CALCUTTA HIGH COURT

Mahendra Pratap Ramachandra

Vs.

Commercial Tax Officer

C.R. No. 428(W) of 1962

(D. Basu, J.)

24.09.1964

ORDER

D. Basu, J.

1. This petition under Article 226 of the Constitution is directed against the assessment order at Ann. C to the Petition (page 17) by which the Commercial Tax Officer - Respondent No. 1 - has directed the. Petitioner to pay a sales tax amounting to Rs. 19,171.65 nP., with a penalty of Rs. 500/-, in respect of the period from 29-3-58 to 16-4-59.

2. The petitioner firm's contention, in the main, is that the sales in question were exempted under items (26) and (28) of Rule 3 of the Bengal Sales Tax Rules, 1941 framed under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as 'the Act'). The other grounds urged in support of the petition will be stated in course of the Judgment.

3. I. The first head on which exemption is claimed relates to Rule 3(26), which is as follows :

> "In calculating his taxable turnover a registered dealer may deduct from his gross turnover his turnover on the following, namely –
>
> (26) Sales of handloom-woven cotton cloth."

4. It has been rightly contended by the learned Government pleader that on the present point, the petitioner is barred from obtaining any relief in this proceeding under Article 226, because his claim for exemption was rejected by the Commercial Tax Officer on a finding of fact against which the petitioner should have moved the higher administrative authorities set up by the taxing statute. That finding is that the purchase vouchers produced by the petitioner did not show "that the goods were actually manufactured on handloom". From the impugned order, based upon this finding, the petitioner could have moved the Asst. Commissioner and then the Commissioner, in appeal. Revision also lay to the latter and then the Board of Revenue. Not having taken recourse to these remedies, the petitioner is precluded from challenging this finding of fact : *Shri Ambica*

Mills Co. Ltd. v. S.B. Bhatt[1], It has not been shown that this finding is tainted with any error of law apparent on the record or vitiated by contravention of the rules of natural justice or want of jurisdiction. The Petitioner's case on this point must, accordingly, fail.

5. II. The other head on which exemption is claimed relates to Rule 3(28)(a) of the said Rules. This item has undergone legislative changes, which may be shown as follows :

> (a) The item, as it stood, at the time of its adoption on 3-3-58 was :
> "Sales of cotton fabrics..... on which duty-has been paid under the Additional Duties of Excise (Goods of Special Importance) Act, 1957."
> (b) The condition for exemption imposed by the words "on which duty has been paid....." was, however; removed by deleting these words from the item by a notification of 7-2-61, so that since that date, the exemption of cotton fabrics from sales tax in this State became absolute. We are not, however, concerned with this change, for, the period in dispute is anterior to 7-2-61.

6. The first question for determination is whether the Petitioner has succeeded in establishing that he was entitled to exemption under the original item, by showing that the additional duty payable under the Central Act of 1957 had, in fact, been paid in respect of his goods which were assessed to sales tax by the impugned order.

7. The Petitioner produced before the Commercial Tax Officers some certificates from manufacturers to show that the additional duty of excise had in fact been paid in respect of some of the goods sold. But as regards some others, the Petitioner could not produce such certificates on the ground "that these manufacturers owned four power-loom factories and no additional excise duty was levied on such factory products". It is in respect of the sale of these latter goods that the Respondent disallowed deduction from the Petitioner's turnover to the extent of Rs. 3 lakhs and made the impugned assessment.

8. It appears from Notn. No. 107/57/14-12-57, issued under the Central Act of 1957 that no duty, was payable under this Act on the manufacture of cotton fabrics where not more than 4 power-looms were employed in such manufacture. The Commercial Tax Officer has held that the very fact that no additional excise duty under the Central Act was payable in respect of goods manufactured by an establishment having less than 4 power-looms, - assuming that the goods dealt with by the Petitioner belonged to that category, - sales tax under the Bengal Act was payable, on such goods on the Petitioner's own showing, because the. exemption under Rule 3(28)(a) of the Rules made under that Act could be claimed only on showing that the additional excise duty had, in fact, been paid under the Central Act of 1957.

