

(1971) 11 AHC CK 0016

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 3716, 3717 and 5017 of 1970 and 4166 of 1971

Annapurna Biscuits Manufacturing Company and Another

APPELLANT

Vs

The State of Uttar Pradesh and Another

RESPONDENT

Date of Decision : 11-11-1971

Acts Referred:

Constitution of India, 1950 — Article 132, 133, 136, 137, 226

Citation : (1971) 41 AWR 831 : (1972) 29 STC 118

Hon'ble Judges : S.N. Dwivedi, J; R.L. Gulati, J; J.S. Trivedi, J

Bench : Full Bench

Advocate : Bharatji Agarwal and R.R. Agarwal, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

S.N. Dwivedi, J.—The judgment of the court was delivered by DWIVEDI, J.—In all these petitions there arises a single question : " Has the State Legislature power to enact Section 17 of the U. P. Sales Tax (Amendment and Validation) Act, 1971 ?"

2. It is necessary to state the background legal position for a proper understanding of the question. Section 8-A(2)(a) of the U. P. Sales Tax Act, 1948 (hereinafter called the principal Act) provided that no person who was not a dealer registered under the principal Act should, in respect of any sale or purchase made by or through him, realise from any person any amount by way of sales tax or any amount in lieu of sales tax. It further provided that no dealer registered under the principal Act shall in respect of any sale or purchase made by or through him, realise from any person other than a person to whom goods are sold by him any amount by way of sales tax or any amount in lieu of sales tax by giving it a different name or colour. Clause (b) of Section 8-A(2) provided that where sales tax was payable on any turnover by a dealer including a commission agent or any of the persons mentioned in Explanation 2 of Section 2-

C of the principal Act, the dealer may recover an amount equivalent to the amount of sales tax payable from the person to whom the goods are sold by him, whether on his own behalf or on behalf of the principal. Section 8-A(4) provided that " the amount realised by any person as tax on sale of any goods shall, notwithstanding anything contained in any other provision..., be deposited by him in a Government treasury within such period as may be prescribed, if the amount so realised exceeds the amount payable as tax in respect of that sale or if no tax is payable in respect thereof." The Supreme Court has held that the State Legislature has no power to enact Section 8-A(4) (see *Ashoka Marketing Ltd. Vs. State of Bihar and Another*, . Thereafter the State Legislature repealed Section 8-A(4) and inserted Section 29-A in the principal Act. Section 29-A provided that notwithstanding anything contained in the principal Act or in any other law or in any judgment, decree or order of any court where any amount is either deposited or paid by any dealer or other person under Sub-section (4) or Sub-section (5) of Section 8-A, such amount or any part thereof "shall, on a claim being made in that behalf in such form and within such period as may be prescribed, be refunded to the person from whom such dealer or the person had actually realised such amount or part, and no other person."

3. It appears that the tax realised and deposited by the petitioners was more than what was actually due by them. When they claimed refund of the excess, the Sales Tax Officer passed an order to the effect that as the amounts were realised from the customers, they would not be entitled to any refund "in terms of the law as it stands at present". Section 29-A shields the order of the Sales Tax Officer. The petitioners filed petitions challenging the constitutionality of Section 29-A. The cases came up for hearing before a Division Bench. Before the Bench, the petitioners relied on *Ashoka Marketing Ltd. Vs. State of Bihar and Another*, . The standing counsel on the other hand, relied on a Division Bench decision of the Lucknow Bench of the court in *Messrs Kasturi Lal Har Lal v. The State of Uttar Pradesh*, Writ Petition No. 849 of 1970 decided on 13th July, 1970.

4. The present petitions were accordingly referred to a larger Bench. Hence they are before us now.

5. In the meanwhile the State Legislature enacted the U. P. Sales Tax (Amendment and Validation) Act, 1971. Section 15 of this Act substitutes Section 29-A. The substituted Section 29-A now reads:

(1) Where any amount is realised from any person by any dealer purporting to do so by way of realisation of tax on the sale of any goods to such person, such dealer shall deposit the entire amount so realised into the Government treasury, within such period as may be prescribed, notwithstanding that the dealer is not liable to pay such amount as tax or that only a part of it is due from him as tax under this Act.

