

(1999) 02 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal No. 317 Of 1997

Devi Dass Gopal Krishen Ltd.

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 04-02-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 301, 304
General Sales Tax Act, 1962 — Section 4(1)

Citation : (1999) KashLJ 532 : (1999) 1 SriLJ 71

Hon'ble Judges : Bhawani Singh, C.J and Syed Bashir-Ud-Din, J

Bench : Division Bench

Advocate : Z.A.Shah, Shahnaz, M.A.Goni , Advocates appearing for the Parties

Judgement

Bhawani Singh, Chief Justice

1. This Letters Patent Appeal is directed against Judgment of Single Judge dated September 10, 1997 in OWPNo.853/ 1995. Before advertng to

the controversy involved for consideration and determination in this case, narration of material facts may he made

2. The AppellantCompany is registered under Indian Companies Act, 1956. It is carrying on the business of manufacturing and sale of ""P"" mark

mustard oil, units located at Moga (Punjab) and Bahadurgarh (Haryana), for the past 60 years with goodwill and reputation, states the Managing

Director.

3. In 1962, the Jammu and Kashmir General Sales Tax Act, 1962 was enacted. Section 4(1) thereof empowers the State Government to impose

tax on goods. State Government issued notifications prescribing rates of tax on various kinds of goods. By SRO80/1982 dated March 12, 1982,

Sales Tax at the rate of 1% was levied on edible oil produced by both outside and

local manufactures. Thereafter, by SRO135/ 1989 dated

March 29, 1989, the rate of tax on this item was enhanced to 4% for both the categories of manufacturers of edible oil. Thereafter, another

notification SRO93/ 1991 dated March 7,1991 has been issued under Section 5 of the Sales Tax Act granting exemption against payment of Sales

Tax to small Scale units of J and K State producing edible oil. Since entire edible oil industry in Jammu and Kashmir comprised of small Scale

units, all the industrial units of J and K got exempted from paying Sales Tax Under this notification.

4. Thereafter, SRO124/1994 dated June 27, 1994 was issued amending SRO135/1989 increasing rate of sales Tax. The result was that industrial

units of J and K remained exempted under SRO93/1991, while outside manufacturers, who had been paying Sales Tax at the rate of 4% under

SRO135/1989 were liable to pay increased rate of Sales Tax at 8%. Thus, subjecting industrial units producing edible oil out side the State to

hostile discrimination visavis industrial units of Jammu and Kashmir.

5. Appellants preferred writ petition challenging SRO93/1991 read with SRO135/1989 and SRO124/1994, restraining respondents from

recovery of tax under these orders and directing the State against implementing these orders.

6. During the pendency of the writ petition in this court, the action of State Government was assailed before Supreme Court in Civil Appeal No.

14996 of 1996, S.L.P. (C)No.27488 of 1995 (Shree Mahavir Oil Mills and another Vs, State of J and K and Others), wherein notification

SRO93/1991 was challenged violative of Articles 301 and 304 (a) of the Constitution of India. This notification was quashed in the decision dated

November 29,1996. The result according to the Appellants, is that local millers and outside millers were placed on the same footings, liable to pay

the same rate of tax. What the Apex Court has decided in this case shall be adverted to in the latter part of this judgment when we deal with the

precise claim of Appellants in this case. Suffice it to say that the Appellants assert that their stand against the SRO93/1991 stands Vindicated by

the Apex Court in Mahavir Oil Mills case, but learned Single Judge did not extend the relief to them and erroneously accepted the plea advanced

by the respondents that the Suprem0 Court may have quashed notification

SRO93/1991, yet no relief was extended to the Appellants, who were required to pay the tax which has not been recovered from the consumers.

7. Shri. Z.A.Shah, senior Counsel for Appellants, contended that Appellants were charging only 4% tax pursuant to SRO135/ 1989. Even when

exemption notification SRO93/1991 was issued, the same rate they continued to charge after SRO93/1991 was declared illegal in Mahavir Oil

Mills case. Despite the fact that the Appellants were discriminated against by notification SRO93/ 1991, they continued to realise 4% Sales Tax

without Challenging it in Court of Law, since they could bear this extent of discrimination.

It was only when the rate of Sales Tax was enhanced from 4% to 8% by SRO124/1994 that the discrimination became unbearable and the action

was challenged, particularly when the local millers were exempted from paying any tax. The action of respondents demanding tax 4% more than

the original levy, particularly when it has not realised from consumers amounts to unjust enrichment on the part of the State. Sales Tax was realized

from consumers at the rate of 4% and deposited with the state. 'Enhancement by 4% undoubtedly, violates the mandate of Articles 301 and 304

(a) of the Constitution of India, a question set at rest by the Apex Court in Mahvir Oil Mills case. It is also contended that this Judgment of

Supreme Court does not entitle the respondents and call upon the Appellants to pay tax at the rate of 4% more than the already realized and paid

at the rate 4% under SRO124/ 1994. In nutshell, the submission, runs on the plane that the Apex Court declared in Mahavir Oil Mills case that the

state cannot make any discrimination between local and outside manufacturers. Such a recourse would violate Articles 301 and 304 (a) of the

Constitution. Examined in the context of the Supreme Court decision in Mahavir Oil Mills case, the respondents are forbidden to direct the

Appellants to pay 4% more Sales Tax when they had realised only from the consumers under SRO135/1989. We shall hereafter discuss some of

the decisions of Apex Court touching the competence of State resorting to taxation on interState sales of goods under the Sales tax Act in the

context of Articles 301 and 304(a) of the Constitution of India before answering the submission advanced before us. .

