
(1952) 12 PAT CK 0006

In the Patna High Court

Case No : Misc. Judicial Case No. 241 of 1952

Bengal Immunity Co. Ltd.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 04-12-1952

Acts Referred:

Bihar Sales Tax Act, 1947 — Section 13(5), 2, 24, 25, 33
Constitution of India, 1950 — Article 226, 254, 286(1), 286(2), 304

Citation : AIR 1953 Patna 87 : (1953) 1 BLJR 48

Hon'ble Judges : Sarjoo Prosad, J; Ramaswami, J

Bench : Division Bench

Advocate : N.C. Sen Gupta, B.C. De, Ajit Kumar Dutta and Sudhir Chandra Ghosh, for the Appellant; Government Pleader and L.M. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, J.—In this case the petitioner has obtained a rule calling upon the State of Bihar and the other respondents to show cause why a writ in the nature of prohibition or certiorari should not be issued for quashing the proceedings instituted against the petitioner for assessment of sales tax. Cause was shown against the rule by the Government pleader on behalf of the State of Bihar and the other respondents to whom notice of the rule was directed to be given.

2. The petitioner, the Bengal Immunity Company, Limited, is a corporate body with its registered office at 153 Dharmatala Street, Calcutta, The petitioner carries on the business of manufacturing and selling vaccines, sera and biological products. The petitioner conducts an extensive sale of the manufactured goods not only in West Bengal but in other parts of the Union of India. The goods are despatched from Calcutta by rail, steamer or air against orders which are sent to Calcutta by various customers. The petitioner has no agent or office in the State of Bihar. It is stated in the affidavit that the petitioner is not a resident of Bihar nor does the petitioner carry on business as dealer within the territorial limits of

Bihar. The petitioner alleges that on 18-12-1951 the Superintendent of Commercial Taxes sent a notice u/s 13(5), Bihar Sales Tax Act

"calling upon the petitioner to apply for registration and submit a return showing turn-over for the period 26-1-1950 to 30-9-1951."

The petitioner remonstrated saying that there is no liability to pay tax under the provisions of the Bihar Sales Tax Act and the petitioner cannot be lawfully required to be registered as dealer. But the Superintendent of Sales Tax rejected the contention and required the petitioner to comply with the terms of the notice previously sent. On 28-5-1952, the petitioner was informed that in case of default assessment will be made by the sales tax officer to the best of his judgment in accordance with the provisions of Section 13(5) of the Act.

It is submitted on behalf of the petitioner that the State of Bihar has no jurisdiction to impose sales tax on persons residing outside Bihar, that the provisions of the Bihar Sales Tax Act are inconsistent with the Constitution of India and that the order of the Superintendent of Commercial Taxes calling upon the petitioner to file a return and to get itself registered as dealer was illegal and without jurisdiction. The petitioner, therefore, asks for a writ in the nature of certiorari or prohibition to quash the proceedings instituted by the Superintendent of Commercial Taxes for assessment of sales tax.

3. The first question which arises is whether in the state of facts disclosed in the petitioner's affidavit a writ under Article 226 of the Constitution may be properly issued. It was pointed out by the Government pleader that only a notice u/s 13(5) has been issued, and that no order of assessment upon the petitioner has been made by the sales tax authorities. The Government pleader stated that the facts have not been investigated by the taxing authorities & the liability of the petitioner has not been determined. It was argued on behalf of the respondents that in issuing notices u/s 13(5) the Superintendent of Commercial Taxes was acting within the ambit of his jurisdiction and the High Court cannot control his proceedings by issue of a writ. Now Section 13(5) states

"if upon information which has come into his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless wilfully failed to apply for registration, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer"

It was contended on behalf of the petitioner that he was not liable to pay tax under the Act, and that he cannot be asked to apply for registration or submit his return. It was argued that the Superintendent of Commercial Taxes committed an error of jurisdiction in holding that the petitioner was liable to pay tax. In my opinion this argument proceeds on a misconception.

