

(1980) 04 AHC CK 0027

In the Allahabad High Court

Case No : Civil Miscellaneous Writs (Tax) No's. 2276, 4782 and 4783 of 1974, 1031 of 1973, 19, 238, 239, 528, 529, 530, 531 and 917 of 1975 and 14 of 1977

Indodan Milk Products

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 11-04-1980

Acts Referred:

Central Sales Tax Act, 1956 — Section 12, 8
Constitution of India, 1950 — Article 14, 174, 19, 226, 301
Central Sales Tax Act, 1956 — Section 12, 8
Constitution of India, 1950 — Article 14, 174, 19, 226, 301
Central Sales Tax Act, 1956 — Section 12, 8
Constitution of India, 1950 — Article 14, 174, 19, 226, 301

Citation : (1981) 48 STC 197

Hon'ble Judges : Satish Chandra, C.J.;Yashoda Nandan, J

Bench : Division Bench

Advocate : R.R. Agarwal and Bharatji Agarwal, for the Appellant; The Standing Counsel, for the Respondent

Judgement

Satish Chandra, C.J.—In this group of writ petitions the question is if condensed milk is liable to sales tax. There is a constant tussle between the State Government which wants to tax it and the dealers who wish to avoid . it. This problem has come before this Court for the fourth time now.

2. On the first occasion, in Nestle's Products (India) Ltd. v. Commissioner of Sales Tax [1963] 14 S.T.C. 606 this Court held that condensed milk is not milk within the meaning of Section 4(1) of the U.P. Sales Tax Act, 1948, and, therefore, not exempt from sales tax. Condensed milk is milk product within the meaning of the relevant notification dated 7th June, 1948, and, if it is sold in sealed containers, it is liable to sales tax. The sales tax reference of 1954 was answered in favour of the revenue.

3. The view taken in the Nestle's Products" case [1963] 14 S.T.C. 606 was

doubted and the matter was referred to a Full Bench in *Indodan Milk Products Ltd., Muzaffarnagar v. Commissioner of Sales Tax, U.P.* 1973 U.P.T.C. 569 (F.B.) The Full Bench held that condensed milk is milk and so exempt u/s 4(1) of the Sales Tax Act. It was not a milk product. The decision in the *Nestle's Products* case [1963] 14 S.T.C. 606 was overruled. The references which related to the years 1964-65 and 1965-66 were answered in favour of the assessee.

4. For the assessment year 1967-68, Messrs. Indodan Milk Products Limited filed writ petition in this Court against the assessment order. This Court followed the Full Bench decision and allowing the writ petition directed the Sales Tax Officer to modify the assessment order in relation to condensed milk.

5. Previously Section 4 exempted from sales tax the sale of water, salt, food-grains, milk, gur, electrical energy for industrial purposes, books, magazines, newspapers and motor spirit and any other goods which the Provincial Government may exempt from time to time. The State Government issued a notification exempting many goods including milk products but excluding those sold in sealed containers. After the Full Bench judgment of this Court which was rendered on 20th July, 1973, the State Government at first issued an Ordinance No. 11 of 1974 on 21st May, 1974. This Ordinance was replaced by U. P. Act No. 17 of 1974 which was published on 3rd July, 1974. The Ordinance as well as the Act repealed and re-enacted Section 4 retrospectively with effect from 31st March, 1956. The amended section provided :

4. No tax under this Act shall be payable on-

(a) the sales of water (other than mineral water, aerated water, tonic water, distilled water or scented water), milk (other than condensed milk, milk powder or baby milk), salt, newspapers, motor spirit or any other goods which the State Government may, by notification in the official Gazette, exempt.

6. Section 12, which was the validating section, provided :

12. Notwithstanding any judgment, decree or order of any court, anything done (including any notification issued) or action taken or anything purporting to be done or action purporting to be taken under the provisions of Sub-section (1) of Section 3-AB, read with the Second Schedule, Sub-section (1) of Section 3-D, Section 3-F, Section 4 or Section 21 of the principal Act, shall be deemed to be as valid and effective as if the amendments made in the said provisions by this Act were in force at all material times.

