K. Damodaraswamy Naidu & Bros.

Vs

State of T. N. and Another

Civil Appeals No. 1415-16 of 1990 with No. 354 of 1985

(S. P. Bharucha, B. N. Kirpal, V. N. Khare, D. P. Mohapatra, N. Santosh Hegde JJ)

12.10.1999

JUDGMENT

BHArucha, J.: -

1. The issues in these appeals and writ petitions relate to the entitlement of the States to levy tax on the sale of food and drink. Entry 54 of List II of the Seventy Schedule to the Constitution empowers the States to levy "taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I". (Entry 92-A of List I deals with taxes on the sale or purchase of goods in the course of inter-State trade or commerce and does not concern us here.)

2. In the decision in State of Punjab v. Associated Hotels of India Ltd.[(1972) 1 SCC 472: (1972) 2 SCR 937] this Court considered the plea of Associated Hotels of India Ltd., which ran Cecil Hotel in Shimla, that it was not liable to pay sales tax in respect of meals served to guests who came there to stay. Posing the questions, what was the nature of the transaction and the intention of the parties when a hotelier received a guest in his hotel and was there in that transaction an intention to sell him the food contained in the meals served to him during his stay, this Court held that the transaction was essentially one and indivisible, namely, to receive customers in the hotel to stay. Even if the transaction was to be disintegrated, there was no question of the supply of meals during such stay constituting a separate contract of sale since no intention on the part of the parties to sell and purchase foodstuff supplied during mealtimes could realistically be spelt out. The transaction, essentially, was one of service by the hotelier, in the performance of which meals were served as part of and incidental to that service, such amenities being regarded as essential in well-conducted modern hotels. Such amenities, including meals, were part and parcel of service, which was in reality the transaction between the parties. The Revenue, therefore, was not entitled to split the transaction into two parts, one of service and the other of sale of foodstuffs, and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for foodstuff served.

3. The case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [(1978) 4 SCC 36 : 1978 SCC (Tax) 198] dealt specifically with the levy of sales tax upon the service of meals to casual visitors in a restaurant. The question was whether the service of meals to non-resident customers in the appellant's restaurant constituted a sale of foodstuff. This Court said that the view taken in the case of Associated Hotels of India Ltd. indicated the approach to the question. This Court considered the origin and historical development of the institution of a restaurant and found it akin to what, historically, was an inn. An innkeeper or hotelier

> "does not lease this rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the

> guest is to consume the food he needs, and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of food supplied to him, nor can he claim a certain portion of food as his own to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest". (SCC p. 39, para 4)

This principle, put in the words of Professor Beale, had been extended in England to the service of food at restaurants. The restaurateur was regarded fundamentally as providing sustenance to those who ordered food to eat in the premises. Like the hotelier, the restaurateur provided many services in addition to the supply of food. He provided furniture and furnishings, linen, crockery and cutlery and, perhaps, music, a dance floor and a floor show. The Court held, accordingly, that the service of meals to visitors in the appellant's restaurant was not liable to sales tax and this was so whether the charges were imposed for the meals as a whole or according to the dishes separately ordered.

4. A review petition was field in respect of the judgment in Northern India Caterers [(1980) 2 SCC 167 : 1980 SCC (Tax) 222] and all three Judge found that it should be dismissed. The order of the majority noted that it appeared from the submissions that were made in the review petition that the States were apprehensive that the judgment in Northern India Caterers would be invoked by restaurant-owners in those cases also where there was sale of food and title passed to the customers. It seemed to the two learned Judges who constituted the majority, having regard to the facts on which that judgment rested, undisputed as they had remained throughout the different stages of the litigation, and the considerations which they attracted, that no such apprehension could reasonably be entertained. Where food was supplied in a restaurant and it was established upon the facts that the substance of the transaction, evidenced by its dominant object, was the sale of food and the rendering of service was merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case it would be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied was intended. Krishna Iyer, J., concurring with the majority, said that the judgment under review squarely applied to the cases of high-style restaurants or residential hotels which rendered a bundle of special services for a consolidated sum.

5. The Constitution Forty-sixth Amendment Act, 1982 amended Article 366 of the Constitution thereafter by inserting clause (29-A) therein. So far it is relevant for our purposes, it read:

> "366. (29-A) `tax on the sale or purchase of goods' includes--
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> (a)-(e) * * *
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> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.
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> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

By reason of this amendment the States became entitled to levy a tax on the supply of food and drink.

