

(1978) 07 DEL CK 0003

In the Delhi High Court

Case No : Civil Writ Appeal No. 166 of 1977

D.P. Wool Company

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-07-1978

Acts Referred:

Citation : (1979) ILR Delhi 27 : (1979) 44 STC 447

Hon'ble Judges : V.S. Deshpande, J;H.L. Anand, J

Bench : Division Bench

Advocate : B.N. Sen, Balram Sangal and R.C. Chawla, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The petitioners in this and the connected writ petitions pray that the various orders of assessments of Sales-tax made against them and the proceedings for recovery of sales-tax started against them be quashed and their claims for refund of sales-tax already paid but rejected by the Sales-tax authorities be upheld on the following two grounds, namely : (1) that the goods sold by them were formerly exempt from payment of sales-tax under the Second Schedule to the Bengal Finance (Sales-tax) Act, 1941 as applied to Delhi. These exemptions were illegally withdrawn by the Government, and (2) section 3 of the Delhi Sales-tax (Amendment and Validation) Act, 1976, which purports to validate the levy, assessment and collection of Sales-tax on these commodities is unconstitutional inter alia for the following reasons :

1.Circumvention of Articles 141 and 265 of the Constitution; and 2. Violation of Article 19(1)(f) thereof.

(2) These claims are denied by the Government on the ground that even if the exemptions are assumed to be invalid initially they were retrospectively validated by the validation Act of 1976. The above contentions of law have arisen from the following facts :

(3) The Bengal Finance (Sales-tax) Act, 1941 was extended to Delhi u/s 2 of the part C States (Laws) Act, 1950, which ran as follows, by notification dated 28-4-1951, with the necessary restrictions, amendments and modifications:

"THE Central Government may, by notification in the official gazette, extend to the Union Territory of Delhi, Himachal Pradesh, Manipur or Tripura or to any Part of such territory with such restrictions and modifications as it thinks fit, any enactment which is in force in a State at the date of the notification."

Under section 6(2) as originally applicable to Delhi a notice of not less than three months had to be given by the Government before the Second Schedule to the Act could be amended to withdraw any exemption from sales-tax enjoyed by any commodities there under. But by notification dated 7-12-1957 the Government amended section 6(2) and omitted the words "not less than three months notice" and substituted in, their place the words "such previous as it considered reasonable". Thereafter exemptions enjoyed by certain commodities were withdrawn by the Government by giving less than three months notices. In a writ petition, Lachmi Narain v. Union of India (1971) 1 Delhi 107, challenging the assessment of sales-tax on these commodities, it was held by one of us (V.S. Deshpande J.), that this modification of section 6(2) was ineffective and section 6(2) continued to be the same as before as if it was not modified at all. Consequently, notices for less than three months were invalid and the purported withdrawal of the exemptions enjoyed by certain commodities from Sales-tax were also invalid. Sales-tax could not, Therefore, be levied, assessed and recovered on these commodities. On 18-11-1971 a Division Bench of this court consisting of the Hon'ble Chief Justice and Prithvi Raj J. reversed the decision of the learned single Judge and held the amendment of section 6(2) valid. While an appeal against the Division Bench decision was pending in the Supreme Court under Article 136 of the Constitution, Parliament enacted Delhi Sales-tax Act, 1975 repealing the Bengal Finance (Sales-tax) Act, 1941 as applied to Delhi with effect from 21-10-1975. On 25-11-1976 the Supreme Court reversed the judgment of the learned Division Bench and restored that of the learned single Judge, (reported as Lachmi Narain and Others Vs. Union of India (UOI) and Others, , holding that the power to amend or modify the provision of Bengal Finance (Sales-tax) Act, 1941 was meant to make the said Act suitable for application to a Union Territory, that the said power was exhausted when it was exercised at the time of extending the said Act to Delhi and that it could not be exercised repeatedly thereafter. It was also held that the power u/s 6(2) could not be exercised for making an essential change in section 6(2) which could not be said to be a modification for the purpose of making the said Act applicable to Union territory.

