

ALLAHABAD HIGH COURT

Firm Bangali Mal Satish Chandra Jain

Vs.

Sales Tax Officer

Writ Petn. No. 2429 of 1957

(O.H. Mootham, C.J. Raghubar Dayal and A.P. Srivastava, JJ.)

14.02.1958

JUDGMENT

O.H. Mootham, C.J.

1. In this petition under Article 226 of the Constitution the petitioner challenges the validity of an assessment order dated 21-9-1957, made under the U. P. Sales Tax Act, 1948, (hereinafter called the Principal Act), and of a notice of demand which is undated but which it is common ground was issued on 22-9-1957.

2. The petitioner is a firm which carries on business in Agra in Cloth, supplies of which it obtains from places both within and outside the Uttar Pradesh. It is a registered dealer under Section 8A of the Act. The tax purports to be levied under a Notification No. ST/905X dated 31-3-1956, and it is the validity of that notification which is the principal question which arises in this case. This notification was held to be invalid by this Court in *Adarsh Bhandar v. Sales Tax Officer, Aligarh*¹, but it is the case of the respondents that subsequent to the judgment in that case the notification has been validated by the U. P. Sales Tax (Amendment) Act, 1957 (U. P. Act No. XXIV of 1957).

3. It is necessary to refer shortly to certain statutory provisions. Prior to the coming into force of the U. P. Sales Tax (Amendment) Ordinance, 1956, U. P. Ordinance No. IX of 1956, (hereinafter referred to as the Ordinance), subsection (1) of Section 3A of the Principal Act empowered the State Government by a notification in the Official Gazette to declare that the turnover in respect of any goods shall not be liable to sales tax, save at such single point as the State Government may specify. Sub-section (2) of this section then provided that

"(2) If the State Government makes a declaration under sub-section (1) of this section it may further declare that the turnover of the dealer, who is liable to pay tax on the sale of

such goods shall, in respect of such sale, be taxed at such rate as may be specified not exceeding one anna per rupee if the sale relates to goods specified below - (Five classes of goods were then specified) and nine pies per rupee if it relates to any other goods."

¹1957-8 STC 666 : AIR 1957 All 475

On 31-3-1956, the Ordinance was published in the Gazette. Section 4 of the Ordinance provided that, in lieu of sub-section (2) of Section 3A of the Principal Act, two new sub-sections be substituted. The new sub-section (2) read thus:

(2) If the State Government makes a declaration under sub-section (1), it may further declare that the turnover in respect of such goods shall be liable to tax at such rate not exceeding one anna per rupee as may be specified." The effect of this provision was therefore to above list the limited list of goods in respect of which sales tax could be levied at the rate of one anna per rupee and to enable tax at the rate to be levied on all such goods as should be specified in a declaration made under sub-section (1).

4. On the same date on which the Ordinance was published, namely 31-3-1956, the Governor issued the impugned Notification No. ST/905-x, which so far as is relevant reads as follows:

"In exercise of the powers conferred by Section 3A of the U. P. Sales Tax Act, 1948, as amended from time to time and in supersession of all previous notifications on the subject the Governor of Uttar Pradesh is hereby pleased to declare that the turnover in respect of the goods specified in the list below shall not with effect from 1-4-1956, be liable to tax except-

(a) in the case of goods imported from outside Uttar Pradesh, at the point of sale by the importer; and

(b) in the case of goods manufactured in Uttar Pradesh, at the point of sale by the manufacturer and the Governor is further pleased to declare that such turnover shall with effect from the said date be taxed at the rate of one anna per rupee."

Then follows a list of forty-seven classes of goods, including as Item No. 5 "Cloth of all kinds". This Court in Adarsh Bhandar's Case, held that the impugned notification was invalid on the ground that the amendment of sub-section (2) of Section 3A had effect only from 1-4-1956, and that the Governor had no power to issue the notification on the preceding day under the unamended subsection.

5. The Ordinance was subsequently replaced by the U. P. Sales Tax (Amendment) Act, 1956, U. P. Act No. XIX of 1956, herein called 'the 1956 Act.' Section 1 of this Act reads thus:

"1. (1) This Act may be called the Uttar Pradesh Sales Tax (Amendment) Act, 1956.

(2) This section and the amendments to the U. P. Sales Tax Act, 1948 (hereinafter called the Principal Act), made by Sections 2 to 9 and 11 to 15-shall, subject as herein provided,

have and be deemed to have effect on and from 1-4-1956 and Sections 10 and 16 shall have effect from such' date as the State Government may by notification in the official Gazette appoint:

Provided that the amendments made by Sections 12 and 15 shall also apply in relation to assessment for any year before 1-4-1956, whether such assessments have or had at any stage been completed or not."

