
(1978) 03 KL CK 0024

In the High Court Of Kerala

Case No : W.A. No's. 354, 365, 368, 370, 412, 413, 419, 420, 422, 449, 470, 472, 473, 477, 478, 499, 502, 507 to 510 and 532 to 535 of 1976 and 5, 11, 20, 21, 23, 69, 117, 123 and 124 of 1977 and O.P. No's. 3330, 3966 and 5241 of 1975 and 4597 of 1976

K.P. Govindan and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 30-03-1978

Acts Referred:

Constitution of India, 1950 — Article 14, 301, 304, 304(2)

Citation : AIR 1978 Ker 195 : (1978) 42 STC 128

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; V. Khalid, J.; V. Balakrishna Eradi, J.; K.K. Narendran, J.; G. Balagangadharan Nair, J

Bench : Full Bench

Advocate : K. Sukumaran, K.P. Dandapani and Sumathi Dandapani, for the Appellant; Adv.-General and Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, C.J.—The removal of "Tapioca" from item 10 of the III Schedule of the Kerala General Sales Tax Act, 1963, by Act 22 of 1974 (with effect from 1-7-1974) and its insertion as a specific item in entry No. 72 of Schedule I by the same Act have been challenged in these cases as violative of Articles 301 and 14 of the Constitution. Section 5 of the Act is the charging section, which imposes the tax at the rates and only at the points specified, against the goods enumerated in the First or the Second Schedules; and in the case of other goods, at the rate of 4% at all points of sale. (We leave out as unnecessary the minimum limits of turnover subject to which the tax has been imposed). Section 9 of the Act grants exemption to a dealer who deals in the goods specified in the III Sch, to the Act, from payment of tax in respect of the sale and purchase of such goods. Till 1974, item 10 of the III Schedule read:

"10. Vegetables (other than green ginger), whether roots, green fruits or leaves,

used for human consumption including tapioca, yam, potatoes, lime, sabola and tomatoes, except their manufactured products.

Explanation:-- The term "vegetables" shall not include any goods of the description specified in the First or Second Schedule."

By the Amending Act of 1974 referred to supra, the word "Tapioca" was omitted from the inclusive part of the explanation to item 10 of the III Schedule and instead of treating it as an item exempted from taxation under the III Schedule it was lifted into the First Schedule as one of those items to be taxed at the last purchase point in the State at the rate of 2%. The entry reads as follows:

Sl. No.

Description of the goods

Point of levy

Rate of tax (per cent)

XX

XX

XX

XX

72

Tapioca

At the point of last purchase in the State by a dealer who is liable to tax u/s 5.

2

2. There is in force the Kerala Tapioca (Manufacture and Export Control) Order, 1966, on and from 1-7-1966 in the State. From 1-5-1966 an administrative surcharge was levied on Tapioca by Notification G.O. Ms. No. 18/66/Food dated 15-4-1966. The said notification was struck down by this Court as violative of Article 301 of the Constitution -- vide K.P. Govindan v. State of Kerala 1971 Ker LT 910): 1972 Tax LR 2606. The decision was affirmed on appeal by the Supreme Court -- vide State of Kerala v. K. P. Govindan 1974 Ker LT 876:1975 Tax LR 107 . It is thereafter that the Kerala General Sales Tax Act was amended in the fashion noticed. Our attention was called to the allegations made in paras. 2 to 14 of O. P. No. 4597 of 1976 regarding the conditions of the tapioca trade and industry. Attention was drawn to the large scale production in the State of tapioca of both the edible and the non-edible varieties, the importance of tapioca as a staple food crop and an important raw material in the starch industry, and the traditional trading centres for tapioca in the Tamil Nadu State for the starch industry in Salem and Dharmapuri. We have given these our careful attention. But we have found them far short of the averments needed to establish a

contravention of Article 301 of the Constitution. We should regard it as firmly and sufficiently well established that in order to violate Article 301 of the Constitution the offending provision of law must directly and- immediately affect the movement part of the trade, This, we think, has been well established by the *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , and the *Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam*, -- not to refer to the numerous decisions that have followed in their wake. For the sake of convenience, we might reproduce Article 301 of the Constitution, and also Article 304:

"301. Freedom of trade, commerce and intercourse -- Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

304. Restrictions on trade, commerce and intercourse among States--

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

(a) impose on goods imported from other States 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 purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President." It is not contended that the consent of the President has been obtained for the Legislative amendments in question either previous to the amendments or subsequent thereto. The contention of the learned Advocate-General has been plainly and simply that there is no contravention of Article 301 and therefore no case for any Presidential assent.

