

ALLAHABAD HIGH COURT

Gurna Mal

Vs.

State of U.P

Civil Misc. Writ No. 4013 of 1968 connected with 92
(Satish Chandra and R.L. Gulati, JJ.)

03.03.1970

JUDGMENT

R.L. Gulati, J.

1. This and the connected bunch of writ petitions have been filed by the manufacturers of bricks and raise a common question as to whether the turnover of bricks can be assessed to tax under a notification issued under Sec. 3-A of the U. P. Sales Tax Act.
2. The petitioner is a partnership firm which carries on the business of manufacture and sale of bricks at Sheopur in the district of Varanasi and is a registered dealer under the Act. The petitioner's allegation is that the Sales Tax Department had been levying tax on the petitioner on the sale of bricks under notifications issued under Sec. 3-A of the Act at a rate higher than the rate prescribed in Sec. 3 and that the Sales Tax Department is seeking to levy tax in respect of the assessment years 1965-66, 1966-67 and 1967-68, which are pending at the rate of 7% under notification No. S. T. 6438/X-1012-1962, dated December 1, 1962. The petitioner contends that the notification of December 1962 as also the earlier notifications of similar nature are ultra vires.
3. We have heard Sri K. L. Misra, learned counsel for the petitioner, in this case and other counsel appearing on behalf of the petitioners in the connected writ petitions. The common contention raised is that according to the trade structure in the State of Uttar Pradesh bricks are sold directly by the manufacturers to the consumers. There are no middlemen and as such Sec. 3-A which contemplates a series of sales by successive dealers, cannot be applied to bricks.
4. Section 3 is the charging section which provides for the levy of sales tax on the sale of every commodity and at all points of sale except the turnover of goods which are exempt under Sec. 4 of the Act, at a rate which since 1959 is 2 n. p. per rupee. (The rate was 3 pies per rupee when the Act was originally enacted and has been enhanced to 3 n.p. per rupee by Act No. II of 1969). Sec. 3-A provides for a single point taxation under which the State Government has been authorised to declare that the turnover in respect of any goods or class of goods shall not be liable to tax except at such single point in the series of sales by successive dealers as the State

Government may specify. Sub-sec. (2) of this section provides that if the State Government makes a declaration under sub-sec. (1) it may further declare that the turnover in respect of such goods shall be liable to tax at such rate not exceeding ten naya paise per rupee as may be specified.

5. It has been argued on behalf of the petitioner that bricks is a commodity which is outside the purview of Sec. 3-A as it is not a commodity which passes through a series of sales by successive dealers before reaching the consumer, and as such cannot be notified for taxation under Sec. 3-A. It has also been contended in this connection that Sec. 3-A was intended to provide relief to the business community and to the consumer and not to enable the State Government to subject certain commodities to a rate of tax higher than the general rate prescribed in the charging Sec. 3. Our attention has been invited to the Statement of Objects and Reasons appended to the Bill which was later enacted into Act No. XXV of 1948 which introduced Sec. 3-A into the Act. The Statement of Objects and Reasons as appearing in the gazette extra-ordinary dated May, 2, 1948 reads as under :

"Since the United Provinces Sales Tax Act, 1948 came into force various interests. In the United Provinces have made representations to Government. The business community considers the Act to be somewhat rigid in its application and have made certain suggestions for its smooth working. Government have carefully and sympathetically considered all the suggestions made so far. Government desire to meet the wishes of the business community and also to protect the interests of the consumers, and hence they propose to amend the Act." Section 3-A as originally enacted stood as below :

"3-A (1) Notwithstanding anything contained in Sec. 3 the State Government may, by notification in the official Gazette declare that the proceeds of sale of any goods or class of goods shall not be included in the turnover of any dealer except at such single point in the series of sales by successive dealers as may be prescribed.

