SUPREME COURT OF INDIA

Federation of Hotel and Restaurant Associations Of India

Vs.

Union of India

C.A.No.21790 of 2017

(R.F.Nariman and Navin Sinha,JJ.,)

12.12.2017

JUDGMENT

R.F.Nariman,J.,

SLP(C)No. 28685 /2015

1. Leave granted.

2. The present appeals arise out of Writ Petition (C) No. 6517/2003 filed by the Federation of Hotel and Restaurant Associations of India in the High Court of Delhi, seeking a declaration that the provisions of the Standards of Weights and Measures Act, 1976, the Standards of Weights and Measures (Enforcement) Act, 1985 and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 are not applicable to services rendered in the premises of hotels/restaurants.

3. The appellant's main concern was that the Controller of Weights and Measures was seeking to proceed against the hotels and restaurants of the appellant-Association for charging a price higher than the printed Maximum Retail Price ("MRP" in short) for supply of packaged water bottles during services provided to their customers while in the hotels and restaurants. The appellants plead in the Writ Petition that the transaction consisting predominantly of a service, and not of a sale of drinking water, consisted of a composite charge which included incidental charges for food, drinks etc. The challenge in the Writ Petition resulted in a judgment by the learned Single Judge dated 05.03.2007. The judgment of the learned Single Judge referred to and relied upon the decisions in The *State of Punjab vs. M/s. Associated Hotels of India Ltd*[1]*., Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi*[2]*,* and the review judgment in the latter case reported in (1980) 2 SCC 167. After discussing these judgments in detail, and considering the statement of objects and reasons of the Standards of Weights and Measures Act, the learned Single Judge finally held:

"16. In the above analysis I hold that charging prices for mineral water in excess of MRP printed on the packaging, during the service of customers in hotels and restaurants does not violate any of the provisions of the SWM Act as this does not constitute a sale or transfer of these commodities by the hotelier or Restaurateur to its customers. The customer does not enter a hotel or a restaurant to make a simple purchase of these commodities. It may well be that a client would order nothing beyond a bottle of water or a beverage, but his direct purpose in doing so would clearly travel to enjoying the ambience available therein and incidentally to the ordering of any article for consumption. Can there by any justifiable reason for the Court or Commission to interdict the sale of bottled mineral water other than at a certain price, and ignore the relatively exorbitant charge for a cup of tea or coffee. The response to this rhetorical query cannot but be in the negative. Although the vires of Rule 23 have been assailed, I do not find it necessary to answer that challenge since the provision relates to sales between dealers and neither the hotels and restaurants of the one part and customers of the other falls within this categorization."

4. In a Letters Patent Appeal filed before the Delhi High Court, by a judgment dated 11.02.2015, the Division Bench recorded that the counsel for the writ petitioners was agreeable to disposing of the appeals in a particular manner and accordingly, the appeals were disposed of in such manner. Paras 16 & 17 of this judgment are set out herein below:

"16. The counsel for the writ petitioners is agreeable to our disposing of these appeals with observations that the judgment of the learned Single Judge shall not come in the way of the appellant enforcing the provisions of the new Act even if identical or similar to the old Act and it being left to be adjudicated in the proceedings if any initiated under the new Act whether hotels/restaurants, are entitled to do so or not.

17. We accordingly dispose of these appeals in following terms:

"A. Owing to the change in law, there is no need to set aside or affirm the judgment of the learned Single Judge.

B. However the question of law adjudicated by the learned Single Judge is left open for adjudication in any fresh proceeding under the new law and the judgment of the learned Single Judge shall not be a precedent in any such adjudication even if the concerned provisions of the old and the new law are identical/similar.

C. The appellant shall however not be entitled to initiate any proceeding/prosecution for violation of the old law in this respect, even if notices of such violation were issued, as in our opinion, considering the nature of offence, the long time which has elapsed and the doubt which has arisen whether such prosecution will be within the prescribed time, it is not deemed expedient that the state resources in this regard, which are already strained, be expended thereon."

