State of Kerala and Others

Vs

Travancore Chemicals and Manufacturing Co. and Another

Civil Appeals Nos. 4112-4145 of 1994

(S.P. Bharucha, G.T. Nanavati, B. N. Kirpal JJ)

11.11.1998

JUDGMENT

B. N. KIRPAL, J. –

1. Leave granted. Delay condoned.

2. In these appeals, the appellants are aggrieved by the common judgment of the Kerala High Court which has held Section 59-A of the Kerala General Sales Tax Act, 1963 (for short "the Act") as being invalid.

3. The respondents in these appeals manufacture and sell various commodities like copper sulphate, batteries, battery plates, electrical goods, laboratory apparatus, battery spare parts etc. If during the course of their assessment proceedings under the Act any question used to arise relating to the rate of tax leviable on the goods sold by various dealers or the entry under which a particular item sold by a dealer would fall, the same used to be decided by the assessing and the appellate authorities under the Act. By an amendment, Section 59-A was inserted in the Act with effect from 1-4-1978. This section sought to give power to the Government to determine the rate of tax and it reads as follows :

> "59-A. Power of Government to determine rate of tax. - If any question arises as to the rate of tax leviable under this Act on the sale or purchase of any goods, such question shall be referred to the Government for decision and the decision of the Government thereon shall, notwithstanding any other provision in this Act, be final."

4. In exercise of the powers given by the said Section 59-A, the State Government issued orders from time to time, purporting to clarify the rate of sales tax. On 23-4-1984, an order was issued by the State Government purporting to clarify the rate of sales tax on various items. One of the items contained in this order was tinned foods like Horlicks, Viva, Boost, Bournvita, Ovamalt etc. By this order, the Government stated that the said items of tinned food were covered by Entry 6 of the First Schedule of the Act.

5. M/s Parry and Company, one of the respondents in these appeals, wrote a letter dated 11-12-1984 to the Secretary, Board of Revenue, with regard to the classification of the aforesaid item - Horlicks. It was stated in this letter that they were registered dealers since 30-6-1957 and all along, successive officers had accepted their classification of Horlicks as a milk product falling under Sl. No. 3 of the First Schedule and, therefore, they were liable to pay tax at a lesser rate and not at the rate of ten per cent which was payable under Sl. No. 6 of the First Schedule. To this letter, the reply which was

received was to the following effect :

> #"No. OS 2661/85/TX/Ldis. Office of the Board of Revenue (Taxes) Trivandrum-1 dated 31-1-1985##
>
> From,
>
> The Secretary, Board of Revenue (Taxes), Trivandrum.
>
> To,
>
> M/s Parry & Company Ltd., "DARE HOUSE" Post Box No. 12, Madras-600 001.
>
> Gentlemen,
>
> Sub : Taxes - Sales tax rate of tax on Horlicks etc.
>
> Ref : Your letter dated 11-12-1984
>
> The case at issue has already been examined previously and the Government in GO Rt. 314/84/TD dated 23-4-1984 have clarified that Horlicks would come under Entry 6 of the First Schedule to the KGST Act, 1963.
>
> # Yours faithfully, sd/- [Secretary (Taxes)]"##

6. It is in view of such decisions taken by the State Government in determining the entries under which different items would fall, in exercise of its power under Section 59-A of the Act, that the respondents in these appeals filed different writ petitions in the Kerala High Court challenging the constitutional validity of Section 59-A. The main contention of the dealers was that Section 59-A gave the Government arbitrary and unguided power in determining the rate of tax applicable to different items and, furthermore, the said power had in fact been exercised in an arbitrary manner.

7. The High Court in the impugned judgment referred to an earlier Bench decision of that Court in Dadha Pharma (P) Ltd. v. State of Kerala [(1990) 2 Ker LT 307]. That was a case by way of revision before the High Court under Section 41 of the Act. The High Court had to deal with the applicability of Section 59-A in that case. As it was exercising limited jurisdiction of tax revision, it obviously could not pronounce on the constitutional validity of Section 59-A. The Court observed that if literal meaning was given to the words used in that section, then such literal interpretation would render the section vulnerable to attack of being vague and uncertain and as one taking away guaranteed rights. The Court, however, read down the section in a drastic manner and sought to provide some safeguards against the arbitrary exercise of power by the Government. In the present case, the High Court exercising its jurisdiction under Article 226 of the Constitution, felt unfettered and proceeded to examine the constitutional validity of the said provision. After analysing the provision and seeing the manner in which the power had been exercised under Section 59-A of the Act, the High Court came to the conclusion that the said section had all the features of deleterious vagueness and it was unconstitutional, being violative of Article 14 of the Constitution.

8. On behalf of the appellants, it was contended by Mr. K. N. Bhat, learned Senior Counsel, that Section 59-A is a piece of delegated legislation conferring power on the Government to decide any question regarding rate of tax. The section, it was submitted, furnishes the limitations subject to

which the power could be exercised. This power, it was contended, was in respect of classification under the Schedule and not for levying a tax.

9. On the other hand, the learned counsel for the respondents submitted that effect of Section 59-A is that whenever a direction is issued under the said provision, the statutory right of appeal etc. is taken away and the section itself contains no guidelines and gives unbridled powers to the Government to act in any manner it feels like.