(2) If the State Government makes a declaration under sub-sec. (1) of this section, it may further declare that the turnover of the dealer, in whose turnover the sale of such goods is included 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 :

(i) Motor vehicles including motor cars, motor taxicabs, motor cycles and cycle combinations, motor scooters, motorettes, motor omnibuses, motor vans and motor lorries.

Chassis of motor vehicles.

Component parts of motor vehicles.

Articles (including rubber and other treys and tubes and batteries) adapted for use as parts and accessories of motor vehicles, not being such articles as are ordinarily also used for other purposes than as parts or accessories of motor vehicles.

(ii) Refrigerators and air conditioning plants.

(iii) (a) Wireless reception instruments and apparatus and component parts thereof,

including all electrical valves, accumulators, amplifiers and loudspeakers which are not specially designed for purposes other than wireless reception.

(b) Radio gramophones.

(iv) Cinematographic, photographic and other cameras, projectors and enlargers and films, plates, papers, and cloth required for use therewith.

(v) Scents and perfumes at nine pies per rupee if it relates to any other goods."

6. It is urged that it is a matter of common knowledge that a large number of consumer goods pass through at least four sales before they reach the consumer, namely :

(i) sale by the producer or manufacturer to the distributor;

(ii) sale by the distributor to the whole-saler or the stockist.

(iii) sale by the whole-saler or stockist to the retailer; and (iv) sale by the retailer to the consumer.

in between there may be other sales before the goods finally reach the consumer. Every time a commodity changes hand from one dealer to another, it is subjected to tax and the amount of tax is added to the price and thus the incidence of the tax is ultimately passed on to the consumer. Such a procedure was bound to cause hardship to the trade and to the consumer. It is argued that Sec. 3-A was introduced to soften the rigour of the charging section by authorising the State Government to restrict the point of taxation to one point in the series of sales at a prescribed rate subject to the maximum provided by the legislature. It is significant that the legislature provided the maximum rate of one anna per rupee which is four times the rate of 3 pies per rupee specified in Section 3 at the time when Section 3-A was introduced. It is reasonable to infer that while enacting Sec. 3-A the legislature had in contemplation such goods as could normally undergo four sales before reaching the consumer, so that if the State Government fixed the maximum rate, there would be no hardship to the consumer, but there would be some relief to the trade inasmuch as a large number of dealers in the series of successive dealers would be saved of the botheration of assessment etc. It is pointed out that the State Government was expected to fix a rate lower than the maximum.

7. Another significant feature is that the maximum rate of one anna per rupee was prescribed in respect of goods which normally can be regarded as luxury goods, but in the case of other goods the maximum rate was 9 paise per rupee so that even if the State Government prescribed the maximum rate, the consumer and the trade would both get some relief.

8. The U. P. Sales Tax (Amendment) Act XIX of 1956 made the following two changes in Sec. 3-A:

(i) Sub-sec. (2) was replaced by the following :

(2) If the State Government makes a declaration under sub-Sec. (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."

(ii) Sub-sec. (3) was added which read as below :

(3) Every notification made under this section shall be laid before the Legislative Assembly of the State as soon as may be after it is made and if a resolution amending or modifying it is passed by the Assembly within the Session in which it is laid, it shall, from the date of passing of the resolution be amended or modified accordingly but without prejudice to the validity of anything previously done or of any liability incurred or assessment made."

By these amendments the distinction between the luxury goods and other goods was done away with and a uniform maximum rate of one anna per rupee was prescribed in respect of all goods. The selection of goods for a single point taxation was left to the State Government, but such selection was brought under the legislative control by the addition of sub-Sec. (3). These amendments, however, do not indicate that there was any change of policy on the part of the Legislature in the sense that Sec. 3-A was no longer intended to be used to provide relief in suitable cases to the trade and the consumer.

