
(1990) 02 KAR CK 0020
In the Karnataka High Court
Case No : Writ Petition No. 9824 of 1987

M/s. Ranganatha Associates, Bangalore APPELLANT
Vs
State of Karnataka and Others RESPONDENT

Date of Decision : 09-02-1990

Acts Referred:

Constitution of India, 1950 — Article 14
Karnataka Sales Tax Act, 1957 — Section 5(3D)

Citation : (1993) 2 KarLJ 336

Hon'ble Judges : S. Rajendra Babu, J;K. Shivashankar Bhat, J

Judgement

1. The petitioner, M/s. Ranganatha Associates, a firm of partners, is the purchaser of the exclusive privilege of retail vend of arrack in the Bangalore Urban District for the year commencing from the 1st of July, 1987.

In this writ petition, petitioner challenges the legality and correctness of the condition requiring him to pay sales tax on the excise duty on arrack and the bottling charges of arrack. Petitioner also assails the constitutionality of the 46th Amendment. The vires of Section 5(3-D) of the Karnataka Sales Tax Act, 1957, is also challenged.

2. Under the Karnataka Excise (Lease of the Rights of Retail Vend of Liquor) Rules, 1969, arrack is required to be supplied to the petitioner and, in turn, sold in retail by him, in scaled bottles. Under Rule 2 of the Karnataka Excise Duties Rules, 1958 (referred as "the Rules" hereinafter), excise duty is payable on arrack when arrack is issued from any distillery, Warehouse or place of storage. Petitioner before obtaining delivery of arrack in bottles is required to remit the price of the arrack and the excise duty to the Government; and at the time of obtaining delivery of arrack in bottles pay the bottling charges to the bottler through whom bottled arrack is delivered to the petitioner. In respect of these transactions the petitioner is called upon to pay not only the sales tax on arrack, but also on the excise duty and bottling charges by the petitioner. Section 5(3-D) stipulates, inter alia, that where goods sold or purchased are contained in

containers, the latter are liable to be taxed at the same rate of tax as is applicable to the contents, whether or not the containers have already been subject to tax under the Act.

3. The first contention of Sri K. Srinivasan, learned counsel for the petitioner, is that the arrack which is the subject-matter of sale is itself manufactured by Government; that, accordingly, there is no question of Government as seller of the arrack being required to pay any excise duty on "arrack" manufactured by itself; and that the requirement of payment of "excise duty" by the petitioner as purchaser, which by reason of the fact that it is payable by the petitioner after the purchase by him of the arrack, is payable at the post-sale stage and cannot, therefore, become a part of the price of arrack so as to attract sales tax. The payment of excise duty in this case, it is contended, follows, and does not precede, the sale and therebeing no pre-existent liability on the part of the seller-government to pay excise duty, the payment of "excise duty, in the circumstances, cannot also be deemed to be for and on behalf, or to the account, of, the seller, so that even by fiction it could not become a part of the price. Sri Srinivasan placed strong reliance on the pronouncement of this Court in *D. Cawasji and Co., Mysore v State of Mysore and Others*, 1969(1) Mys. L.J. 461 (hereinafter referred to as Cawasji's case) where this Court, in the context of a similar situation, held that it was not competent for the State to collect sales tax on such excise duty.

4. At the time of hearing this petition, challenge to the 46th Amendment to the Constitution was not pursued. Therefore, only two contentions survive for consideration:

(i) Whether State Government is competent, in the circumstances of the case, to collect sales tax on the amount of excise duty paid by the petitioner? and (ii) Whether Section 5(3-D) of the Karnataka Sales Tax Act, 1957 is unconstitutional?

Re. Contention No. I:

5. Strong reliance was placed by the learned counsel for the petitioner, on the decision of a Division Bench of this Court, in Cawasji's case, in support of the first contention. In the said decision, identical provisions of the Excise Act and the Rules thereunder came up for consideration. The court also had considered the definition of "turnover" as stated in Section 2(1)(b) of the Karnataka Sales Tax Act (hereinafter referred to as "the Act"), which at that time defined it as the aggregate amount for which goods are bought or sold or supplied or distributed by a dealer. Though this definition of turnover has undergone some changes now, it is not the case of the State that such a change has affected the ratio of Cawasji's case. The ground urged by the petitioner in the said case was, that, the collection of sales tax on excise duty was invalid, because, the said levy did not form part of the price of arrack or special liquor, or part of the consideration for the sale of those articles by the State Government to the licensees (vide page 477 of the report). There are other grounds, which are not necessary to refer

here. The relevant facts found at page 480 of the said decision, were that, there were three licensed manufacturers (distilleries) in the State and every distillery had a warehouse who was allowed to keep rectified spirit without payment of excise duty; the arrack manufactured were sold to the State Government and from the Bonded depots of the Government the licensees (of exclusive privilege of vending of arrack) were given their requirements of arrack. Government pays the distillers the price of arrack, but no excise duty was collected from the distillers, nor paid by the Government to itself. The excise duty was collected from the licensees (retail vendors) by the Government when arrack or special liquor was sold to them; this excise duty was treated as part of the sale price for the purposes of levy of sales tax on the turnover of the licensees. Some of the relevant observations of the Bench were:

"If the State Government had levied and collected excise duty from the distiller, either immediately after he manufactured arrack or special liquor, or before he issued it from his distillery or bonded warehouse to the State Government if the State Government had paid to the distiller a price inclusive of such excise duty levied and collected from the distiller, and if the State Government had while supplying that article to the licensees charged the same price or a higher price, the matter might not have presented any difficulty. In those circumstances, excise duty on arrack or special liquor, would have merged in the selling price and the State Government could have collected from the licensees sales tax on such inclusive price.

