
(1956) 12 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 117 of 1956

Behubar Co. Ltd.

APPELLANT

Vs

Commissioner of Taxes and Others

RESPONDENT

Date of Decision : 10-12-1956

Acts Referred:

Constitution of India, 1950 — Article 226, 245, 286

Citation : AIR 1957 Guw 61 : (1957) 8 STC 417

Hon'ble Judges : Sarjoo Prosad, C.J.; Ram Labhaya, J

Bench : Division Bench

Advocate : B. Sen, P. Chaudhury and G.K. Talukdar, for the Appellant; D.N. Medhi, Senior Government Advocate, for the Respondent

Judgement

Ram Labhaya, J.—This is a petition under Article 226 of the Constitution of India for a writ in the nature of mandamus, certiorari and also for other suitable writs or orders. It arises out of three assessments made under the Assam Sales Tax Act, 1947. The three periods of assessments are :--(1) from 1st April, 1951, to 30th September, 1951; (2) from 1st October, 1951, to 31st March, 1952; (3) from 1st April, 1952, to 30th September, 1952. In respect of these periods the petitioner was assessed on certain items of turnover amounting to Rs. 50,823, Rs. 1,05,685 and Rs. 1,73,820 respectively. The turnover in each case was from tea chests and machine parts which were purchased at Calcutta by the petitioner's head office and despatched to the petitioner in Assam for use in its business, namely, manufacture and sale of tea. The assessments were made under the second proviso to Section 2 (12) of the Assam Sales Tax Act, 1947, which provides that any use by a dealer from his stock of any goods liable to tax under the Act shall be deemed to be a sale.

2. Notices of demand were served on the petitioner. The tax was due to be paid only on or before 23rd October, 1953. It is alleged that the notices of demand were mislaid in the Calcutta office of the petitioner and therefore an application was made for extension of time for appeals under the second proviso to Section

30 (1) of the Assam Sales Tax Act. The Superintendent of Taxes informed the petitioner that the question whether delay could be condoned could be considered only when the appeals were filed. On 22nd February the petitioner filed three appeals before the Assistant Commissioner of Taxes. These appeals were dismissed on 30th July, 1954, on the ground that they were barred by limitation. The Assistant Commissioner did not go into the merits of the controversy. The order, it is said, was passed without hearing the petitioner. He then filed three petitions of revision before the Commissioner of Taxes. These petitions were rejected on 18th May, 1956. The Commissioner came to the conclusion that the order rejecting the appeals was correct. But he did not dispose of the revision petitions only on that ground. He observed further as follows :--

On merits also there does not appear to exist any ground for relief. Certain goods and stores were purchased by the petitioners in Calcutta free of tax. These were brought to the garden for consumption therein. Under the second proviso to Section 2 (12) of the Assam Sales Tax Act, 1947, any use by a dealer from his stock of goods liable to tax under this Act shall be deemed to be a sale. If so, all taxable articles and stores used by the petitioners in the garden constitute a sale and so are liable to the Assam Sales Tax.

3. The petition is directed against this order.

4. The learned counsel for the petitioner has argued that the second proviso to Section 2 (12) of the Act is ultra vires the Government of India Act, 1935, and the Constitution of India, 1950, inasmuch as Entry 48 of List II to the Seventh Schedule to the Government of India Act, 1935, and Entry 54 of List II of Seventh Schedule to the Constitution authorise the State Governments to impose tax only on sales and not on the use of goods. He has argued first that the word "sale" in the relevant entries of the two Constitution Acts has a well-defined meaning and mere use does not fall within the scope of the expression. The power conferred on State Legislatures cannot be enlarged or added to by widening the scope of the expression "sale" for the purposes of any taxation measure. The assessments are illegal and void inasmuch as the provision under which they purport to have been made involves an excessive use of the legislative power by the State Legislature. The learned counsel has also argued that the petitioner can be exonerated from the apparently illegal levy only by suitable writs. He has no other remedy available to him.

