

(1993) 07 BOM CK 0017
In the Bombay High Court
Case No : Writ Petition No. 787 of 1984

Naranga Hotels Private Ltd.	Vs	APPELLANT
Union of India and others		RESPONDENT

Date of Decision : 16-07-1993

Acts Referred:

Central Sales Tax Act, 1956 — Section 4(2), 6, 8

Citation : (1994) 1 MhLj 983

Hon'ble Judges : M.L. Pendse, J;A.P. Shah, J

Bench : Division Bench

Advocate : K.S. Cooper, B.C. Joshi and D.G. Jhangiani, for the Appellant; R.V. Desai, for the Respondent

Judgement

A.P. Shah, J.—The petitioner, which is a private limited company, is engaged in the business of hoteliering and has two hotels, the Ambassador Hotel at Bombay and the Ajanta Ambassador Hotel at Aurangabad. The hotels of the petitioner are having status of "four star" and there are restaurants forming part of the said hotels.

2. By this petition under article 226, the petitioner questions the authority of the State to levy sales tax in respect of food and beverages supplied or served in the hotels/restaurants of the petitioner. The petitioner challenges the validity of the Forty-sixth Amendment to the Constitution and the relevant entries in the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the said Act") imposing sales tax on the food articles supplied in the hotel, restaurant, etc.

3. The sales tax was being levied upon sales of food articles in hotel/restaurant right since the inception of the Sales Tax Act in the then State of Bombay and also in the State of Maharashtra. The concept of levy of sales tax on food served and supplied in hotel/restaurant existed even under the old Bombay Sales Tax Act, 1946. So far as, the levy of sales tax on the aforesaid basis under the said Act was as per entry 70 of Schedule "C" up to June 30, 1981. By an amendment to the said Act, Schedule "C" was amended on and from July 1, 1981 and the tax

on food served in hotels and restaurants was levied under entry 22, which reads as follow :

"22. Food and non-alcoholic drinks not being food or drinks to which entry 99 in this Schedule applies served at one time for consumption inside any eating house, restaurant, hotel, refreshment room or boarding establishment - (a) at a price of more than 5 8 paise in 8 paise in rupees but not more than 30 the rupee. the rupee. rupees per person. (b) at a price of more than 30 15 paise in 15 paise in rupees per person. the rupee. the rupee."

We may mention that entry 99 in Part II of Schedule "C" covers food or drinks served on consumed in a hotel or restaurant or part thereof in any other place, where a cabaret floor or similar entertainment is provided.

4. By the Maharashtra Sales Tax (Amendment and Validating Provisions) Act (No. 9 of 1984), several amendments were effected to the provisions of the Bombay Sales Tax Act. Entry 22 in Part II of Schedule "C" to the said Act was substituted by a new entry 22, which reads as under :

"22. Food and non-alcoholic drinks 8 paise in 8 paise in not being food or drinks to the rupee. the rupee." which entry 22A or 99 of this Part applies, served for consumption in any eating house, restaurant, hotel, refreshment room or boarding establishment or any part thereof.

Entry 22A of Part II of the said Schedule "C" to the said Act was also amended by the said Act No. 9 of 1984. The said amended entry 22A reads as under :

"22. Food and non-alcoholic drinks 15 paise in 15 paise in not being food or drinks to the rupee. the rupee." which entry 99 in this Part applies, served for consumption in any eating house, restaurant, hotel, refreshment room or boarding establishment or any part thereof having gradation of "three star and above".

5. The Supreme Court by its judgment delivered on September 7, 1978, in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [1978] 42 STC 386 held that no tax can be levied on the supply of food articles in hotel/restaurant on the ground that the transaction is essentially a transaction of service and not a transaction of sale. The judgment of the Supreme Court in Northern India Caterers (India) Ltd. [1978] 42 STC 386 was preceded by two decisions of the Supreme Court, (i) State of Madras v. Gannon Dunkerley and Co (Madras) Ltd. [1958] 9 STC 353 and (ii) State of Himachal Pradesh v. Associated Hotels of India Ltd. [1972] 29 STC 474 interpreting the words "taxes on the sale or purchase of goods" in entry 54 in List II as not including taxes on works contract or service or supply of foodstuff, etc., in the hotel. The above three decisions led to the making of the Constitution (Forth-sixth Amendment) Act, 1982, which received the assent of the President on February 2, 1983, on which day it came into force. By this amendment, in article 366 of the Constitution following clause (29A) was inserted after clause (29) :

""tax on the sale or purchase of goods" includes -

(a) - (c)

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

By section 6 of the Constitution (Forth-sixth Amendment) Act, 1982, which is a provision relating to validation and exemption, retrospective effect is given to the above constitutional amendment. The plain object of the above constitutional amendment was to remove retrospectively the existing defect of want of legislative competence on the part of the State Legislature to levy sales tax on supply of food-stuff, etc., in the hotel, restaurant, etc., and to validate such taxes and so also the recoveries of tax made thereunder.