The learned Special Government Pleader admitted that excise duty is not being levied and collected from the distiller, either at the stage of manufacture of arrack or special liquor or at the stage of its issue from the distillery to the State Government. Nor does the State Government pay the distiller a price inclusive of excise duty."

The court observed, (at p. 482) as a prelude to further discussion:

"Though Sections 22 and 23 of the Mysore Excise Act, 1965, and Rule 2 of the Mysore Excise (Excise Duties) Rules, 1968, do not expressly state whether excise duty levied at the stage of issue of liquor from the Government depot, should be collected from the issuer or from the person to whom it is issued, it is obvious, that excise duty cannot be collected from the State Government which issues liquor from its Depots. The only person from whom it can be collected is the licensee to whom the State Government issues liquor from its depots.

Thus what is collected by the State Government from the licensees when arrack or special liquor is issued to them from government Depots, is excise duty levied under the Excise Act. We cannot accept the contention of the learned Special Government Pleader that excise duty, as such, levied under the Excise Act, is not being collected from the licensees, and that what is collected from them is by way of reimbursement of excise duty or by way of passing on to the licensees the burden of excise duty, which has been paid or is payable by some other

person." (emphasis supplied)

Thereafter, the court posed a question to be answered by its, as:

"If what is collected by the State Government from the licensees, is excise duty levied under the Excise Act, does excise duty become part of the sale price of arrack or special liquor sold by the State Government to the licensees?"

After quoting an extract from the decision of the Supreme Court in *George Oakes (P) Ltd.*'s case, the Bench held:

"But in the present petition excise duty is not collected by the State Government in its capacity as the seller selling arrack or special liquor to the licensees. On the other hand, excise duty is collected by the State Government under the Excise Act and de hors its role as the seller. Even if arrack or special liquor had been sold by a private person from a bonded warehouse, to the licensees, the State Government could have levied and collected excise duty from the licensees. Hence we think the above observations of Goddard, L.J., and the Supreme Court are not applicable to the sale price at which the State Government sells liquor to the licensees.

It is difficult to see how excise duty paid, not by the seller but by the purchaser, to the State Government can become a part of the price at which the goods are sold by that seller to that purchaser. If that is the true position, we think the State Government cannot, under Section 19 of the Sales Tax Act, collect sales tax on excise duty which is not a part of its selling price." (emphasis supplied)

At p. 484, after referring to *Utkal Distributors Ltd.*, case, the Bench again reiterated that excise duty was collected by the State Government not in its capacity as seller but as the State entitled to levy and collect excise duty under the Excise Act.

6. Therefore, the ratio of the decision in *Cawasji*'s case, as we understand it, is that excise duty was charged on the licensee, having regard to the provisions of Sections 22 and 23 of the Excise Act read with Rule 2 of the relevant Rules; in other words, though, excise duty is a charge imposed on the manufacture of goods, its levy can be postponed to a later event and this later event, in those cases, was, the sale of liquor to the licensees by the Government; it was not a case of a levy imposed earlier being passed on by the various sellers by way of reimbursement, which ultimately fell on the licensee, as part of the consideration for the purchases of liquor by the licensee. The excise duty is levied for the first time on the licensee, though the occasion for the impost was the manufacture of liquor. The Bench did not give any importance to the following circumstances:

(i) That it may be legal device adopted by the Government to collect the excise duty, which is an impost on the manufacture of the goods (liquor).

(ii) On proved facts it is clear that, no useful purpose, in practice, would be served by collecting the excise duty from the manufacturers, by the Government,

because, when the Government purchased the liquor from the distiller, the same would have to be repaid as part of its purchase price. It is in these circumstances, the State Government obviously did not collect the excise duty from the distillers. Distillers' cost-price, profit plus excise duty will be its selling price to the Government and therefore, by collecting excise duty from the distiller the Government will only be increasing the paper work and an unnecessary exchange of money between the Government and the distiller. Thus collection of excise duty from the distiller will be an exercise in futility.

The Bench, in Cawasji's case proceeded as if the levy of duty was on the licensee, and the excise duty collected from the licensee was not as a consideration for the purchase of arrack by it, but as a tax payer who was responsible to discharge the tax liability.

7. Appeal filed by the State Government against this decision was withdrawn by it subsequently. Therefore, the Supreme Court had no occasion to examine the correctness of this decision.

The State Government withdrew the appeal against the above decision, obviously, because of an amendment made to the Sales Tax Act, by Mysore Sales Tax (Amendment Act 17 of 1969). By this amendment, the Act sought to impose a higher levy of sales tax in respect of the sale of arrack, retrospectively, with effect from 1st April, 1969, increasing the rate from 61/2% to 45%. The Act also declared the levy of sales tax levied or collected, earlier, as valid. This amendment in noway amended the law so as to cure the defect in the earlier law which resulted in the decision in Cawasji's case, though, the object of the Amendment Act was to get over the legal bar found in the said decision against the levy of sales tax on the amount collected as excise duty. This Amendment Act was challenged, and the challenge reached the Supreme Court ultimately. The challenge was by the same petitioner, who had challenged the levy earlier resulting in Cawasji's case in the year 1969. The decision of the Supreme Court is reported in AIR 1984 SC 1780 (referred as "the 2nd Cawasji's case" hereinafter). The Supreme Court found that the earlier decision of the High Court in the first Cawasji's case had become final and conclusive between the parties thereto and therefore, unless the Amendment Act removed the basis of the earlier decision, its effect cannot be taken away by validating the earlier collections, and the Supreme Court found that the Amendment Act in noway altered the basis of the earlier decision; consequently it was held that the Amendment Act was invalid, to the extent the said Act purported to nullify the earlier judgment. The reasoning of the Supreme Court is found at page 1787:

"The impugned amendment has been passed, as the Statement of Objects which we have earlier set out clearly indicates to override the judgment of the High Court and to enable the State to hold on to the amount collected as sales tax on excise duty, health cess and education cess, if any, on arrack or special liquor. It has to be noted that the said judgment of the High Court in the earlier case had become final and conclusive inasmuch as the special leave petition filed against

the judgment by the State was withdrawn. The State instead of seeking to test the correctness and effect of the judgment and order of the High Court thought it fit to have the judgment and order nullified by introducing the impugned amendment. The amendment does not proceed to cure the defect or the lacuna by bringing in an amendment providing for exigibility of sales tax on excise duty, health cess and education cess. The impugned Amending Act may not, therefore, be considered to be a validating Act."