5. A Review Petition was then filed against the aforesaid judgment which met with no success, in that the review was dismissed by an order dated 15.05.2015, in which it was pointed out that the practice of review being sought on a ground which is not supported by the original advocate but by a different advocate has been deprecated, and hence the review was dismissed.

6. Mr. K.V. Viswanathan, learned Senior Counsel, appearing on behalf of the appellant before us, has argued that both the original as well as the review order impact his clients in that the judgment of the learned Single Judge, which is a detailed and comprehensive judgment dealing with all the law points at hand has been brushed aside, and the result is that any de novo proceeding under the Legal Metrology Act, 2009, which has since replaced the two Acts of 1976 and 1985, would transgress the rights of the appellant's clients as this has to be gone into de novo. According to the learned Senior Counsel, the concession that is made cannot possibly bind the appellant as not only is it a concession on a point of law but on a concession made on jurisdiction, and according to the learned Senior Counsel once it is conceded, as will be come clear from a reading of the Legal Metrology Act, that the position under the two statutes, namely, the 2009 Act as well as the repealed Acts is identical, then the Single Judge's judgment, if it is otherwise good in law, would require to be confirmed. According to the learned Senior Counsel, having regard to the judgments of this Court, and having regard to the changes made by the Constitution (forty-sixth Amendment) Act, contained in Article 366 (29-A), and further having regard to the fact that despite such changes having been made, no such change as was made by the Constitutional amendment has been made in the definition of "sale" which continues to be the same under the 2009 Act as it was under the 1976 Act, the Division Bench ought to have affirmed the judgment of the learned Single Judge and dismissed the appeal.

7. Mr. Ajit Kumar Sinha, learned Senior Counsel, appearing on behalf of the Union of India has argued before us that we should not go into the jurisdictional question at all in view of the statement of counsel made for the writ petitioner before the learned Division Bench. Alternatively, he argued that if for some reason we are to go into the merits of the case, despite the fact that the 2009 Act admittedly does not make any change in the earlier position so far as the definition of "sale" is concerned, yet a reading of the definition of "pre-packaged commodity" contained in Section 2(l) of the 2009 Act read with Rule 3 explanation (1) of the Rules made thereunder would show that hotels such as the appellant's are within the reach of the statute and the rules made thereunder. He also referred us to Section 57 of the 2009 Act, which repeals the 1976 Act, and submitted that transactions made under the old Act would continue as a result. The question that therefore arises in the present case is: given the fact that the Legal Metrology Act, 2009 continues with the same definition of "sale" as was contained in the 1976 Act, whether the judgment of the learned Single Judge can be said to be correct in law and applicable qua the 2009 Act.

8. A consideration of the statement of objects and reasons of the 1976 Act would show that the said Act is concerned with a provision for consumer protection by which the proper indication on the package of net quantity by weight etc. is contained therein and the price of

the package is also indicated. Further, indication of date of manufacture and date of expiry would also be marked for appropriate products. The relevant portion of the said statement of objects and reasons is set out herein below:

> "5. The Bill further provides for consumer protection in respect of packaged commodities by providing, in pursuance of the recommendations of the OIML, for the proper indication on the package of net quantity by weight, measures or number, the identity of the commodity contained therein, name of the manufacturer, and what is very important, the price of the package. It is also proposed that commodities commonly used by people should be packed in rationalised standard quantities by weight, measure or number, so as to facilitate the purchase and comparison of price by the people. Further, indication of date of manufacture and date of expiry would also be marked for appropriate products.
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> 6. A further provision for consumer protection is the approved models of weights, measures and weighing and measuring instruments, which is recommended by the OIML, draft law. The scientific evaluation of the performance accuracy and dependability of weights, measures etc. would enable the consumer to buy his requirements with greater confidence about accuracy and also give industries the facility to use more accurate measuring instruments in their production control and enable the scientists to measure accurately to quantities involved in their researches. All these benefits will contribute to national development.
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> 7. The main features of the Bill are, -
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> (a) establishment of the standards of weights and measures, based on the SI units, as adopted by the CGPM and recognised by the OIML;
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> (b) establishment of the standards of numeration, based on the international form of Indian numerals;
>
> (c) regulation of inter-State trade and commerce in weights and measures and commodities sold, distributed or supplied by weight or measure;
>
> (d) regulation of inter-State trade and commerce in commodities sold, supplied or distributed in packaged form;
>
> (e) control and regulation of export and import of weights and measures and commodities in packaged form;
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> (f) approval (before manufacture) of models of weighing and measuring instruments intended to be manufactured after the commencement of the proposed legislation;