6. As a consequence of the above constitutional amendment, the Act was amended by the Maharashtra Act No. 24 of 1985 which received assent of the Governor on August 16, 1985. The term "sale" is redefined by adding an explanation which reads thus :

"Explanation. - For the purposes of this clause, -

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in sub-section (2) of section 4 of the Central Sales Tax Act, 1956;

(b) (i) every disposal of goods referred to in the explanation to clause (11);

(ii)

(iii) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is made or given on or after the 2nd day of February, 1983 for cash, deferred payment or other valuable consideration;

shall be deemed to be a sale."

Section 8 of the above amending Act is a provision relating to validation and saving, by which it has been given retrospective effect in certain matters.

7. We may state that the challenge to the Constitution (Forty-sixth Amendment) Act, 1982, does not survive in view of the judgment of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, upholding the validity of the said Forty-sixth Amendment. The constitutional amendment enlarged the scope of entry 54 in List II and conferred in the matter

legislative competence to the State Legislature with retrospective effect which was found absent by the Supreme Court. As a result, the State Legislatures were authorised to make laws imposing such levy and collection of tax. Such amendment in the State laws for the past was not necessary in case State laws already permitted such levy. As already mentioned, such a provision existed in the Act not only during the material period, but since the very inception. In view of this, Mr. Cooper, learned counsel for the petitioner, conceded the challenge to the retrospective operation given to the entries in question of the said Act.

8. Mr. Cooper then submits that though the competence of the State Legislature to impose tax on the supply of food articles in hotel/restaurant cannot be questioned, the old entry 22 and the new entries 22 and 22A impugned in the present petition are liable to be struck down as violative of article 14 of the Constitution being completely discriminatory and unreasonable. As regards old entry 22, which is based on the total price of food and drinks served at one time per person, Mr. Cooper submits that the fixation of rate of tax is without any rational basis and, therefore, the same is unconstitutional. According to Mr. Cooper, basing the tax rate on the total price of food and drinks served at a time would amount to taxing the amount of food and drinks consumed at a time and not taxing the sale of goods supposed to have been involved in the transaction. Mr. Cooper submits that fixing different rates of tax on the sale of goods, basing the rates upon the total sale price results in lesser the total price, lesser the rate, more the total price, higher the rate, which means that the tax rate is not on the sale of goods but on the total quantum of price, and as such there is no nexus with the sale of goods. Mr. Saraf, learned counsel for respondents Nos. 2 to 5, submits that the rate fixed under the said entry 22 is a graded rate depending upon the "sale price" of the food and other articles supplied and consumed by the patrons. Mr. Saraf further submits that the rate of tax prescribed under the aforesaid entries has a nexus with the "sale price" of food and drinks consumed and not with consumption.

9. We are unable to accept the submissions advanced by Mr. Cooper. On reading old entry 22, it is clear that the State Legislature has fixed the rate of tax on the basis of the total price of the food and drinks served per person at a time. If the price is more than Rs. 5 but not more than Rs. 30, the rate of tax is at 8 per cent and if the price is more than Rs. 30, the rate of tax is 15 per cent. Thus, the incidence of tax is on the "sale price" of the food/drinks supplied in a hotel/restaurant. We do not find any arbitrariness or unreasonableness in the said entry 22. Mr. Cooper faintly submits that the implementation of the said entry 22 will lead to absurd results because it is possible that a customer may consume certain food articles and then go out and again come back and place orders for some new articles and in that case tax payable will be less than the tax which would be payable when the food articles served at one time. The submission of Mr. Cooper is stated only to be rejected. The illustration given by Mr. Cooper that there is a possibility of person going out and again coming back and ordering food is far remote and cannot form basis for challenging the vires of a taxing

statute. The rate to be prescribed and the manner of imposition of levy is essentially a matter of legislative policy and unless there is something in the statute, which can be said to be totally unreasonable or discriminatory, it is not open for the court to interfere with the legislative policy.

10. As regards the validity of new entries 22 and 22A of Schedule "C" to the said Act, Mr. Cooper submits that the classification of hotels/restaurants, etc., under the gradation of "three star" and above is per se discriminatory and violative of article 14 of the Constitution. According to Mr. Cooper, there are number of restaurants in the city of Bombay, which are more expensive than the restaurants in the "five star" hotels, but those restaurants are being, charged at a lesser rate under entry 22, which amounts to discrimination in respect of restaurants falling in the same category. Mr. Cooper submits that those independent restaurants are equivalent to restaurants located in "five star" hotels from the point of view of decoration, furnishing, range of the menu, pricing of the items, the standards of service, etc. Many of them, according to Mr. Cooper, are far more posh, luxurious and expensive than restaurants and/or dining rooms in "three star" and "four star" hotels in the city of Bombay. Mr. Cooper submits that the classification under the gradation of "three star" and above has no nexus to the object of the Act and, therefore, the same is liable to be declared as unconstitutional. In support of his submission, Mr. Cooper relied upon price-lists of three or four restaurants in the city of Bombay produced by the petitioner along with the affidavit-in-rejoinder. Mr. Cooper heavily relied upon the judgment of the Supreme Court in *Arya Vaidya Pharmacy v. State of Tamil Nadu* [1989] 73 STC 346.