After a few observations, Supreme Court concluded at page 1788:

"The judgment of the High Court declaring the levy of sales tax on excise duty, education cess and health cess to be bad become conclusive and is binding on the parties. It may or may not have been competent for the State Legislature to validly remove the lacuna and remedy the defect in the earlier levy by seeking to impose sales tax through any amendment on excise duty, education cess and health cess; but, in any event, the State Government has not purported to do so through the Amending Act. As a result of the judgment of the High Court declaring such levy illegal, the State became obliged to refund the excess amount wrongfully and illegally collected by virtue of the specific direction to that effect in the earlier judgment. It appears that the only object of enacting the amended provision is to nullify the effect of the judgment which became conclusive and binding on the parties to enable the State Government to retain the amount wrongfully and illegally collected as sales tax and this object has been sought to be achieved by the impugned amendment which does not even purport or seek to remedy or remove the defect and lacuna but merely raises the rate of duty from 61/2% to 45% and further proceeds to nullify the Judgment and order of the High Court."

8. In the instant case before us, the State relied upon the decision of the Supreme Court in *Mc Dowell and Company Ltd. v Commercial Tax Officer*, 59 STC 277-(known as 2nd *Mc Dowell* case)-to contend that the ratio of *Cawasji*'s case, is no longer good law and therefore demand of sales tax on the amount paid as excise duty by the licensee is perfectly valid.

9. Under the provisions of the Andhra Pradesh Excise Act read with the relevant Rules, excise duty was leviable on the manufacturers of liquor, but the manufacturer cannot remove the liquor from the distillery unless the duty imposed has been paid. The appellant before the Supreme Court was a licensed manufacturer of liquor. The procedure was, for the buyers from appellant's distillery to obtain distillery-passes for release of liquor after making payment of excise duty and present the same at the distillery, whereupon the bill of sale or invoice was prepared by the distillery showing the price of liquor but excluding the excise duty. When the authorities sought to include the excise duty paid by the buyers, in the turnover of the appellant-manufacturer, same was successfully challenged, on the ground that such an excise duty did not go into the common till of the appellant and did not become a part of its circulating capital; therefore it was not competent to include the same in the turnover of the appellant-

manufacturer. After the pronouncement of the judgment by the Supreme Court, the State of Andhra Pradesh amended its relevant rules by stating that, without the payment of excise duty by the D2 licensee (manufacturer), the liquor shall not be released from the distillery. In this background, the 2nd Mc Dowell case came up before the Supreme Court.

10. The Supreme Court referred to several decisions to point out that excise duty is primarily a duty on the production or manufacture of goods produced or manufactured, but the tax can be levied at a convenient stage so long as the character of the impost is not lost and that the method of its collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. At page 289 (of 59 STC) it was observed:

"Thus, the incidence of excise duty is directly relatable to manufacture but its collection can be deferred to a later stage as a measure of convenience or expediency."

Reference was made to the earlier Mc Dowell's case, and it was held:

"On an examination of the provisions of the Excise Act, the Rules framed thereunder and the pronouncements referred to above, we are of the view that the conclusion of this Court at page [921 of 1977-I SCR 914: AIR 1977 SC 1459 at 1464 and page 158 of 39 STC 151] that intending purchasers of the Indian liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty is too broadly stated. The "duty" was primarily a burden which the manufacturer had to bear and even if the purchasers paid the same under the Distillery Rules, the provisions were merely enabling and did not give rise to any legal responsibility or obligation for meeting the burden." (emphasis supplied)

Thereafter, definition of "turnover" in the Andhra Pradesh Sales Tax Act was referred, to point out that whatever consideration was paid for the sale, it will be part of the turnover. At page 292, the device adopted by the parties was referred, as:

"Admittedly, the bills issued by the appellant did not include the excise duty. As already found, payment of excise duty is a legal liability of the manufacturer, its payment is a condition precedent to the removal of the liquor from the distillery and payment by the purchaser is on account of the manufacturer. According to normal commercial practice, excise duty should have been reflected in the bill either as merged in price or being shown separately. As a fact, in the hands of the buyer the cost of liquor is what is charged by the appellant under its bill together with excise duty which the buyer has directly paid on seller's account. The consideration for the sale is thus the total amount and not what is reflected in the bill. We are, therefore, clearly of the opinion that excise duty though paid by the purchaser to meet the liability of the appellant, is a part of the consideration for the sale and is includible in the turnover of the appellant. The purchaser has paid the tax because the law asks him to pay it on behalf of the

manufacturer." (emphasis supplied)

The principles deducible from this decision (2nd Mc Dowell's case) are,- (i) Excise duty is a levy on the manufacture of goods and normally it is payable by the manufacturer.

(ii) Collection of excise duty at a point later to manufacture and from some-one-else is a matter of administrative convenience, and is related to the machinery of collection.

