

**(1957) 07 BOM CK 0019**

**In the Bombay High Court**

**Case No :** Special Civil Applications No's. 203, 204, 303, 345, 738 and 739 of 1956

Pokhardas Meghraj

APPELLANT

Vs

The State of Bombay and Another

RESPONDENT

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**Date of Decision :** 15-07-1957

**Acts Referred:**

Bombay Sales Tax Act, 1953 — Section 2(6), 49

**Citation :** (1957) 59 BOMLR 1104 : (1957) 8 STC 758

**Hon'ble Judges :** Tendolkar, J;J.M. Shelat, J

**Bench :** Division Bench

**Advocate :** D.H. Buch, K.H. Buch, M.K. Shah, H.K. Shah, S.P. Mehta and A.A. Rizvi, for the Appellant; Advocate-General and instructed by . Little and Co., Attorneys, for the Respondent

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## Judgement

Tendolkar, J.—These are a group of rules in which a common question of law relating to sales tax arises for determination. The petitioners are dealers within the meaning of the sales tax law and they have all been assessed to general tax for the period 1st November, 1952, to 31st March, 1953, and 1st April, 1953, to 31st March 1954. The assessment for the first of these two periods is governed by the Sales Tax Ordinance No. 3 of 1952 and the Bombay Sales Tax Rules, 1952, made thereunder. The assessment for the second period is governed by the Bombay Sales Tax Act, 1953. The provisions of the Ordinance, in so far as they are relevant for the purpose of disposing of these petitions, have been reproduced verbatim in the 1953 Act; and the Bombay Sales Tax Rules, 1952, were continued in force by section 49 of the Act of 1953. Therefore, it is unnecessary to refer separately to the provisions of the Ordinance and the Rules made thereunder and the provisions of the Act of 1953 and the Rules which were applicable to cases falling under that Act. Taking the relevant provisions of the Act of 1953, we have first a definition of "dealer" given in section 2(6) which before the Act was amended by subsequent legislation read "dealer" means any person who carried on business of selling goods in the State of Bombay". Then

there is in sub-clause (2) a definition of "turnover of sales" and turnover of sales means "the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period." Section 5 of the Act subjects turnover to a general tax. Then action 7 provides how the taxable turnover shall be determined and it is in these terms :

"The taxable turnover for the purpose of sub-section (1) of section 6 shall be determined in the following manner, namely :- (i) From the turnover of the dealer in respect of all sales to goods during any period of his liability to pay the general tax, there shall first be deducted his turnover in respect of -

- (a) sales of any goods declared from time to time as tax-free u/s 8, and
- (b) such other sales as may be prescribed."

2. Therefore, u/s 7(i)(b) there is power conferred on the State of Bombay to prescribe by rates for a deduction from the turnover for the purpose of calculating the taxable turnover. Under this section the relevant rule with which we are concerned is rule 5 and the relevant parts of it with these petitions are concerned are as follows :-

"Deduction of certain sales is calculating taxable turnover u/s 7. - (1) In calculating the taxable turnover of a dealer u/s 7 of the turnover of the following sales may be deducted under clause (i)(b) of that section :- "(vii) Sales to a registered dealer recognised for this purpose by the Collector of any goods falling under any entry specified in column 1 of Schedule B hereto, where it is certified by the purchasing dealer that the goods purchased are intended for use by him in the manufacture of any goods falling under the corresponding entry in column 2 of the said Schedule, for sale :

Provided that -

(a) Where any goods to which this clause applies are utilised by the purchasing dealers for purposes other than such manufacture, or

(b) Where no general tax is actually payable by the purchasing dealer on any sale made by him of articles in the manufacture of which such goods have been used (except where such sale is itself eligible for deduction under the provisions of this clause), the price of the goods so purchased shall be included in the taxable turnover of the purchasing dealer u/s 7."

"(xi)(I) Sales to a registered dealer in cases where the following conditions are fulfilled :-

(B)(b) where the goods are consigned to place in India outside the State of Bombay, the purchasing dealer obtains and produces before the Collector or the assessing authority, if so required, a certificate from the consignee in Form A3."