9. On behalf of the Petitioner, therefore, it has been contended that the restrictive words "on which duty has been paid....." at the end of Rule 3(28)(a) of the Rules, which render the sale of cotton fabrics produced by less than 4 power-looms liable to the levy of sales tax even though the production of such goods was exempted from the additional excise duty payable under the Central Act of 1957, is ultra vires and unconstitutional. The validity of the imposition has been challenged also on several other grounds;

[1] AIR 1961 SC970(973)

(i) In *Dilip Mukherjee v. C. T. O. C. R*[2]. I have discussed the question of ultra vires and unconstitutionality of a similar imposition with respect to another declared 'goods, with reference to Article 286(3) of the Constitution and the Central Sales Tax Act, 1956 and the Additional Duties of Excise (Goods of Special Importance) Act, 1957 - referred to in this judgment as 'the Central Act of 1957' - I need not, therefore, reiterate the reasons given in that judgment, but shall only state my conclusions :

I. By the Constitution (Sixth Amendment) Act, 195(3, Article 286(3) of the Constitution was amended, with effect from 11-9-56. The result of this amendment was that, if subsequently, Parliament declared any goods to be of special importance to inter-State trade or commerce and also specified restrictions and conditions in regard to the imposition of sales tax on the sale or purchase of such goods, the State Legislature could, in the exercise of its power to levy sales tax under Entry 54 of List II, impose tax on the sale of such declared goods only subject to such restrictions and conditions as Parliament might specify.

2. Cotton fabrics were, in pursuance of the above provisions, declared to be goods of special importance in inter-State trade or commerce, by, Section 7 of the Central Act of 1957 and it was further provided by that section that :

> "Every sales tax law of a State shall, in so far, as it imposes or authorizes the imposition of a tax on the sale or purchase of the declared goods, be subject as from the 1st day of April, 1958, to the restrictions and conditions specified in Section 15 of the Central Sales Tax Act, 1956."

Now, one of the conditions imposed by Section 15 of the Central Sales Tax Act, 1956 was that the levy of the State sales tax on the declared goods shall not exceed 2 per cent, of the sale price thereof, But prior to the amendment of Section 5(1)(c) of the Bengal Act by West Bengal Act XIII of 1959, which came into force on October 28, 1959, the rate of sales tax leviable was 5 per cent. It is, thus, evident that the rate prescribed by Section 5(1) of the Bengal Act was inconsistent with Section 15 of the Central Sales Tax Act and the levy by the impugned order @ 5% is clearly ultra vires as well as unconstitutional
(being inconsistent with Article 286(3) of the Constitution).

3. The invalidity of the impugned assessment with respect to cotton fabrics from October 1, 1958 is thus clear, because on that date Section 15 of the Central Sales Tax Act, 1956 was given effect; to, by the notification in G.S.R. 897 of 23-9-57. The legislative power of the State to levy a sales tax being subject to the restriction imposed by Section 15 of the Central Sales Tax Act (read with Article 286(3) of the Constitution), that the tax shall not exceed 2%, Section 5(1) of the Bengal Act, inasmuch as it imposed a tax in excess of that limit, became invalid, in toto, as soon as Section, 15 of the Central Sales Tax Act was given, effect to and until Section 5(1) was amended in October, 1959, to bring it into conformity with the restriction imposed by the Central Sales Tax Act.

4. It has been rightly contended on behalf of the Petitioner that the invalidity of Section 5(1) on the preceding ground will commence from any earlier date, namely, the 1st of

[2] No. 344(W) of 1961, (1964) 2 Rev and LR 28

April, 1958, which is specified in Section 7 of the Central Act of 1957. If the words 'as from the 1st day of April, 1958' were not there in Section 7, the result would have been that the restrictions imposed by Section 15 of the Central Sales Tax Act could not fetter the legislative power of the State Legislature until Section 15 itself had been brought into operation. But the words 'as from the first day of April 1958, indicate that the intention of Parliament in exercising its power conferred by Article 286(3) of the Constitution was that any sales tax law of a State must not be inconsistent with the restrictions mentioned in Section 15 of the Central Sales Tax Act, - the time when that Section was brought into operation being immaterial in this behalf. Section 7 of the Central Act, 1957 was an instance of legislation by incorporation and the result of such incorporation of or reference to Section 15 of the Central Sales Tax Act in Section 7 of the Central Act of 1957 was that the contents of Section 15 became a part of Section 7 from the moment when Section 7 was enacted and, from that moment, it was no longer necessary to see what happened to Section 15 itself. This follows from the observations in *In Re Wood's Estate*[3],

> "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that..... is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it and the moment you have those clauses in the latter Act, you have no occasion to refer to the former Act at all."