(iii) The Rules providing for collecting the excise duty from the buyers are only enabling provisions, which in no way result in imposing an exclusive obligation on them to meet the tax burden.

11. Thus, it is clear that, the levy of excise duty is a charge attached to the goods manufactured, to be discharged primarily by the manufacturer and the fact that the machinery of collection comes into operation at a subsequent stage would not shift this primary responsibility of the manufacturer on the subsequent buyer of goods, exclusively. The distinction between the technical concept of a "charge" of a tax, and its "collection", is implicit in this reasoning. When the buyer, pays the excise duty, as a condition for obtaining the release of the goods, his payment is relatable to the legal liability of the manufacturer and thereby his payment is nothing but, a payment made for and on behalf of the seller, or manufacturer, as the case may be. Therefore, the condition for the payment of the excise duty, in effect, results, in converting this payment as part of the consideration for the sale of the goods.

In Cawasji's case, the Bench proceeded on the assumption that the point of collection itself was the point of levy and such a levy was statutory, having regard to the provisions of Sections 22 and 23 of the Excise Act, read with Rule 2 of the relevant Rules.

Section 22 creates a charge by levying the excise duty and countervailing duty on any excisable article manufactured and Section 23 prescribes the ways of levying the excise duty. Section 23 in essence directs the levy of excise duty rateably on the quantity of goods produced in or manufactured in or issued from a distillery, brewery, manufactory or warehouse, or imported into the State. Sub-clause (aa) thereof pertains to litre-fee levied on the quantity of excisable article imported by any person or recovered by any person when issued from a distillery, brewery, manufactory or warehouse, as the case may be. Here again, State is empowered to adopt one of the ways as may be prescribed. As per Rule 2 of the Rules, excise duty or litre-fee or both shall be levied when such excisable articles are issued from any distillery, warehouse or other place of storage. Thus the charge is on the manufacture of goods; and the "ways" of levy is as prescribed. But these provisions, "specifically does not charge the tax on the buyer. If so, the impost being an excise duty, should be primarily charged on the manufacturer and the collection of the same from a subsequent buyer cannot be equated to imposition of the charge on the latter; the buyer is made to discharge

the burden fastened on the goods on its manufacture, as held by the Supreme Court in the 2nd Mc Dowell's case.

12. The practical way of looking at the entire transaction is:

On the goods coming into existence and before it leaves the distillery or manufactory, the manufacturer, if made to pay the excise duty, is bound to pay it to the Government. But, immediately on its manufacture, Government has to purchase the entire quantity, and the purchase price payable by Government would necessarily include the excise duty which it has received from the manufacturer. Thus it serves no purpose, as a matter of effective collection of the excise duty, for the State Government to collect the excise duty from the manufacturer. Anyhow, when the Government sells the arrack to the licensees, Government has to collect the excise duty as part of its selling price. This multiple movement of excise duty along with the arrack is reduced, by the State Government adopting a simple mode of collecting it at the stage of releasing the arrack to the licensees. As observed by the Supreme Court this mode of collection is only applying the machinery of collection at a particular stage and not imposing the charge on the licensee.

13. Therefore, the conclusion of the Division Bench in Cawasji's case, that the licensee pays the excise duty, as the person charged with the tax liability is opposed to the decision of the Supreme Court in 2nd Mc Dowell case. The State Government's role in collecting the excise duty from the licensee, as a condition for the sale of arrack to the licensee, is in its capacity as the seller of arrack only; instead of merging the component of excise duty in the price as a single item, for practical reasons of accountancy, it is collected separately, by a distinct challan. This is nothing but an act of discharging the tax burden of the manufacturer by the licensee, under the compulsion of circumstances, i.e., the passing of arrack to Government from the manufacturer, and thereafter from Government to the licensees, in such a way that collection of excise duty from the manufacturer would be an avoidable exercise in accountancy.

14. Sub-section (b) of Section 2 of the Karnataka Sales Tax (in substance), defines "sales", as every transfer of the property in goods....for cash or for deferred payment or other valuable consideration, and sub-section (v) of Section 2 defines "turnover" as the aggregate amount for which goods are bought or sold, etc. The payment of excise duty is a basic requirement to be complied with by the licensee before the arrack gets transferred to him. It may be a condition precedent or it may be part of the compulsory consideration for passing of the title in the goods. In the circumstances and having regard to the principles governing the concept of excise duty, it is not unreasonable to hold that, here, payment of excise duty is part of the consideration and not merely a compliance with a prior condition, for the transaction. In view of the above, we are of the view that the decision of the Bench of this Court in Cawasji's case is no longer good law and is not binding on us in the light of the decision of Supreme Court in 2nd Mc Dowell case.

15. One of the reasons given in Cawasji's case was that, "it is obvious, that excise duty cannot be collected from the State Government which issues liquor from its depot" (at p. 482). As observed by the Supreme Court in *The Joint Director of Food, Visakhapatnam v The State of Andhra Pradesh*, 38 STC 329 at 331, there is nothing in law which makes it impossible for the Government to collect tax from itself. It is stated:

"The thrust of the argument, if we may say so, is that the Central Government being the taxing authority may not, without being guilty of grotesqueness, tax itself. Counsel was cautious to concede that legally it was not impossible for the Central Government as a statutorily empowered agency to collect tax that falls due from it as an assessee. Indeed, if the statute clearly states that Government is liable to pay tax qua dealer, it is not a legal plea to say that Government is also the taxing authority."

In the face of the broad language employed by the Act and Rule 2, it cannot be said that the Government cannot collect the excise duty from itself, if the occasion warrants. If so, the collection of the excise duty from the licensee is nothing but by way of reimbursement, of the theoretical liability of the Government borne by it earlier.