"(II) If the purchasing dealer fails to produce a certificate in Form A3 in accordance with paragraph (B)(b) of sub-clause (1), the purchase price of the

goods payable by him shall be included in the taxable turnover of the purchasing dealer u/s 7."

3. It will, therefore, be seen that by reason of the proviso to rule 5(1)(vii) as well as rule 5 (xi) (II) the purchase price shall be included in the taxable turnover of the purchasing dealer under certain circumstances.

4. Having in mind these provisions of the law, we will not turn to the short facts necessary for the purpose of disposal of these petitions. The petitioners purchased cloth for processing and then selling it. They sold some of the goods and despatched them outside the State of Bombay. These sales did not attract general tax and in the case of such sales the purchase price of the goods sold by the petitioners was added to their taxable turnover by virtue of the proviso to rule 5(1)(vii). In some cases the purchase price was added to the taxable turnover for failure to produce a certificate in Form A3 in accordance with paragraph (B)(b) of sub-clause (I) under rule 5(xi)(II). These petitions challenge the provisions in these rules that purchase price shall be included in the taxable turnover of the purchasing dealer as being ultra vires the rule-making power.

5. A provision which is in pari materia with the provisions that have now been challenged was challenged before a Division Bench of this Court in Special Civil Application No. 1077 of 1955 (unreported judgment delivered on the 13th September, 1955). I was a party to that decision. We were there dealing not with general sales tax but with decision. We were there dealing not with general sales tax but with special sales tax; and the provision that was challenged was the proviso to rule 5(1)(i)(b) which was in these terms :-

"Deduction of certain sales in calculating taxable turnover u/s 11. - (1) In calculating the taxable turnover of a dealer u/s 11 the turnover in respect of the following sales may be deducted under clause (i)(b) of that section :- (i) Sales to a licensed dealer where -

(b) the selling dealer produces a certificate from such purchasing dealer in Form A2 :

Provided that -

(a) where the goods are not despatched or caused to be despatched by the purchasing dealer to a place outside the territory of India, or as the case may be, to a place in India outside the State of Bombay within a period of three months from the date of his purchase, or

(b) where the provisions of sub-rule (2) are not satisfied, or the purchasing dealer fails to produce a certificate in the form specified in clause (iv) of the said sub-rule (2) -

the purchase price of the goods payable by the purchasing dealer shall be included in the taxable turnover of that dealer u/s 11".

6. We held that the proviso to this rule was ultra vires and therefore invalid. It is

conceded by the Advocate-General that as the provisions which have been challenged in these petitions, although they relate to general sales tax and not to special sales tax, are *pari materia* they would also be *ultra vires* if the judgment still holds good; but subsequent to the date of the judgment still the Legislature enacted Act (XXXIX of 1956, by section 15 of which they inserted section 51 in the Sales Tax Act of 1953. That section is as follows :-

"For the avoidance of doubt it is hereby declared that notwithstanding anything contained in section 49 and 50, and notwithstanding any judgment, decree or order of a court or decision or order of the Tribunal any rule made or deemed to have been made under the Bombay Sales Tax (No. 2) Ordinance, 1952, or this Act shall not be deemed to be and shall be deemed never to have been invalid or inconsistent with the provisions of this Act, merely on the ground that any such rule provides that in respect of sales of any goods made to a dealer, the purchase price of such goods shall be deemed to be the sale price and shall be included in the turnover of sales of such dealer, if he commits a breach of any of the conditions prescribed by such rule and thereby the incidence of the tax payable by a selling dealer is shifted to the purchasing dealer; and any assessment of the tax made on such turnover, the levy and collection of the tax on such turnover, and the proceedings held and orders made for making such assessment, levy and collection, shall not be and shall be deemed never to have been illegal;"

7. Whilst on the one hand the Advocate-General contends that this section validates the provisions of the rule which we had held to be *ultra vires*, on the other the petitioner's Advocates contend that the Legislature has failed in its object of validating the rule. It is common ground that the object of inserting section 51 in the Act of 1953 was to validate the rules and the marginal note to the section itself is "validation of certain rules made under Bombay Ordinance No. III of 1952 and Bombay III of 1953." But the question is, has the Legislature succeeded in its object ? This question may fairly be considered in the light of rule 6(1)(i)(b) which we had held to be *ultra vires* as it is agreed that the result will apply to the rules that are challenged before us in these petitions.

