

(1974) 04 PAT CK 0019
In the Patna High Court
Case No : C.W.J.C. No. 1028 of 1971

M/s Goenka Mica Company		APPELLANT
	Vs	
State of Bihar and Others		RESPONDENT

Date of Decision : 09-04-1974

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(f), 286(1)(b)

Citation : (1974) PLJR 565

Hon'ble Judges : S. Sarwar Ali, J;S. Anwar Ahmad, J

Bench : Division Bench

Advocate : Basudeva Prasad, Radha Mohan Prasad, Narendra Prasad and Renuka Sharma, for the Appellant; Balabhadra Prasad Singh, A.G., Uday Sinha, Standing Counsel III and Umesh Prasad Singh, for the Respondent

Judgement

S. Sarwar Ali, J.—These writ applications have been heard together, as the points involved in all of them are identical. The petitioners challenge the validity of Sections 3A and 6(2A) (amended by Ordinance 12 of 1970) of the Bihar Sales Tax Act, 1959. They also challenge the validity of the notification issued, under the provision of Bihar Sales Tax Act, dated 14.12.1970, which is Annexure-1 to the writ applications. They further pray that the notices issued by the Sales Tax Authorities directing them to show cause as to why penalty should not be imposed for their failure to furnish returns, should be quashed. Thus, they challenged the imposition of purchase tax on mica and the steps taken subsequent to the imposition.

2. Ordinance 12 of 1970 amended certain provisions of the Act. For the then Section 3A of the Act the following section was substituted:

3-A. Goods liable to purchase tax--

Subject to such rules as may be prescribed the State Government may, by notification, declare any goods or class or description of goods to be liable to tax on purchase and where tax on purchase has been levied on any such goods,

class or description of goods, no general sales tax or special sales tax shall be payable on sales thereof.

Section 6(2A) reads as follows:--

(2A), The purchase tax payable by a dealer u/s 3 on goods declared u/s 3A shall be levied at the rate of 5 per centum of his taxable turnover of purchases:

Provided that the State Government may, from time to time, by notification, and subject to such conditions and restrictions as it may impose, fix a higher rate not exceeding 15 per centum, or any lower rate not below 1 per centum in respect of such class of dealers or such goods or such purchases as may be specified in the notification..

The Ordinance was promulgated on 27.10.1970. After the aforesaid amendments a notification, being Notification No. S.O. 1218 dated 14.12.1970 (Annexure-1), was issued levying purchase tax on mica at 3 per cent. The relevant portion of notification may be quoted:--

In exercise of the powers conferred by Section 3A, Sub-section (3) of Section 5 and the proviso to sub-section (2A) of Section 6 of the Bihar Sales Tax Act, 1959 (Bihar XIX of 1959), the Governor of Bihar is pleased to declare the goods mentioned in column 2 of the Schedule hereto annexed as goods liable to tax on purchase at the stage of purchase as mentioned in column 3 and at the rates mentioned in column 4 thereof.

The result was that multi point sales tax which was then leviable on sales on mica ceased to be operative from 14.12.1970 and sales of mica were exempted both from levy of general sales tax and special sales tax.

3. After the aforesaid amendment the State legislature was for the first time summoned on 27.11.1970 and was prorogued on 8.1.1971. Thereafter another Ordinance dated 11.1.1970 being Ordinance no. 9 of 1971 was issued. Clause 7 of the said Ordinance (when translated) is as follows:--"Repeal and exception-- (1) Bihar Sales Tax (Amendment) Ordinance 1970 (Bihar Ordinance No. 12, 1970) is hereby repealed.

(2) Notwithstanding such repeals, any act done or any action taken in exercise of any power conferred by or under the said Ordinance shall be treated to have been done or taken in exercise of the powers conferred by or under this Ordinance, as if this Ordinance was in force on the day on which such act or action was done or taken--

4. Since the petitioners did not file any return in respect of purchase tax on mica, as already noticed, a notice was issued on 7.7.1971 asking the petitioner in C.W.J.C. 1028 of 1971 to show cause as to why penalty should not be imposed for its failure to file return for the period 1st January, 1971 to 31st March, 1971 for the purposes of assessment to purchase tax in respect of mica purchased by it. It was in these circumstances that the petitioner filed C.W.J.C. 1028 of 1971.