Section 4 is in the same terms as Section 4 of the Ordinance. Section 17 of the Act enacts that the Ordinance "is hereby repealed and in the absence of specific provision to the contrary this section must be held to have come into force on the date on which the Act was published, namely 28-5-1956. The only other enactment to which reference has to be made is the U. P. Sales Tax (Amendment) Act, 1957, U. P. Act No. XXIV of 1957, to which it is convenient to refer as "the 1957 Act." This Act was published in the Gazette dated 3-9-1957, and under sub-section (1) it came into force at once. The Act consisted of only two Sections, and Section 2, so far as is material, provides-

"2. For sub-section (2) of Section 1 of the U. P. Sales Tax (Amendment) Act, 1956, the following shall be and be deemed to have always been substituted:

'2. This section, so much of Section 3, as relates to the substitution of the second proviso to sub-section(1) of Section 3 of the U. P. Sales Tax Act, 1943 and Section 4, shall have effect on and from 31-3-1956;".

It is the contention of the State that the effect of this section is to validate the impugned notification and consequently the assessment order made and the demand notice issued there under.

6. It is important to observe that the 1957 Act contains no provision validating the impugned "notification. Why such a provision was not inserted in the Act is difficult to understand, for examples of such validating provision are to be found in the U. P. Sales Tax (Amendment) Act, 1952, U. P. Act No. XL of 1952, Section 8, and more recently in the T.J. P. Panchayat Raj (Amendment) Act, 1957, U. P. Act NO. XIX of 1957, Section 6. In our opinion the absence of such a provision is fatal to the validity of the impugned notification.

7. The Court has to look at the matter as it stands today. There can be no doubt that as a consequence of the coming into force of the 1957 Act, Section 3-A (2) of the principal Act as amended by the 1956 Act must be deemed to have been in force on 31-3-1956; there can be no doubt therefore that this Court must hold today that the State Government had the power on 31-3-1956, to issue a declaration under that sub-section as so amended.

8. It is convenient hereafter to refer to Section 3A (2) as it stood prior to its amendment by the 1956 Act as "the old Section 3A (2)" and to that section after amendment by that Act as "the new Section 3A (2)". The possession of a power must however be distinguished from its exercise. An authority may possess a power but may not exercise it for some time or at all, and therefore the

actual or presumed existence of a power at a particular point of time does not give rise to the inference that it was in fact exercised at that time. Before the question whether some act was done in the exercise of a power can be answered in the affirmative it must be shown that, at the time the act was done, (i) the power existed and, (ii) the act was done in purported exercise of the power.

9. The crucial question therefore, we think, is this : Did the State Government on 31-3-1956, purport to issue the impugned notification under the new Section 3A (2)? Did it, in other words, purport to exercise the power conferred upon it by this section as amended by the 1956 Act? Now the notification makes it clear that it was issued. "In exercise of the powers conferred by Section 3A of the U. P. Sales Tax Act, 1948, as amended from time to time"; and this Court has held in Adarsh Bhandar's case, that on the date on which the notification was issued only the old Section 3A (2) was in force. The State Government could therefore issue, and in fact purported to issue, the notification only in the exercise of its powers under the old section. The fact that in view of the retrospective operation of the 1957 Act, the State Government must be deemed to have requisite power under the new Section 3A (2) on 31-3-1956 will not convert a notification issued under the old Section 3A (2) into one issued under the new section. The conferment of the necessary power from a back date cannot, in other words, have the effect of validating a notification which was not issued in exercise of that power.

10. The learned Standing Counsel has placed great reliance on *East End Dwellings Co. Ltd. v. Pinshbury Borough Council*², in which Lord Asquith said, at page 132:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." This statement has been cited with approval by the Supreme Court in *State of Bombay v. Pandurang Vinayak*³, and we do not doubt that it accurately lays down the duty of the Court in those cases in which the Court has to proceed on the basis that an imaginary state of affairs is to be assumed to be real.

The state of affairs which this Court has to imagine as a consequence of the coming into force of the 1957 Act is that the new Section 3A (2) came into force on 31-3-1956; but it is not an inevitable corollary that the power conferred on the State Government by that section has been exercised. In fact and in law it has not done so.

11. Mr. Dhavan also places reliance on a passage of the judgment of the Supreme Court in *Bhikaji Narain Dhakras v. State of Madhya Pradesh*⁴, in support of his argument that the

impugned notification was validated by the power subsequently acquired by the State Government under the 1957 Act. The argument is that the notification, although invalid at the time it was issued, existed in fact and was 'revived' - that is to say validated - by the subsequent Act.