7. In the present group of writ petitions this amendment was challenged on the following grounds :

(1) It violated the guarantee of equality under Article 14 of the Constitution.

(2) The retrospective operation of the amending Act was an unreasonable restriction on the freedom of trade guaranteed by Article 19 of the Constitution.

(3) Article 301 of the Constitution is transgressed.

(4) The amending Act does not validate the assessment under the Central Sales Tax Act.

(5) The amending Act does not, in law, take away the effect of the High Court decision in the Full Bench case as well as in the subsequent writ petition.

8. The learned counsel attacked the notifications previously issued u/s 4 whereunder milk products sold in sealed containers were liable to sales tax though milk products other than those sold in sealed containers were exempt from sales tax. It was submitted that the nature of packing of a commodity cannot form the basis of classification. The argument does not arise. After the amendment of Section 4 by the 1974 Act, condensed milk, milk powder or baby milk are not exempt, irrespective of the nature of packing in which they are sealed. The amendment is effective from 31st March, 1956, the date when the notification was previously issued. The notification, in so far as it exempted milk products, which may not have included condensed milk, no longer remains in operation. The notification was issued by the State Government u/s 4 as it stood. After its amendment, the legislature excluded condensed milk from being given exemption from sales tax. Since this amendment was retrospective no notification of the State Government could override the efficacy of the legislative will. After the amendment of Section 4, the notification issued in 1956 exempting milk products became nullified retrospectively in so far as they sought to exempt condensed milk, milk powder or baby milk.

9. It was urged that under the amended Section 4, the State Government has been given the power to exempt goods by notification and hence the notification of 31st March, 1956, remains in force. Under Clause (a) of the amended Section 4, the State Government has been authorised to exempt "any other goods". None the less, it has no power to exempt condensed milk, milk powder or baby milk which has been specifically mentioned in Clause (a) itself as goods which are not exempt. The phrase "or any other goods" which the State Government can exempt refers to goods other than those excluded from exemption in the earlier part of the clause. The State Government cannot validly issue a notification exempting, inter alia, condensed milk, milk powder or baby milk from sales tax. So the question of the validity of the notification, in so far as condensed milk is concerned, does not arise either from the point of view of Article 14 or from the point of view that the words "but excluding" occurring in the notification were outside the State power.

10. It was then argued that classification of condensed milk was arbitrary and discriminatory. Milk was exempt from tax. Condensed milk was only a species of the commodity known as milk. It was not a different article. There was hence no reasonable basis for this classification.

11. In the *Nestle's Products* case [1963] 14 S.T.C. 606, this Court held that powdered milk and condensed milk were not milk. They were milk products. In the *Indodan Milk Products* case 1973 U.P.T.C. 569 (F.B.), a different view was

taken. It was held that, on the language of the notification of 31st March, 1956, condensed milk was milk in another form. It was not a milk product. The legislature has now stepped in to treat condensed milk on a par with powder milk or baby milk liable to sales tax. In matters of taxation the legislature has been given a much wider latitude in choosing articles for sales tax. Merely because one article closely resembles another is no ground for not choosing one of them for taxation. The learned counsel invited our attention to American Jurisprudence, Second Edition, Volume 71, Article 174, for the proposition that property subject to taxation is to be treated as a single class and one rate of taxation can be levied on all species of it. This general proposition does not relate to sales tax. The burden of the proposition is on uniformity of rate. It is hardly applicable to a situation where the legislature granted exemption from sales tax to a commodity of universal and daily use like milk and not to a commodity, though similar but which is not of such universal use, as condensed milk, milk powder or baby milk. The commercial world considers all these as different commodities meant for different uses. The selection of condensed milk for taxation cannot be held to be arbitrary or discriminatory.

12. In *Jagannath and Others Vs. Union of India (UOI)*, a levy of separate excise duty on tobacco leaf as well as on broken leaf of tobacco was upheld. In *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*, a classification for the purposes of sales tax between split or unsplit dal was upheld. It was ruled that the power of the legislature to specify the nature of the goods which will bring it to tax, is very wide. We see no merit in the attack based on Article 14 of the Constitution.