5. Entry No. 48 of List II of the Government of India Act, 1935, authorises the imposition of taxes on sale of goods and on advertisements. Entry No. 54 of List II of the Seventh Schedule to the Constitution of India authorises the States to impose taxes on the sale or purchase of goods other than newspapers. The Constitution came into force on 26th January, 1950. The impugned provision was introduced into the Sales Tax Act by an Amending Act of 1951. The question is whether the second proviso to Section 2 (12) is in excess of the powers conferred on the State Legislature by Entry No. 54.

6. There can be no manner of doubt that the State Legislature could not add to the power conferred on it by virtue of the provision in Entry No. 54, List II, of the Seventh Schedule to the Constitution of India. Adding to the powers under Entry No. 54 would amount to amending the Constitution which a State Legislature has no power to do. It can merely exercise the power within the limits imposed on it by the entry under which it purports to act. The Amending Act by which the impugned proviso was inserted in the Act could only be in the exercise of powers which the State Government had by virtue of the provisions contained in Entry No. 54. The position is almost axiomatic and is also concluded by authority. It was held in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, that the State Legislature cannot by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act. In *Gannon Dunkerley and Co. (Madras) Ltd. v. State of Madras* AIR 1954 Mad. 1130, Item 48, List II, of the Government of India Act, 1935, came to be interpreted. It was held that,

the legislative power of the Provincial Legislature to levy a tax on sale of goods is confined and restricted only to the transaction of sale as understood by the Parliament of the United Kingdom in the law relating to the sale of goods and any attempt of the Legislature to tax under the guise of or under the pretence of such a power, transactions which are wholly outside it, will be ultra vires and must be declared invalid,

7. The proposition of law has been stated very lucidly in the judgments referred to above. It does not require any further elucidation. It seems obvious that State Legislatures have not the power to define the expression "sale" so as to give it an extended scope, or to give it a meaning by which the power intended to be given to them by the Constitution Acts is enlarged.

8. We have next to find out the connotation of the expression "sale of goods" occurring in the two relevant entries of the two Constitution Acts. "Sale of goods" involves a contract whereby property in the goods is transferred by the seller to the buyer. The transfer of property in the goods is for a pecuniary consideration. This consideration is the price for the goods sold and it is an essential element of the contract of sale. It is for this reason that barter is not covered by the expression sale of goods. It was held in *Gannon Dunkerley and Co. (Madras) Ltd. v. State of Madras* AIR 1954 Mad. 1130, that sale of goods in Entry 48 of List II of Seventh Schedule to the Government of India Act means,

a contract" whereby the property in the goods is actually transferred by the seller to the buyer. It is not an executory contract but an executed contract, and the transfer of the property in the goods is for a price, i. e., for money consideration. As price is an essential element of a contract of sale, barter is ruled out from a transaction of sale of goods. The subject-matter of the contract of sale may be either existing goods or future goods. Goods may be ascertained goods or unascertained goods; the property is not transferred in the case of unascertained goods until the goods are ascertained and appropriated to the

contract, while in the case of specific or ascertained goods, the property is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

9. It will follow from this view that in a sale two parties, a seller and a buyer, are necessary. Goods must be transferred and the property in the goods should pass to the purchaser for pecuniary consideration. These are essential elements of a transaction of sale. Their Lordships of the Supreme Court had also occasion to consider the question with reference to Entry 48 of List II of the Seventh Schedule to the Government of India Act, 1935, in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, Interpreting the expression "sale of goods" in Entry 48, in the sense in which it was used in legislation both in England and in India they held that it authorised the imposition of a tax only when there is a completed sale involving transfer of title and not when there is a mere agreement to sell. In this case it was further held that at the time of the enactment of the Government of India Act, there was a well defined and well established distinction between a sale and an agreement of sale and the expression in question was interpreted in full view of this distinction.