Even where, after such incorporation, the incorporated provision of the earlier enactment is itself repealed, the incorporated provision will still continue to operate in the incorporating Act, until the latter is amended in this behalf or repealed : vide *Jenkins v. Great Central Rly*[4]*., Secy. (of State) v. Hindusthan Co-operative Ins. Society*[5]*,*

It follows, therefore, that the restrictions contained in Section 15 of the Central Sales Tax Act, came to circumscribe the validity of Section 5(1) of the Bengal Act with effect from April 1, 1958, as specified in Section 7 of the Central Act of 1957, irrespective of the date of operation of Section 15 itself. In the result, the impugned assessment; with respect to cotton fabrics must fail ab initio and in toto, for, this Court cannot amend Section 5(1)(c), so as to read 2%, during the relevant period, until the clause was amended by the State Legislature in 1959, to that effect.

> (ii) In view of the above finding, it is not necessary, in this case, to go into the further question, namely, whether that part of Rule 3(28)(a) which subjected the right to exemption under that; item to the condition that additional excise duty had in fact been paid under the Central Act of 1957 was ultra vires ab initio.
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> (iii) It is established beyond doubt that an imposition of sales tax which offends against Article 286 of the Constitution or is otherwise ultra vires will also fail for contravention of Article 19(1)(g) of the Constitution. This petition should, therefore, succeed on this additional ground, in view of my finding in relation to Article 286(3), read with Section 7 of the Central Act of 1957.
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> (iv) The ground taken in the petition relating to Articles 301 and 304 of the Constitution have not been pressed at the hearing.

[3](1886) 1 Ch D 607 (615)

[4](1912) 1 KB 1

[5]35 Cal WN 794

(v) Another ground taken by the Petitioner is that the levy of sales tax on cotton fabrics produced by not more than 4 power-looms offended against Article 14 of the Constitution because as a result of the fact that goods produced by 4 power-looms are exempted from the additional duty while they are subjected to heavy sales tax in West Bengal, but goods produced by more than 4 power-looms were subjected to the additional excise duty but exempted from the sales tax in West; Bengal an arbitrary discrimination has been made against producers with not more than 4 power-looms as demonstrated in para. 11 of the Petition. This contention cannot be accepted inasmuch as the two imposts are levied by two Legislatures, each having independent jurisdiction to levy them respectively, as well as to grant such exemptions as it liked. In such circumstances, Article 14 cannot be invoked on the ground that inequality has resulted from the combined operation of the laws made by two different Legislatures vide *State of M.P. v. G.C. Mandawar*[6], (vi) The last ground, namely, that the refusal of the Commercial Tax Officer to exercise his power; under Section 21-A of the Bengal Act to summon the officials of the Excise Department to give evidence as to whether additional excise duty had in fact been paid on the disputed goods has resulted in a violation of the principles of natural justice has also no substance inasmuch as the Petitioner's case, with respect to the disputed cotton fabrics, is not that such duty was paid but that such duty was not payable in view of the fact that the disputed goods were produced by establishments not owning more than 4 power-looms.

10. In view of my finding as to the invalidity of the assessment with respect to cotton fabrics owing to its inconsistency with Article 286(3) of the Constitution and the Central Act of 1957, this petition will succeed in part, since the assessment with respect to handloom cloth is separate an4 severable. The deduction of Rs. 3,00,000/- from, the gross turnover on account of the sale of cotton fabrics having been illegally disallowed by the Commercial Tax Officer, the proper order would be an order in the nature of mandamus directing the Opposite Parties not to enforce the impugned assessment order against the Petitioner or to take further steps in that behalf, without deducting the said sum of is. 3,00,000/- from the Petitioner's-gross turnover and modifying the assessment order accordingly.

11. Let the Rule be made absolute in part in the above terms. There will be no order as to costs.

Revision partly allowed.

[6]1954 SCR 599