16. In *Raj Sheel v The State of Andhra Pradesh*, 64 STC 398 a Bench of Andhra Pradesh High Court had occasion to consider the nature of such a collection of excise duty from the buyers of beer under the Rules which were similar to the unamended Rules involved in the first McDowell case. It was contended before the Andhra Pradesh High Court that excise duty paid by the beer dealer was not to be taken as part of the dealer's turnover as the same was not part of his purchase price. The Bench held, at page 410:

"It is however, submitted by the learned counsel for the petitioners that when Rule 29 of the Andhra Pradesh Brewery Rules, 1970, was not amended as in the case of A.P. Distillery Rules, fastening the liability on the licensee of the brewery to pay the excise duty, then, on the basis of the decision of the Supreme Court in *Mc Dowell and Co. Ltd. v Commercial Tax Officer*, (1977)39 STC 151 (SC) it should be held that the excise duty paid by a purchaser directly to the excise authority at the time of removal of the goods from the brewery would not form part of the turnover of the manufacturer. We are unable to accept this contention in view of the two later decisions of the Supreme Court wherein it had been categorically laid down that the primary responsibility to pay excise duty was on the manufacturer and though it was paid directly to the Government by a purchaser, still it formed part of the turnover of the manufacturer." (emphasis supplied)

This decision was the subject-matter of appeal before the Supreme Court, only on the question of taxability of packing material under Section 6-C of that Act and the decision of Supreme Court is reported in 74 STC 379.

17. *N.K. Papaih and Sons v The Excise Commissioner and Another*, AIR 1975 SC

1007 cited by the learned counsel for the petitioner, was an appeal by a few of the petitioners against the decision in Cawasji's case, to the extent the High Court did not grant some of the reliefs sought by the petitioners. The appellant was a licensee to vend liquor in retail. The first contention was:

"that Sections 16, 22 and 23 of the Act read with Mysore Excise (Distillery and Warehouse) Rules, 1967 and with Mysore Excise (Excise Duties) Rules, 1968, enables levy of excise duty only when arrack is issued from a distillery or warehouse or other place of storage established or licensed under the Act and since the Government depot from which he purchased arrack does not come under the above category, no excise duty can be levied."

This was negated by the Supreme Court on facts of the case, as stated at paras 7 and 8 of the decision as reported in the aforesaid decision, AIR 1975 SC 1007.

The next contention was:

".....that Section 22 of the Act provides for delegation of the power to fix the rates of excise duty to the Government by making rules and since no guidance has been furnished to the Government by the Act for fixing the rate there was abdication of essential legislative function by the legislature and therefore the section is bad." This was also negated by referring to various provisions of the Act and the legislative control provided under Section 71 of the Act. The last contention was against the validity of Section 19 of the Karnataka Sales Tax Act, which was also repelled.

18. Mr. Srinivasan cited this decision in support of his contention that, the burden discharged by the purchaser was not the liability of seller at all, but his own liability and therefore the said excise duty cannot be a component of the sale price, for which he purchased the arrack. We fail to understand as to how the above decision is relevant to this contention.

Mr. Srinivasan, admitted to a specific question, that title to the arrack passed to the licensee only on payment of the excise duty and the "price". Payment of the "price"- "part" of it only would not result investing the title in the licensee. This admission of the learned counsel makes it clear that for the transfer of property in the arrack, payment of the sum referred as excise duty is also absolutely necessary.

19. Before proceeding to take this course of deciding the matter finally and to hold that the earlier decision is not binding on us, we have considered the matter in great depth and anxiety, because, question of propriety of by-passing a decision of a co-ordinate Bench is involved here. With utmost respect to the earlier Bench, we are constrained to depart from its view, because of the clear pronouncement of the law by the Supreme Court in 2nd Mc Dowell's case.

20. Even otherwise, on facts, we are of the view that the licensee has agreed to pay the excise duty as a consideration for the purchase of arrack as is clear from condition 19 of the terms of the auction under which the licensee obtained the

privilege of vending the liquor. Condition 19, reads thus:

"The licensee to vend bottled arrack shall obtain bottled arrack to be sold in his shop from the bottling units. Locations of bottling units and areas to be entered to by them are as under:

Sl. No. Location of bottling unit Area to be covered

1. Bangalore Bangalore Rural District

The licensee shall pay issue price therefor at such rates as may be prescribed from time to time. However the existing rate of arrack and the bottling charges of the bottles of different capacities is specified below:

per bottle of

Sl. No. 750 ML. 375 ML. 180 ML. 100 ML.

Arrack price 1.5300 0.7600 0.3700 0.2030

Duty 3.7500 1.8750 0.9000 0.5000

Sales Tax 0.4530 0.2060 0.1320 0.1003

Total: ---

5.7330

2.8410

1.4020

0.8033

Bottling charges 3.0000 1.3000 0.9500 0.8000

Note: Sales tax is liable to be collected on the price of arrack inclusive of Duty and Bottling charges on receipt of orders of the Government.

At the beginning of the Excise year itself the licensee shall indicate to the Superintendent of Excise of the District the quantity of arrack to be supplied to him in the various capacities of bottles as mentioned in condition No. 19. This should be done by the licensee on the basis of his assessment. Such prior indications to the Superintendent of Excise is necessary to enable him to ask the bottling units to be ready with sufficient number of bottles of the capacities

required by the licensee.

While placing the indent for bottled arrack and for issue of permit the licensee shall credit to the Government the cost of arrack, duty, sales tax, etc."