10. The implication of this decision is that at the time the Government of India Act was enacted, the expression "sale of goods" had acquired a well defined meaning. The statutory meaning of the expression, given to it in Section 4 of the Indian Sale of Goods Act, was referred to. It provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. This was the meaning given to the expression in Entry 48. In other words, the expression in Entry 48 was held to have been used in the sense which it carried in the pre-existing Indian law on the point. It would bear the same meaning in Entry 54 of List II of the Seventh Schedule to the Constitution. The result is that in order that there should be a sale of goods it is necessary that there should be a seller and a buyer and the seller should transfer property in goods to the buyer for a price. The State may impose a tax on a completed sale.

11. Mr. Medhi does not dispute the correctness of the above two propositions. He concedes that a State Legislature may not enlarge its powers of taxation, by including within the scope of the expression "sale of goods" anything that was not intended to be included by the framers of the Constitution Acts. He has also no quarrel with the proposition that the expression "sale of goods" had a well defined meaning as explained in the decisions referred to above. He has therefore made no attempt to show that use by a dealer from his stock of any goods liable to tax could be brought within the ambit of the expression "sale" as used in the Government of India Act, 1935, or the Constitution of India. He agrees that the use by a dealer of any goods from his stock lacks the attributes of a sale. There is no second party, there is no passing of the property from one to another, there is no consideration for which the property changes hand. Such use as is contemplated by the second proviso to Section 2 (12) therefore

admittedly does not fall within the purview of the expression "sale of goods". The Legislature therefore by authorising the imposition of tax on use of goods has added to the meaning of the expression and has assumed power which the Constitution did not confer on it. The proviso would therefore be hit by Entry 54 which may not be utilised to tax user as distinguished from a sale. Mr. Medhi however has tried to justify the proviso on the ground that Entry 54 of List II of Seventh Schedule to the Constitution authorises levy of tax not only on the sale of goods but also on the purchase of goods. In his view larger powers are given to the State Legislatures by Entry 54 of List II of Seventh Schedule. The Government of India Act did not include the expression "purchase" in Entry 48. He argues that purchase as distinguished from sale also justifies the imposition of a levy. By adding the second proviso to Section 2(12) the Assam State Legislature merely permitted taxation of purchases. He amplifies his argument by pointing out that the petitioner in this case purchased tea chests and parts of machinery in Calcutta. From Calcutta these were brought over to Assam for use here and if purchases are taxable, they would not cease to be so merely because goods purchased are used. In his view Entry 54 permits taxation of purchases whatever be the object. He therefore urges that even if the use contemplated by the impugned proviso may not fall within the purview of the expression "sale of goods" it would fall under purchase and therefore the proviso would not be beyond the legislative competence of the State Legislature.

12. The reasoning suffers from a fallacy. There can be no transaction of sale without a purchaser. There cannot be also a transaction of purchase without a seller. A seller and a purchaser are two necessary parties. The one sells, the other purchases. Sale and purchase are two different names of one transaction. The transaction cannot be split up into two parts. The two expressions merely make a distinction between the two parties to a transaction of sale. Purchase is no more than a phase or a facet of the sale transaction. It is not correct therefore to say that Entry 48 of the Government of India Act was limited to sales as distinguished from purchases. It was held in *Province of Madras v. Boddu Paidanna and Sons* AIR 1942 F.C. 33 that "though the word "purchase" was not in this item (Entry 48), the item gave the power to tax the transaction of sale and the power to tax either party thereto.

13. A purchaser therefore could be taxed under the Government of India Act before the Constitution came into force. When a sale is permitted to be taxed either party to the sale may be taxed. It will be open to the legislature to collect the tax from either the seller or the purchaser. The inclusion of the word purchase in the Constitution has not therefore enlarged the powers of the State Legislature. The expression "sale or purchase of goods" in Entry 54 would require a transaction whereby the property in the goods is actually transferred by the seller to the buyer for a price.