(4) The Parliament thereupon enacted the Delhi Sales-tax (Amendment & Validation) Act, 1976, section 3 of which is as follows :

"VALIDATION(1) Subject to the provisions of sub-section (2) each of the sales-tax extension notifications shall, for the purposes (including the levy, assessment

and collection of taxes under the principal Act and the purposes of section 73 of the Delhi Sales-tax Act, 1975) (43 of 1975) be deemed to have been, and to be, a law enacted by the Parliament which took effect on the date on which such notification was published in the Gazette of India and accordingly anything done or purporting to have been done or any action taken or purporting to have been taken before the commencement of this Act, under the principal Act or under the said section 73, shall be deemed to be, and to have always been as valid and effective as if this section had been in force when such thing was done or such action was taken. (2) Notwithstanding anything contained in sub-section (1), the provisions of sub-section (2) of section, 6 of the principal Act, shall, for all purposes (including the levy assessment and collection of tax under that Act and the purposes of section 73 of the Delhi Sales-tax Act, 1975) (43 of 1975); have effect and be deemed always to have had effect as if the said sub-section (2) (hereinafter referred to as the named sub-section) conferred powers on the Central Government to add to, or omit from or otherwise amend by notification in the official Gazette, the schedule (hereinafter referred to as the named Schedule) mentioned in the named sub-section, without giving any previous notice of its intention to do so. (3) Notwithstanding any judgment, decree or order of any court or other authority, every notification, to add to, or omit from, or otherwise amend, the named schedule, issued or purporting to have been issued by the Central Government under the named sub-section, shall be, and shall be deemed always to have been, as valid and effective as if this section had been in force when such notification was issued and accordingly - (a) any tax levied, assessed or collected or purporting to have been levied, assessed or collected under the principal Act by reason of any amendment (whether by way of omission or otherwise) to the named Schedule specified in such notification shall be deemed to have been validly levied, assessed or collected in accordance with law. (b) no suit or other proceedings shall be maintained or continued in any court or before any authority for the refund of, and no enforcement shall be made by any court or other authority of any decree or order directing the refund of any such tax which has been collected; (c) recoveries shall be made, in accordance with the proviso to sub-section (1) of section 73 of the Delhi Sales-tax Act, 1975 (43 of 1975), of all amounts which would have been collected as tax under the principal Act, by reason of any amendment referred to in clause (a) but which had not been collected."

(5) In considering validation statutes, we may draw a distinction between two kinds of them: (1) those which alter the basis of the judicial decisions holding a statute void, and (2) those which simply try to enact a law contrary to the said judicial decision. The former kind of validation are unobjectionable as pointed out by the Supreme Court in *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, . On the other hand, the latter kind of validations are ineffective as pointed out by the Supreme Court in *Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another*, . Such a validating statute is unable to achieve its purpose and the judicial decision of

the Supreme Court sought to be abrogated will remain the law in view of Article 141 of the Constitution and the collection of the tax held invalid by the judicial decision would be contrary to Article 265 of the Constitution. We are to examine Therefore, whether the Validation by section 3 is of the former or of the latter kind.

(6) In trying to show that the Validation Act of 1976 did not remove the basis of the Supreme Court decision and was, Therefore, itself invalid, Mr. B. Sen argued as follows:

(1) When section 73 of the Delhi Sales-tax Act, 1976 repealed the Bengal Finance (Sales-tax) Act, 1941 as applied to Delhi the repealed Act became dead ; (2) The deeming provisions of section 3 of the Validation Act could not revive the dead Act unless it was re-enacted ; and (3) The Validation Act, Therefore, did not achieve its purpose and was invalid as being contrary to Article 141 and no assessment could be made by virtue of the validation as it is contrary to Article 265.

(7) Mr. B. Sen did not dispute the validity of the argument developed in the book "Judicial Review of Legislation" by one of us (V.S. Deshpande J.) that effect of a judicial decision invalidating a statute is merely to make the statute ineffective and unenforceable in the eye of law, though the statute continued to exist on the statute book. If such a judicial decision is later reversed then the statute became effective and enforceable in law. Mr. Sen contended that the effect of a formal repeal of a statute by legislation was not only to make the statute ineffective in the eye of law, but also to delete the statute from the statute book. For the latter reason, such a statute could be called a dead statute. In so far as section 3 of the Validation Act purports to give effect to section 6(2) of the Bengal Finance (Sales-tax) Act, 1941, it assumes that section 6(2) was available for such reactivation. This assumption is wrong because section 6(2) had been formally repealed. It was not, Therefore, reactivated by section 3 of the Validation Act.

