(1986) 09 AHC CK 0051

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 650 of 1986

Pandit Restaurant APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 05-09-1986

Acts Referred:

Constitution of India, 1950 — Article 19, 226, 304, 366
Constitution of India, 1950 — Article 19, 226, 304, 366
Constitution of India, 1950 — Article 19, 226, 304, 366

Citation : (1987) 65 STC 443

Hon'ble Judges : R.P. Singh, J;K.C. Agarwal, J

Bench : Division Bench

Advocate : Vinod Misra, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

K.C. Agarwal, J.—This writ petition under Article 226 of the Constitution has been filed by M/s. Pandit Restaurant, 49/7, Generalganj, Kanpur which is a registered assessee with the Sales Tax Officer, Kanpur and is engaged in the business of a hotel who used to serve food to the customers staying in the hotel on being demanded by them from the petitioner-hotel. The customers are required to eat the food so supplied at the hotel premises itself. The petitioner has been paying sales tax. The Sales Tax Officer by assessment order dated October 3, 1983, assessed the petitioner for Rs. 20,800 and taxed it with Rs. 832 for the period from February 3, 1983 to March 31,1983, on the basis of the Forty-sixth Amendment of the Constitution. By this Constitution amendment Article 366 was amended and a new definition of the word "sale" was inserted. The definition as inserted by the Forty-sixth Amendment of the Constitution reads as follows:

(29-A) ''tax on the sale or purchase of goods'' includes-

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(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.

2. Section 6 of the aforesaid Constitution amendment is a validation and exemption clause. Sub-section (1) of Section 6 provides inter alia that notwithstanding any judgment, decree or order of any court, tribunal or authority, no law which was passed or made before such commencement and which imposed or authorised the imposition of the aforesaid tax shall be deemed to be invalid or ever to have been invalid on the ground merely that the legislature or other authority passing or making such law did not have competence to do so.

3. At this juncture it is necessary to briefly point out that the Honourable Supreme Court in the case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [1978] 42 STC 386 held that there is no sale when food and drink are supplied to guests residing in the hotel while for this proposition the Supreme Court had relied on its earlier decision reported in State of Himachal Pradesh v. Associated Hotels of India Ltd. [1972] 29 STC 474. The decision rendered by the Supreme Court was that even on meals served to casual visitors in restaurant was not taxable as a sale under the Bengal Finance (Sales Tax) Act, 1941 (as applied to the Union Territory of Delhi). This was held to be so whether a charge was imposed for the meal as a whole or according to dishes separately ordered.

4. As a result of the aforesaid decision of the Supreme Court the Constitution (Forty-sixth Amendment) Act, 1982 was enacted. The Statement of Objects and Reasons attached to the Amendment Act as stated broadly that the expression "sale of goods" should have been interpreted broadly but it had been interpreted narrowly and the words "sale of goods" in the Seventh Schedule have been construed as having the same meaning as in the Sale of Goods Act, 1930.

5. In the Statement of Objects and Reasons various decisions of the Supreme Court were mentioned.

6. In paragraphs 8 and 13 of the Statement of Objects and Reasons the cases of Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, and The State of Punjab Vs. Associated Hotels of India Ltd., have been referred.

7. In paragraph 13 of the Statement of Objects and Reasons, it is stated as follows:

The proposed amendments would help in the augmentation of the State revenues to a considerable extent. Clause 6 of the Bill seeks to validate laws levying tax on the supply of food or drink for consideration and also the collection or recoveries made by way of tax under any such law. However, no sales tax will be payable on food or drink supplied by a hotelier to a person lodged in the hotel during the period from the date of the judgment in the The State of Punjab Vs. Associated Hotels of India Ltd., and the commencement of the present Amendment Act if the conditions mentioned in Sub-clause (2) of Clause 6 of the Bill are satisfied. In the case of food or drink supplied by restaurants this relief will be available only in respect of the period after the date of judgment in the Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, and the commencement of the present Amendment Act.

8. About the effect of the amendment made by "Forty-sixth Amendment 1982" a case came up for decision in this Court before Honourable B.N. Sapru, J., in Northern India Hotels Ltd. v. Commissioner of Sales Tax reported in [1984] 65 STC 68. Honourable B.N. Sapru, J., decided a number of revisions filed u/s 11 of the U.P. Sales Tax Act by the aforesaid judgment. What is material about this decision is that they were in respect of the assessment years 1975-76, 1976-77 and 1977-78. Since it is not necessary for us to recite the fact of that decision excepting to point out the years in respect of which the controversy had arisen in Northern India Hotels Ltd. [1984] 65 STC 68 (All) we do not wish to narrate the same in this judgment. Honourable Sapru, J., held :

(i) Scope of the State''s legislative competence under entry 54 of List II of the Seventh Schedule has been widened by the addition of Clause (29-A) in Article 366 of the Constitution and as from that date the State Legislatures are competent to enact taxes on sale or purchase of goods by hotel and restaurant owners to their customers.

(ii) Since the U.P. Sales Tax Act, 1948 could not be said to have been made in pursuance of the expression ''taxes on the sale or purchase of goods'' as was the entry 64 of List II, hence Sub-section (1) of Section 6 of the Amendment Act has no application to the U.P. Sales Tax Act, 1948.

(iii) The definition of the word ''sale'' in Section 2 of the U.P. Sales Tax Act, 1948, having not been altered by the Amendment Act; the original definition stands. Under the original definition sales tax cannot be imposed on sales by a hotelier and in a restaurant where the dominant object of the hotelier or the restaurant owner when he effected the supply, was service.