8. Now, the operative part of section 51 is that any rule falling within the ambit of that section "shall not be deemed to be and shall be deemed never to have been invalid or inconsistent with the provisions of this Act." In other words, every such rule is retrospectively validated and deemed to be consistent with the provisions of this Act; but this result is brought about by the section only if the rule was invalid or inconsistent with the provisions of this Act "merely on the ground" stated in the section. Therefore, invalidity on this ground only is saved and if the rule was invalid on any other ground that invalidity still survives. The ground stated in the rule is "that any such rule provides that in respect of sales of any goods made to a dealer, the purchase price of such goods shall be deemed to be the sale price and shall be included in the turnover of sales of such dealer, if he commits a breach of any of the conditions prescribed by such rule and thereby the incidence of the tax payable by a selling is shifted to the purchasing

dealer." It is clear that the ground stated in this section is a composite one and it has three ingredient : (1) the rule provides that in respect of sales of any goods made to a dealer the purchase price of such goods shall be deemed to be the sale price; (2) the rule provides that the purchase price shall be included in the turnover of sales of the dealer if the commits a breach of any of the conditions prescribed by such rule; and (3) thereby the incidence of tax is shifted from the seller to the purchaser. Now, it is the case of the petitioners before us that ingredient (1) in this composite ground is not satisfied although ingredients (2) and (3) may be satisfied. Now, quite obviously, ingredients (2) and (3) are satisfied in respect of the rule because the rule does provide that the purchase price shall be included in the turnover of sales if the dealer commits a breach of one of the conditions and undoubtedly thereby the incidence a tax is shifted. The question, therefore, that arises for determination is whether ingredient (1) is satisfied. Before determining the question, since this ingredient deals with a ground of invalidity of the rule, it is essential to look carefully at the judgment of the Division Bench which held the rule to be ultra vires and the grounds of that decision. To quote the very words of the learned Chief Justice the grounds are to be found in the following passages from the judgment :

(1) "Rule 6 really in substance alters the incidence of the taxation in question. The scheme of the Sales Tax Act is that the incidence of tax must fall upon a seller and not upon the purchaser ....."

(2) "Really the effect of rule 6 is to impose a penalty upon the petitioner for giving a false certificate and permitting his vendor to escape paying the sales tax" and

(3) "When one really analyses the matter, it really comes to this that rule 6 has extended the definition of a turnover given in the statute itself; whereas in the Act a turnover could only be the aggregate of prices of sales effected by the dealer, rule 6 extends that definition and includes in that turnover a purchase price under certain circumstances."

9. These appear to us to be the main grounds of the decision of the Division Bench. The reference to a purchase price being deemed to be a sale price appears in the following passage in that judgment :-

"As the Act stands, and as the definition of "turnover" stands, it is impossible to contend that a turnover can possibly include a purchase price, because the attempt of rule 6, as we have already pointed out, is to include in the turnover of the petitioner not the sale price of any article but the purchase price of these goods in question. But is it competent to the Legislature to treat something as being part of a turnover which in fact it is not ? It may be proper that in a case like this the purchase price paid by the petitioner shall be deemed to be a sale price for the purpose of being included in the turnover. But the Legislature has not so provided."