Other writ applications were filed subsequently. But there is no substantial difference in the facts except in relation to the number of Annexure and the date of the notice. Since no stay was granted in these cases penalties have been imposed during the pendency of these writ applications. The validity of the imposition of the penalty was also challenged during the course of argument in these cases.

5. A number of points have been raised by the learned counsel appearing on behalf of the petitioners. Instead of enumerating them here it would be convenient to state and to deal with the points raised separately.

6. It was contended that Annexure--1 authorises the levy of purchase tax in course of export and is thus ultra vires of Article 286(1)(b) of the Constitution . I do not think that the argument is correct. True it is that no purchase tax can be levied on purchases in the course of export. This has been clearly laid down in Article 286(1)(b) of the Constitution. But there is nothing in the notification (Annexure-1) which either explicitly or even impliedly amounts to imposition of purchase tax on such purchases. The notification fixes, levy on "purchase affected immediately before the goods are exported to any place outside the territory of India...." What it envisages is purchase tax on purchases made for export and not in course of the export. Sales Tax or purchase tax on sales or purchases for export, as distinct from sale or purchase in course of the export, has been held to be valid and within the power of the State legislature in a number of cases of the Supreme Court. It is not permissible on well established rules of interpretation, to read the notification in such a way as to make it illegal, ultra vires or beyond the competence of the authority issuing the notification. I, therefore, read the notification as levying tax on purchases for export and not on purchases in the course of export. I thus do not find any merit in the first contention raised on behalf of the petitioners.

7. It was next contended that if the notification is valid the impugned notices, demand of purchase tax and imposition of levy is ultra vires the notification (Annexure-1) as the purchase made by the petitioners were in course of export and not for export. The question whether the individual transactions of purchase were in course of export or not is a question of fact which has to be investigated and decided by the Sales Tax authorities on perusal of relevant materials produced before them. It is not possible in these writ applications to accept and proceed on a mere assertion, which is not accepted as correct, that all the transactions of the petitioners are in the course of export.

8. It has been urged on behalf of the petitioners that unlike sales tax the purchase tax has to be paid by the petitioners out of their income or profits. There is no corresponding provision in respect of purchase tax as there is in respect of the sales tax, namely, Section 20A. It was thus urged that the levy of purchase tax amounts to unreasonable restriction on petitioners' right to property and carrying on of trade and business, and further that in the garb of purchase tax this is a tax on income and is thus beyond the legislative

competence of the State, legislature.

9. Section 20A(1) and (2) permit the collection of an amount not exceeding the demand payable as sales tax by a registered dealer from a purchaser. Thus it is possible for a registered dealer to pass on his burden to the purchaser in cases where he is liable to pay sales tax. But as observed in (1) *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, a registered dealer need not, if he so chooses, collect tax from the purchasers. As observed by S.R. Das, J.

The buyer is under no liability to pay sales tax in addition to the agreed sales price unless the contract specifically provides otherwise.

The imposition of the tax on the (seller and his liability is in no way affected whether or not he realises the sales tax from the purchaser. To quote from *Konduri Buchirajalingam Vs. The State of Hyderabad and Others*, :

It made no difference whether he was able to recoup himself the amount paid or not.

When the law makes any person liable to pay tax the mere fact that he cannot pass on his burden to some other person cannot, in my view, amount to unreasonable restriction on his right to property nor does it amount to unreasonable restriction on his right to carry on trade and profession. The petitioners can, if that be commercially possible, so arrange their transactions as to fix a price which may relieve them partially or wholly of the burden of the tax that is prescribed by the Act. Only they cannot charge it as purchase tax. But even if the tax, liability whereof is admittedly on the petitioners, is ultimately to be paid out of the price recovered from the buyers or comes out of the profits of the registered dealer it does not in my opinion, amount to infringement of the rights of the petitioners under Article 19(1)(f) & (g) of the Constitution.