(8) This argument does not take into account the effect of section 6 of the General Clauses Act which is as follows :

" WHERE this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not (a) revive anything not in force or existing at the time at which the repeal takes effect; or (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under ; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or

enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

(9) "THE words "unless a different intention appears" in section 6 are intended to give an opportunity to the legislature to modify the effect of section, 6 by making special provisions in addition to or in derogation of section 6. Section 73 of the Delhi Sales-tax Act, 1975 was enacted to express the special intention of the legislature to modify the effect of section 6 of the General Clauses Act. Section 73(1), of the Delhi Sales-tax Act is as follows:

"(1)The Bengal Finance (Sales-tax) Act, 1941 (VI of 1941) as in force in Delhi (hereinafter referred to as the said Act) is hereby repealed; Provided that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred there under and subject thereto, anything done or any action taken including any appointment, notification, notice, order, rule, form or certificate in the exercise of any power conferred by or under the said Act shall be deemed to have been. done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was taken, and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act. 35 The effect of reading section 6(2) of the Bengal Finance (Sales-tax) Act, 1941, section 73 of the Delhi Sales-tax Act, 1975 and section 3 of the Validation Act, 1976, in the light of the decision of the Supreme Court may be stated as follows: (1) In respect of any rights, titles or liabilities which have to be dealt with under the Bengal Finance (Sales-tax) Act, 1941, the effect of section 6 of the General Clauses Act is fully preserved by section 73 of the Delhi Sales-tax Act, 1975. If such a right or liability can be dealt with only under the repealed Act, then, only the repealed Act could apply to it and the subsequent legislation will not apply. (2) Section 6(2) prior to its amendment in 1957 was valid according to both the parties. The two reasons why the amendment of 1957 was invalid were that only the initial adaptation could be made by the Government and the amendment was beyond the power of the Government. Both these reasons were taken a care of when section 3 of the Validation Act enacted that the said amendment would be deemed to have been made by Parliament itself and not by the Government. It cannot be disputed that Parliament had the right to amend the Bengal Finance (Sales-tax) Act and such amendment could even reduce the period of notice provided in section 6(2) to less than three months. This is precisely what has been done by section 3(2) of the Validation Act. Section 3(2) of the validating Act has to be regarded as a substantive parliamentary enactment specifically authorising the Central Government to amend section 6(2) with a view to add to or subtract from the second schedule in the said Act without giving any previous notice of its intention to do so. It is only the Government which was incapable of amending section 6(2) in an essential particular. Parliament does not suffer from any such limitation on its power. The legislative power of Parliament specially in respect of a Union territory is plenary. There is no reason why the Parliament

should not be able to give such a power to the Central Government.

(10) Mr. Sen did not argue such delegation of power by parliament to the Central Government could be excessive and unconstitutional for that reason. The doctrine which holds that a statute may be invalid because parliament delegates its power essentially legislative power to the executive can be based only on a construction of Article 245(1) of the Constitution from which the legislative power of parliament is derived. Article 254(1) of our Constitution is contrasted with Article 1, Section 1 of the Constitution of the United States stating that all legislative powers therein granted shall be vested in the Congress. The Constitution of India vests only the executive power vesting in the President. It does not vest the legislative power of the parliament or the State legislature or the judicial power in the Supreme Court and the High Courts. The doctrine of separation of powers contained in the Constitution of the United States is not reproduced in our Constitution. The theory propounded by the United States Supreme Court under the United States Constitution was that the delegation of essential legislative functions by the Congress to the executive was contrary to Article I Section 1 of the United States Constitution whereby the legislative power was vested in the Congress alone and could not be delegated to the executive. The adoption of this theory by our Supreme Court on the analogy of the United States Supreme Court decision is based more on the need to avoid the undesirable consequences of the excessive delegation by parliament which could not be intended by Article 245(1) than on any express provision in our Constitution comparable to Article I Section 1 of the United States Constitution. This theory has, Therefore, been applied with much less rigour in our country by the courts. Even in the United States this theory is no longer active and there is hardly an example of a statute being invalidated on these grounds in the United States after 1937.