10. It is clear, therefore, that the Division Bench did not hold that rule 6 provided

that in respect of sales of any goods that purchase price shall be deemed to be the sale price and shall therefore be included in the turnover of sales of such dealer. The Division Bench only pointed out that what the rule purported to achieve could have been brought about by the Legislature providing that in certain cases the purchase price paid by a dealer shall be deemed to be the sale price for the purpose of being included in the turnover. Looking at these grounds of decision of the Division Bench, therefore, it appears to us to be clear that it was not even one of the grounds of that decision that the rule provided that the purchase price shall be deemed to be the sale price and indeed the judgment did not hold that the rule so provided.

11. Coming back, therefore, to section 51, which undoubtedly, attempts to validate the rule, ingredient (1) of the composite ground appears to be entirely absent as no rule can be pointed out which provides that the purchase price shall be deemed to be the sale price and therefore since the validation that is sought to be brought about is conditional upon the existence of the ground stated in the section and one important element of that composite ground is entirely absent, the section has, in our opinion, not succeeded in validating the rule.

12. The Advocate-General has strenuously contended that although there is no rule which so provides in terms, the rule attempts in effect to provide that a purchase price shall be a sale price; and he urges that since the intention of the Legislature to validate the rule is clearly manifest, that intention should not be allowed to fail because of defective or unskilful draftsmanship. In this connection the Advocate-General drew our attention to a decision of the Privy Council reported in *Salmon v. Duncombe* (1886) 11 Ac. 627. There Lordships of the Privy Council were there dealing with Natal Ordinance No. 1 of 1856. The object of the Ordinance was to give to any subject of the Queen resident in Natal the power of disposing by will according to English law of property both real and personal, which otherwise would devolve according to Natal law. Section 1 which brought about this result concluded with the words "as if such subject resided in England" the effect of which was to leave both the *lex situs* and the *lex domicilii* in operation, thus reducing the section to a nullity. Their Lordships held that the words quoted above should be treated as immaterial or non-existence as otherwise they would destroy the entire effect of the section and defeat the object of the Legislature. In this context Lord Hobhouse in his judgment observes :-

"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskillfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used."

13. The Advocate-General contends, relying on these observations, that since in the case of section 51 of the Sales Tax Act of 1953 the object of the Legislature is clear, we should so interpret the language used as to fit it to the rules that

exist and should not bring about the result that no rule is fact validated by what purported to be validating section. Now, there is not doubt as to the general principle of construction that a Court must endeavour to give effect to the intention of the Legislature where such intention is manifest by the language used in the statute; but for that purpose the language must be fairly susceptible of being so interpreted as to give effect to that intention. The case with which Lord Hobhouse was dealing was a case of somewhat exceptional character where the very object of the entire Ordinance would have been negated as to the substantial part thereof namely, relating to immovable property, if the words at the end of the section had been given effect to. We are not here dealing with a similar case where the invalidity of the rule would affect the entire Sales Tax Act or even a substantial portion thereof; but, quite apart from it, it appears to us that although the observations of Lord Hobhouse are undoubtedly entitled to the highest respect, the principles of construction in a fiscal statute such as the one with which we are concerned are somewhat different. This proposition the Advocate-General contests and he says that a fiscal statute stands on the same footing as any other statute for the purpose of construction and in that regard he relies on the observations of Viscount Simon, Lord Chancellor, in *Commissioners for General Purposes of Income tax for City of London v. Gibbs and Others* [1942] A.C. 402 : 10 ITR Supp 121. In that case the House of Lord was dealing with the construction of rule 9, sub-rules (1) and (2), of the rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918, which provides that if a person charged under Schedule D ceases within the year of assessment of carry on the trade in respect of which the assessment is made and is succeeded by another person, the Commissioners shall adjust the assessment as directed. It appears that during the assessment year a partnership of four carrying on a business took in a fifth partner, and thereafter continued to carry on business and the question was whether the partnership of four ceased to carry on business and was succeeded by the partnership of five within the meaning of that rule. There was divergence of opinion between the Law Lords as to whether under English law of partnership the old partnership can be regarded as ceasing to carry on the business and the new partnership as succeeding to it. Viscount Simon emphatically took the view that the old partnership cannot be regarded as ceasing to carry on the business and the new partnership cannot be regarded as succeeding to it. Having taken this view, the rule, if interpreted from this standpoint, would not have enabled the Commissioners to adjust the assessment and the case would not have fallen within it; but Viscount Simon proceeded to hold that the rule must be so interpreted as to bring this case within its scope and in this connection he observes at page 414;