10. Like other taxing statutes, the Kerala General Sales Tax Act contains elaborate provisions relating to assessment of tax and filing of appeals and revisions to the higher authorities. Chapter IV deals with assessment, collection and levy of tax. Section 17 contains the procedure which is to be followed by the assessing authority. If the assessing authority does not accept the return as submitted by the dealer then he is under an obligation to give a reasonable opportunity to the dealer of being heard before finalising the assessment. In the event of the dealer being aggrieved by the assessment order so passed Chapter VII contains provisions for appeals and revisions. Appeal to the Appellate Assistant Commissioner is filed under Section 34; Section 36 gives the power to the Deputy Commissioner to revise an order on an application being made and power of revision is also given to the Board of Revenue under Section 38 of the Act. Section 39 is a provision which provides for appeal to the Appellate Tribunals against certain orders. Section 40 enables an appeal to be filed to the High Court by any person objecting to an order affecting him which was passed by the Board of Revenue under Section 37, while Section 41 gives a person the right to file a revision in the High Court from an order passed by the Tribunal under Section 39 of the Act. It is apparent from a reading of these provisions that questions like the rate of tax or the entry under which sale of particular goods are to be taxed can be raised and determined before various quasi-judicial and judicial authorities. There is a right of appeal and revision which is given to a person who is aggrieved by any order.

11. A plain reading of Section 59-A shows that if any question relating to the rate of tax leviable under the Act on any goods is referred to the Government then its decision thereon, "notwithstanding any other provision in this Act is final". This section does not indicate as to who can make a reference to the Government. There is no obligation on the Government to hear any dealer before it decides as to the rate of tax leviable on the sales or purchase of any type of goods. In fact, as we have noticed earlier, by an omnibus order dated 23-4-1984, the Government decided rates of tax payable in respect of various items without any opportunity of being heard having been granted to any of the dealers. Lastly, Section 59-A clearly states that the decision so given by the Government shall be final and would have an overriding effect.

12. There is no warrant in our opinion in trying to read down the provisions of Section 59-A. The words of the said provision are clear and unambiguous. The said section gives absolute power to the Government to decide any question regarding the rate of tax leviable on the sale or purchase of goods in any manner it deems proper and finality is given to such a decision.

13. Section 59-A enables the Government to pass an administrative order which has the effect of negating the statutory provisions of appeal, revision etc. contained in Chapter VII of the Act which would have enabled the appellate or revisional authority to decide upon questions in relation to which an order under Section 59-A is passed. Quasi-judicial or judicial determination stands replaced by the power to take an administrative decision. There is nothing in Section 59-A which debars the Government from exercising the power even after a dealer has succeeded on a question relating to the rate of tax before an appellate authority. The power under Section 59-A is so wide

and unbridled that it can be exercised at any time and the decision so rendered shall be final. It may well be that the effect of this would be that such a decision may even attempt to override the appellate or the revisional power exercised by the High Court under Section 40 of the Act as the case may be. The section enables passing of an executive order which has the effect of subverting the scheme of a quasi-judicial and judicial resolution of the lis between the State and the dealer.

14. We are unable to agree with the submission of Mr. Bhat that the section furnishes a limitation subject to which the power can be exercised. The section does not contain and guidelines as to at what stage the power can be exercised and nor does the exercise of such a power make it amenable to the appellate or revisional provisions provided by the Act. It is no doubt true that in certain enactments of other States, the Government has the power but such power is not unbridled. For example, under Section 49 of the Delhi Sales Tax Act, 1975, power has been given to the Commissioner of Sales Tax to determine certain disputed questions. The said section reads as under :

> "49. Determination of disputed questions. - (1) If any question arises, otherwise than an proceedings before a court, or before the Commissioner has commenced assessment or reassessment of a dealer under Section 23 or Section 24 whether for the purposes of this Act, -
>
> (a) any person, society, club or association or any firm or any branch or department of any firm is a dealer; or
>
> (b) any particular thing done to any goods amounts to or results in the manufacture of goods within the meaning of that term as given in clause (h) of Section 2; or
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> (c) any transaction is a sale, and if so, the sale price therefor; or
>
> (d) any particular dealer is required to be registered; or
>
> (e) any tax is payable in respect of any particular sale, or if the tax is payable, the rate thereof,
>
> the Commissioner shall, within such period as may be prescribed, make an order determining such question.
>
> Explanation. - For the purposes of this sub-section, the Commissioner shall be deemed to have commenced assessment or reassessment of a dealer under Section 23 or Section 24, when the dealer is served with any notice by the Commissioner under Section 23 or Section 24, as the case may be.
>
> (2) The Commissioner may direct that the determination shall not affect the liability of any person under this Act as respects any sale effected prior to the determination.
>
> (3) If any such question arises from any order already passed under this Act or under the Bengal Finance (Sales Tax) Act, 1941, Bengal Act VI of 1941, as then in force in Delhi, no such question shall be entertained for determination under this section; but such question may be raised in appeal against, or by way of revision of such order."

The aforesaid section itself provides that a question for determination must arise otherwise than in

proceedings before a court or before the Commissioner has commenced assessment or reassessment. Furthermore, sub-section (2) enables the Commissioner to direct that the determination of the question shall not affect the liability of any person under that Act in respect of any sale effected prior to the determination. No such safeguard or guideline as provided in the said Section 49 of the Delhi Sales Tax Act is present in the main provision.

15. We are in complete agreement with the view of the Kerala High Court that Section 59-A of the Act is violative of Article 14 of the Constitution and the High Court was, therefore, right in striking down the said provision. For the aforesaid reasons, these appeals are dismissed with costs.