9. The net result of the decision of the Honourable B.N. Sapru, J., was that Sub-section (1) of Section 6 of the Forty-sixth Amendment of the Constitution was held not to applicable to the U.P. Sales Tax Act.

10. After the decision in Northern India Hotels Ltd. Vs. Commissioner of Sales Tax, the U.P. State Legislature passed the U.P. Sales Tax (Amendment and Validation) Act, 1985 (U.P. Act 25 of 1985). The Statement of Objects and Reasons of this amending Act is:

(1) By the Constitution (Forty-sixth Amendment) Act, 1982, a new Clause (29-A) was inserted in Article 366 defining the term ''tax on the sale or purchase of goods'' to include within its ambit, inter alia, the tax on the transfer of property in goods involved in the execution of a works contract, the transfer of the right to use any goods for any purpose, the delivery of goods on hire-purchase or any system of payment by installments, the supply of any food or drink, etc., by way of, or as part of, service or in any other manner. The State Government has since decided to levy tax on transactions of the above nature. It has, therefore, become necessary to amend the definition of the word ''sale'' with retrospective effect from February 2, 1983, the date of commencement of the Constitution (Forty-sixth Amendment) Act, 1982 and to insert the definition of the term ''works contract'' in the Uttar Pradesh Sales Tax Act, 1948.

11. By this Act the definition of the word "sale" was also altered. The relevant portion of the definition laying down that the same would be deemed to have been substituted on February 2> 1983 is as under :

(2) for Clause (h) including the explanation, the following clause shall be substituted and shall be deemed to have been substituted on February 2, 1983, namely:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) ...

(vi) 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.

13. Section 17 of the U.P. Act 25 of 1985 is a provision dealing with validation. It confers power of reopening or for a review of the assessment or order by Sub-section (2) of Section 17. In this case we are not concerned with the validation, hence we do not think it necessary to refer it any more. Before shifting to the points argued before us we wish to note that the correctness of the decision in Northern India Hotels Ltd. Vs. Commissioner of Sales Tax, came up for consideration before Honourable N.D. Ojha, J. (as he then was), in Sales Tax Revision No. 171 of 1983. After having expressed his doubt on the correctness of the view stated above the learned Judge referred that case for the papers being

placed before Honourable the Acting Chief Justice for constituting a Division Bench.

14. Before us the simple controversy is whether the legislature could enact the U.P. Act 25 of 1985 which was published in the U.P. Gazette dated 13th September, 1985, with retrospective effect to be applicable with effect from 2nd February, 1983. It is the date of commencement of the Constitution (Forty-sixth Amendment) Act, 1982. It is said that the power to legislate carries with it the power to legislate retrospectively as much as prospectively. This power of legislation with retrospective effect has been upheld with regard to tax laws as well. In Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, it was held by the Honourable Supreme Court that Article 304(b) of the Constitution does not require that laws passing under it must always be prospective nor was it correct to say that once the State Legislature passes an Act without recourse to that article and that Act is struck down, the legislature cannot re-enact that Act under that article and give it retrospective effect.

15. In Misrilal Jain and Another Vs. State of Orissa and Another, it was held that power of legislature carries with it the power to legislate retrospectively.

16. In Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, similar view was pressed. This decision meets with another argument made by the learned counsel for the petitioner before us that since an essential characteristic of sales tax is that the seller must have the right to be passed it on to the consumer if the court upholds the power of legislation retrospectively. That would deprive the seller from recovering the same from the customers and in that event it would cease to be a sales tax. The Honourable Supreme Court repelled the argument by holding that merely because the dealer is prevented from collecting the surcharge recovered from him does not affect the competence of the State Legislature. The relevant portion of this controversy is :

Whether a law should be enacted, imposing a sales tax when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not affect the competence of the legislature : see Tata Iron and Steel Co. Ltd. v. State of Bihar [1958] SCR 1355 J.K. Jute Mills Co. Ltd. v. State of Uttar Pradesh [1962] 2 SCR 1 and S. Kodar Vs. State of Kerala, . The contention based on Article 19(1)(g) cannot therefore be sustained.

17. In Empire Industries Limited and Others Vs. Union of India and Others, it was observed by the Honourable Supreme Court that tax may be imposed retrospectively.

18. Sri Vinod Misra, learned counsel appearing for the petitioner, had strongly relied upon the decision of this Court in Northern India Hotels Limited [1984] 55 STC 68 Northern India Caterers [1978] 42 STC 386 (SC) Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, and Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, All the cases excepting Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, have been dealt with by us above, as those cases,

according to us, have no application to the present case. It is the validity and applicability of the U.P. Act 25 of 1985 which is to be considered in this writ petition. As to what was the law before has a historical value but if nothing illegal or invalid is found in the U.P. Act 25 of 1985, the said Act cannot be held to be invalid. By changing the definition of the word "sale" the legislature has brought 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 where such supply or service is for cash, deferred payment or other valuable consideration within the compass of the definition of the word "sale". Whatever was the defect found by the Honourable Supreme Court in the cases before the Forty-sixth Amendment, that has been cured.

19. In Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, the Honourable Supreme Court held that on account of the restriction imposed by the statute there was no sale and as such no tax was leviable. We are not concerned with the controversy involved in that case in the present petition.

20. In the result the writ petition is dismissed under Chapter XXII, Rule 2 of the Rules of Court.

