

(1955) 10 PAT CK 0007
In the Patna High Court
Case No : Misc. Judl. Case No. 293 of 1954

Bihar Cotton Mills Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 07-10-1955

Acts Referred:

Central Excise Rules, 1944 — Rule 10A
Dhoties (Additional Excise Duty) Act, 1953 — Section 1, 3, 4
General Clauses Act, 1897 — Section 24, 30

Citation : AIR 1956 Patna 131 : (1955) 3 BLJR 679

Hon'ble Judges : Ramaswami, J;Imam, J

Bench : Division Bench

Advocate : Baldeva Sahai, A.B.N. Sinha, Ramji Sharan and Shivanugrah Narain, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, J.—In this case the petitioner is an incorporated company called the Bihar Cotton Mills Ltd. with its registered office at Phulwari Sharif. The petitioner manufactures textile goods of medium quality including "dhoties" under a licence granted by the Collector of Central Excise and bearing Tex Mark No. 401.

2. On 26-4-1953, the President promulgated Ordinance No. 6 of 1953, otherwise known as Dhoties (Additional Excise Duty) Ordinance of 1953 which provided for levy and collection of Additional excise duty on dhoties packed by mills in excess of the quota fixed for the purpose. On 28-11-1953, the Inspector of Central Excise issued a notice calling upon the petitioner to pay a sum of Rs. 52,395/6/-, which was the additional excise duty levied under the Ordinance.

An appeal was taken by the petitioner to the Superintendent of Excise against the order of the Inspector of Excise. The appeal was dismissed by the Superintendent of Excise who considered that the notice issued against the petitioner was a valid notice. The petitioner preferred an appeal to the Collector of Excise, and on 6-4-1954, the Collector of Excise allowed the appeal and set

aside the notice issued by the Inspector of Excise.

The Collector of Excise took the view that Section 4 of the Ordinance authorised additional excise duty to be levied only in respect of excess quantity of dhoties "packed" during the quarter and not for excess clearance of dhoties above the quota fixed by the Textile Commissioner. The Collector of Excise considered that there was no proof that for the period from 26-10-1953 to 27-11-1963, the petitioner had packed 5,23,052 yards of dhوتي.

Meanwhile, Ordinance 6 of 1953 was repealed and Parliament passed an Act called Dhoties (Additional Excise Duty) Act, 1953, providing for the levy and collection of an additional excise duty on dhoties "issued out" of mills in excess of the quota fixed for the purpose. The Act was promulgated on 17-12-1953, but Section 1(3) of the Act expressly provided that the Act "shall be deemed to have come into force on 26-10-1953".

Under Section 4 of this Act the Inspector of Excise issued a notice calling upon the petitioner to pay additional excise duty of Rs. 52,395/6/- (vide annexure H). The petitioner preferred an appeal to the Superintendent of Excise, but the appeal was dismissed on 4-5-1954. The petitioner took the matter in appeal to the Collector of Excise who said that the appeal could not be heard until the petitioner first deposited the amount of duty.

3. In this state of facts the petitioner has moved the High Court for grant of a writ in the nature of certiorari under Article 226 of the Constitution for the purpose of calling up and quashing the notice issued by the Inspector of Central Excise on 21-4-1954, demanding additional excise duty from the petitioner and also the order of the Superintendent of Excise dated 4-5-1954, affirming the validity of the notice.

4. Cause has been shown in this case by the learned Government Pleader on behalf of the respondents, namely, the Union of India and the Collector of Central Excise, to whom notice of the rule was ordered to be given.

5. On behalf of the petitioner, Mr. Baldeva Sahal put forward the argument that Act 39 of 1953 was beyond the legislative competence of Parliament and not constitutionally valid. It was contended by learned counsel that the duty imposed by the Act was not an excise duty and, therefore, the Act was ultra vires of parliament. It was pointed out that the Act permitted excise duty to be levied retrospectively on goods manufactured or produced even before the Act came into force. Counsel for the petitioner also made the submission that the Act permitted the Excise authorities to levy a duty upon the assessee even though the goods had passed out of its hands and were not available.

In my opinion, there is no merit in this argument. There is nothing in the Constitution to suggest that the Parliament cannot levy an excise duty with retrospective effect. Article 246 of the Constitution confers exclusive authority on Parliament to make laws with respect to any of the matters enumerated in List I

in the Seventh Schedule. Item 84 of List I refers to "duties of excise on tobacco and other goods manufactured or produced in India except--(a) alcoholic liquors for human consumption: (b) opium. Indian hemp and other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance Included in sub-paragraph (b) of this entry".

