

(1992) 05 OHC CK 0009

In the Orissa High Court

Case No : Misc. Case No's. 2297, 2488, 2558, 2572, 3117 and 3075 of 1992

Orissa Cement Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-05-1992

Acts Referred:

Cess and Other Taxes on Minerals (Validation) Ordinance, 1992 — Section 2(1)
Constitution of India, 1950 — Article 14, 248, 301
Orissa Cess Act, 1962 — Section 4

Citation : AIR 1993 Ori 17 : (1992) 74 CLT 812

Hon'ble Judges : B.L. Hansaria, C.J.;K.C. Jagadeb Roy, J

Bench : Division Bench

Advocate : G. Rath and Ashok Kumar Parija, for the Appellant; Sovesh Roy, General and Sanjit Mohanty and N.C. Sahoo, for the Respondent

Judgement

Hansaria, C.J.—Certain provisions of the Orissa Cess Act, 1962 were declared ultra vires by the Supreme Court in M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, , judgment in which was pronounced on 4-4-1991. The ground was incompetency of the State Legislature in enacting those provisions. Despite the unconstitutionality of the provisions, the cess collected before 22-12-1989, the date on which this Court had rendered its judgment declaring the levy as unconstitutional, was allowed to be retained by the State. However, it was stated in paragraph 74 that the State cannot on any grounds of equity be permitted to retain cess collected on or after the date of the High Court's judgment. The result of this decision was that various States in the country (may it be stated that along with the aforesaid Orissa Act, the provisions of many other State Acts were also held as ultra vires) were required to refund a large amount of cess and other taxes collected by them. An Ordinance titled as "The Cess and other Taxes on Minerals (Validation) Ordinance, 1992" was, therefore, promulgated on 15-2-1992, which by now has been replaced by the Act of the same name.

2. After the Ordinance was promulgated, demands were made on the petitioners,

inter alia, by the South-Eastern Coalfield Ltd. to pay cess, which became payable, according to the coalfields, by force of the Ordinance. The validity of the same has been assailed in these petitions.

3. The first of such petitions was moved on 27-3-1992 when it was admitted and an interim order of stay of the demand was passed. This was in O.J.C. No. 2415 of 1992. Similar petitions were moved thereafter in which similar orders were passed. We are presently concerned with the question whether the interim stay should be allowed to continue or the same should be vacated.

4. As we are concerned at this stage with the question relating to stay -- to continue or not to continue it -- what we shall state hereinafter has to be taken as our tentative view relating to the validity and scope of the Ordinance and the demand to pay cess due up to 4-4-1991, which had remained unpaid earlier.

5. We may quote the relevant provision of the Ordinance. Section 2 alone is relevant, which reads as below ;--

"2. (1) The laws specified in the Schedule to this Ordinance shall be, and shall be deemed always to have been, as valid as if the provisions contained therein relating to cesses or other taxes on minerals had been enacted by Parliament and such provisions shall be deemed to have remained in force up to the 4th day of April, 1991.

(2) Notwithstanding any judgment, decree or order of any court, all actions taken, things done, rules made, notifications issued or purported to have been taken, done, made or issued and cesses or other taxes on minerals realised under any such laws shall be deemed to have been validly taken, done, made, issued or realised, as the case may be, as if this section had been in force at all material times when such actions were taken, things were done, rules were made, notifications were issued, or cesses or other taxes were realised, and no suit or other proceeding shall be maintained or continued in any court for the refund of the cesses or other taxes realised under any such laws.

(3) For the removal of doubts, it is hereby declared that nothing in Sub-section (2) shall be construed as preventing any person from claiming refund of any cess or tax paid by him in excess of the amount due from him under any such laws."

In the Schedule, mention has been made, inter alia, about the Orissa Cess Act, 1962.

6. Shri Das appearing for some of the petitioners has assailed the validity by contending that the Ordinance, which is a product of exercise of legislative power, has entrenched on judicial power which is not permissible. In this connection, mention has been made about some decisions of the Supreme Court, the latest of which is the one rendered in what is generally known as In the matter of : CAUVERY WATER DISPUTES TRIBUNAL, . There is no dispute before us that the Legislature cannot exercise judicial power in a case of the present nature. But then, it is well settled that the Legislature is competent to re-enact a

law after removing the defect which had resulted in the invalidity of the law, and give it retrospective effect. This is not denied by Shri Das, and fairly.

7. Let us, therefore, see as to whether the Ordinance is an exercise of judicial power simpliciter, or is a piece of validating enactment after taking care of the invalidity which had led to the enactment having been declared ultra vires. As already stated, the provisions in question were regarded as ultra vires because of the lack of competence on the part of the State Legislature. The Ordinance is, however, a piece of Central enactment and the President has exercised the power of the Parliament. In view of the decision in the Orissa Cements" case, which we have noted above, it cannot be said that the Parliament had no competence to enact a provision like the one at hand. Whether in doing so, the Parliament exercised its power under Article 248 read with entry 97 in List-I or any other entry of List I/III is not material, so long as the subject-matter be within the legislative competence of the Parliament, on which not doubt can be entertained in view of the decision in the Orissa Cements" case. We are, therefore, prima facie not satisfied about the invalidity of the Ordinance on the ground of lack of competence.