In the present case the test of jurisdiction is whether the Sales Tax officer had

power to investigate and not whether his determination on a question of fact or law is right or wrong. It is not alleged on petitioner's behalf that there was no information which had come into the possession of the Sales Tax officer or that he acted mala fide without any such information. Section 13(5) not merely confers a power on the Sales Tax Officer to investigate but the section imposes a duty upon the Sales Tax officer to make assessment after giving reasonable notice. The section states that if the commissioner is satisfied that any dealer is liable to pay tax, he shall after giving the dealer a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax, if any, due from the dealer. The section presupposes that the Sales Tax Officer has power to investigate into the matter which comes before him and to form a conclusion one way or the other. It is manifest that the section expressly confers on the Sales Tax officer jurisdiction to investigate for himself the facts before making the order of assessment. In my opinion the Sales Tax Officer was undoubtedly acting within his jurisdiction in issuing notice u/s 13(5) against the petitioner asking him to apply for registration and submit a return.

It was contended for the petitioner that, the Sales Tax Officer was erroneous in law in holding that the petitioner was liable to pay tax. But that decision was one within the ambit of the jurisdiction of the Sales Tax Officer and should he make any assessment u/s 13(5) against the petitioner the Act provides a right of appeal whereby any error of law may be corrected by the appellate authorities prescribed under the Act. It is manifest that Sections 24 and 25 of the Act furnish a complete and effective machinery for appeal and revision against assessment made under the Act. In a similar case -- "Kodak, Ltd. v. Clark" (1903) 4 Tax Cas 549 Kodak Limited applied for a writ of prohibition against the General Commissioners of Taxes on the ground that the profits of the Eastman Kodak, Ltd. Rochester ought not to be assessed as the English Company's profits and that the assessment was not warranted by any jurisdiction conferred by any statute relating to Income Tax. The application was rejected by the Court of appeal. At page 572 the Master of the Rolls states:

Now what is that the General Commissioners of Taxes have to ascertain? Surely they had to ascertain what trade a tax payer who is assessable to income tax is carrying on, and to do this it is within the jurisdiction of the Commissioners to ascertain what is the connection between the Kodak Company in this country and the Rochester business in America. This is what the Commissioners are doing, and I agree with the King's Bench Division that the assertion that the Commissioners have gone, or are going, wrong in determining this question gives no ground for prohibition."

4. In the present case, therefore, I hold that there is no warrant for issuing a writ under Article 226 of the Constitution on the facts disclosed in the petitioner's affidavit. But since the merits of the case have been fully argued in the course of the hearing it is right that I should indicate my views on the other important issues in the case.

5. The main question is whether Sections 2(c) and 2(g) and Section 4, Bihar Sales Tax Act, are constitutionally valid and operative.

6. The Bihar Sales Tax Act is entitled as an Act "to provide for levy of a tax on the sale of goods in Bihar". Section 4 which is the charging section states:

"Subject to the provisions of Sections 5, 6, 7 and 8 and with effect from the commencement of this Act, every dealer whose gross turn-over during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax, under this Act on sales which have taken place in Bihar after the date of such commencement."

Section 2(c) as it originally stood defines "dealer" to mean

"any person who carries on the business of selling or supplying goods in Bihar, whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family, and any society, club or association which sells or supplies goods to its members."

The section was amended by Bihar Act, 17 of 1950, and as a result of the amendment the word "Bihar" was omitted from the sub-section. Section 2(g) states :

" "Sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge; Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale; . Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in Section 4 of that Act is made, shall wherever the "said contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar."

The section was amended "by Bihar Act 7 of 1951, as a result of which the second proviso of Section 2(g) was omitted and to the said clause as so amended the following Explanation was added:

"The sale of any goods actually delivered in Bihar as a direct result of such sale for the purpose of consumption in Bihar shall be deemed for the purpose of this Act to have taken place in Bihar, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has by reason of such sale, passed in another State."