It is well established that Parliament is endowed with plenary powers of legislation, and that it is competent to legislate with prospective or retrospective effect. Retrospective legislation is one of the incidents of plenary legislative power and in -- AIR 1941 16 (Federal Court) the Federal Court held that there was nothing in the Government of India Act to deprive even the provincial legislatures of the power of retrospective legislation.

Under the Constitution there is only one restriction imposed upon the power of retrospective legislation. Article 20 of the Constitution imposes such a restriction upon retrospective penal legislation. There is no such restriction on legislative power with regard to taxation. In the absence of any constitutional provision against retrospective fiscal legislation, it is not right to argue that the Court should apply such a restriction. To adopt the language of Frankfurter J. in a recent American case, "the ultimate touchstone of constitutionality is the Constitution itself" and not any general principle outside it.

6. It was next objected on behalf of the petitioner that if the duty was imposed retrospectively after the goods had passed out of the petitioner's hands, the tax would not be excise tax on the goods but it would be in the nature of a personal tax upon the petitioner. It was pointed out that the Act was actually promulgated on 17-12-1953, but it was made retrospective from 26-10-1953.

It was also contended that the duty was imposed not upon goods manufactured from 26-10-1953, but on goods which had been manufactured before that date but which were issued out of the mills after 26-10-1953. It further appears that notice was served upon the petitioner on 21-4-1954, for payment of additional excise duty.

It was submitted on behalf of the petitioner that the goods had been manufactured and issued out of the mills long before the date of notice of demand. The argument was, therefore, put forward that the duty imposed was not an excise duty on the goods but a personal tax on the petitioner. It is true that in point of fact the duty in this case was levied after the manufacture of the dhoties and the issue of the dhoties out of the mills.

But it is wrong to contend that the duty imposed is, therefore, not an excise duty in its proper sense. It should be noticed that Act 39 of 1953 has been expressly made retrospective with effect from 26-10-1953. In other words, Parliament has by a process of legal fiction related back the levy of duty to the stage of manufacture or production. The duty imposed by the Act has, therefore, the character of an excise duty, and the argument advanced on behalf of the petitioner to the contrary is not a valid argument.

7. It was next contended on behalf of the petitioner that the basis of taxation u/s 4 of the impugned Act is not manufacture and production of dhoties but "issue" of dhoties out of the mills in excess of the quota fixed for the purpose. It was, therefore, argued that the tax imposed was not in the nature of an excise duty mentioned in item 84 of the Union List of the Seventh Schedule. I am unable to accept this argument as correct.

It is true that Section 4 permits a duty to be levied and collected on dhoties "issued out" of the mills in excess of the quota fixed for the purpose, but the basis of taxation is not mere "issue" of dhoties out of the mills, but the basis is manufacture of dhoties. This view is supported by Section 2 (a) which defines "dhoti" to mean "any type of grey or bleached of plain weave which (i) is manufactured by a mill either wholly from cotton or partly from cotton and partly from any other material.....".

Section 2 (b) is also important. It defines a "mill" to mean "any building or place in which cotton yarn is spun and dhoties are manufactured by machinery moved otherwise than by manual labour and includes every part or such building or place". Section 3 defines what is the "permissible quota". It provides that the permissible quota of dhoties "which may be issued out of any mill during any quarter, whether the dhoties were manufactured during that quarter or at any time previous thereto, shall be one-fourth of sixty per cent. of the total quantity of dhoties packed by that mill during the relevant period".

It is clear from these provisions that the duty is imposed upon manufacture of dhoties and not merely upon the issue of dhoties out of the mills in excess of the prescribed quota. It is true that under the provisions of the Act additional excise duty is not collected at the stage of manufacture or production of dhoties but the duty is collected at the stage of issue of the dhoties out of the mills; but that is only a matter of machinery of collection and does not affect the essential nature of tax.

In -- "In the matter of Central Provinces & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938" AIR 1939 1 (Federal Court) , Gwyer, C.J. expressed the view that the power to make laws "with respect to" duties of excise "given to Federal Legislature under entry No. 45 of the Seventh Schedule should be construed as" a power to impose "duties of excise upon the manufacturer or producer of the excisable articles or at least at the stage of or "in connection with manufacture or production of the excisable articles".

The duty impugned in the present case falls within the interpretation given by the learned Chief Justice since Act 39 of 1953 imposes the duty on the manufacturer in connection with the manufacture of dhoties in excess of the permissible quota fixed u/s 3, Explan. I. Counsel for the petitioner may be right in saying that an excise duty is normally imposed at the stage of manufacture or production of the goods, but the administrative authority may always collect the tax at any stage which it considers to be most convenient and lucrative.