9. This contention in our opinion appears to be well founded and we have no doubt in our mind that Sec. 3-A was intended to provide relief to the trade and the consumer in respect of articles which in the normal course of business pass through the hands of successive dealers in a series of sales. A "series of sales" must necessarily have more than two sales otherwise there would be no series. This position was made amply clear by this Court in *Dr. Sukhdeo v. Commissioner of Sales Tax*¹, where a Division Bench of this Court observed at page 584:

"A notification under Sec. 3-A is meant for an article which is expected to be sold more than once. Under Sec. 3 every dealer who sells it is liable to pay a sales tax on its turnover and power has been conferred by Sec. 3-A upon the Government to declare that in respect of it only one of the dealers will be liable to pay sales tax and not every dealer who successively sells it. When sales tax is payable on an article the burden ultimately falls on the consumer and, if an article passes through several dealers, each of whom adds to the price the sales tax paid by him, the consumer would ultimately have to pay a very heavy price for the article. The Legislature was anxious that in respect of articles of common use the burden upon the consumer should not be so great and, therefore, conferred power upon the Government to declare that in respect of them only one dealer will pay the tax and not others."

The Bench went on to observe :

"This necessity could not arise in respect of an article which was incapable of being sold by more than one dealer and was not expected to be sold except directly to the consumer."

10. The learned Chief Standing Counsel appearing on behalf of the opposite parties controverted this position and stated that Sec. 3-A was never meant to provide relief to the trade and the consumer and that this provision could be utilised in respect of a commodity which was capable of only one sale or which according to the normal trade structure was not expected to be sold more than once and in support of this contention he relied upon the opinion of Mr. S. D. Singh expressed in his book "The Law of Sales Tax in U. P." While commenting upon the judgment of this Court in Dr. Sukhdev, the learned author has observed at page 491 of Vol. 1 of his book :

"In any case, it is difficult to read an intention in the section that only those commodities could be notified under the section which are capable of being sold more than once."

¹(1963) 13 S.T.C. 581

In Dr. Sukhdeo's case¹ the Court was examining as to whether a mixture sold by a practising physician to his patient on a prescription can be subject of a notification under Sec. 3-A. The Court expressed the opinion that such a commodity was incapable of being sold more than once. The learned author has expressed the opinion that there are no commodities which are intrinsically incapable of more than one sale and that even in the case of sale by a practising physician of a mixture to a patient, it is possible that the practising physician might get the mixture from another chemist at a lower rate and sell the same to the patient at a higher price. In our opinion this approach of the learned author is not correct. It is not the hypothetical possibility of a commodity being capable of more than one sale that determines the question as to whether such commodity was intended to be included in Sec. 3-A. We are of opinion that before a commodity can be taxed at a higher rate under Sec. 3-A it must be shown that according to the normal trade channels the commodity is passing through successive dealers.

11. Therefore, if the contention of the learned counsel for the petitioner that according to the normal trade structure prevailing in the State of Uttar Pradesh bricks do not pass through a series of sales by successive dealers is true, bricks could not have been intended by the legislature to be taxed under Sec. 3-A.

12. The petitioner in this petition and also the other petitioners in the connected writ petitions have categorically stated that according to the trade structure prevailing in the State of Uttar Pradesh, bricks are directly sold by the manufacturers to the consumers and there are no middlemen like, distributors, wholesalers or retailers. In the counter-affidavit filed on behalf of the opposite parties these allegations have not been controverted. However, some stray instances have been cited to show that bricks have in fact been sold by persons other than manufacturers at certain places in the State. In the Supplementary Rejoinder affidavit filed by the petitioner it has been asserted that the stray instances cited by the opposite parties in the counter-affidavit are not sales by dealers. The opposite parties have not asserted that the instances of sales mentioned in their counter-affidavits are instances of sales which have been subjected to sales tax till the assessment orders passed against the persons concerned. Assuming, however, that the persons other than the manufacturers mentioned in the counter-affidavit, who are alleged to have sold

bricks after purchasing them from manufacturers are persons who have been assessed to tax in respect of the turnover of bricks sold by them, it does not in any way militate against the assertion made on behalf of the petitioner that according to the normal trade structure with regard to bricks, no middlemen are involved in the sense that there are no distributors, wholesalers or retailers engaged in the sale of bricks. In order to judge the applicability of Sec. 3-A the real test to our mind is to find out if a particular commodity which has been brought under the purview of Sec. 3-A is such that in the normal trade conditions it undergoes a series of sales at the hands of successive dealers. The counter-affidavit does not establish that bricks is a commodity of that nature.