10. The contention that in the garb of purchase tax what is being levied is a tax on income is equally untenable. When a question is raised whether the legislature has transgressed the limits imposed by the Constitution, in relation to legislative competence, what has to be examined is the pith and substance of the impugned legislation. In (2) AIR 1947 60 (Privy Council) , a decision consistently approved by the Supreme Court, it was observed:

Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provisional Legislation could never effectively be dealt with.

It was further observed:

The extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as

their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

Thus when the question arises whether the legislation is covered by one of the items in the State list or whether the legislature is, in the garb of legislating under a particular item, in respects where to it has power to legislate, legislating in a forbidden field, the pith and substance of the legislation has to be taken into account. Incidental encroachment or overlapping has to be ignored. Thus examined there cannot be the slightest doubt that the present legislation in its true nature and character is a legislation covered by the topic "Taxes on purchase of goods" and thus covered by item 54 of the state list (List II of the seventh Schedule) and not item 82 of list-I. The mere fact that the burden of the purchase tax cannot be passed on by the registered dealer to his purchaser and consequently the amount of tax may have to be paid out of the sale price or income or profits of the dealer does not mean that the legislation in question is a tax on income and thus a legislation in respect of item 82 of list-I. So far as I am concerned, I do not find even an incidental encroachment in this case, much less to hold that the law has advanced so deep into the Union list as to lead to the inference that its true nature is not concerned with State matters. Reference in this connection may also be made to a decision of the Privy Council in (3) AIR 1945 98 (Privy Council) . The argument in that case was that Madras General Sales Tax Act 1939 in so far as it purports to levy a tax on first sales in Madras, on goods manufactured or produced in India was, except in respect of certain excepted goods, ultra vires and beyond the competence of the legislature, as it was a duty of excise in the cloak of tax on sales. Repelling the argument their Lordships of the Judicial Committees observed:

The two taxes, the one levied upon, a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient, imposing a duty at the moment when the excisable article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise which is attracted by manufacture itself. That this is so is clearly exemplified in those excepted cases in which the Provincial, not the Federal Legislature has power to impose a duty of excise. In such cases there appears to be no reason why the Provincial Legislature should not impose a duty of excise in respect of the

commodity manufactured and then a tax on first or other sales of the same commodity. Whether or not such a course is followed appears to be merely a matter of administrative convenience. So by parity of reasoning may the Federal Legislature impose a duty of excise upon the manufacture of excisable goods and the Provincial Legislature impose a tax upon the sale of the same goods when manufactured.

They did not accept the argument that the tax imposed by the Madras Act was a duty of Excise in the cloak of a tax on sales. The instant case, in my opinion, is even stronger than the case considered by their Lordships. Here as I have pointed out there is no overlapping at all. The legislation falls squarely within item 54 of the State List.

11. In the course of the reply to the argument of the respondents, learned counsel for the petitioners contended that the purchase tax was a tax on export. This was not urged in the opening address. In my view this contention is also without any force. The legislation is, as already observed, in pith and substance a legislation in respect of item 54 of the State list. Moreover the stage at which the tax is levied is the stage of purchase prior to export. In such a situation there is no question of even an incidental encroachment or overlapping.

12. It was argued with vehemence that Section 3A of the Act in so far as it delegates to the State Government the power to select persons and transactions to be subjected to purchase tax, without providing for guidelines, is ultra vires of Article 14 of the Constitution and suffers from the vice of excessive delegation. It was further contended that Section 6(2A) of the Act in so far as it confers right on the State Government to prescribe the rate of purchase tax between 5 per cent to 15 per cent amounts to conferment of unguided discretion on the State Government and is thus ultra vires of the Constitution.