14. The proviso is merely limited to the use of articles from the stock of the dealer. It makes no reference to purchases. It is admitted that in this case tea

chests and parts of the machinery which have been taxed were purchased in Calcutta. The purchase being in Calcutta could not be taxed under Article 286 of the Constitution of India. It provides that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. The fact that the articles assessed to tax were purchased outside the State is not disputed. Purchases made outside the State could not be taxed in Assam and they have not been taxed.

15. There is no justification for reading the expression "purchase" in the impugned proviso. It does not occur there. We may not presume that the legislature intended to contravene a prohibition contained in the Constitution by taxing purchases by merely adding the word use as a distinguishing factor. If the purchases had been taxable, the provision may not be open to any constitutional objection. But the legislature could not add to its power of taxing purchases which it could not tax, merely on the ground that articles purchased were used by the purchaser. A sale or purchase inside the State is necessary in order to tax the seller or the purchaser. The user alone does not involve any transfer of property in question from a seller to a buyer. The impugned proviso therefore does contravene a prohibition of the Constitution and is hit by it. It involves excessive use of the legislative power by the legislature of the State. It is therefore constitutionally invalid and unenforceable.

16. The assessment of the petitioner for the three periods under the impugned proviso would therefore be without any legal sanction. It is illegal. In view of the conclusion reached it is not necessary to examine the second contention raised on behalf of the petitioner. It was contended by his learned Advocate that the tea chests and the machinery parts which were taxed did not form part of his stock as a dealer under the Act. He was a dealer in tea. When selling tea in chests he was paying tax on his turnover on sales. As he was not dealing either in machinery parts or tea chests he could not be taxed u/s 2(12) of the Assam Sales Tax Act even for their use, assuming that the proviso was valid. We do not consider it necessary to examine this contention, the proviso having been found to be void and of no effect.

17. The foregoing discussion leads to the conclusion that the assessment orders have no legal sanction behind them. They are illegal and therefore they may not be permitted to be enforced or given effect to.

18. It has been contended before us by the learned counsel for the petitioner that all remedies under the Sales Tax Act have been exhausted and the petitioner has no other remedy available to him except to invoke the extraordinary jurisdiction of this Court under Article 226. The assessment orders were passed on 30th September, 1953, and notices of demand were issued in pursuance of these orders. On 12th December, 1955, an application was made on behalf of the petitioner for condonation of delay in filing the appeals on the ground that notices of demand had been mislaid. On 2nd May, 1954, the petitioner was

informed that the application could be considered only when the appeals were filed. The appeals were dismissed as time-barred. Delay was not condoned. It was found on revision that the dismissal of the appeals by the Assistant Commissioner on the ground that they were barred by limitation was correct. The Commissioner however entered into the merits of the cases also and found that the assessment orders were justified under the impugned proviso to Section 2 (12).

19. It is not correct to say in these circumstances that the petitioner has exhausted his remedies. His appeals were time-barred. The result was that the appellate authority had no occasion to consider or dispose of the cases on the merits. Filing appeals out of time is not availing of the remedy provided by the law. It is more a failure to avail of the remedy than anything else. The appellate orders were upheld on revision and it has not been shown to us that these orders are contrary to law so far as the determination of the question of limitation is concerned. The petitions for revision were also disposed of on the merits and therefore it was open to the petitioner to ask for a reference to this Court. Even this was not done. The available remedies may not be considered to have been utilised. Notwithstanding this there is no gainsaying the fact that at this stage no other remedy is available to the petitioner. We have found that the assessments are illegal and are incapable of being given effect to. The available remedy being by a writ of mandamus is discretionary. It may not be claimed as of right even in England. Article 226 leaves the discretion to the Court in the case of all writs including the writ of mandamus.

