
(2009) 04 AP CK 0009
In the Andhra Pradesh High Court
Case No : Writ Petition No. 6046 of 2009

ITC Limited

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 16(3), 17

Citation : (2009) 26 VST 682

Hon'ble Judges : Anil R. Dave, C.J.; Ramesh Ranganathan, J

Bench : Division Bench

Advocate : C.R. Sridharan, for the Appellant; K. Raji Reddy, S.C., for the Respondent

Final Decision : Allowed

Judgement

Ramesh Ranganathan, J.—The petitioner seeks a declaration that the impugned notice issued by the 2nd respondent dated 20.3.2009 is void abinitio, non-est, without authority of law, illegal and invalid.

2. The petitioner, carrying on business of manufacture and sale of cigarettes, is registered under the APVAT Act. They were also registered as a tobacconist, under the A.P. Tax on Luxuries in Hotel & Lodging Houses Act, 1987 (hereinafter called "Luxury Tax Act"), from August, 1996. The Luxury Tax Act was amended on 1.8.1996 and its scope was enlarged to include levy of luxury tax on supply of tobacco and tobacco products. The petitioner filed W.P. No. 16909 of 1996 before this Court challenging the vires of the said Act. Though the writ petition was admitted, no interim order was granted in the petitioner's favour pending disposal of the writ petition. The 2nd respondent passed order dated 31.03.1998 for the assessment year 1996-97, under the Luxury Tax Act, allowing the exemptions claimed by the petitioner. The challenge to the validity of the Luxury Tax Act was, however, rejected by a Division Bench of this Court by its order dated 12.11.1998 and appeals were preferred thereagainst to the Supreme Court.

3. The Deputy Commissioner (CT), Visakhapatnam revised the assessment order passed by the 2nd respondent and held that the petitioner was liable to pay tax of Rs. 4,80,71,375/- under the Luxury Tax Act. The petitioner preferred an appeal to the Sales Tax Appellate Tribunal in T.A. No. 893 of 2000. In the meanwhile, the Constitution bench of the Supreme Court, by judgment dated 20.01.2005, held that the Luxury Tax Act was beyond the legislative competence of the State and was unconstitutional. The appeal preferred by the petitioner, in T.A. No. 893 of 2000, was transferred to the Sales Tax Appellate Tribunal, Visakhapatnam and the Tribunal, by its order dated 20.11.2006, dismissed the said appeal. The 2nd respondent issued notice dated 20.3.2009 informing the petitioner that they were finally assessed for the year 1996-97 under the Luxury Tax Act, 1987, that the tax due was Rs. 4,80,71,375/-, that the appeal preferred by them to the Sales Tax Appellate Tribunal was dismissed on 20.11.2006 and that they should pay the entire amount within 3 days from the date of receipt of the notice failing which action, to realize the tax, would be initiated u/s 17 of the APGST Act without any further notice or time. Petitioner was also informed that, in addition to the above, action would also be initiated for levy of interest u/s 16(3) of the APGST Act.

4. As the proceedings of the Deputy Commissioner dated 10.7.2000, and the order of the Sales Tax Appellate Tribunal dated 20.11.2006, had not been challenged, the petitioner filed W.P.M.P.9723 of 2009 seeking amendment of the prayer in W.P. No. 6046 of 2009 and to declare the aforesaid two proceedings ab-initio void, non-est in law and consequently inoperative.

5. In his counter affidavit, the second respondent submits that the Supreme Court had passed an interim order on 1.4.1999 directing the dealers to file their returns to the competent authority, that the Supreme Court had held that no action on the return, for recovery of the amounts due, should be taken during the pendency of the appeals and that, in the event of the challenge by the dealers to the validity of the Act failing, the dealers would be liable for payment of tax in accordance with the assessments made on the basis of the returns so filed. According to the 2nd respondent, the interim order of the Supreme Court would apply only for recovery of tax and not for levy of tax, that the revision order passed by the Deputy Commissioner on 10.7.2000, on the basis of the incriminating material found with the petitioner for the assessment year 1996-97, was valid and justified since the Supreme Court had not delivered its judgment as on that date. The 2nd respondent would give a detailed narration of the facts leading to the passing of the order in revision by the Deputy Commissioner and the dismissal of the appeal, preferred by the petitioner, by the Sales Tax Appellate Tribunal, Visakhapatnam.