(2) Any amount deposited by any dealer under Sub-section (1) shall, to the extent it is not due as tax, be held by the State Government in trust for the

person from whom it was realised by the dealer, or for his legal representatives, and the deposit shall discharge such dealer of the liability in respect thereof to the extent of the deposit.

(3) Where any amount is deposited by any dealer under Sub-section (1), such amount or any part thereof shall, on a claim being made in that behalf in such form as may be prescribed, be refunded, in the manner prescribed, to the person from whom such dealer had actually realised such amount or part, or to his legal representatives, and to no other person :

Provided that, no such claim shall be entertained after the expiry of three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference, if any, in respect thereof, whichever is later.

Explanation.-The expression "final order on appeal, revision or reference" includes an order passed by the Supreme Court under Article 32, Article 132, Article 133, Article 136 or Article 137, or by the High Court under Article 226 or Article 227 of the Constitution.

6. Section 17, with which we are directly concerned, provides:

(1) Notwithstanding anything contained in any judgment, decree or order of any court or other authority to the contrary, every payment or deposit made by any dealer under Sub-section (4) or Sub-section (5) of Section 8-A, as it stood prior to its omission by this Act, shall be deemed to be a deposit made under Sub-section (1) of Section 29-A as substituted by this Act as if the latter-mentioned section were in force at the time of such payment or deposit, and accordingly be governed by the provisions of that section with the modification that in the proviso to Sub-section (3) thereof, for the words " three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference, if any, in respect thereof, whichever is later ", the words " three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference, if any, in respect thereof or one year from the commencement of the Uttar, Pradesh Sales Tax (Amendment and Validation) Act, 1971, whichever is latest", shall be deemed to be substituted and accordingly,-

(a) no suit or other proceeding shall be entertained or continued in any court or before any authority for the refund of any amount referred to in this sub-section ; and

(b) no court shall enforce any decree or order directing the refund of any such amount.

7. It may be observed that Section 17 is dependent on and interrelated with Section 15 of the U.P. Sales Tax (Amendment and Validation) Act, 1971. Section 17 provides that the amount already deposited u/s 8-A(4) of the principal Act shall be deemed to be made u/s 29-A(1) as substituted by Section 15. So

Section 15 is the principal provision, while Section 17 is an auxiliary provision. If Section 15 is unconstitutional, Section 17 will also fall down as unconstitutional because it is inseverable from Section 15.

8. Let us now examine what Section 15 endeavours to accomplish. Sub-section (1) envisages a case where a dealer realises some amount as sales tax from the person to whom goods are sold by him and the dealer himself is not liable to pay the collected amount or any part thereof as tax. Sub-section (1) directs such a dealer to deposit the collected amount into the Government treasury. Sub-section (2) provides that the amount so deposited by a dealer shall, to the extent it is not due as tax from him, be held by the Government in trust for the person from whom it was realised by the dealer or for his legal representatives. It further provides that when the dealer has deposited the amount, into the Government treasury, he shall no longer be liable to the person from whom he has realised the amount. Sub-section (3) provides that the amount deposited into the Government treasury by the dealer or any part thereof shall be paid to the person from whom the dealer had realised it or to his legal representatives. It further provides that the claim of the payer or his legal representatives shall not be entertained after the expiry of three years from the date of the order of assessment or one year from the date of the final order on appeal, revision or reference. In brief, Section 29-A seeks to catch the amount which could not be realised as sales tax by a dealer. Obviously such an amount is not a tax on the sale of goods. Accordingly the subject-matter of Section 15 is not covered by entry 54 of List II of the Seventh Schedule to the Constitution. Indeed, standing counsel has not placed reliance on entry 54. According to the standing counsel, Section 15 is a law with respect to transfer of property or contracts or trust and trustees and is covered by either entry 6 or entry 7 or entry 10 of List III of the Seventh Schedule to the Constitution. These entries read:

Entry 6: Transfer of property other than agricultural land; registration of deeds and documents.