"It is these considerations which have made it necessary for me to look further into the statutory history and possible application, of rule 9, not because I have any doubt of the correctness of the proposition of English law as to the nature of a partnership firm, but because our duty in construing a statute such as this is to find out what the Legislature must be taken to have really meant by the

expressions which it has used, without necessarily attributing to the Legislature a precise appreciation of the technical appropriateness of its language."

14. The Advocate-General is undoubtedly right that Viscount Simon was dealing with a fiscal statute, and the passage just quoted above undoubtedly states that the Courts must have regard to what the Legislature intended "without necessarily attributing to the Legislature a precise appreciation of the technical appropriateness of its language." Therefore, all that was in controversy was the technical appropriateness of the language. The language itself was of doubtful import; its technical meaning under the English law was itself a subject on which the Law Lords took different opinion; the language was capable of a popular meaning; and what Viscount Simon, L.C., really did was nothing more or less than to prefer the popular meaning to the strictly technical meaning as the intention of the Legislature was clear. We do not think that Viscount Simon intended to lay down a proposition such as the one which the Advocate-General canvassed before us that even in a fiscal statute when the intention of the Legislature is clear the court is entitled to ignore the language to give effect to such an intention. Indeed, the principle of construction of a fiscal statute has been well settled; and Viscount Simon himself, in *Canadian Eagle Oil Co. Ltd. v. The King* [1942] A.C. 119, quoted with approval the words of Rowlatt, J., in *Cape Brandy Syndicate v. Inland Commissioners* [1921] 1 K.B. 64 in these terms :-

"In the words of the late Rowlatt, J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase : "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.""

15. We have no doubt that Viscount Simon could not have intended to lay down any proposition contrary to the passage from the judgment of Rowlatt, J., which he cited with complete approval four years after the case of *Commissioners for General Purposes of Income Tax v. Gibbs & Others* [1942] A.C. 402 : 10 supp ITR 121, was decided by him. We may also draw attention to an oft quoted passage from the judgment of Lord Cairns in *Partington v. Attorney-General* (1869) 4 L.R. 100 , where Lord Cairns observes :-

"I am not at all sure that, in a case of this kind - a fiscal case - form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

16. It appears to us, therefore, that in any event in the case of interpretation of fiscal statutes the principle laid down by Lord Hobhouse in the case which we

have referred to is not strictly applicable.

17. But then the Advocate-General urges that we are not dealing with the construction of a fiscal statute when interpreting section 51 of the Act of 1953. He says that this is not a section that imposes tax on anyone, it is merely a validating section, and the canons of construction of fiscal statutes apply to statutes which impose a tax. With respect to the learned Advocate-General, we find it difficult to hold that section 51 is not a section which purports to impose a tax. One has merely to ask himself the question, would a tax have been imposed under the rules which had been declared void by this Court but for this section. The answer must obviously be "No". The section, therefore, in terms sought to impose a tax on those who would otherwise not have been taxable if the section was not enacted. The section is, therefore, in our opinion, clearly a section which attracts the canons of construction of fiscal statute which imposes a tax; and it is not open to us so to strain the language of that section as to bring within its scope a rule which although it does not provide that a purchase price shall be deemed to be a sale price may conceivably be capable of being interpreted as a rule which attempts in effect so to provide. In our opinion, therefore, this is a clear case where the Legislature has misfired and it has failed in its object of validating the rule.