6. Sri C.R.Sridharan, Learned Counsel for the petitioner, would submit that, as the Luxury Tax Act itself had been declared ultra vires and did not exist, the impugned notice did not have any legs to stand, that the effect of the law being declared unconstitutional for lack of legislative competence was that the law was

ab-initio void, that it never existed, that any order passed thereunder would also be ab-initio void and that the impugned notice founded upon such a void order would be equally non-est in law. Learned Counsel would rely on *Behram Khurshed Pesikaka Vs. The State of Bombay*, and *Deep Chand Vs. The State of Uttar Pradesh and Others*, .

7. Sri K.Raji Reddy, Learned Special Standing Counsel for Commercial Taxex, would, however, contend that the order in revision passed by the Deputy Commissioner had attained finality on the appeal preferred thereagainst being dismissed by the Sales Tax Appellate Tribunal, that the petitioner had not challenged the validity of the order of the Sales Tax Appellate Tribunal before this Court prior to the filing of the amendment petition in the present writ petition and, as the order in revision had attained finality, notwithstanding the Act having been set aside and declared unconstitutional by the Supreme Court subsequently, the petitioner was liable to pay the tax due pursuant to the revisional order of the Deputy Commissioner and that the impugned notice, calling upon them to make payment, cannot be said to be illegal. What was originally under challenge in W.P. No. 6046 of 2009 was only the notice issued by the 2nd respondent dated 20.03.2009 and not the revisional order of the Deputy Commissioner dated 10.07.2000 or the order of the Sales Tax Appellate Tribunal dated 20.11.2006. Sri C.R. Sridharan, learned Counsel for the petitioner, had contended that both the orders of the Deputy Commissioner dated 10.07.2000, and the Sales Tax Appellate Tribunal dated 20.11.2006, were a nullity and, as they were required to be ignored, it was wholly unnecessary for the petitioner to seek a declaration that these proceedings were null and void. All decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 1995. Until its validity is challenged, its legality is preserved *Halsbury's Laws of England*, 4th Edn., (Re-issue) Vol. 1(1) in para 26, p.31. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity, and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. This is equally true even where the brand of invalidity is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court *Wade and Forsyth Administrative Law*, Seventh Edn., at pp.341-342. *Smith v. East Elloe Rural District Council* 1956 AC 736. No individual or authority can ignore the order assuming authority upon itself to decide that the order is *coram non judice*. A quasi-judicial order, not invalid on its face, must be given effect to entailing all consequences, till it is declared void in a duly constituted judicial proceedings. *Prakash Narain Sharma Vs. Burmah Shell Cooperative Housing Society Ltd.*, .

8. If an act is void or *ultra vires* it is enough for the court to declare it so and it collapses automatically. It need not be set aside. The aggrieved party can simply seek a declaration that it is void and not binding upon him. But, nonetheless, the

order has at least a de-facto operation unless and until it is declared to be void or a nullity by a court. A party aggrieved by the invalidity of the order has to approach the court for the relief of declaration that the order against him is inoperative and not binding upon him. *State of Punjab and Others Vs. Gurdev Singh*, . The order may be hypothetically a nullity, but the court may refuse to quash it because of some legal reason. In any such case the "void" order remains effective and is, in reality, valid *Wade Administrative Law 6th edition Page 352*.

9. To obviate the possibility of the relief, as originally sought for, not being granted, Sri C.R. Sridharan, learned Counsel for the petitioner, has filed W.P.M.P. No. 9723 of 2009 to amend the prayer in the writ petition and a declaration is now sought that the order of the Deputy Commissioner dated 10.07.2000, and the order of the Sales Tax Appellate Tribunal dated 20.11.2006, are ab-initio void, non-est in law and consequently inoperative. The learned Special Standing Counsel does not oppose the amendment. W.P.M.P. No. 9723 of 2009 is, accordingly, allowed.