3. Counsel for the appellants invited our attention to *Firm Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, where Rule 16 (2) of the Madras General Sales Tax Rules was struck down as invalid as contravening Article 301 of the Constitution. Observed the Court (At p. 931):--

"10. It is therefore now well settled 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 Article 301 and will be valid only if it comes within the terms of Article 304(a)."

It was pointed out that the tax was levied on sale of hides and skins which had been tanned from outside the State from the dealer, who, in the State, is the first seller of the hides or skins. The result was that the dealer in such hides and skins tanned from outside the State had to pay the tax on the amount for which such hides and skins are sold by him. Under the impugned Rules he had also to pay a similar tax in respect of hides and skins tanned within the State, again on the amount for which they are sold. The tax was necessarily different on account of the existence of substantial disparity in the price of raw hides and skins and hides and skins after they had been tanned, despite the rate of tax being the same for both the varieties. Therefore, it was ruled that the impugned rule discriminated against the imported hides and skins purchased from outside the State, and hence contravened Article 304(a) of the Constitution. We do not think the decision is of any assistance to counsel for the appellants. There is no case for the appellants or for any of the writ petitioners of any violation of Article 304(a) . As for Article 304(b) the same can arise only if there are any restrictions on the freedom of trade under Article 301. Nor are we able to derive much of assistance from State of Madhya Pradesh Vs. Bhailal Bhai and Others, where it was pointed out that the tax payable at the point of sale by the importer in Madhya Bharat directly impeded the freedom of trade and commerce guaranteed by Article 301 of the Constitution. Reliance was placed on the decision of the Supreme Court in the Kalyani Stores Vs. The State of Orissa and Others, ; but the ratio of that decision has been explained in the Kerala Luxury Tax on Tobacco Act case -- The State of Kerala Vs. A.B. Abdul Kadir and Others, . After remand by the Supreme Court in the above case, the Luxury Tax Act was sustained by a Division Bench of this Court in Abdul Kadir v. State of Kerala 1971 Ker LJ 4: 1972 Tax LR 512 . The decision was sustained by the Supreme Court -- see A.B. Abdul Kadir and Others Vs. State of Kerala, .

4. Counsel for the appellants drew our attention to the observations of Mathew, J. in G.K. Krishnan and Others Vs. State of Tamil Nadu and Others, (at para 27):

"That apart, taxing powers of the Union and States are separate and mutually exclusive. It is rather strange that power to tax given to States, say, for instance, under Entry 54 of List II to pass a law imposing tax on sale of goods should depend upon the goodwill of the Union executive. It is said that a tax on sale does not impede the movement of goods. But Shah, J. said in State of Madras Vs. N.K. Nataraja Mudaliar, : "that tax under Central Sales-tax on inter-State sale, it must be noticed, is in its essence a tax which encumbers movement of trade and commerce." However, Bachawat, J. in his separate judgment in that case said that Article 301 makes no distinction between movement from one part of the State to another part of the same State and movement from one State to another, that if a tax on intra-State sale does not offend Article 301, equally, a tax on inter-State sale cannot do so, and that neither tax operates directly or immediately on the free flow of trade or free movement as the tax is on the sale, the movement being incidental or consequential. What is guaranteed by Article 301 is freedom of trade, commerce and intercourse. Freedom of movement of