8. As to the submission of Shri Das that the Ordinance violates Article 14 of the Constitution because of acceptance of different rates of cess as prevailing in different States -- which range from 30% to 40% and even more -- is a question on which we do not propose to express any firm opinion now, though it appears to us that because of the existence of different rates of cess in different States, the Ordinance should not be violative of Article 14 of the Constitution inasmuch as one State may be taken to be a unit by itself and, also because, as it is known that in different States rates of levy are fixed keeping in view its own peculiar facts and circum-stances which cannot be uniform throughout the country.

9. As to the submission that the Ordinance violates Article 301 of the Constitution because in certain States cess has not been levied at all (one such State named being Rajasthan), we would remain content at this stage by saying that the point raised cannot be accepted without a full-dress argument on this aspect and without considering the various decisions of the apex Court relating to Article 301, to which Shri Das did not invite our attention, and rightly, because at this stage we could not have decided this issue finally. It may be stated that the Ordinance is one which ex facie cannot be said to be violative of Article 301 of the Constitution.

10. This takes us to the question of the scope of the Ordinance. The specific question to be examined in this context is whether the cess which had become payable by 4th April, 1991 but had not been realised/collected can be so done by the force of the Ordinance.

11. Shri Rath, who has advanced main argument in this regard, has submitted that the objects and reasons behind the promulgation of the Ordinance as well as the enactment of the related Act being to save the States from the "serious

impact on the State revenues" which would be caused if the State Governments are called upon to refund the cess and other taxes collected by them pursuant to the striking down of the various enactments in the aforesaid case; and to "validate collection of such levies by the State Governments up to 4th April, 1991", the scope of the Ordinance has to be confined to the cess which had already been collected by the time the Ordinance was promulgated; the same does not confer any power on any agency to collect cess which had become payable by 4th April, 1991, but which had not been collected.

12. Though the aforesaid is factually correct in the sense that the Statement of Objects and Reasons does state so, the first question is how far this statement can be used to interpret a statutory provision. The normal rule of interpretation is that the language used in the enactment is the guide to find out its meaning and extent. It is, however, permissible to resort to external and internal aids of construction where the language is not clear, as stated in *Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors.* . In paragraph 40 of this decision, it has been stated that the objects and purposes of the person who initiated the Bill are not admissible as aids to construction since it is impossible to contend that such purpose in the minds of some officials of the Government before the matter is discussed by the Cabinet would at all be relevant. It is further noted in this paragraph that the Statement of Objects and Reasons cannot be used to determine the true meaning and effect of the substantive provision of the statute. In para 41, however, it was observed that the Objects and Reasons of the Act could be taken into consideration in interpreting the provisions of the statute in case of doubt, more particularly, to ascertain the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted.

13. So, if we refer to the Statement of Objects and Reasons to find out the mischief sought to be remedied, we do find that the purpose of the enactment was to save the State Governments from serious impact on their revenues which they would have faced if called upon to refund the cess; and so, the Ordinance was promulgated to validate collections made up to the 4th April, 1991. The further question is whether this purpose, which was the motivating force for promulgation of the Ordinance, can cut down the width of the Ordinance if the language of the same would permit a wider meaning to be given to it. No such decision has been brought to our notice.

14. The entire submission of Shri Rath as well as Shri Das is based on what had happened after the Supreme Court had declared the U. P. Sugarcane Cess Act, 1956 as ultra vires in the case of *Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another*, , following which the Sugarcane Cess (Validation) Act, 1961 (Act 38 of 1961) was passed, certain aspects relating to which had come up for consideration before the Supreme Court first in *Jaora Sugar Mills (P) Ltd. Vs. State of Madhya Pradesh and Others*, thereafter in *Bhopal Sugar Industries Ltd. Vs. State of Madhya Pradesh and Others*, , and finally in

Shetkari Sahakari Sakhar Karkhana Ltd. Vs. The Collector of Sangli and Others, . In the last of these cases, the specific question before the Supreme Court was whether the aforesaid Validation Act permitted assessment and recovery of cess after the commencement of the Act. This was held to be permissible because of the provision in Section 3 (1)(c) of that Act which reads as below:--

"any cess imposed or assessed under any State Act before the commencement of this Act but not collected before such commencement may be recovered (after assessment of the cess, where necessary) in the manner provided under this Act."

As such a provision does not find place in the Ordinance, or, for that matter, in the Act, it is strenuously contended that no amount can be collected by force of the Ordinance which, though has become payable, had not been collected earlier.