13. The learned Chief Standing Counsel contended that whatever might have been the position in the past, the same is now materially altered as a result of the promulgation of the U. P. Sales Tax (Amendment and Validation) Ordinance, 1370 (U. P. Ordinance No. 2 of 1970). This Ordinance was passed during the pendency of these petitions and this Court accordingly allowed the petitioners to amend their petitions so as to include fresh grounds based upon the amendment introduced by the Ordinance.

14. The material portion of this Ordinance is Sec. 2 which seeks to amend Secs. 3-A and 7 read as below :

"2. In Sec. 3-A of the U. P. Sales Tax Act, 1948, hereinafter referred to as the Principal Act, in sub-Sec. (1) :

(i) for the words "at such single point, in the series of sales by successive dealers as the State Government may specify" the words "at such single point of sale as the State Government may specify" shall be substituted and be deemed always to have been substituted Validation.

"7. Notwithstanding any judgment, decree or order of any court or tribunal to the contrary, every notification issued or purporting to have been issued under Sec. 3-A or Sec. 3-D of the Principal Act before the commencement of this Ordinance shall be deemed to have been issued under that section as amended by this Ordinance and shall be so interpreted and be deemed to be and always to have been as valid as if the provisions of this Ordinance were in force at all material times, and accordingly, anything done or any action taken (including any order made proceedings taken, jurisdiction exercised, assessment made, or tax levied, collected or paid, purporting to have been done or taken in pursuance of any such notification) shall be deemed to be, and always to have been, validly and lawfully done or taken."

It is contended that after its amendment by the Ordinance Sec. 3-A no longer is meant to be used for the purpose of giving relief to the trade and the consumer because even goods which do not pass through a series of sales and are capable of only one sale can be taxed at a higher rate under the amended Sec. 3-A. We are unable to agree with this contention. The Ordinance no doubt does away with the expression "at such single point in the series of sales by successive dealers",

but even after the amendment the State Government is yet required to make a selection of a single point of sale before issuing a notification in respect of a particular commodity. The selection of a single point of sale obviously implies plurality of sales. Further, all such sales must be sales by dealers because under the scheme of the Act it is only the sale by a dealer that can be subjected to tax. In other words, even under the amended Sec. 3-A, even though there may not be a series of sales by successive dealers, yet there must be more than one sales by dealers. A "dealer", according to the definition contained in Sec. 2 (c) of the Act, should be "a person who carries on the business of buying or selling goods." It has already been pointed out that so far as bricks are concerned, there are no dealers like distributors, wholesalers or retailers who can be said to be carrying on the business of buying or selling bricks;. The only person who is engaged in the business of sale of bricks is the manufacturer. In this view of the matter, bricks would still be outside the purview of Sec. 3-A after its amendment by the Ordinance.

15. The argument of the learned Chief Standing Counsel that the amended Sec. 3-A can be utilized in respect of commodities which are, in the normal course of business, expected to be sold only once is clearly fallacious. Even the amended Sec. 3-A contemplates "such single point of sale as the State Government may specify". Where there is only one sale, this expression would be wholly meaningless. Moreover, if the interpretation of the learned Chief standing Counsel is accepted, no guiding principle would be left for the State to take a particular commodity out of Sec. 3 and to place it under Sec. 3-A for higher taxation, with the result that the amended Sec. 3-A may well be hit by Art. 14 of the Constitution. We are not prepared to accept an interpretation as would render the provisions ultra vires particularly when in the provision itself there are words which militate against such a contention. There is nothing to show that the intention behind the amendment brought about by the Ordinance in Sec. 3-A was to change the policy and the purpose underlying that provision.