goods from one place to another is a very important facet of freedom of trade and commerce. That is perhaps the reason why the Court, in the *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, restricted the freedom of trade and commerce guaranteed under Article 301 to the movement part of it. Whether there is any warrant for respecting the concept of freedom of trade and commerce to the movement part of it is a matter upon which we are not called upon to make any pronouncement. A tax on sale of goods might encumber sale and purchase and, to that extent, restricts the freedom of trade and commerce. That apart, as Shah, J. said, if tax on inter-State sale is in essence "a tax which encumbers movement of trade and commerce", a tax on intra-State sale, if it involves movement from one part of the State to another part of the same State, would encumber the movement part of it and is a restriction on the freedom of trade and commerce. Generally speaking, selling and buying involves delivery of the goods sold and bought. If that be so, it would mean that imposition of sales tax by a State on intra-State sale, at any rate, when the sale involves movement of goods will be restriction of trade and commerce and unless the law imposing it has received the previous sanction of the President, the law would be bad as a tax on sales is neither regulatory nor compensatory. If the President were to refuse his consent, the State will be bereft of that source of revenue which the Constitution has expressly given to the State. It is unnecessary to pursue the matter further, as we think the tax imposed by the notification is compensatory in character and could not therefore, restrict the freedom of trade and commerce according to the decision in *Automobile case*." We find nothing in the above observations to depart from the current of settled authority that a violation of Article 301 is involved only if the impugned law directly and immediately affects the movement part of the trade as was ruled in three at least of the Supreme Court decisions noticed earlier. We do not think the trend of these rulings has been departed from. The learned Advocate-General invited our attention to the recent decision of the Supreme Court in *V. Guruviah Naidu and Sons and Others Vs. State of Tamil Nadu and Others*, . In that case, the validity of the levy of Sales Tax on raw hides and skins and on dressed hides and skins again came up for consideration, as an aftermath of *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, . It was pointed out that the Legislature had taken into account the higher price of dressed hides and skins as compared to the price of raw hides and skins; and also taken further note of the fact that no tax under the Act had been paid in respect of those hides and skins. It calculated the price of hides and skins in the dressed condition to be double that of raw hides and skins; and in order to obviate and to prevent discrimination it prescribed the rate of tax for sale of dressed hides and skins which was one-half of that levied in respect of raw hides and skins. In these circumstances, the attack levelled on the imposition of sales tax on item 7 (b) of the Second Schedule of the Madras General Sales Tax Act, as contravening Article 304(a) of the Constitution was repelled.

5. The learned Advocate-General also invited our attention to the decision of the

Supreme Court in State of Tamil Nadu and Others Vs. Sitolakshmi Mills and Others, . But the exposition was more concerned with Article 302 and Article 303, than with Article 301.

6. Beyond stating that as a result of the amendments carried out to the Sales Tax Act the trade with Salem and Dharmapuri had fallen, and that the demand from or supply to, these trading centres for the non-edible variety of Tapioca from Kerala had considerably decreased, counsel could place very little record or material to show that the consequence deplored was the result of the amendments complained of. In the course of arguments, attention was called to a letter written by the Railway Authorities to one of the petitioners in the writ petitions enquiring why the despatch of wagon loads of Tapioca had fallen compared to the previous years. What would have been of interest to us is not the eager enquiry of the Railway Authorities, but the reply, if any, of the writ petitioners. This was not even read out. It might have been of interest to know if there was any reply that the consignment of wagon loads had fallen on account of the increased burden of Sales Tax piled on the camel's back. Nor have we even been treated to the accounts of the petitioners in regard to their business or despatch of the quantities or consignments of Tapioca, or other records showing the details and particulars of these, to demonstrate that as a result of the amendments complained of the movement part of the trade had been directly and immediately affected. In the circumstances, we are unable to accept the arguments of counsel that there has been a violation of Article 301 of the Constitution as a result of the amendments complained of.

7. The challenge based on Article 14 cut no ice. The only ground urged was that "tapioca" having been originally shepherded into the inclusive part of the term "vegetable" in entry 10 of the III Schedule the omission of it alone, from that part, and its transference to Schedule I as item 72, was discriminatory. We are quite unable to agree. The power of exemption from tax in respect of commodities, and the withdrawal of the exemption, are alike powers to be exercised by the Government with due regard to revenue raising purposes. We are unable to hold that the withdrawal of exemption for tapioca and its subjection to tax under Schedule I, violates Article 14 of the Constitution.

We dismiss these writ appeals and these writ petitions with no orders as to costs.

The petitions for stay and direction are dismissed.