7. It is material to state that as a result of the Adaptation of Laws (Third Amendment) Order dated 4-4-1951, a new Section 33 was incorporated to the

following effect:

"33. (1) Notwithstanding anything contained in this Act, --

(a) a tax on the sale or purchase of goods shall not be imposed under this Act -

(i) where such sale or purchase takes place outside the State of Bihar; or

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India;

(iii) a tax on the sale or purchase of any goods shall not, after the 31st day of March, 1951, be imposed where such sale or purchase, takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The Explanation to Clause (1) of article 286 of the Constitution shall apply for the interpretation of Sub-clause (i) of Clause (a) of Sub-section (1)."

8. The contention of Dr. Sen Gupta is that Section 2(c) and the new explanation added to Section 2(g) of the Act are void and inoperative since they violate Article 286(2) of the Constitution. The objection of the learned Counsel is that the impugned sections authorise imposition of tax on the sale or purchase of goods in the course of inter-state trade and commerce and was, therefore, void and illegal to that extent. The argument is based upon Article 286(2) of the Constitution which states :

"Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce."

It was pointed out by the learned counsel that the petitioner was a manufacturer of vaccine & biological products with its head-office located at Calcutta, that the petitioner sold goods to various persons of Bihar, that the goods were despatched from Calcutta and after crossing the inter-state border the goods were delivered to various persons in Bihar. It was argued that the petitioner was engaged in inter-state trade or commerce and the State of Bihar had no authority to impose tax on the goods of the petitioner.

9. In my opinion the argument is attractive but wholly unsound. Section 33 of the newly amended Act only reproduces the explanation which is set out in Article 286(1) of the Constitution. It is necessary in this context to set out the provisions of Article 286 in full:

"(1) 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 -

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of,

the territory of India.

Explanation, -- For the purposes of Sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase" passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce....."

10. The problem in this case is what is the right construction to be placed on the general language of Clause (2) of this Article. Let us take a concrete example. A trader sends goods from State A to State B for the purpose of consumption in State B. The contract of sale is effected in State A and title passes in State A but goods are actually delivered in State B for consumption in that State. There is movement of goods across the inter-state border, and if the sale takes place at any stage of this movement, Article 286(2) of the Constitution would prohibit State B or State A from imposing a tax on the sale. Since the sale has taken place outside the State border, the case would also fall under Article 286(1)(a) which prohibits State B from taxing such a sale. But the Explanation states that notwithstanding the fact that title has passed and sale has taken place in State A, the sale or purchase should be deemed to have been effected in State B in which the goods have been actually delivered for the purpose of consumption. It follows that State B would have jurisdiction to impose a tax on such sale. It is, therefore, manifest that if Article 286(2) is construed in a full and unqualified sense the explanation to Article 286(1) would become nugatory and of no effect. This would be contrary to all canon of sound construction. In order to obviate such result it is necessary that the two parts of the article must be read together and the language of the one must be interpreted and where necessary be modified by the other.

The principle is stated by the Judicial Committee in -- "Citizens Insurance Co. of Canada v. Parsons" (1882) 7 AC 96 at :

"With regard to certain classes of subjects, therefore, generally described in Section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however, difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists, in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two" sections must be read together, and the language of one

interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them," The principle of construction is that from a large general class must be excepted a particular class which forms a branch or sub-division of the larger class. If no such exception is made the danger would be that the more general class will absorb or override the particular class. In the present case Article 286(2) refers to inter-State trade or commerce which is a conception of general scope. In -- "Welton v. Missouri" (1878) 91 U. S. 275 Field, J. said: "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the, transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States."

On the contrary, the explanation to Article 286(1)(a) relates to a small category of sale of goods in which the property passes in State A and the goods are actually delivered as a direct result of the sale and for the purpose of consumption in State B. The transactions within the scope of the explanation are manifestly of a particular or a small class. Applying the principle of construction already formulated it is manifest that the phrase "sale or purchase in the course of trade or commerce" in Article 286(2) must be construed so as to exclude the particular class of sales or purchase described in the explanation to Article 286(1). If this conclusion is right it follows that the newly amended Sections 2(c) and 2 (g) and the newly substituted Section 33, Bihar Sales Tax Act, are not in conflict with Article 286(2) of the Constitution.