(g) establishment of an Indian Institute of Legal Metrology for imparting training in legal metrology to inspectors and other persons;

(h) surveys and collection of statistics for facilitating planning and enforcement of the proposed legislation;

(i) punishment for offences against the proposed legislation."

9. We are concerned primarily with the definition of "sale" that is contained in the 1976 Act as it then stood. Sale is defined as follows:

> "2(v) "sale", with its grammatical variations and cognate expressions, means transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by installments, but does not include a mortgage or hypothecation of, or a charge or pledge on, such weight, measure or other goods;"

It will be clear on a cursory reading of the said definition that "sale" means transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration. It will be noticed that despite this Court's judgment in M/s. Associated Hotels of India Ltd. (supra), which is a judgment of the year 1972, Parliament has chosen to adopt the definition of sale which does not include or split up sales of goods from services in composite contracts. Also, a reading of the various penal provisions that are contained in the Act, starting with Section 50 would show that there is no penalty for selling above MRP in hotels and/or restaurants.

10. As has been stated in the trilogy of judgments in M/s. Associated Hotels of India Ltd. (supra) and the two Northern India Caterers (India) Ltd. (supra), it is clear that when "sale" of food and drinks takes place in hotels and restaurants, there is really one indivisible contract of service coupled incidentally with sale of food and drinks. Since it is not possible to divide the "service element", which is the dominant element, from the "sale element", it is clear that such composite contracts cannot be the subject-matter of sales tax legislation, as was held in those judgments.

11. Bearing these judgments in mind, Parliament amended the Constitution and introduced the Constitution (forty-sixth Amendment) Act, by which it introduced Article 366 (29-A). Sub-clause (f), with which we are directly concerned, reads as follows:-

> "366. (29A) (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, 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."

A reading of the constitutional amendment would show that supply by way of or as part of any service of food or other article for human consumption is now deemed to be a sale of goods by the person making the transfer, delivery or supply.

12. What is interesting to note is that despite the fact that the constitutional amendment was made way-back in the year 1982, the 1976 Act was not amended so as to incorporate the definition of sale contained therein. What is of greater importance is to appreciate that when the 2009 Act has replaced the 1976 Act, again the definition of "sale" contained in the 2009 Act reads as follows:

"(r) "sale", with its grammatical variations and cognate expressions, means transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration and includes a transfer of any weight, measure or other goods on the hire-purchase system or any other system of payment by instalments, but does not include a mortgage or hypothecation of , or a charge or pledge on, such weight, measure or other goods; As is clear from the statement of objects and reasons for the 2009 Act, the object of the said Act was only to do away with the 1976 and 1985 Acts so as to combine the said provisions into one enactment so as to make the law simple, ensure accountability, and bring in transparency. The statement of objects and reasons for the 2009 Act reads as follows:-

"STATEMENT OF OBJECTS AND REASONS

In India, uniform standards of weights and measures based on the metric system, were established in the year 1956, which were revised in the year 1976 with a view to give effect to the international system of units. Apart from it, the Standards of Weights and Measures Act, 1976 provides for establishing Standards of Weights and Measures, regulation of inter-State trade or commerce in weights and measures and other goods which are sold by weight, measure or number. In the year 1985, the Standards of Weights and Measures (Enforcement) Act, 1985 was enacted for enforcement of standards of weights and measures established by or under the 1976 Act.

2.The advancement of technology has necessitated the review of above mentioned enactments to make them simple, eliminate obsolete regulations, ensure accountability and bring transparency.