18. But this is not all. Assuming for a moment that the rule had been rendered valid if it was invalid on the ground stated in the section, as we have stated earlier, this does not affect the invalidity of the rule on any other grounds. One of such grounds is the ground that the Division Bench gave in the judgment which I have already referred to, namely, that in effect it imposes a penalty. There is yet another ground which has been urged by the petitioners in these petitions, and that ground is that the rule-making power is derived from section 7 of the Act of 1953 which empowers the State Government to prescribe rules for deductions to be made from the turnover in order to arrive at the taxable turnover and not for additions to be made to the turnover and the rules challenged in terms provide for additions and not deductions. There appears to us to be no answer to this contention. It is true that this contention was not advanced before the Division Bench which held rule 6 void; but the contention, it upheld, gives an additional ground of invalidity of the rule which in any event is not cured by the section even if it validates the rule on the ground stated therein. The Advocate-General has not attempted to argue that the rule is within the rule-making power conferred by section 7; but he has attempted to argue that if the rule has been validated by section 51 the result is also that the rule shall not be deemed to be and shall be deemed never to have been inconsistent with the provisions of this Act and therefore he says that the rule shall not be deemed to be inconsistent with the provisions of section 7. Now, this argument, with respect, ignores the word "merely" in the validating section. The validation is restricted to the invalidity that arose by reason of the ground specified in the section only. If there is any other ground of invalidity, that, in our opinion, is not cured by the section. Therefore, in any event, even if section 51 had succeeded in validating the rule if

it was invalid on the ground mentioned in that section, the rule is still invalid on other grounds and no tax can be levied on the petitioners under the rules under which the tax is purported to be levied.

19. There are some subsidiary arguments to which a reference may be made. It was urged in regard to the period covered by the Ordinance that the rules made under the Ordinance had in any event not been validated by section 51. This argument has, in our opinion, no substance in it because section 49(2) of the Act of 1953 in terms provides that rules made under the Ordinance "shall continue in force and be deemed to have been made or issued under the provisions of this Act." Therefore, obviously, section 51 comprises within its scope the rules made under the Ordinance of 1952 although the ordinance was repealed. Then another argument was advanced that rule 5 itself was deleted on the 1st December, 1953, and it cannot be validated after its deletion. That argument appears to us to be a fallacious one. The attempted validation of the rule is for the period during which it was operative and not for a period subsequent to the deletion of the rule.

20. Although strictly it is not necessary to consider whether the tax-ability of some of the petitioners could have been questioned if the rule had been validated, since the question was raised and debated before us, we wish to record our finding on that part of the case as well. The contention shortly stated is this :

Section 51 requires as a condition that the dealer should commit a breach of any of the conditions prescribed before the purchase price can be included in its sale price, and what is urged is that where the dealers sold these goods without processing them, they undoubtedly committed a breach of the condition under which the sale which resulted in their purchasing the goods did not attract tax; but where they processed the goods and sold them outside the State they did not commit a breach of any condition, and to the extent to which any of these petitioners have been taxed in respect of sales of goods which were processed by them but sold outside the State of Bombay, even if the rules were valid, they have not committed a breach of any condition and therefore the purchase price cannot be included in their turnover as a sale price. Now, turning once again to rule 5(1)(vii) the deduction that is granted is on the ground that the goods are intended "for sale". "Sale" is defined in the Act of 1953 as meaning a sale of goods made within the State of Bombay. and it appears to us that the word "sale" is used in this rule in that context and with that meaning because were it not so, proviso (b) would be meaningless. That proviso deals with cases where no general tax is actually payable; and the cases where no general tax is actually payable are, we are told at the Bar, only the sales to people outside the State of Bombay and no others. Therefore, "sale" in this rule means a sale in Bombay; and if there is no sale in Bombay there is a breach of the condition on which the goods attracted the deduction under rule 5(1)(vii), and if section 51 had succeeded in validating the rule, in our opinion, all the petitioners whether they

had failed in fulfilling the condition that they would process the goods or whether they have failed in fulfilling the condition that the goods would be sold in Bombay State would equally have attracted tax.

21. The result, therefore, is that all these petitions must succeed and the orders made by the Sales Tax Officer in respect of both the periods, since they have been made under rules which are ultra vires, shall be set aside and the rules will be absolute with costs.

22. Petitions allowed.