(rest omitted as unnecessary)

By agreeing to abide by the terms of condition No. 19, the consideration for the sale of arrack by the Government to the licensee was the payment of three items referred as arrack price, duty (this means, excise duty) and sales tax. These payments will have to be credited to the Government while placing the indent for the arrack. The duty is not here charged on the licensee either by the Excise Act or by the Rules made thereunder, but by the terms of condition No. 19 which blossomed itself into a term of the contract, on the licensee becoming the successful bidder as a lessee. This aspect of the situation, makes it imperative for us to conclude that the so-called excise duty paid by the licensee is nothing but a component of the consideration for the arrack.

Explaining the concept of sale price the Supreme Court in *Hindustan Sugar Mills v Rajasthan State*, AIR 1978 SC 1496 held as follows:

"The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale....."

"Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The sale price in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the sale price because it forms a component of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill.

We would like to add, that the position is not different when under a prior agreement, the legal liability of the manufacturer-dealer for payment of excise duty is satisfied by the purchaser by direct payment to the excise authorities or to the State exchequer."

A Full Bench of this Court in *Arvind Motors v State of Karnataka*, 59 STC 337 applied the ratio of the decision in *Hindusthan Sugar Mills* case in interpretation of "turnover" the KST Act as equivalent to "sale price" in Rajasthan Act. In substance there is no difference between the two definitions of "sale price" and "Turnover" and total sum paid by the dealer forms turnover for purposes of the Act. Hence all that is paid by the dealer to obtain the goods in question constitutes turnover for purposes of levy of tax under the Act.

Consequently, we are of the view that the amount collected by the Government from the petitioner, naming it as excise duty, is in substance, an amount which is part of the price of the arrack sold to the petitioner, and hence taxable as an integral component of the consideration for which the arrack was sold to the petitioner.

Re. Contention No. II:

21. The attack against Section 5(3-D) of the Sales Tax Act, is based on Article 14 of the Constitution. Section 5(3-D) reads as follows:

"5. Levy of tax on sale or purchase of goods- (3-D): Notwithstanding anything contained in this Act, where goods sold or purchased are contained in containers or are packed in any packing materials liable to tax under this Act, the rate of tax and the point of levy applicable to turnover of such containers or packing materials, as the case may be, shall, whether the containers or the packing materials have already been subjected to tax under this Act or not or whether the price of the containers or of the packing materials is charged for separately or not, be the same as those applicable to goods contained or packed:

Provided that no tax under this sub-section shall be leviable if the sale or purchase of goods contained in such containers or packed in such packing materials is exempt from tax under this Act."

It is contended that, this section treats sale of a container or a packing material when sold along with the goods, differently, from an identical container or a packing materials, sold independently and hence offends Article 14. Section 5(3-D) is attracted,- where goods sold or purchased are (i) contained in containers; or (ii) packed in any packing materials liable to tax under the Act. In such a case, the rate of tax and the point of levy applicable to turnover of such containers or packing materials,- shall be the same as those applicable to goods contained or packed (irrespective of the fact that the containers or the packing materials have already been subjected to tax under the Act or not. It is also irrespective of the fact that the price of the containers or of the packing materials is charged separately or not).

Proviso says that if the goods, contained in the containers or packed in the packing materials, is exempt from tax, then, no tax under this provision shall be levied on the containers or the packing materials.

The result is that, the containers are treated as part of the goods contained in

the containers (similarly, packing material is treated as part of the goods packed) for purposes of taxation, here. It is possible that, sale of a few goods may attract a lesser rate of tax and if so, sale of its container also would attract the lesser rate than the rate of tax prescribed in respect of the container simpliciter. If the goods are exempted, sale of container along with the goods also gets the exemption. The container goes with the goods contained in it, and the packing materials goes with the goods packed in it for purposes of levy of sales tax.

Essential condition is that the goods sold are to be in a container or packet. If the goods sold is not contained in the container or packet, a subsequent packing or housing it in a container would not attract this provision.

22. In a case, where container is not sold at all and only the goods is sold, then, question of any turnover in respect of the container does not arise and hence, again, this sub-section will be inapplicable, because, without a sale or purchase, there cannot be any "turnover" in respect of the container-{vide definition of "turnover" as per Section 2(v)}. Therefore, this sub-section implies the existence of a sale of the container, containing the goods. With the above facts in mind, it has to be examined whether a differential treatment meted out to the container or a packing material (containing taxable goods), is violative of Article 14 of the Constitution.

23. Mr. Srinivasan cited the decision of the Supreme Court in *Raj Sheel and Others v State of Andhra Pradesh and Others*, 74 STC 379, in support of his contention, that, Section 5(3-D) of Karnataka Sales Tax Act is in pari materia with Section 6-C of the Andhra Pradesh Sales Tax Act and therefore should be construed in the manner interpreted by the Supreme Court. Alternatively, it was contended, that, the factum of treating the Government as the first seller under Section 5(3)(a) of the Karnataka Sales Tax Act, being available only to the sale of arrack, it is not possible to apply the same to the containers of arrack and hence Section 5(3-D) cannot be attracted when the container is the subject of independent sale.

24. Under the Andhra Pradesh Act, Section 6-C deems the sale of packing material, although there is no sale of the packing material (vide 74 STC 379, at 388). This deeming provision was held to be a clarificatory provision, "at best", by the Supreme Court. Supreme Court proceeds that, in a few cases, it is possible that the price of goods is determined upon a consideration of several components of a sale, including the value of packing material, but nonetheless the price paid for, is the price of the goods. In such cases, it is not open to analyse the value of different components; in other words, when the value of goods is determined by taking into consideration the value of the packing materials also, it is impermissible to analyse and separate the value of the packing material for the purpose of levying the sales tax. Section 6-C of Andhra Pradesh Act in such a situation, levies the same rate of tax on the packing material as applicable to the goods packed in it. This was held to be valid, because, the transaction between the dealer and the purchaser, is essentially in

respect of the goods. If an account is to be taken of the different components that make the price of the goods, all the components should attract the same rate of tax.