If the authority, therefore, collects the duty at a late stage, it cannot be contended that the nature of the tax suffers any change. The argument of Mr. Baldeva Sahai on this point is beset by a fallacy and must be rejected.

8. Counsel for the petitioner next raised the objection that there is no machinery provided by the Act or by the rules for collection of excise duty retrospectively and reference was made in this connection to Rr. 9 and 52, Central Excise Rules, 1944.

Rule 9 provides that "no excisable goods shall be removed from any place where they are produced, cured or manufactured.....until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require, and except on presentation of an application in the proper form and obtaining the permission of the proper officer on the form".

Rule 52 provides for clearance of goods on payment of duty. The rule states : "When the manufacturer desires to remove goods on payment of duty, either from the place or premises specified under Rule 9 or from a storeroom or other place of storage approved by the Collector under Rule 47, he shall make application in triplicaw to the proper officer in the proper Form and shall deliver it to the officer at least twelve hours before it is intended to remove the goods".

I am unable to accept the argument of the petitioner that the rules do not provide for collection of excise duty after the goods have been removed from the custody or control of the as-sessee. Rules 9 and 52 have no application to the present case. Rule 10-A is the relevant rule. Rule 10A refers to "residuary powers for recovery of sums due to Government".

Rule 10A states:

"Where these Rules do not make any specific provision for the collection of any duty or of any deficiency in duty if the duty has any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

Rule 10A, therefore, provides the machinery for collection of tax from the assessee after the goods had left the factory premises. It follows that the procedure adopted by the Excise authorities in this case for recovery of the additional excise duty from the petitioner is authorised by law.

9. Lastly, the argument was put forward that there was no valid notification of the Government of India under Expln. I of Section 3 of Act 89 of 1953 fixing the relevant period for calculation of tne permissible quota. It was, therefore contended that the demand of additional excise duty from the petitioner was unauthorised and illegal. I do not think there is any substance in this argument.

It was admitted by the Government Pleader that no notification was issued by the Government of India fixing the relevant period u/s 3 of Act 39 of 1953, but Counsel pointed out that a notification had been issued by the Govt. of India under the corresponding section of Ordinance 6 of 1953. The notification was issued on 27-10-1953, and published in the Gazette of India dated 26-10-1953.

The notification is to the following effect:

"S.R.O. 1988. --In exercise of the powers conferred by the Explanation to Sub-section (1) of Section 3, Dhoties (Additional Excise Duty Ordinance, 6 of 1953), the Central Government hereby fixes for all mills the period of twelve months commencing from the 1st day of April, 1951 and ending with the 31st day of March 1952 as the relevant period."

10. In my opinion Section 24, General Clauses Act 1897, applies to this case and the notification issued under Explan. I of Section 3 of Ordinance 6 of 1953 continues in force and would be deemed to have been made and issued under Explan. I of s. 3 of Act 39 of 1953. It should also be noticed that Section 30, General Clauses Act makes it clear that the expression "Central Act" Includes an Ordinance made and promulgated by the President under Article 123 of the Constitution.

It was contended by Mr. Baldeva Sahai that there was some inconsistency between the provisions of Act 39 of 1953 and Ordinance 6 of 1953 and, therefore Section 24, General Clauses Act would not apply to the case. I do not think that this argument has any justification. The provisions of Ordinance 6 of 1953 have been in substance re-enacted by Parliament in Act 39 of 1953 with the only difference that additional excise duty is levied upon dhoties issued out of the mills instead of upon dhoties packed.

I do not think that there is any inconsistency between the provisions of Ordinance 6 of 1953 and Act 39 of 1953, and hold that Section 24, General Clauses Act applies to the case, and that the notification of the Central Government dated 27-10-1953, would continue in force and would be deemed to have been made under Explan. I of Section 3 of Act 39 of 1953. I think that the decision of the Supreme Court, -- The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, , is in point.

11. For the reasons I hold that the constitutional objection raised on behalf of the petitioner must fail. I hold that Act 39 of 1953 is legally valid and not beyond legislative competence of Parliament and that the demand notice issued by the inspector of Excise on 21-4-1954, against the petitioner is legally competent.

It follows that there is no case made out on behalf of the petitioner for issue of a writ under Article 226 of the Constitution against the respondents. In my opinion, this application fails and must be dismissed with costs. Hearing fee Rs. 100/-.

Imam, J.

12. I agree.