6. In Tamil Nadu, the Tamil Nadu General Sales Tax Act was amended by the Tamil Nadu General (Sales Tax) Fourth Amendment Act, 1984. The definition of "sale" now included.

> "a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration."

The definition of "dealer" was similarly expanded. Section 3-A was introduced providing for the levy of tax on the transfer of the right to use goods and, in 1986, Section 3-B was inserted to provide for the levy of tax on the transfer of goods involved in work contracts. [Article 366 clause (29-A) sub-clauses (d) and (b) respectively provided for the levy of tax on the transfer of the right to use goods and on the transfer of goods involved in work contracts.] By successive notifications issued under the said Tamil Nadu Act, exemptions were granted in respect of the tax payable on the sale of food and drink by hotels, restaurants, sweet stalls and other eating houses. Then, in 1977, Section 3-D was introduced with effect from 1-4-1997 and the exemption in respect of the tax payable on the sale of food and drinks by hotels, restaurants, sweet stalls and eating houses was increased so that those whose turnover was not more than Rs 25 lakhs were exempt.

7. Learned counsel for such restaurant-owners from Tamil Nadu (appellants in CAs Nos. 1415 and 1416 of 1990), contended that the Tamil Nadu State Legislature had evinced no intention of taxing the supply of food and drink until Section 3-D was introduced in 1997, while it had evinced the intention to tax the transfer of the right to use goods and the transfer of goods involved in work contracts by the introduction of Sections 3-A and 3-B in the said Tamil Nadu Act. In his submission, the mere amendment of the definition section as aforestated was not enough to entitle the State to levy the tax prior to 1997. We find it difficult to accept the contention. Once the definition of "sale" in the said Tamil Nadu Act was amended to include the supply of food and drink, the supply of food and drink fell within the purview of the charging section thereof and became exigible to tax thereunder. That the State Legislature had earlier chosen specifically to incorporate Sections 3-A and 3-B to tax the transfer of the right to use goods and the transfer of goods involved in work contracts respectively does not lead to the conclusion that, therefore, it had not intended to tax the supply of food and drink until Section 3-D was inserted in 1997. The incorporation of Sections 3-A and 3-B can only be said to be measures of abundant caution.

8. Learned counsel next contended, relying upon the judgments aforementioned, that, in the eye of the law, the tax on food served in restaurants could not be levied on the sum total of the price charged to the customer. In his submission, restaurants provided services in addition to food and these had to be accounted for. Thus, restaurants provided an elegant d[illegible]cor, uniformed waiters, good linen, crockery and cutlery. It could even be that they provided music, recorded or live, a dance floor and a cabaret. The bill that the customer paid in the restaurant had, therefore, to be split up between what was charged for such service and what was charged for the food.

9. The provisions of sub-clauses (f) of clause (29_A) of Article 399 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of sub-clause (f)

have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned counsel. The supply of food by the restaurant-owner to the customer though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery, music, a dance floor and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50 for its supply and it is on Rs 50 that the restaurant-owner must be taxed.

10. The contentions of learned counsel for owners of restaurants in West Bengal (Write Petitions Nos. 15227 and 17245 of 1984) are similar and must be similarly rejected.

11. Learned counsel for the owners of residential hotels in the State of Maharashtra (Write Petition No. 9901 of 1983) raised much the same contention, but in the context of residential hotels. He pointed out that residential hotels provided only together or lodging and boarding. The boarding could comprise full board, i.e., breakfast, launch and dinner or breakfast and one meal or breakfast alone. In Mr. Salve's submission, the composite charge that the hotel-owner levied for lodging and such boarding had to be split up and only the element thereof that related to the supply of meals could be subjected to the tax. The tax could not be levied on the composite charge for boarding and lodging unless the State made rules which set down formulae for determining that component of the composite charge which was exigible to the tax on food and drink.

12. It was not disputed by learned counsel for the State of Maharashtra that the tax on food and drink could be imposed only upon that component of the composite charge for lodging and boarding at a residential hotel as related to the supply of food and drink. But, in his submission, no rules in this behalf were necessary; the Sales Tax Officers would make assessments depending upon the facts of each individual case.

13. There are several hundred residential hotels in the State of Maharashtra. They provide lodging and boarding to several thousands of customers in every assessment year. It is in practical terms impossible for the Sales Tax Authorities to make assessments upon the basis of the facts relevant of each individual customer in each individual hotel. Generalisations are, therefore, inevitable and there is every likelihood that the basis of the generalisation made by one Sales Tax Officer would differ from the basis of the generalisation made by another, leading to unacceptable arbitrariness. Rules that indicate to Sales Tax Officers how to treat composite charges for lodging and boarding would eliminate substantial differences in their approach and, thus, arbitrariness.