The observations of the Supreme Court is extracted below:

"Turning to Section 6-C of the Act, it seems to envisage a case where it is the goods which are sold and there is no actual sale of the packing material. The section provides by legal fiction that the packing material shall be deemed to have been sold along with the goods. In other words, although there is no sale of the packing material, it will be deemed that there is such a sale. In that event, the section declares, the tax will be leviable on such deemed sale of the packing material at the rate of the tax applicable to the sale of the goods themselves. It is difficult to comprehend the need for such a provision. It can at best be regarded as a provision by way of clarification of an existing legal situation. If the transaction is one of sale of the goods only, clearly all that can be taxed in fact is the sale of the goods, and the rate to be applied must be the rate as in the case of such goods. It may be that the price of the goods is determined upon a consideration of several components, including the value of the packing material, but nonetheless the price is the price of the goods. It is not open to anyone to say that the value of the different components which have entered into a determination of the price of the goods should be analysed and separated, in order that different rates of tax should be applied according to the character of the component (for example, packing material). What Section 6-C intends to lay down is that even upon such analysis the rate of tax to be applied to the component will be the rate applied to the goods themselves. And that is for the simple reason that it is the price of the goods alone which constitutes the transaction between the dealer and the purchaser. No matter what may be the component which enters into such price, the parties understand between them that the purchaser is paying the price of the goods. Section 6-C merely clarifies and explains that the components which have entered into determining the price of the goods cannot be treated separately from the goods themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is applicable to the goods themselves. We find it difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case under Section 6-C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated. In the circumstances, no question arises of Section 6-C being constitutionally discriminatory, and therefore invalid."

25. The principle behind Section 5(3-D) seems to us, to be, that, a buyer bargains for the goods and pays the price in its entirety inclusive of the value of the packing material, whenever the goods are sold in a packed condition (or housed in a container); the consideration for the sale essentially, is the

consideration for the goods, though, the price (i.e., the consideration) may have as a component of it, the price of the packing material (or of the container). This is not an irrelevant principle at all, if one considers the practical aspect of a trading transaction. Here, under Section 5(3-D) the legislature has thought it fit and convenient to treat the sale of goods contained in a container as an integrated, single transaction of sale of the goods; this levy makes it simpler for the assessee to maintain his accounts, and convenient for the revenue to levy and collect the tax; it makes it necessary to analyse the components of a particular sale and enter upon investigation to find out the real price (i.e., genuine price) at which the packing material (or the container) is purported to have been sold, and separate it from the computation of the turnover regarding the particular goods (which was packed in the packing materials or housed in the container).

26. Simplicity of procedure and convenience of the tax collection are not irrelevant while considering the validity of a particular levy. Section 5(3-D) on the face of it elevates the status of the container (or the packing material) to that of the goods dressed in it. Such a container/packing material is distinct from, another container/packing material which has not housed any goods.

27. Sri Srinivasan relied on a decision of the Supreme Court in *Porritts and Spencer (Asia) Ltd. v State of Haryana*, AIR 1979 SC 300 for the proposition that the character of goods would not depend upon the use to which it may be put and contended that the distinction under Section 5(3-D) of the Act based on user of bottles is an irrelevant test. In the *Porritts and Spencer's* case, the Supreme Court was concerned with interpretation of an entry which read:

"All varieties of cotton, wollen or silken textiles including Rayon, artificial Silk or Nylon....."

and the question that fell for consideration was whether "dryer felts" fall with this category of goods and whether they constitute a variety of textile.

In that context while explaining the meaning to be given to "textiles" Supreme Court held that the character of a fabric or material does not depend upon the use to which it may be put. In that case Supreme Court was not concerned with goods which were sold as part and parcel of other goods as in the present case. Hence the principle stated in that case in our opinion has no application to the case on hand.

28. This distinction between a packing material simpliciter and a packing material carrying a goods has been recognised for purposes of Central Excises and Salt Act and upheld by the Supreme Court in *Union of India v Bombay Tyre International Ltd.*, AIR 1984 SC 420. An excise duty is levied on the manufactured goods; but assessable value need not be confined to the manufacturing cost and manufacturing profit; the said value may go up with the manner in which the goods enter the market (including the value of packing material in which the goods is packed). In other words, packing materials in

which the goods is packed become a component of the goods manufactured while entering the stream of trade and hence, inclusive of such a component in the assessable value was upheld. The packing material containing the goods, thus, has no special status of its own, but integrates itself within the status of the goods packed.

At p. 442 (para 51), the Supreme Court held:

"Now the price of an article is related to its value (using this term in a general sense) and into that value have poured several components, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value up to the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee up to the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance) charges for other services after delivery to the buyer, namely after sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted."

Further, proceeding to consider the question of value of packing materials, the court observed:

"It is relevant to note that the packing, of which the cost is included, is the packing in which the goods are wrapped, contained or wound when the goods are delivered at the time of removal. In other words, it is the packing in which it is ordinarily sold in the course of wholesale trade to the wholesale buyer. The degree of packing in which the excisable article is contained will vary from one class of articles to another. From the particulars detailed before us by the assessee, it is apparent that the cost of primary packing that is to say, the packing in which the article is contained and in which it is made marketable for the ordinary consumer, for example a tube of toothpaste or a bottle of tablets in a cardboard carton, or biscuits in a paper wrapper or in a tin container, must be regarded as falling within Section 4(4)(d)(i)."