20. Normally a writ of mandamus may not issue where another adequate and efficacious remedy is available. But even the existence of an alternative remedy does not invariably operate as a bar to the issue of the writ. In this case the petitioner admittedly has no other remedy available now. If the writ is refused it would amount to perpetuating a miscarriage of justice and this may not be suffered notwithstanding the fact that the petitioner might well have come to this Court by obtaining a reference. There is however a still better reason why a suitable writ should issue in this case. In *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, it was held by no less than four learned Judges of the Supreme Court that:

the remedy under an Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself ultra vires and void and the principle of another remedy can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is ultra vires the powers of the Legislature which enacted it and as such void and prays for appropriate relief under Article 226.

21. This pronouncement from their Lordships of the Supreme Court would entitle the petitioner to writs prayed for when he has succeeded in showing that the provision of law under which orders of assessments have been made against him

is void. In these circumstances it is ordered that the assessment orders stand quashed and that writs of mandamus shall issue to opposite parties directing that the orders of assessment being without legal authority shall not be given effect to or enforced against the petitioner.

Sarjoo Prosad, C.J.

22. The only substantial question which we have to decide in this case is whether the second proviso to Sub-section (12) of Section 2 of the Assam Sales Tax Act, 1947 (Assam Act XVII of 1947) is ultra vires the Constitution Act of 1935 or the present Constitution. If the argument that it is ultra vires prevails, then the orders of assessment of sales tax made against the petitioner will have to be quashed and the case will have to go back to the Superintendent of Taxes for appropriate assessments. The objection relates to assessment of tax on tea chests and machinery parts used by the dealer in carrying on his tea business and industry. The petitioner has, therefore, prayed for a writ of certiorari for quashing the orders in question, and for a writ of mandamus prohibiting the Sales Tax Authorities from enforcing the said proviso.

23. The impugned proviso to Section 2 (12) of the Sales Tax Act runs thus:--

Provided further that any use by a dealer from his stock of any goods liable to tax under this Act shall be deemed to be a sale.

24. This proviso was inserted by Amending Act No. IV of 1951, that is, after the present Constitution had taken effect. We have, therefore, to see if the proviso is in excess of the authority conferred on the State Legislature under Entry 54 of List II of the Seventh Schedule to the present Constitution. The said entry entitles the State Legislature to legislate in regard to taxes on the sale or purchase of goods other than newspapers. It is under the authority of this entry read with the relevant Article 245 of the Constitution that the State Legislature proceeded to introduce the amendment inserting the proviso. The learned counsel for the petitioner argues that the word "sale", as used in Entry 48 of List II of the Government of India Act, 1935, or in Entry 54 of List II of the Seventh Schedule of the present Constitution, has a well-recognised and definite legal connotation], which does not and cannot include mere user of goods. According to the contention of the learned counsel, "use" of any goods is not "sale" and, therefore, under cover of the proviso in question, the State Legislature could not arrogate to itself the authority of taxing the use by a dealer of any goods in his stock. It is well-settled that, both under the English and Indian law, "sale" connotes the transfer of interest in the goods sold from one person to another, being the vendor and the purchaser respectively, for valuable consideration. In the case of user, all these elements are absent; there is neither a vendor nor a purchaser, nor is there any transfer of interest from the one to the other in the goods for any consideration. Mere "user", therefore, without these elements cannot, by any stretch of language, be regarded as "sale" and the Constitution in adopting the word "sale" as an item for taxation in the relevant entry cannot be

deemed to have given to it a concept and meaning utterly different from the one, which was well accepted and recognised both in legal and popular phraseology.