11. The language of the explanation to Article 286(1) is significant. It applies only when the goods are actually delivered for the purpose of consumption in the State. It corresponds to what is called in American Legislation a "Use tax". As regards the legislative authority of the State to impose such a tax, the constitutional position in America is different and the American decisions are not of much assistance. For the Commerce Clause has been utilised as an instrument for assertion of national power as opposed to local State interest in the American constitutional scheme. The power of the State to tax is also subject to Due Process Clause of the Fourteenth Amendment, Even so the Supreme Court has sustained State legislation taxing "use" of property which has just been moved in interstate commerce or imposing property tax on goods at the conclusion of the interstate journey. In -- *McGoldrick v. Berwind-White Coal Mining Co.*" (1939) 309 U.S. 33 it was held by the Supreme Court that the New York City tax laid upon the Pennsylvania Corporation as regards sale of coal for consumption in New York City did not infringe the Commerce Clause of the Federal Constitution. In the course of his opinion Mr. Justice Stone said:

"But it was not the purpose of the commerce clause to relieve those engaged in inter-state commerce of their just share of state tax burdens, merely because an

incidental or consequential effect of the tax is an increase in the cost of doing the business. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the States, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect inter-state commerce which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress."

12. It was next objected that the impugned sections of the Sales Tax Act were invalid since they are repugnant to the Indian Sale of Goods Act and the assent of the President has not been taken under Article 254 of the Constitution. The argument is founded on Article 254(1) of the Constitution which states :

"If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

In my opinion the argument proceeds upon misconception. The Bihar Sales Tax Act is in pith and substance not a law with respect to sale of" goods but is a law imposing taxation on sale of goods." The Act is entitled as an Act to provide for the levy of a tax on the sale of goods in Bihar. The preamble recites that it is necessary to make an addition to the revenues of Bihar and for that purpose to impose a tax on sale of goods in Bihar. The main provisions of the Act are designed to carry out the purpose stated in the preamble. It is manifest that the legislation falls entirely within Item 54 of the State list, viz., taxes on the sale or purchase of goods other than newspapers. It follows that Article 254 has no application to the present case though the Act may incidentally trench to a certain extent upon Items 7 and 8 in the Concurrent List.

The case falls within the "ratio1 of -- "Megh Raj v. Allah Rakhia" 74 IA 12 (PC) in which the Judicial Committee held that Section 107, Government of India Act, 1935, had no application in a case where the province could show, as it did in that case, that it was acting wholly within its powers under the Provincial List & was not relying on any power conferred on it by List III of the Concurrent List. In that case it was argued that the Punjab Restitution of Mortgaged Lands Act, 1938, was invalid in that a number of its provisions were in fact legislation on matters falling within List III, namely, Items 7, 8 and 10 of that List. It was held by the Judicial Committee that the impugned Act which dealt with mortgage on agricultural lands are legislation falling entirely within Item, 21 of the Provincial Legislative List, that is, land or any interest in land and, therefore, no question of repugnancy could arise by reason of the fact that the Act might encroach to a certain extent upon the items in the Concurrent Legislative List. viz.. Items 7. 8 and 10. The argument of Dr. Sen Gupta on this part of the case must, therefore,

fail.

13. I pass on to consider the argument that there is conflict between the impugned Act and Article 304 of the Constitution. It was contended by Dr. Sen Gupta that the impugned provisions of the Bihar Sales Tax Act impose restrictions on the freedom of trade and commerce within the meaning of Article 304(b), that the Act was not valid since previous sanction of the President had not been obtained to the introduction of the Bill in the State legislature. In my opinion the argument of the learned counsel is not correct. Article 304 occurs in Part XIII of the Constitution which is entitled "Trade, Commerce and Intercourse within the territory, of India". Article 301 states that

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

Article 304(b) empowers the legislature of a State to enact legislation imposing reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. The proviso stipulates that no bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. But neither Article 301 nor Article 304 has any relevance in the context of the present case.