11. In our opinion, there is no arbitrariness or unreasonableness in the classification of hotels/restaurants having status of "three star" or above. These hotels are given "star" status by the Tourism and Civil Aviation Department having regard to the facilities available in such establishments. Such recognition entails several benefits. It is well-known that the tariff in hotels depends on its star status, it being higher for the higher star hotels. The object being to tax food sold at a higher tariff, the status of the hotel where it is sold is certainly relevant. The classification is made in the present case to bring within the tax net, hotels or eating houses of the higher status excluding therefrom the more modest ones. A rational nexus exists of this classification with the object for which it is made and the classification is founded on intelligible differentia. The Supreme Court has upheld the validity of similar provisions under the Tamil Nadu General Sales Tax Act, 1959 and the Kerala General Sales Tax Act, 1963, in the case of *Kerala Hotel & Restaurant Association v. State of Kerala* reported in [1990] 77 STC 253.

12. Mr. Cooper, however, submits that the decision of the Supreme Court in the aforesaid case of *Kerala Hotel & Restaurant Association v. State of Kerala* [1990] 77 STC 253 is not applicable to the present case. Mr. Cooper drew our attention to the following paragraph of the judgment of the Supreme Court :

"It has not been shown that any eating house similar to those grouped together for purpose of taxation has been excluded from the group. The classification made is to group together all eating houses wherein costlier cooked food is sold. It has not been shown that the tariff of cooked food sold in any of the exempted eating houses is the same or higher than that of those taxed. The tax is applied equally to all those within the tax net."

Mr. Cooper submits that in the case before the Supreme Court no material was produced to show that hotels or restaurants similar to those grouped together for purpose of taxation has been excluded from the group. But, in the present case, sufficient material has been brought on record in order to demonstrate that the classification of the restaurants and hotels under the gradation of "three star" and above is discriminatory. It is not possible to accept the submission of Mr. Cooper for more than one reason. It may be that there are some restaurants in the city like Bombay, which may be charging more price than restaurants in the "star establishments", but that by itself cannot render the classification invalid or unreasonable. The Act is applicable to the entire Maharashtra State. The petitioner has not given any instance outside the city of Bombay where an independent restaurant is charging more price than the restaurants having "star" status. Simply because few restaurants in Bombay are pricing food items served in their establishments at a rate higher than the "star" hotels, the classification made by the Legislature cannot be said to be unreasonable or without any nexus with the object sought to be achieved by the enactment. In *Federation of hotel & Restaurant Association of India v. Union of India* [1989] 74 STC 102 the Supreme Court, while dealing with the similar objection to classification in a taxing statute, held as under :

"..... The State, in the exercise of its Governmental power, has, of necessity, to make laws operating differently in relation to different groups or class or persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience."

The lack of perfection in a legislative measure does not necessarily imply its unconstitutionality. So long as those within the tax net can be legitimately classified together enacting an intelligible differentia vis-a-vis those left out and the classification so made bears a rational nexus with the object sought to be achieved, the classification is clearly permissible and it does not violate article 14 of the Constitution. We may make a reference to the observations made by Justice Stewart of the U. S. Court in *San Antonio Independent School District v. Rodriguez* [1973] 411 US 1 :

"No scheme of taxation, whether the tax is imposed on property, income or purchases of goods and services, has yet been devised which is free of all

discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."

We do not find any discrimination or arbitrariness in the classification of establishments having status of "three star" and above.

13. Before we conclude, we may also mention that the decision of the Supreme Court in Arya Vaidya Pharmacy's case [1989] 73 STC 346 relied upon by Mr. Cooper has no application to the present case. In Arya Vaidya Pharmacy's case [1989] 73 STC 346, the question before the Supreme Court was whether "arishtams" and "asavas", which are ayurvedic medicinal preparations, can be taxed at the higher rate than the other ayurvedic medicinal preparations only on the ground that such "arishtams" and "asavas" contain certain alcoholic percentage. The Supreme Court found that the said "arishtams" and "asavas" and other ayurvedic medicinal preparations fall in the same category and, therefore, there is no rational basis for discriminating between one commodity and another falling under the same class. As we are holding that hotels/restaurants having "three star" or above status are a class by themselves, the ratio of the Supreme Court judgment in Arya Vaidya Pharmacy's case [1989] 73 STC 346 has no application to the facts of the present case.

14. In view of the aforesaid discussion, the writ petition must fail. Rule is discharged with costs.

Mr. Cooper applies for leave to appeal to Supreme Court. Leave refused. Mr. Cooper also applies for continuation of interim relief. Prayer rejected.