related to the tea estate. There is nothing to suggest that a particular tea estate produces only one class of tea, and when reference is made to a certain class of tea, the reference identifies a certain class of tea estates. We may presume that the same estate produces different classes of tea and not one class of tea only. While there must always be a nexus between the subject of the levy and the measure of the levy, that nexus extends into different dimensions. Variations considered appropriate for the purpose of determining the measure must correspond to variations in the subject of the levy. If the measure of levy is to vary with the despatches of different classes of tea, there must be something in the class of tea concerned which points to a reason located in the particular tea estate or classes of tea estates which are made the subject of the levy. So also, if the measure varies with the centre of sale of tea, the variation must relate to a reason to be found in the nature of the tea estate or classes of tea estates. In other words, there must be a reason why one class of tea is treated differently from another class of tea when deciding upon the rate to be applied to different classes of tea and that reason must be found in the nature of the tea estate concerned. Ultimately, the benefit of exemption or reduced levy must be related to the need for exempting the tea estate from that levy or relieving it from part of the normal levy. When the provisions before us are examined in their totality, we find no such relationship or nexus between the tea estate and the varied treatment accorded in respect of despatches of different kinds of tea. It seems to us that having regard to all the relevant provisions of the statute, including section 4(2)(aa) and section 4(4), in substance, the impugned levy is a levy in respect of despatches of tea and not in respect of tea estate.

Treating it as a levy on despatches of tea, it is evident that the levy must be regarded as constituting a direct and immediate restriction on the flow of trade and commerce in tea throughout the territory of India, and the levy can avoid the injunction declared in article 301 only if it satisfies the provisions of article 304(b) and the proviso thereto. For bringing the legislation within the saving provisions of article 304(b), it is necessary that the Bill or amendment should have been introduced or moved in the Legislature of the State with the previous sanction of the President. It is not disputed that the amendments to the West Bengal Act made in 1981 and 1982, did not satisfy that requirement. Indeed, it appears that the West Bengal Government had sent an earlier Bill to the President with the object of levying a tax on the income from tea but the Presidential assent was not granted. It appears further that the Finance Minister of West Bengal made a statement in the West Bengal Legislature on February 27, 1981, stating that he would introduce the rural employment cess on despatches of tea. He referred to a Bill for amending the West Bengal Marketing (Regulation) Act, 1972, having been sent to the President and the President not having signified his consent to the amendment.

In our opinion, the impugned provisions brought into the West Bengal Act by the amendments in 1981 and 1982 so far as they purport to relate to tea estates are unconstitutional and void and cannot

be given effect to.

Another aspect of the matter may be considered and that relates to legislative competence. If the impugned legislation were to be regarded as a levy in respect of tea estates, it would be referable to entry 49 in List II of the Seventh Schedule of the Constitution which speaks of "taxes on lands and buildings". But, if the legislation is, in substance, a legislation in respect of despatches of tea, legislative authority must be found for it with reference to some other entry. We have not been shown any entry in List II or in List III of the Seventh Schedule which would be pertinent. It may be noted that Parliament had made a declaration in section 2 of the Tea Act, 1953, that it was expedient in the public interest that the Union should take under its control the tea industry. Under the Tea Act, Parliament has assumed control of the tea industry including the tea trade and control of tea prices. Under section 25 of the Act, a cess on tea produced in India has also been imposed. It appears to us that the impugned legislation is also void for want of legislative competence as it pertains to a covered field.

We do not consider it necessary to express our opinion on the other points raised between the parties in this case.

In the result, the writ petitions filed in this court and the petitions in the transferred cases are allowed, the impugned amendments effected in the West Bengal Rural Employment and Production Act, 1976, by the amending Acts of 1981 and 1982 so far as they purport to relate to tea estates are declared void and the petitioners are held entitled to the refund of cess paid by them under the impugned statutory provisions. The petitioners are entitled to their costs.

Petitions allowed.

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