Article 301, Subject to the other provisions of this part, trade, commerce and

intercourse throughout the territory of India shall be free.

Article 304. Notwithstanding anything in Article 301 or article 303, the Legislature of a State may by law

(a) Impose on goods imported from other state or the Union territories any tax to which similar goods manufactured or produced in that state are

subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced, and

(b) Impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that state as may be required in the public

interest:

Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a state without the previous

sanction of the president.

8. In *Atiabari Tea Co. Ltd. Vs. State of Assam* (1961 (1) S.C.R.809), the Constitutional validity of Assam Taxation (on goods carried by roads

or Inland Waterways) Act, 1954 providing for levy of tax on certain goods carried by road or inland waterways in the State of Assam was

challenged by Tea Companies who sold most of their produce outside the State of Assam after transporting it by roads or water ways to West

Bengal and other States Majority opinion of the court is that:

Our conclusion, therefore, is that when Art. 301 provides that trade, shall be free throughout the territory of India it means that the flow of trade

shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is

the free movement or the transport of goods from one part of the country to the other that is intended to be saved, any if any Act imposes and

direct restrictions on the very movement of such goods it attracts the provisions of Art, 301, and its validity can be sustained only if it satisfies the

requirements of Art.302 or Art. 304 of Part XIII. At this stage, we think it is necessary to repeat that when it is said that the freedom of the

movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is

that the said restrictions can be imposed By ""the ""state"" Legislatures only after satisfying the requirements of Art 304(b). It is not as if no

restrictions at all can he imposed on the free movement of trade.

it was also held:

"Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Art. 301, would be

such 1 restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but

it is only such taxes as directly and immediately restrict trade that would fall within the purview of Art. 301... . we are, therefore, satisfied that in

determining the limits of the width and amplitude of the freedom guaranteed by Art. 301 a rational and workable test to apply would be: Does the

impugned restriction operate directly or immediately on trade or its movement?

In *Firm A.T.B.Mehtab Majid and Co. vs State of Madras* (1963 Suppl. (2) S.C.R. 435), the effect of section 3 of the Madras General Sales Tax

act, read with Rule 16 made thereunder was an issue, since its effect was that tanned hides and skins imported from outside the state of Madras

and sold within the state were subject to a higher rate of tax than the tax imposed on hides and skins tanned and sold within the state. Similarly,

hides or skins imported from outside the state after purchased in their raw condition and then tanned inside the state were, also subject to higher

rate of tax than the hides or skins purchased in raw condition in the State and tanned within the state. Following the law laid down in *Atiabari Tea*

Co. Ltd. case, the court said:

It is therefore now well settled¹ that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they

are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to

be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating

between goods of one state and goods of another, may affect the free flow of trade and it will then offend against Art. 301 and will be valid only if

it comes within the terms of Art.304(a).

Article 304(a) enables the Legislature of a state to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on

goods from other states and similar goods in the states are subjected to similar taxes, so as not to discriminate between the goods manufactured or

produced in that state and the goods which are imported from other states. This

means that if the effect of the sales tax on tanned hides or skins

imported from outside is that the latter subject to a higher tax by the application becomes of the provision to subrule of r. 16 of the Rules, then the

tax is discriminatory and unconstitutional and must be struck down.

Similar view has taken in India cement and Others. Vs. State of Andhra Pradesh 7 Others. (1988 (1) S.C.C. 743), Weston Bectronics Vs. State

of Gurat (1988 (2) S.C.C.568) and West Bengal Hosiery Association Vs. State of Bihar (1983 (4) S.C.C. 134).

9. Having referred to the above decisions, attention may be diverted to what the Apex Court held in Mahavir Oil Mills case on which strong

reliance has been placed by both sides. Appellants submitting that in view of this decision, Respondents cannot call upon Appellant to pay

remaining 4% Sales Tax and the Respondents that since notification has been declared invalid from April 1997, liability incurred before this period

has to be paid single Judge has rejected the contention holding that impugned notification has been declared invalid from April 1997, therefore,

upto March 31,1997, impugned notification would continue to be effective. The Appellants shall have to pay tax at the rate of 8% announced by

the impugned notification.

10, We have perused the impugned Judgement and examined the contention. advanced before us by Appellants Counsel. We find from Apex

Court decision in Mahavir Oil Mills case that the Apex Court has declared the Imposition of tax on manufacturing units outside the state invalid, but

no relief upto March 31,1997 flows to the Appellants. It is dear from the penultimate paragraph of the Judgement, which is reproduced:

We declare that the exemption granted by notification No.S.R.O 93 of 1991 to manufactures and/producers of edible oil is violative of the

provisions contained in Article 301 and 4304(a) Sic. At the same time, we direct that: (a) the appellants shall not be entitled to claim any amounts

by way of refund or otherwise, by virtue of or, as a consequence of, the declaration contained herein and (b) that the declaration of invalidity of the

impugned...notifications shall take effect on and from April 1, 1997, Till that date, i.e. upto and inclusive of 31st March. 1997 the impugned

notification shall continue to be effective and operative."" (Emphasis ours)

11. Therefore, the Appellants shall have to pay Sales Tax at the rate of 8% upto

March 31, 1997. In case tax at the rate of 4% has been paid deposited, balance 4% of the Sales Tax shall have to be paid upto March, 31, 1997 even if it is not recovered from the customers, as contended.

No other points was urged.

12. Consequently, we find no merit in this Appeal and the same is dismissed.