13. Section 3A of the Act has already been noticed. The State Government is empowered under the said Section, by notification, to declare goods or class or description of goods liable to be taxed on purchase. Is it excessive delegation? It is now well established the essential legislative functions cannot be delegated and that the essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Once the policy is enunciated in the statute there can be delegation to designated authority to fill up the details. Here the legislative policy consists in the decision to impose purchase tax. The details regarding the determination of facts to which the policy declared by the legislature is to apply, has been, legally left to a selected instrumentality, namely, the State Government. Indeed the matter does not appear to be open to serious controversy, as is clear from the dictum of Venkatarama Aiyar, J. as laid down in (4) Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others, where he observed:

Now, the authorities are clear that it is not unconstitutional for the legislature to leave the executive to determine details relating to the working of taxation laws,

such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like.

(underlining is mine)

This enunciation of law has been consistently accepted as laying the correct law in a number of subsequent cases of the Supreme Court. Thus, it is clear that the details relating to the working of the taxation law can be left to the State Government. It can, therefore, select registered dealers entering into transaction of purchase of mica as persons on whom tax is to be levied. The contention that there is excessive delegation of legislative power amounting to an effacement of the legislature has to be rejected.

14. This takes me to other branch of the submission, namely, the failure of the legislature to lay guidelines in respect of the rates. The learned counsel for the petitioners relied on a decision of Supreme Court in (5) *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . It will be proper to quote from paragraph 15 of judgment where it was observed as follows:--

The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.

It is also pertinent to quote from paragraph 23 of the judgment where the challenge to the rate prescribed in the Punjab Act was considered. It was observed as follows:--

Even so it was contended that Section 5 as amended, only gave the maximum rate and did not disclose any policy giving guidance to the legislature for fixing any rate within that maximum. Here we are concerned with sale tax. If the Act

had said "2 pice in a rupee" it would be manifest that it was a clear guidance. But as the Act applies to sales or purchases of different commodities it had become necessary to give some discretion to the Government in fixing the rate. Conferment of reasonable area of discretion by a fiscal statute has been approved by this court in more than one decision, see *Khandige Sham Bhat and Others Vs. The Agricultural Income Tax Officer*, . At the same time a larger statutory discretion placing a wide gap between the minimum and the maximum rates and thus enabling the Government to fix an arbitrary rate may not be sustained. In the ultimate analysis, the permissible discretion depends upon the facts of each case. The discretion to fix the rate between 1 pice and 2 pice in a rupee is so insignificant that it is not possible to hold that it exceeds the permissible limits. It follows that Section 5 of the Act as amended is valid.

The principle that is deducible from aforesaid paragraph is that in a fiscal statute a discretion may be given in respect of fixation of rates and that the legislature may instead of fixing the rate itself leave it to the executive to fix the rate provided some guidance is available to the executive. It may, with that end in view, fix a minimum and maximum rate so as to enable the Government to fix a rate in between those figure, but the difference between the maximum and minimum should not be such as to enable the Government to fix an arbitrary rate. This decision in *Devi Das's* case still holds the field and no decision had been brought to our notice in the course of argument which could lead to the inference that the dictum laid therein has been modified. It is, therefore, necessary to examine, in the light of this decision, whether Proviso to Section 6(2A) of the Act can be said to be a valid piece of law.

15. What we find in this case is that by Section 6(2A) the legislature has first itself fixed the rate-that being 5%. In the proviso discretion has been given to the State Government to either lower the rate or increase the same within prescribed limits. The root question, now, is whether the legislature in permitting this lowering or raising of rates is conferring arbitrary powers on the State Government. In order to resolve this controversy the occasion on which and the circumstances in which power has to be exercised must be borne in mind. There cannot be any straight jacket test with reference to which the question can be decided. The extent to which the commodities were capable of bearing the burden of tax depends on various imponderable factors which could not remain constant. Even in respect of the same commodity the prices do vary from time to time due to impact of various economic factors. When the legislature have validly left the discretion with the State Government to determine which of the commodities should be made the subject matter of single point purchase tax and has not enumerated the commodities itself, it is clear, taking a practical view of the situation, that the area of discretion in varying the tax burden cannot be confined without a narrow range and compass. It is also worthy of notice that the amendment in the Sales Tax Law has taken place after the decision of the Supreme Court in *Devi Das's* case. It is, therefore, legitimate to think that it was after appreciating the ratio of this decision that the amendment was made. It is