(11) The whole subject has been elaborately discussed in the judgments written in the *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another*. The dominant trend of these judgments is to dilute the doctrine considerably. Even if the preamble or the scheme of the statute is sufficient to indicate the necessity of delegation to the executive, such delegation under the statute would be upheld by the court and it would be extremely rare that the delegation would be regarded as excessive and thereby invalidating the statute. The power to amend the Second Schedule of the Bengal Finance (Sales-tax) Act, 1941 is merely the power to decide which commodity should be liable to the payment of sales-tax and which commodity should be exempted from such payment. This decision is arrived at on considerations of economics, administration, the need of the Government for revenue and the desirability or otherwise of making the sale of a commodity liable to the levy of sales-tax or not. These are considerations which are more properly the subject of administration rather than legislation. The delegation was, Therefore, not objectionable.

(12) By way of abundant caution the deeming provision has been extended to the power to apply the Bengal Finance (Sales-tax) Act to Delhi and even such application is deemed to be made by parliament by legislation rather than by Government by a notification. This shows how determined parliament was to give to the Government the power to amend the Second Schedule. In view of the powers given by the parliament to the Government the very basis of the decision of the Supreme Court disappears. That decision only held that the Government did not have the power to amend section 6(2) and, Therefore, to amend the Second Schedule without giving three months notice. There is nothing In the said decision to indicate that parliament did not have such a power.

(13) The main thrust of Sr. Sen's argument was that the repeal of section 6(2) of the Bengal Finance (Sales-tax) Act, 1941 by section 73 of the Delhi Sales-tax Act, 1975 obliterated the former from the statute book and the former could not be revived by the latter except by a re-enactment of the former by parliament. Since Parliament did not re-enact section 6(2) of the Bengal Finance (Sales-tax) Act, 1941 it continued to be a non-law. Therefore, any rights and obligations which were enforceable under it could not survive its repeal and levy, assessment and collection of sales-tax which became due there under could not be made either u/s 73 or the Delhi Sales-tax Act, 1975 or by virtue of section 3 of the Validation Act, 1976. As already stated above, this power is plenary power of parliament to enact any legislation not forbidden by the Constitution and the effect of section 6 of the General Clauses Act as modified by section 73 of the Delhi Sales-tax Act. There has never been any doubt as to the power of parliament to enact retrospective legislation, nor has it been doubted that rights and obligations under the repealed Act can be preserved by virtue of section 6 of the General clauses Act subject to such modifications as may be made by the repealing Act, i.e. section 73 of the Delhi Sales-tax Act, 1975 in the present case. Whether the validating Act violates the provisions of Articles 19(1)(f) or Article 19(1)(g) of the Constitution would be considered later. The legislative competence of parliament to enact it is not otherwise in doubt.

(14) The effect of section 6 of the General Clauses Act read with section 73 of the Delhi Sales-tax Act, 1975 may be analysed on the reasoning made by a Division Bench of the Madhya Pradesh High Court in Hanuman Prasad v. Sales-tax Officer (1963) 14 StC 507. The analysis of section 6 of the General Clauses Act read with section 73 of the Delhi Sales-tax Act, 1975 is as follows :

(A)The repeal is not to affect the previous operation of section 6(2) of the Bengal Finance (Sales-tax) Act, 1941. That is to say rights and obligations which arose there under would be enforceable as if section 6(2) had not been repealed at all. This demolishes the argument that section 73 of the 1975 Act wiped out from the statute book section 6(2) of the 1941 Act. For, the repealing statute itself is subject to section 6 of the General Clauses Act. which keeps the repealed statute alive for the purposes of enforcing the past liabilities. Section 6 prevents the repealed statute from having the effect as would have been the case under the

common law when the presumption was that a repealed statute had never been enacted at all. It is the counter-act the common law that section 6 was enacted. (B) If a past right or obligation is inconsistent with the repealing Act, then it is enforceable under the repealed Act. Otherwise it is deemed that the said past right or obligation has arisen under the repealing Act and is, Therefore, enforceable under it. The effect of the deeming provision is that while the substantive liability to pay the tax was incurred under the repealed Act and will be enforceable there under the procedure for enforcing it would be the procedure laid down in the repealing Act. The repealing Act is subject to the provision of section 6 of the General Clauses Act and would apply only in so far as it inconsistent with the repealed Act.