25. The above principles find support from a large number of decisions, both of the Supreme Court and of the Indian High Courts. In *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, it was pointed out that under the statute law of India, that is the Sale of Goods Act, 1930, which is based on the English common law, the term "sale" has a specific meaning. In the case of sale, there is a transfer of interest from the seller to the buyer. Therefore, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between sale and agreement to sell, it would be proper to interpret the expression sale of goods in Entry 48 in the sense in which it was used in legislation both in England and in India. The State Legislature cannot by enlarging the definition of sale as including forward contracts, arrogate to itself a power to tax, which is not conferred upon it by the Constitution Act. Accordingly, the definition of "sale" in the U.P. Sales Tax Act was declared ultra vires. Again in a Madras case, *Gannon Dunkerley and Co. (Madras) Ltd. v. The State of Madras* AIR 1954 Mad. 1130, the learned Judges held that sale of goods means a contract whereby the property in the goods is actually transferred by the vendor to the purchaser. It is not an executory contract, but an executed contract and the transfer of the property in the goods is for a price, i.e., for money consideration; and as price is an essential element of a contract of sale, barter is ruled out from a transaction of sale of goods.

26. The learned Government Advocate appearing for the department has no quarrel with the above propositions, as indeed he could not have, but he contends that Entry 54 of the present Constitution is wider than Entry 48 of the Constitution Act. The present entry authorises the State Legislature to tax not only sales, but also purchases and in so far as the goods used by the dealer from his stock were purchased, the State Legislature was entitled to tax those goods on account of their user by the dealer. This argument is palpably erroneous. Sale and purchase are no doubt but different phases of the same transaction; but to tax the mere user of the goods by the dealer is altogether different. The impugned proviso says nothing about purchase. If the sale or purchase took place outside the State, the State Legislature was precluded from taxing the same under Article 286(1) of the Constitution; but here the proviso contemplates taxing the use of the goods by the dealer. It is obvious that such a levy cannot be described as sale or purchase tax. It must, therefore, be held that the impugned proviso transgresses the constitutional powers of the State Legislature vouchsafed under Entry 54, List II, of the Seventh Schedule of the present Constitution, and as such is ultra vires. It is significant to note that we have not come across any such proviso in any other sales tax legislation in India unduly enlarging the meaning of sale in a parallel sense. There being thus no legal sanction for the assessment of taxes on the goods in question, the imposition is in violation of the fundamental rights of the petitioner. The petitioner might, therefore, well claim the protection of an appropriate writ of certiorari against

any such assessment.

27. The learned counsel for the petitioner has further submitted that even on the supposed authority of the impugned proviso, the taxing officers had no jurisdiction to assess tax on tea chests and machinery parts used by the dealer in the business of manufacturing and selling tea. He contends that these goods were not mentioned in the dealer's registration certificate, as goods liable to tax under the law in respect of which transaction of sale and purchase were carried on by the dealer in this State. The dealer carries on the business of selling tea and not tea chests and machinery parts. In fact, tea chests containing tea are sold with the tea itself and tax is assessed as on these sales. Tea chests by themselves were not subject to any assessment of tax. The language of the proviso is "any goods liable to tax under the Act", which must have reference under the law to the goods in which the dealer is authorised to deal as entered in his registration certificate and not any other commodity. The tea chests and machinery parts do not form the stock-in-trade of the dealer. For the above reasons, it must be held that the assessment orders are illegal and unauthorised and are liable to be quashed.

28. The learned Senior Government Advocate, however, urges that the petitioner had a remedy open under the law itself and should not have applied for a writ without exhausting those remedies. In the first place, I am not satisfied that the dealer has not already pursued his appropriate remedies under the law. But even if he had not, an application for a writ is not altogether barred. In appropriate cases, this Court can always interfere by prerogative writs when it finds that manifest injustice is likely to result by unauthorised and unwarranted acts of the taxing authorities purporting to tax under cover of a law, which is ultra vires and in excess of constitutional sanctions. A rule nisi had been already issued by this Court on the facts stated above and when the Court is satisfied on hearing parties that the assessments were quite unauthorised to the extent indicated earlier, the Court will not refuse to interfere and allow that injustice to continue.

29. The application must, therefore, be allowed and appropriate writs issue as prayed for. I make no order as to costs of the application.