also permissible to infer that the range prescribed was not in the opinion of the legislature arbitrary. Although the view of the legislature cannot be conclusive so far as the Courts are concerned, it would, in my view, be proper that the Courts do take the view of the legislature, which knows best the need of the State and the area within which the discretion should be left to operate, as well into consideration before deciding the question whether there is any arbitrariness in the impugned provision. For all these reasons I am of the view that the power to vary rates to the extent mentioned in the proviso does not amount to conferment of arbitrary discretion on the State Government. Section 6(2A) of the Act cannot, therefore, be struck down.

16. It is worthy of notice that the proviso is severable from the main part of the section. If the argument of the learned counsel was accepted as correct it would only mean that the proviso will have to be struck down, resulting in the liability of purchase tax at the uniform rate of 5% instead of the present lowered rate of 3% a position which the petitioners could hardly welcome.

17. It was next contended that there is no procedure for filing of returns, assessment and realisation of taxes and as such the levy of taxes is not legal. This argument is clearly misconceived. The various provisions of the Act read with the rules make adequate provision in respect of filing of returns, assessment and realisation of purchase tax. Reference in this connection may be made to Sections 9, 14, 16, 20 and rule 10 read with form XII (and in particular Part B).

18. It was contended that the notification (Annexure-1) is ultra vires of Article 14 of the Constitution, as it purports to tax only some of the purchasers of mica without any rational basis. The relevant statement made connected with this argument is in paragraph 30 of C.W.J.C. 1028 of 1971. In this paragraph it is stated that those who enter into any manufacturing process in relation to mica are exempted from tax. The correct position, however, is that if after the manufacturing process has been gone through mica ceases to be "mica" within the meaning of law, then alone it is not taxable. Otherwise it is taxable as envisaged in Annexure-1, which prescribes the point of charge. In fact there is no distinction between those who carry on manufacturing process and those who do not as long as they deal in the sale and purchase of mica. Moreover it is difficult to hold on the basis of the cryptic statements as those contained in the aforesaid paragraph and similar paragraphs in other writ application that petitioners have been discriminated against.

19. Learned counsel for the petitioners contended that Ordinance 12 of 1970 ceased to operate on 8.1.1971, that being the date of expiry of six weeks from the reasonably of the legislature. The next Ordinance being Ordinance No. 9 of 1971 was promulgated on 11.1.1971. The latter ordinance, it was contended, cannot revive the notification (Annexure 1) passed under, what the learned counsel described, a dead ordinance. Learned counsel emphasised that the saving provision contained in Clause 7 of the Ordinance cannot have the effect of reviving Annexure 1. This argument is also, in my view, clearly unacceptable.

There cannot be any doubt, in view of the decision of the Supreme Court in the case of (6) State of Punjab Vs. Satya Pal Dang and Others and Baldev Parkash and Others, that the power of legislation by Ordinance is as wide as the power of the legislature in enacting an Act. Clause 7 aforesaid treated a fiction which, in my view is legally permissible. It was observed by Mahajan, J. in (7) The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, :

When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

Full effect has to be given to the legal fiction envisaged in Clause 7. The mere fact that the earlier Ordinance has been repealed or has expired by efflux of time cannot prevent the legal fiction from operating. Learned Advocate General rightly placed reliance on the decision of the Supreme Court in case of (8) Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, . This decision is a clear authority for the proposition that there can be retrospective validation of even an illegal collection of tax under an invalid Act. When a retrospective validation of illegal collection of tax is within legislative competence, I do not find any valid scope for argument that the power of Ordinance making, which is co-extensive with the power of legislature, cannot extend to creation of retrospective legal fiction as envisaged.

So far as challenge to the imposition of penalty is concerned, I need not express any opinion and leave it open to the petitioners to seek departmental remedy.

In the result, all the writ applications are dismissed but without costs.

Anwar Ahmad, J.

I agree.