(15) The same view as to the meaning of section 6 of the General Clauses Act as modified by a repealing Act has been expressed by the Supreme Court in the *Swastic" Oil Mills Ltd. v. H. B. Munshi*, Deputy Commissioner of Sales-tax, Bombay. (1968) 21 StC 383 . The Supreme Court went further and observed as follows regarding the effect of the repealing Act: "The effect.. is.. as if there had been no repeal.... Consequently, the repeal.....did not in any way effect the power of the Deputy Commissioner to institute proceedings for revision suo motu" under the repelled Act (also see *Hiralal Rattan Lal v. Sales-tax Officer*, Section Iii, Kanpur (1973) 31 StC 178 (7)).

(16) In *Krishna Chandra Gangopadhyaya and Others Vs. The Union of India and Others*, , V. K. Krishna Iyer J. speaking for the court reviewed the case law relating to the effect of validating Act. His Lordship specifically dealt with the question of the validating Act referring to a statute which had been held to be invalid by the Supreme Court in *Bajinath Kadio Vs. State of Bihar and Others*, . In paragraph 14 of the report, the court referred to the argument of the Solicitor General that "Parliament had legislated for itself, although adopting a shorthand form of incorporation referentially of a State Act and subordinate legislation given in the Schedule to the validation ActIf the re-enacting technique adopted for the referential or incorporating legislation was not sufficient in law, he failed. Otherwise, the Act and rules referred to in the Schedule to the validation Act revived and became operational, retroactively." The court accepted this argument in the following words:

" THERE is force in the submission that taking a total view of the circumstances of the validation Act parliament did more than simply validate an invalid law passed by the Bihar Legislature but did re-enact it with retrospective effect in its own right adding an amending Central Act to the statute book."

A similar technique has been adopted in section 3 of the validation Act. Instead of re-enacting the provisions of Bengal Finance (Sales-tax) Act, 1941, section 3 of the Validation Act has referentially incorporated them in the Parliamentary legislation in the Validation Act. The effect is as if the parliament itself had legislated the relevant provisions of the Bengal Finance (Sales-tax) Act so as to validate by Parliamentary intervention something which the Government had

been unable to do. It is true that the observations in Krishna Chandra's case relates to the rejuvenation of a statute which had been invalidated by a judicial decision and not by repeal. Whatever other differences may exist between the validation of a statute by judicial decision and its repeal by legislation, there is no difference in the power of parliament to refer to a statute and incorporate it by way of a referential legislation. The effect is the same whether the statute so incorporated by reference was invalidated by a judicial decision or by a statutory repeal.

(17) Raising revenue by taxation is a function of the State without which Government cannot be run. Effect of a judicial decision is by its very nature not final. The decision may either be overruled by another judicial decision or its effect may be negative by an amendment of a statute or of the Constitution. It cannot be argued that after the decision of the single Bench till it was reversed by the Division Bench, the petitioners could take it to be the established law that sales-tax was not livable on the commodities which are exempted under the Second Schedule of the Bengal Finance (Sales-tax) Act in respect of the amendment of section 6(2) thereof and the withdrawal of exemption under the Second Schedule by the Government. The petitioners knew that the decision of the single Bench was liable to be reversed by the Division Bench. They also knew that legislature could take action to retrospectively validate the levy, assessment and collection of sales-tax on commodities which the petitioners maintain continued to be exempt from sales-tax under the Second Schedule. "The retrospective legislation in the form of the validating Act could not, Therefore, be said to be contrary to the fundamental rights enshrined in Articles 19(1)(f) and 19(1)(g) of the Constitution S. Kodar V. State of Kerala, (1974) 34 Sales-tax Cases 73(10).

(18) For these reasons this writ petition No. 166 of 1977 and the connected writ petitions Nos. 167 of 1977, 168 of 1977, 291 of 1977, 304 of 1977, 350 of 1977 and 77 of 1978 are dismissed with costs.