16. Sec. 7 of the Ordinance also does not help the Department. It merely, declares that every notification issued under Sec. 3-A before the commencement of the Ordinance shall be deemed to have been issued under that section as amended by the Ordinance We have already shown that even the amended provision requires the selection of a single point of sale out of more than one sales. Sec. 7 might validate notifications pertaining to goods which did not pass through a series of sales by successive dealers, but it would not validate a notification in respect of a commodity which in the normal course of business passes through only one sale. When a notification is challenged as being outside the scope of Sec. 3-A as in the case before us, the State must place before the Court material to show that the commodity in question passes through more than one sales by dealers in the normal trade channels. There is no suggestion in the counter-affidavit filed on behalf of the opposite parties as to what are the two points of sale with regard to the trade in bricks, and that, the State applied its mind to this aspect of the matter and selected one of such points.

17. Before parting with this case, we might briefly notice two decisions of this Court upon which

the learned Chief Standing counsel relied in support of his contention that Sec. 3-A before its amendment could be invoked in respect of commodities which do not pass through a series of sales. The first case is that of *M/s Singhal Goel and Co. v. The Sales Tax Officers*¹. In this case a similar question was raised in respect of cement, the sale and distribution whereof was controlled under the Cement Control Order of 1961. it was urged by the petitioner in that case that cement could be sold by the petitioner only to permit holders and permits were issued to the consumers only. Rejecting .tat contention, it was observed by the Bench which decided the case :

"We are not satisfied that cement is a commodity which by its very nature is capable of one sale only. There is nothing inherent in cement as a commodity which justified that assumption. Indeed, the petitioner who was a stockist of cement purchased it from a manufacturer and then in turn sold it to a permit holder. Therefore even if we assume that cement can be sold by a stockist only to a consumer by reason of the Cement Control order, there are at least two sales here, one by the manufacturer to the stockist and the other by the stockist to the consumer."

"That case is clearly distinguishable, because there it was not argued that cement was a commodity which according to the normal trade channels did not go through the series of sales by successive dealers. It is a matter of common knowledge that cement like most other consumer goods passes through dealers like manufacturers, distributors wholesalers and retailers.

¹ Writ Petition No. 3731 of 1967 decided on 26.07.1968.

18. The other case relied upon is *M/s Seth Vishan Dass and Co. v. The State of Uttar Pradesh*², That case related to bricks. That writ petition was dismissed because the petitioner had failed to bring on record sufficient material in support of his contention, as would be apparent from the following observations occurring in that judgment :

"There is no clear statement in the petition from which an inference could reasonably be drawn that the trade structure confines the bricks as a commodity to one sale only and precludes it from being the subject of successive sales." Here in this petition there is a clear averment that according to the normal trade structure relating to the trade of bricks there are no middlemen like distributors, stockists and retailers and therefore bricks do not pass through a series of sales by successive dealers. The averments have been fully proved.

19. In the circumstances we hold that the notifications issued under Sec. 3-A with regard to bricks are invalid. The turnover of bricks, however, is tax- able at the general rate provided in Sec. 3 of the Act.

20. In some of these petitions it has been prayed that the excess tax be directed to be refunded. At the hearing learned counsel stated that this relief is not pressed at this stage as the petitioners

would apply to the Assessing Authority from refund. No order need hence be passed on this relief.

21. In some of the petitioner's cases assessment proceedings are pending. In other cases assessment orders have already been passed. We direct that the respondents shall not assess the petitioners on their turnover of bricks under Sec. 3-A or the notifications issued thereunder. They may be assessed under Sec. 3. The respondents shall suitably modify the assessments already made and impugned in the petitions.

22. The petitions are accordingly allowed with costs.

Petitions allowed.

² Civil Misc. Writ No. 1712 of 1967, decided on 6.8.1968