The Bihar Sales Tax Act makes no discrimination between the goods imported and the goods produced or manufactured in the State. The Act is in its true nature and character--in its "pith and substance"--not legislation with respect to freedom of trade or commerce but it is legislation enacted by the State Legislature by virtue of the power conferred by Item 52 of the State List. How can it be then said that the legislation falls within the ambit of Part XIII of the Constitution? The Act professes to be an Act imposing tax on the sale of goods in Bihar. It does not profess to directly tax articles in inter-state trade and commerce. The acts and the transactions on which it directly operates are not inter-state commercial dealings or inter-state transportation. The operation of the Act in no way depends on the inter-state or intra-state nature of the sale transaction. The Act does not differentiate between interstate sales and intra-state sales. The statute has manifestly been enacted for the purpose of imposing tax on the sale of goods and not for regulating inter-state or intra-state trade and commerce. It is difficult, therefore, to accept the argument that the Act contravenes in any way Article 304 of the Constitution. This opinion is supported by the ratio of the Australian case -- "O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways" 52 C L R 189, in which it was held that the provisions of the State Transport Act, 1931, and the charge imposed u/s 37 did not contravene Section 92 of the Constitution as interfering with the freedom of trade, commerce and intercourse among the States.

14. Learned Counsel next submitted that the impugned sections of the Bihar Sales Tax Act were invalid since they were extra-territorial in operation. It was

contended that the Act imposes tax with respect to transactions concluded in West Bengal, and that the State Legislature had no power to impose a tax of this nature. It was argued that under Article 254(245?) of the Constitution the Bihar legislature was competent to make a law only for the territory of Bihar. In my opinion the argument proceeds upon misconception. It is true that the petitioner is resident of Calcutta but jurisdiction to tax does not depend on the residence or domicil of the assessee. On the contrary the power of the State to tax extends to all matters properly within the sovereignty of the State. The jurisdiction to tax exists not only in regard to persons or property but also as regards the business done within the State. It is not however, necessary for the purpose of jurisdiction that the entire transaction of sale should have taken place within the frontiers of the State. On the other hand, the fact that the goods are delivered in Bihar for consumption constitutes a sufficient "nexus" or territorial connection which confers jurisdiction upon the Bihar legislature to impose the tax. This opinion is supported by the decision of the Judicial Committee in -- "Wallace Brothers & Co. Ltd. v. Commr. of Income Tax, Bombay City and Bombay Suburban district" 75 IA 86 (PC), in which a company incorporated in England having its registered office there was carrying on business in India. The Income Tax authorities in India imposed a tax on the company not merely with respect to the income received in India but also with respect to the income received in England.

It was held by the Judicial Committee that the major portion of the income of the company was derived from British India and there was hence territorial connection sufficient to justify the company being treated as at home in British India and so properly subject to the jurisdiction of the Indian legislature. A similar principle is enunciated in -- "A. H. Wadia v. Commissioner of Income Tax, Bombay" 1948 FCR 121 in which the Gwalior Durbar was advancing large sums on mortgage of debentures over property in British India. The question was whether interest received by the Durbar at Gwalior was assessable to Income Tax. It was contended that Section 42(1), Income Tax Act, under which the assessment was sought to be made was extra-territorial in its operation and, therefore, ultra vires of the Indian Legislature. It was held by the majority that on the facts there was sufficient connection to clothe the Indian Legislature with competence to impose the tax. Reference may also be made to the recent American case -- "State of Wisconsin v. J. C. Penny Co.," (1940) 311 US 435, in which the Supreme Court upheld the validity of a tax imposed by Wisconsin State on dividend declared by a foreign corporation licensed to do business in Wisconsin.

In the course of his opinion Frankfurter J. said:

"The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the State has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions

within a state for which the tax is an exaction."

In view of these authorities it is manifest that the constitutional objection raised by the learned Counsel must fail. It is also important to notice that the explanation to Article 286(1)(a) of the Constitution expressly confers upon the State the power to tax sale or purchase of goods which are actually delivered for consumption inside the State.

15. For the reasons I have expressed I am of opinion that this application is without merit and must be dismissed with costs. Hearing fee five gold mohars

Sarjoo Prosad, J.

16. I agree.