13. The point that Article 19 is violated, because the retrospectivity given to the amendment of Section 4 amounted to unreasonable restriction, does not impress us. In the *Nestle's Products* case [1963] 14 S.T.C. 606, this Court held that condensed milk was taxable. It was only the Full Bench decision in the *Indodan Milk Products* case 1973 U.P.T.C. 569 (F.B.), which was rendered on 20th July, 1973, that held that condensed milk was exempt. Soon thereafter in May, 1974, the legislature intervened to set matters right. The period of interregnum was hardly ten months. Right from 1948 everyone knew that condensed milk was taxable if sold in sealed containers. In order to clarify the taxability of condensed milk the legislature intervened and amended the section with retrospective effect. We see no unreasonableness in this legislative venture. It is not as if for the first time after 18 years that the legislature retrospectively taxed condensed milk. The machinery for enforcement of this tax liability was already there. Dealers were required to file returns. The officers were to make assessments. Those provisions were as much applicable to condensed milk as to any other article. Further it is not quite correct that the petitioners were not conscious of the tax liability on condensed milk. Annexure I to Writ Petition No. 2276 of 1974 shows that the petitioners have been carrying on business in condensed milk, etc., in form C (sic). They were hence conscious of the fact that condensed milk was liable to tax. In any event, the amending Act cannot be declared invalid

merely for the reason that the dealer cannot pass on the burden of sales tax to his customers. In *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*, the Supreme Court held that the contention that the retrospective levy did not afford any opportunity to the dealers to pass on the tax payable to the consumers has not much validity. The tax is levied on the dealer, the fact that he is allowed to pass on the tax to the consumers or he is generally in a position to pass on the same to the consumer has no relevance when we consider the legislative competence. The argument based on violation of Article 19 was repelled by the Supreme Court. In our opinion, the amending Act does not violate Article 19 of the Constitution.

14. It was then submitted that the retrospective levy of sales tax violated Article 301 of the Constitution. By the amendment, the State Legislature seems to levy sales tax on the sale of condensed milk in the State of U.P. It is not dealing with inter-State trade or commerce.

15. It was then submitted that the assessments under the Central Sales Tax Act are not affected by the amending Act and that Section 12 of the amending Act will not validate the assessments under the Central Sales Tax Act. The argument is misconceived. In the Full Bench decision in the *Indodan Milk Products* case 1973 U.P.T.C. 569 (F.B.), this Court held that if condensed milk was milk product liable to tax under the U. P. Sales Tax Act, it will also be liable to tax u/s 8(2A) of the Central Sales Tax Act because its sale was not exempt from tax generally under the U. P. Sales Tax Act. Now that the amending Act makes it clear that condensed milk is liable to tax under the U. P. Sales Tax Act, it will be liable to tax under the Central Sales Tax Act. There is no question of Section 8(2A) of the Central Sales Tax Act being void for abdication of legislative power. The Central Act had adopted the machinery for levy and imposition of tax in each State. It was not a case of abdication of its own legislative function by Parliament. The amended position of the U. P. Sales Tax Act will necessarily apply to assessment under the Central Act.

16. The last submission related to efficacy of this Court's decisions in the Full Bench case and in the writ petition. Both these judgments were rendered by this Court inter partes. The question is, has the efficacy of those decisions been affected.

17. The Full Bench decision dealt with references under the Sales Tax Act for the assessment years 1964-65 and 1965-66. The references were made at the instance of the assessee which was the present petitioner, namely, Messrs. Indodan Milk Products Ltd. This Court held that even if condensed milk was another form of milk and so may be a different commercial commodity, yet it was liable to be exempted u/s 4(1) of the Act. The legislature by re-enacting Section 4 has not usurped this Court's judicial power. It has accepted the Full Bench decision but has amended the law retrospectively so as to bring out its intention clearly and specifically. After the amendment, the very substratum of this Court's Full Bench decision has disappeared. It is said that after the decision of