15. To decide this question, we have to note the provisions of the 1961 Act. That Act contained five sections, the first of which related to Short Title and Commencement, the second to Definition, the fourth and fifth to omission of section "in the concerned Bombay Act and amendment of the concerned U. P. Sugarcane Cess (Validation) Act. Section 3 (1) alone is material which reads as below :--

"3. Validation of imposition and collection of cesses under State Acts.--

(1) Notwithstanding any judgment, decree or order of any court, all cesses imposed, assessed or collected or purporting to have been imposed, assessed or collected under any State Act before the commencement of this Act shall be deemed to have been validly imposed, assessed or collected in accordance with law, as if the provisions of the State Acts and of all notifications, orders and rules issued or made thereunder, in so far as such provisions relate to the imposition, assessment and collection of such cess, had been included in and formed part of this section and this section had been in force at all material times when such cess was imposed, assessed or collected; and accordingly,--

(a) no suit or other proceeding shall be maintained or continued in any court for the refund of any cess paid under any State Act;

(b) no Court shall enforce a decree or order directing the refund of any cess paid under any State Act; and

(c) any cess imposed or assessed under any State Act before the commencement of this Act but not collected before such commencement may be recovered (after assessment of the cess, where necessary) in the manner provided under that Act."

16. The above shows that that Act had no provision parallel to Section 2 (1) of the present Ordinance. According to us, this makes a vital distinction. Section 2(1) of the Ordinance having stated that the laws specified in the schedule (which includes the Orissa Cess Act) shall be deemed always to have been valid

as if the provision contained therein had been incorporated by the Parliament, the result of the same is that all the provisions contained in the Orissa Cess Act must be deemed to have become part of the Central enactment. It needs no mention that such modes of legislation is permissible and is called legislation by incorporation. The deeming provision contained in Section 2(1) has to be given some meaning, as it is well settled proposition of interpretation that the Parliament does not legislate unnecessarily, nor does it make pointless legislation, as stated in paragraph 9 of *Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others*, .

17. The present is not a fit occasion to deal with in detail about the extent of legal fiction created by a deeming provision. It would be sufficient to refer to the oft quoted passage of Lord Asquith in *East End Dwelling Co. Ltd. v. Finsbury Borough Council* (1951) 2 All ER 587 , which has been referred with approval in umpteen number of cases by the Supreme Court :--

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs."

Of course, a legal fiction cannot be extended beyond its legislative filed as it is adopted in law for a limited and definite purpose only. (See paragraphs 10 to 12 of *Ram Lal Vs. State of Uttar Pradesh*, .

18. Now, the Ordinance having stated that the provisions of the Orissa Cess Act, which contains its own machinery of assessment (and collection) of cess, shall be deemed always to have been valid, we have to give some meaning to this provision, and that too, to its inevitable corollaries. So, according to us, Section 2(1) of the Ordinance wanted to make "fully alive and operative" all the relevant provisions of the Orissa Cess Act. (This is the expression used in paragraph 5 at page 1975 of *Shetkari Sahakari Sakhar Karkhana Ltd. Vs. The Collector of Sangli and Others*, , referred earlier, regarding the effect of validation). The Orissa Act having contained machinery of assessment (and collection), we are inclined to think that power of collection was not specifically required to or conferred by the Ordinance at hand, as had been done in the 1961 Validation Act by the Parliament, which did not contain, as already noted, a provision parallel to Section 2(1) of the Ordinance. Any other view would render Section 2(1) of the Ordinance lame.

19. The above apart, in so far as the State of Orissa is concerned, there is a special feature which is required to be noted in this connection. The same is that as stated in paragraph 68 (ii) of *Orissa Cements*" case (supra), there has presumably been no collection of cess in this State since the quarter ending

December, 1989. If that be so, and if collection cannot be made on the strength of the Ordinance, the provisions in Section 2(1) of the Ordinance keeping the provisions of the Orissa Cess Act alive upto 4-4-1991 would not be much meaningful.

20. We are, therefore, of the tentative view that the Ordinance, as it is, and for that matter the Act, as it is, does not prohibit collection of cess which had become payable by 4th April, 1991.

21. In view of the above, the stay orders passed earlier are vacated. But then, we have to deal with another submission of Shri Das. The same is that if the petitioners were to pay cess now and ultimately the Ordinance/Act were held to be invalid or, for that matter, not permitting collection of the cess which had become payable but not collected earlier, refund of the same cannot be assured by the Court because of what had happened in the present cases itself wherein despite undertaking having been given by the State or the Coalfields Limited that they would refund the amount collected with interest if the levy would be found to be invalid, refund was refused by the apex court. To take care of this submission, we state that the Coalfields in question would receive the amount in question from the petitioners on condition that if it would be ultimately found that the realisation was not valid, it would refund the same with interest at the rate of 12% per annum from the date of realisation till the date of refund. As this condition is imposed by the Court, and as the Coalfields would be receiving the amount on this condition, we do not visualise any difficulty in the way of refund of the amount in question if the petitioners were ultimately to win. Another condition we should like to impose on the Coalfields is that the amount received by them from the petitioners shall be deposited with the State Government as payment of cess due to the Government.

22. As to the submission of Shri Das that the petitioner may be allowed to offer bank guarantee of the required amount to take care of the aforesaid apprehension, learned Advocate-General states, and rightly, that Governments cannot be run on mere bank guarantees as observed by Chinappa Reddy, J. in paragraph 7 of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, .

23. The Misc. Cases are disposed of accordingly.

K.C. Jagadeb Roy, J.

24. I agree.