The principle, is indicated, very precisely at page 444 (para 55):

".....the expression "manufacture", is related to the taxable event and refers to a process which enters into the character of the article, while "packing" has been defined by Section 4(4)(d)(i) in relation to the Value" of the article."

29. A seller who sells the bottles only and the purchaser who purchases them as such, are not concerned with anything else, except the marketability of the bottles. But the person who sells liquor contained in a bottle, and a person who purchases such a liquor, is concerned with the liquor and its marketability; the payment of a price for the bottle in such a situation, is part of the bargain for the sale and purchase of the liquor. In other words, the sale and purchase of the

bottles, here, is incidental to and integrated with the sale and sale and purchase of the liquor. This makes all the difference and for the purpose of the levy of sales tax, this distinction between the two types of sales which classify the dealers differently, i.e., a trader who sells or purchases only bottles and another dealer who sells or purchases the bottles, because it contains the liquor, cannot be held as an arbitrary classification, bearing no nexus to the object of the Act. Such a classification, also, makes the levy and collection simpler reducing the area of disputes to the minimum; it also, prevents the dealers from resorting to tax evading mechanisation, while dealing in goods which are sold in containers or in packed condition by showing unrealistic prices for the container (or the packing materials) and the goods, so as to reduce the sales tax payable in a given case, i.e., if the sale of the goods attracts a higher rate of taxation, then, the dealers are likely to sell the goods for a lesser price and offset the reduction by increasing the sale price of the container; Section 5(3-D), thus, prevents the dealers from being tempted to resort to such a scheme of tax evasion. Taxation operates in the sphere of realities and a law levying a tax normally takes note of such realities. A hypothetical equality, is not the basis of Article 14 of the Constitution. Whenever, a distinction exists in reality, and such a distinction has a reasonable nexus with the object of the law, the distinction made by the law can - not be nullified as violative of Article 14 of the Constitution; every distinction made, is not an act of discrimination; a reasonable distinction is the product of a sound discretion.

30. The decision of a Bench of this Court in *State of Karnataka v Shaw Wallace and Co. Ltd.*, 48 STC 169 is of no assistance to construe the provisions of Section 5(3-D), as the said decision pertains to a period anterior to the introduction of this provision. Section 5(3-D) therefore cannot be invalidated as contravening the provisions of Article 14 of the Constitution.

Consequently, the second contention of the petitioner also fails.

31. In the result, for the reasons stated above this petition fails and is dismissed with costs.

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Constitution of India, Articles 141 and 323-A - Administrative Tribunals Act, 1985, Sections 14, 15 and 16 - Jurisdiction to decide "Disputes and Complaints" in service matters - Whether includes question relating to Constitutional validity of service laws - Decision of the High Court holding that the tribunal has no jurisdiction to decide questions relating to Constitutional validity of service laws - Decision not appealed against - Question not decided by the Constitution Bench in the case of *Sampath Kumar v. Union of India*, AIR 1987 SC 386 - Whether the stalemate made in a subsequent judgment of the Supreme Court in *J.B. Chopra v. Union of India*, AIR 1987 SC 357 that the question has been decided in the case of *Sampath Kumar* is a declaration of law within the meaning of Article 141.

HELD: The learned Attorney-General of India, on notice from this court, submits

that this is an extremely important question and the power of judicial review being one of the basic structures of the Constitution is vested in the Supreme Court and the High Courts. In this regard, he draws our attention to the proviso to Section 113, CPC, as well as Section 395, Cr. P.C. under both these provisions, the function of declaring the unconstitutionality is only with the High Court.....It is true that in Sampath Kumar's case, AIR 1987 SC 386, the specific question whether the High Courts' jurisdiction under Article 226 stands excluded did not come up for consideration.....In Chopra's case, AIR 1987 SC 357, the Supreme Court has chosen to interpret Sampath Kumar's case in a particular manner. Whether that interpretation was warranted or not, this court cannot decide. Till, of course, the Supreme Court interprets in future and lays down a contrary ruling, it is Chopra's case, which will govern the field.....It cannot be gainsaid that this is an important question having far-reaching consequences. As rightly submitted by the learned Attorney-General, the power of judicial review which is one of the basic structures of the Constitution, has been vested in the Supreme Court and the High Courts.....Though the definition of "service matters" occurring in Section 3(q) of the Act. ... is comprehensive enough, does it take within it, the power to declare a rule or statute as valid?.. The learned single Judge in S.M. Pattanaik's case, ILR 1986 Kar. 3954, has held that notwithstanding the Constitution of the Administrative Tribunal-of course the case related to the Central Administrative Tribunal-the jurisdiction of this court under Article 226 to decide the Constitutional validity is not taken away. The learned Judge has given valid and cogent reasons for holding so. Of course, the judgment has become final since it had not been appealed against.... However, in Sampath Kumar's case, is this specific question did not arise for consideration.....We do not know how, as rightly urged by the learned Attorney-General, this court could take the view that the interpretation placed in Chopra's case, warranted or not. We are of the view that it may not be open to us to do so. In fact, while declining to grant special leave in Chopra's case, this very question came up for decision and it has rendered such a decision. We find no escape from the decision unless of course the Supreme Court holds otherwise while interpreting Sampath Kumar's case in an appropriate case in future.....We accept the submissions of the learned Attorney-General that it is not for us to hold that the decision rendered in Chopra's case, would not constitute a statement of law under Article 141 though that was not actual decision in Sampath Kumar's case.....If the Supreme Court has viewed Sampath Kumar's case AIR 1987 SC 386 in a particular way, we are bound by the same as a precedent under Article 141.....Accordingly, we answer Question No. 1 in the affirmative. In view of our answer to Question No. 1 to Question No. 2 does not arise. (paras 3, 4, 5 and 6)