the Full Bench the matter went back to the sales tax authorities for disposal u/s 11(6) of the U.P. Sales Tax Act. The Judge (Revisions) was hence bound by the decision of this Court. This precise submission was raised and repelled by the Supreme Court in *The State of Uttar Pradesh and Others Vs. Modi Industries Limited*, . It was ruled that after the amendment, the High Court judgment had become unenforceable and the Judge (Revisions) was justified in giving effect to the true position in law, even though it meant ignoring the High Court's decision. Section 31(2) of the amending Act had provided that notwithstanding any judgment, decree or order of any court, all assessments or orders made, shall be deemed to be good and valid in law as if they were made in accordance with the amended provision. The position in the present case is identical. Section 12 of the amending Act operates notwithstanding any judgment, decree or order of any court. Any action taken shall be deemed to be as valid and effective as if the amendments made in the said section were duly made. Those assessments made in accordance with the amended Section 4 were to be valid notwithstanding any judgment, decree or order of any court. The aforesaid Supreme Court decision is applicable on all fours and hence the submission that the Judge (Revisions), Sales Tax, ought to be directed to comply with the High Court's judgment cannot be accepted.

18. The position with respect to the High Court's judgment given in the writ petition under Article 226 of the Constitution is, however, different. Writ Petition No. 2443 of 1972 was filed by the present petitioner. It relates to the assessment year 1967-68. It was allowed on 9th November, 1973. The Sales Tax Officer was directed to modify the assessment order dated 25th February, 1972, in relation to condensed milk in the light of the observations made in it. The Sales Tax Officer was directed to appropriately amend the demand notices as well. The mandamus issued by this Court under Article 226 of the Constitution cannot be countermanded merely by retrospectively amending the sales tax law. Section 12 which validates the assessment notwithstanding any judgment, decree or order of any court, will not apply to judgments rendered under the constitutional power under Article 226 of the Constitution. No State Legislature can affect the constitutional power vested under Article 226 of the Constitution in relation to a judgment actually rendered by it in between certain parties. The judgment of this Court in the aforesaid writ petition, having become final, operated in between the present petitioner and the sales tax authorities. A similar situation arose in *Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others*, . In that case the Supreme Court held that a mandamus issued by the Calcutta High Court under Article 226 of the Constitution had to be obeyed notwithstanding the amendment of the law. Beg, C.J., observed :

I may, however, observe that even though the real object of the Act may be to set aside the result of the mandamus issued by the Calcutta High Court, yet, the section does not mention this object at all. Probably this was so because the jurisdiction of a High Court and the effectiveness of its orders derived their force from Article 226 of the Constitution itself. These could not be touched by an

ordinary Act of Parliament. Even if Section 3 of the Act seeks to take away the basis of the judgment of the Calcutta High Court, without mentioning it, by enacting what may appear to be a law, yet, I think that, where the rights of the citizen against the State are concerned, we should adopt an interpretation which upholds those rights. Therefore, according to the interpretation I prefer to adopt the right which had passed into those embodied in a judgment and became the basis of a mandamus from the High Court could not be taken away in this indirect fashion.

19. The 1974 Amending Act did not make any provision authorising the authorities to apply to the High Court for review of its judgment given in a writ petition. Such a course has been adopted by the State Legislature under some amending Acts like Section 5(2) of the U.P. Tendu Patta (Vyapar Viniyaman) (Sanshodhan) Adhiniyam (5 of 1980) read with Section 5 of Ordinance No. 21 of 1979.

20. In this situation, the mandamus issued by this Court having become final is binding between the parties and the respondents are bound to give effect to it, lest they may be guilty of contempt of court.

21. In the result, we hold that the U. P. Sales Tax (Amendment) Act (17 of 1974) was valid and intra vires. The respondents are, however, directed to forthwith obey the mandamus issued by this Court in Writ Petition No. 2443 of 1972 decided on 9th November, 1973, in respect of the assessment year 1967-68. The various other reliefs claimed in the writ petition are refused. The respondents will be entitled to costs.