Entry 7: Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land,

Entry 10 : Trust and trustees.

9. Standing counsel has relied principally on entry 10. Arguments for and against have ranged over a wide spectrum. But we do not think it necessary to deal with all those arguments. We think that the fate of Section 15 of the U.P. Sales Tax (Amendment and Validation) Act, 1971, is foredoomed by *Ashoka Marketing Ltd. Vs. State of Bihar and Another*, . In that case Section 20-A of the Bihar Sales Tax Act was assailed. In substance Section 20-A resembles Section 29-A inserted by Section 15. The Advocate-General of Bihar contended before the Supreme Court that Section 20-A "is in truth not for levy or collection of an amount as tax which the State is not competent to levy or collect, but for compelling a registered

dealer to pay over the amount collected on behalf of the State as tax so that it may be made available to a person from whom it was unlawfully recovered." According to him Section 20-A was covered by entries 6, 7 and 13 of List III of the Seventh Schedule to the Constitution. The Supreme Court has held that the subject-matter of Section 20-A did not fall within entry 54 of List II of the Seventh Schedule to the Constitution. Dealing with the argument of the Advocate-General based on entries 6, 7 and 13 of List III of the Seventh Schedule to the Constitution, the Supreme Court observed :

We fail to appreciate how power to legislate in respect of entries 6, 7 and 13 would authorise the State Legislature to legislate in respect of recovery from the dealer of an amount which the dealer was in law not entitled to collect, but which he has collected. The power to legislate in respect of Sub-sections (3), (4) and (5) of Section 20-A does not fall under entries 6, 7 and 13 of List III expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in entries 6, 7 and 13 of List III. As already pointed out, this court in the judgment in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, has clearly held that the State has no power to legislate for recovery of an amount which is collected by the taxpayer in order to recoup himself for payment of tax which under the law he is not bound to pay. Even though the competence of the State to legislate was not sought to be supported under entries 6, 7 and 13 of List III, the decision of the court plainly implies that the State has no such power under any entry in the third List.

(emphasis added).

10. We have already mentioned that Section 29-A inserted by Section 15 of the U.P. Sales Tax (Amendment and Validation) Act, 1971, is substantially similar to Section 20-A of the Bihar Sales Tax Act. Accordingly we find it difficult to accept the argument of standing counsel that the subject-matter of Section 15 is covered by entries 6 and 7 of List III of the Seventh Schedule to the Constitution. We are also unable to agree with him that the subject-matter of Section 15 is covered by entry 10 of List III of the Seventh Schedule. The words "under any entry in the third List " in the passage already quoted from the judgment of the Supreme Court in Ashoka Marketing Ltd. Vs. State of Bihar and Another, forecloses the argument of standing counsel based on entry 10.

11. Standing counsel has submitted that as the Advocate-General did not place specific reliance on entry 10 of List III before the Supreme Court, we can examine for ourselves whether the subject-matter of Section 15 of our Act is covered by that entry. But the phrase "under any entry in the third List " in the passage quoted earlier plainly excludes entry 10.

12. In view of the decision of the Supreme Court in Ashoka Marketing Limited¹, we are bound to hold that the State Legislature has no power to enact Section 29-A as inserted by Section 15 of the U.P. Sales Tax (Amendment and Validation) Act, 1971. We hold that Section 29-A is unconstitutional. Section 17 which is

subordinate to Section 15 which inserts Section 29-A will inevitably become unconstitutional.

13. The petitions are accordingly allowed with costs. Sections 15 and 17 of the U.P. Sales Tax (Amendment and Validation) Act, 1971, are declared unconstitutional. The respondents shall now refund the amounts due to the petitioners in respect of various assessment orders in the light of our judgment.