3. It has become imperative to combine the provisions of the existing two Acts to get rid of anomalies and make the provisions simple. It has also become necessary to keep the regulation pragmatic to the extent required for protecting the interest of

consumers and at the same time keep the industry free from undue interference. It has also become necessary to recognise certain "Government approved Test Centres" which will be empowered to verify prescribed weights or measure.

4. The Bill, inter alia, provides for,-

(a) regulation of weight or measure used in transaction or for protection;

(b) approval of model or weight or measure;

(c) verification of prescribed weight or measure by Government approved Test Centre;

(d) prescribing qualification of legal metrology officers appointed by the Central Government or State Government;

(e) exempting regulation of weight or measure or other goods meant for export;

(f) levy of fee for various services;

(g) nomination of a Director by a company who will be responsible for complying with the provisions of the enactment;

(h) penalty for offences and compounding of offences;

(I) appeal against decision of various authorities; and

(j) empowering the Central Government to make rules for enforcing the provisions of the enactment."

13. On a reading of the said Act and the Rules made thereunder, it is clear that the position qua "sale" remains exactly the same as that contained in the 1976 Act, which now stands repealed. This being the case, we are of the view that the learned Single Judge was absolutely correct in his conclusion that despite the constitutional amendment having been passed, the definition of "sale" contained both in the 1976 Act and now in the 2009 Act would go to show that composite indivisible agreements for supply of services and food and drinks would not come within the purview of either enactment, and that this is for the very good reason that the object for both these enactments is something quite different - the object being, as has been pointed out above, to standardize weights and measures for defined goods so that quantities that are supplied are thus mentioned on the package and that MRPs are mentioned so that there is one uniform price at which such goods are sold.

14. Mr. Sinha, learned Senior Counsel, however, has argued before us that given the fact that learned Senior Counsel on behalf of the appellant had made a concession before the Division

Bench, we should not interfere with the said judgment. It is settled law that any such concession made on a question relating to jurisdiction to proceed further, particularly qua criminal prosecutions, does not bind the party in question. It is of utmost importance for all to know exactly how they stand in such cases. Also, Mr. Sinha's reliance upon Section 2(l) of the 2009 Act read with Rule 3 of the Rules does not take us very much further. Section 2(l) of the 2009 Act reads as follows:-

> "(l) "pre-packaged commodity" means a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity;"

15. A cursory reading of the aforesaid definition would show that it refers only to the fact that a pre-packaged commodity should have a pre-determined quantity as stated in the definition section. It has no bearing whatsoever on the issue before us. Equally, reliance upon Rule 3 of the 2011 Rules again does not lead us anywhere. Rule 3 of the said Rules read as follows:-

> "3. Applicability of the Chapter.- The provisions of this Chapter shall not apply to,-
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> (a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg; and
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> (b) packaged commodities meant for industrial consumers or institutional consumers.
> Explanation.- For the purpose of this rule,-
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> (i) "institutional consumer" means the institutional consumer like transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use by that institution;
>
> (ii) "industrial consumer" means the industrial consumer who buy packaged commodities directly from the manufacturer for use by that industry."

16. Mr. Sinha relied upon the definition of institutional consumer contained in explanation (i) in order to show that hotels, in particular, would be under the coverage of the Act read with the Rules. First and foremost, a reading of the opening of Rule 3 would show that the provisions of the Chapter would not apply to packaged commodities meant for institutional consumers such as hotels. Also, the Rules cannot take us very much further when it has already been held by us that the Act itself would not apply for the reasons given herein above.

17. We are, therefore, of the view that neither the Standards of Weights and Measures Act, 1976 read with the enactment of 1985, or the Legal Metrology Act, 2009, would apply so as to interdict the sale of mineral water in hotels and restaurants at prices which are above the MRP.

18. The appeals are accordingly allowed and the judgments dated 11.02.2015 and 15.05.2015 of the High Court are set aside.

Judgment Referred.

[1]*(1972) 1 SCC 0472*
[2]*(1979) 1 SCR 0557*