10. The Constitution bench of the Supreme Court, in *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, , held that Entry 62 of List II of the VII Schedule to the Constitution, i.e., "taxes on entertainments, amusements, betting and gambling", did not permit levy of tax on goods or articles, that the word "luxuries" in the entry referred to activities of indulgence, enjoyment or pleasure and, in as much as none of the impugned statutes had sought to tax any activity and, admittedly, sought to tax goods described as luxury goods, they must be declared to be legislatively incompetent. Following the principles laid down in *M/s. Somaiya Organics (India) Ltd. Vs. State of Uttar Pradesh and Another*, , the Supreme Court, while striking down the impugned Acts, did not consider it appropriate to permit refund of the taxes already paid under the impugned Acts. The Supreme Court further held that, if the appellants had collected any amount towards luxury tax from their consumers/customers after obtaining interim orders, they should pay the said amounts to the respective State Governments.

11. The consequences of a revisional order, passed under an Act which is declared unconstitutional, must be examined. Decisions of Courts do not amend or add to a statute. They merely interpret the law and declare whether it is valid or not and the result of a declaration that it is not valid is that no effect can be given to it in a court of law (*Behram Khurshed Pesikaka Vs. The State of Bombay*,). When a statute is adjudged to be unconstitutional, it is as if it had never, at any time, possessed legal force. A judicial declaration of the unconstitutionality of a statute has the effect of ignoring or disregarding it so far as the determination of the rights of private parties is concerned. The court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no application (*Deep Chand Vs. The State of Uttar Pradesh and*

Others,).

12. As the Luxury Tax Act, on its being declared unconstitutional by the Supreme Court in *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, , must be held as never to have possessed any legal force, the revisional order passed by the Deputy Commissioner thereunder must also be, and is, declared non-est and a nullity. Consequent upon such a declaration it matters little that the appeal, preferred against the revisional order, before the Sales Tax Appellate Tribunal has been dismissed for default. Since the very revisional order of the Deputy Commissioner is a nullity, the impugned notice, calling upon the petitioner to pay luxury tax, pursuant to the said revisional order must also be set aside. The respondents would, however, contend that the revisional order passed by the Deputy Commissioner on 10.07.2000 is prior to the judgment of the Constitution bench of the Supreme Court in *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, dated 20.01.2005 and that a subsequent judgment of the Supreme Court would not effect the prior revisional order of the Deputy Commissioner. This contention has only to be noted to be rejected. The decision of the Supreme Court, enunciating a principle of law, is applicable to all cases irrespective of the stage of its pendency. The law laid down by the Supreme Court must be held to be the law from the inception, unless the Supreme Court itself indicates that its decision will operate prospectively. It is not open for Courts/Tribunals to apply the law laid down by the Supreme Court only from the date on which the judgment came to be passed *M.A. Murthy Vs. State of Karnataka and Others*, ; *G. Rajababu Vs. Government of A.P. and Others*, .

13. It is not even the case of the respondents, in the counter affidavit filed in the writ petition, that the petitioners have paid the luxury tax pursuant to the revisional order of the Deputy Commissioner or that they have collected tax from their customers. In its affidavit dated 23.03.2009, the petitioner has specifically stated that they have not recovered any amount towards luxury tax from their customers in respect of the disputed turnover involved in the present case and that this fact is admitted both in the assessment order passed by the Commercial Tax Officer as well as the revisional order of the Deputy Commissioner. In view of this assertion by the petitioner, in their affidavit filed before this Court, and as the respondents have also not stated anything to the contrary in their counter affidavit, the impugned notice issued by the second respondent dated 20.03.2009 is set aside.

14. The writ petition is allowed. However, in the circumstances, without costs.