14. We, therefore, direct that the State of Maharashtra shall henceforth not make assessments of the tax on the supply of food and drink on hotel-owners who provide lodging and boarding for a composite sum until it frames rules that set out formulae for such assessment which take account of the fact that residential hotels may provide lodging and full or part-board as set out above. If the rules are framed by 1-6-2000 the assessments that are not completed only by reason of this order may be proceeded with. If the rules are not framed by the said date, these assessments shall lapse. No proceedings for assessments shall be commenced hereafter until the rules have been framed. At the same time, completed assessments as of today shall not be affected by this order, and the assesses would be entitled to adopt proceedings there against, subject to the law.

15. Learned counsel for the owners of residential hotels in the State of Maharashtra then referred to the provisions of the Bombay Sales Tax Act, 1959. Section 2 clauses (28) dealing with "sale" was amended with effect from 16-8-1985 and clause (b) was introduced in the explanation therein. Sub-clause (iii) thereof read:

> "(iii) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given on or after the 2nd day of February, 1983, for cash, deferred payment or other valuable consideration;"
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> (emphasis supplied)
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> In learned counsel's submission to tax on food or drink could, therefore, be levied by the State of Maharashtra for any supply thereof prior to 2-2-1983, but the State was purporting to levy such tax for periods before that date.

16. It is relevant to the argument to mention that the Schedule to the Bombay Sales Tax Act listed "cooked food" as an item liable to sales tax.

17. There was no amendment of the U.P. Sales Tax Act, 1948, to make the supply of food and drink taxable after clause (29-A) was introduced in Article 366 until 1985 when the definition of "sale" was amended appropriately with effect from 2-2-1983. The Schedule to the U.P. Sales Tax Act contained an entry whereby "sweetmeats, namkin, cooked food, confectionery, rewari, gajak, biscuits, bread, cakes, pastries, buns, jams, jellies, murabbas, gulkand, churan, chatani and achar when sold loose or unpacked" were taxable.

18. A "halwai" in Uttar Pradesh challenged the levy of the tax on the supply of food and drink by him for periods prior to 2-2-1983, and the High Court upheld his case. It noted that the Tribunal had found that he provided the service of bearers, radio, fans, etc. and had made seating arrangements in his shop. Reliance was placed on behalf of the State on Section 6 of the Constitution Forty-sixth Amendment Act, but the argument was turned down. The judgment and order of the High Court of Uttar Pradesh is under appeal (CA No. 354 of 1985).

19. Learned counsel for the States of Maharashtra and Uttar Pradesh relied upon Section 6 of the Constitution Forty-sixth Amendment Act. The said Section 6 reads thus:

> "6. Validation and exemption.--(1) For the purposes of every provision of the Constitution in which the expression `tax on the sale or purchase of goods' occurs, and for the purposes of any law passed or made, or purporting to have been passed or made, before the commencement of this Act, in pursuance of any such provision,--
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> (a) the said expression shall be deemed to include, and shall be deemed always to have included, a tax (hereafter in this section referred to as the aforesaid tax) on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) for cash, deferred payment or other valuable consideration; and

(b) every transaction by way of supply of the nature referred to in clause (a) made before such commencement shall be deemed to be, and shall be deemed always to have been, a transaction by way of sale, with respect to which the person making such supply is the seller and the person to whom such supply is made, is the purchaser,

and notwithstanding any judgment, decree or order of any court, tribunal or authority, no law which was passed or made before such commencement and which imposed or authorised the imposition of, or purported to impose or authorise the imposition of, the aforesaid tax shall be deemed to be invalid or ever to have been invalid on the ground merely that the legislature or other authority, passing or making such law did not have competence to pass or make such law, and accordingly-

(i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under any such law before the commencement of this Act shall be deemed always to have been validly levied or collected in accordance with law:

(ii) no suit or other proceeding shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any such aforesaid tax which has been collected;

(iii) recoveries shall be made in accordance with the provisions of such law of all amounts which would have been collected thereunder as such aforesaid tax if this section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax--

(a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978 and before the commencement of this Act and for the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or

(b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of January, 1972 and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time:

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case may be, clause (b), shall be on the person claiming the exemption under this sub-section.