The passage on which the learned counsel relies is to be found on page 599 of the Report where Das C.J., delivering the judgment of the Court, said:

"All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article

²1952 AC 109 41955-2 SCR 589: AIR 1955 SC 781

³1953 SCR 773

13, rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes."

12. The short answer to the argument is we think this, that it involves the assumption, which for reasons we have stated we think to be unwarranted, that the existence of a power implies that it has been exercised. Unless it can be shown that the notification was issued in exercise of the power conferred by the new Section 3A (2) it remains invalid. In our opinion neither Bhikaji Narain Dhakras's case, nor the two cases cited in this connection by Mr. Pathak - *Newberry v. United States*⁵, apply to the facts in the present petition, for in none of them was the Court called upon to consider the effect of the retrospective operation of an enactment on a statutory provision or notification invalid on the date on which it was made. Mr. Pathak has contended that the impugned notification is dead for all purposes and for all time. On this question (which does not in the circumstances directly arise) we prefer to reserve our opinion.

13. Mr. Pathak has also attacked the validity of the notification on two other grounds, and in view of the fact that this case may go further we think it proper to state shortly what they are.

14. The first argument is that, although the 1957 Act has given retrospective effect to the amendment made in Section 3A by the 1956 Act, a statute ought not to be construed to have a greater retrospective operation than its language renders necessary; and that the 1957 Act ought not to be construed as affecting the impugned notification. Now, "in order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case (1584-3 Co. Rep. 7a), to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief" : *Re Mayfair Property Co.*, (1898) 2 Ch 28, Learned counsel has not been able to suggest what the intention of the Legislature in passing the 1957 Act could have been, if it were not to validate the impugned notification. The extent of the retrospective effect of a statute must be determined by the language employed keeping in view the purpose sought to be achieved. In this case however, even if full retrospective effect is given to the 1957 Act it has not in our opinion, for reasons already stated, attained its object.

15. Secondly Mr. Pathak has argued that it is an essential feature of a sales tax that the burden is borne by the consumer, and that if a tax imposed on a dealer lacks that essential feature it is not a tax on the sale of goods within the meaning of Item 54 of List II of the Seventh Schedule to the Constitution and is beyond the competence of the State Legislature. This contention was raised in Adarsh Bhandar's case but the Court was of opinion that it was not well founded. Mr. Pathak says that the Court came to a wrong conclusion and he has invited our attention to *Syed Mohammad and Co. v. State of Madras*⁶, and *Konduri Buchi Rajalingam v. State of Hyderabad*⁷, In the former of these cases the Court, after referring to the views of certain writers on economics, said-⁵(1920) 65 Law Ed 913, and *Saghir Ahmad v. State of U. P.*, 1955-1 SCR 707 ⁷ AIR 1954 Hyd 1 (FB)
⁶ AIR 1953 Mad105

"These passages clearly show that the words 'sales tax' are generally

understood as importing a tax on the occasion of sale, that it is immaterial whether it is collected in the first instance from the seller or the purchaser, for eventually it would be passed on to the consumer, and that in either case it would be a tax on sales. It is in this sense that the words 'tax on sales' would appear to have been used in Entry No. 48.", and in the latter case Palnitker J., said at page 6

"It is now well settled that the sales tax is intended to be a tax on consumers as opposed to and distinct from an excise tax which is a tax imposed upon the producers and that the sales tax is collected from and through the agency of dealers who have been given power under the Act to reimburse themselves by collecting the tax from persons to whom they sell the commodity taxed."

In neither of these cases had the Court under consideration the point which has been advanced for in each case it was dealing with another matter, namely whether the provincial legislature was competent to impose a sales tax on the purchasers of goods. The reasons which led this Court in Adarsh Bhandar's case, to reject the argument now advanced are stated in my judgment in that case, and Mr. Pathak has not been able to satisfy us that the view there expressed is erroneous.

16. In our opinion the impugned notification continues to be invalid. We regret that we are compelled to come to this conclusion as we can entertain no doubt that it was the purpose of the legislature in passing the 1957 Act to get over the difficulty which had been caused by the decision of this Court in Adarsh Bhandar's case. In our opinion it has not succeeded.

17. We allow the petition and direct the issue of a writ in the nature of certiorari quashing the assessment order dated 21-9-1957, and the demand notice issued on 22-9-1957. The petitioner is entitled to its costs which we assess at Rs. 500/-.

Petition allowed.