(3) For the removal of doubts, it is hereby declared that,-

(a) nothing in sub-section (1) shall be construed as preventing any person-

(i) from questioning in accordance with the provisions of any law referred to in that sub-section, the assessment, reassessment, levy or collection of the aforesaid tax, or

(ii) from claiming refund of the aforesaid tax paid by him in excess of the amount due from him under any such law; and

(b) no act or omission on the part of any person, before the commencement of this Act, shall be punishable as an offence which would not have been so punishable if this Act had not come into force."

20. Learned counsel for the States of Maharashtra and Uttar Pradesh argued, to start with, that the said Section 6 validated the sales tax laws of the States with retrospective effect and that, therefore, the States were entitled to levy the tax on the supply of food and drink regardless of the fact that there was no provision in the State Acts for such levy prior to 2-2-1983. The argument was not pressed after the learned Additional Solicitor General, appearing for the Union of India submitted that the said Section 6 validated a State law only, prior to 2-2-`1983, if the State law had contained a provision entitling the State of levy a tax on the supply of food and drink. If such State law had existed, it was rendered valid by reason of the amendment of the definition of "sale" in Article 366(29-A) made by Section 4 of the Constitution Forty-sixth Amendment Act on that date and the retrospectively given thereto by the said Section 6. The contention then urged on behalf of the States of Maharashtra and Uttar Pradesh was that the said Section 6 validated the levy of sales tax on food and drink by equating it to the levy on the supply of food and drink.

21. Parliament, when exercising the powers to amend the Constitution under Article 368, cannot and does not amend State Acts. There is no other provision in the Constitution which so permits and there is no judgment of this Court that so holds. The power to make laws for the States in respect of matters listed in List II in the Seventh Schedule is exclusively that of the State Legislatures. The State Legislature alone could have amended or modified a State law levying tax under Entry 54 of List II. The said Section 6 would, therefore, be bad in law if it were construed to be an essay by Parliament, exercising constituent powers, to amend the sales tax laws of the states. The said Section 6 must be read as only giving retrospective operation to the expansion of the expression "tax on the sale or purchase of goods" in Entry 54 of List II to include a tax on the supply of food or drink and thus validating retrospectively State Sales Tax Acts that had theretofore made provision for the levy of sales tax on the supply of food and drink. There is, accordingly, no warrant even for the submission that the said Section 6 equates a provision for sales tax on food and drink in State Sales Tax Acts with a provision for sales tax on the supply of food and drink. Neither the States of Maharashtra nor the State of Uttar Pradesh had provisions in their Sales Tax Acts prior to the introduction of clause (29-A) in Article 366 which enabled them to tax the supply of food and drink. The said Section 6, therefore, can be of no assistance to them. The levy of sales tax on the supply of food and drink prior to 2-2-1983 in the state of Maharashtra and in the State of Uttar Pradesh is bad in law.

22. Learned counsel for the State of Uttar Pradesh submitted that there were some observations in the judgment of the High Court of Uttar Pradesh under appeal which suggested that the said Section 6 could have no application to the U.P. Sales Tax Act because it was a statute that was enacted prior to the Constitution. We agree with learned counsel that the observations in this behalf are not justified. The language of the said Section 6 would show that it applies to all laws passed or made before the Constitution Forty-sixth Amendment Act, 1982.

23. Writ Petition No. 9901 of 1983 is made absolute to this extent:

> The State of Maharashtra is directed henceforth not to make assessments of the tax on the supply of food and drink on hotel-owners who provide lodging and boarding for a composite sum until it frames rules that set out formulae for such assessment which take account of the fact that residential hotels may provide lodging and full or part-board. If the rules are framed by 1-6-2000 the assessments that are not completed only by reason of this order may be proceeded with. If the rules are not framed by the said date, these assessments shall lapse. No proceedings for assessments shall be commenced hereafter until the rules have been framed. At the same time, completed assessments as of today shall not be affected by this order and the assessees would be entitled to adopt proceedings there against, subject to the law.

24. It is further declared that the levy of sales tax on the supply of food and drink prior to 2-2-1983 in the State of Maharashtra is bad in law.

25. Civil Appeal No. 354 of 1985 is dismissed.

26. Civil Appeals Nos. 1415 and 1416 of 1990 and Write Petition Nos. 15227 and 17245 of 1984 are dismissed.

27. The write petitions against the State of Karnataka (Write Petitions No. 3522 of 1983, 9022-47 and 11812 of 1985) were not argued; they are dismissed.

28. No order as to costs.