(1996) 05 MP CK 0043

In the Madhya Pradesh High Court

Case No : Writ Petition No. 4007 of 1995

Prakash Industries Ltd. and Another — APPELLANT

Vs

State of Madhya Pradesh and Others — RESPONDENT

Date of Decision : 13-05-1996

Acts Referred:

Constitution of India, 1950 — Article 366, 366(29A)
Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 — Section 2, 9A

Citation : (1997) 1 JLJ 2 : (1997) 1 MPLJ 157

Hon'ble Judges : A.K. Mathur, C.J;Shambhu Singh, J

Bench : Division Bench

Advocate : H.S. Shrivastava, for the Appellant; R.S. Jha, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Mathur, C.J.

The petitioners by these writ petitions have sought declaration that Constitution (46th Amendment Act) 1982 to the extent it inserts clause (d) in Article 366 deeming leasing without involving transfer of property in goods as sale is void, invalid and ultra vires being in conflict with and opposed to Entry 54, List II of Schedule VII. The petitioners have also prayed that sub-clause (vi) of clause (t) of section 2 and section 9-A of M. P. Vanijyik Kar Adhiniyam, 1994 may be declared ultra vires the powers of the State Legislature being beyond the scope of Entry 54 of List II of VIIth Schedule.

Both the writ petitions involve similar question of law and therefore, they are being disposed of by a common order. For convenient disposal of the case, the facts given in W P. No. 4007 of 1995 are taken into consideration. Petitioner No. 1 is a Company registered under the Companies Act, 1956 with registered office situated at 15 K. P. Stone Delhi Road, Hissar, Haryana. Petitioner No. 2 is Director of the Petitioner No. 1 Company and is interested in the well being of the Company. The petitioner Company entered into various lease agreements with TATA Finance Limited whereby the said company leased out various Plants and Machineries. The Company raised debit notes dated 5th July, 1995 charging the tax amounting to Rs. 26,880/- and Rs. 25,792/- under the above provision on the rentals in respect of the lease agreement with the said party. Petitioner Company also entered into similar agreements with Gujarat Lease Financing Ltd., Ahmedabad and that party had also raised debit notes charging tax for three months amounting to Rs. 50,343.88 p. and Rs. 14,865.62 p. Pal Credit and Capital Limited also leased various plant and machinery purchased by them from Encon Furnances (P) Limited by a similar agreement dated 23rd July, 1993. It has also raised debit note in respect of the tax for the period from May 1995 to September, 1995 amounting to Rs. 15,513/-.

It is alleged that the above lessors had purchased the machineries from other manufacturers who had consigned them from their places outside the State to the petitioner company and Central Sales Tax at full rate of 10% was charged to the Companies. These machineries have been erected and installed at the factory of the petitioner Company being embedded or presently fastened to the earth. Hence, the petitioners have challenged the amendment in clause (29A) of Article 366 of the Constitution of India, whereby the word ''sale'' has been defined and the same definition of sale has been incorporated by the State in its Act of 1994 u/s 2(t) and section 9A, whereby it has been provided that every dealer who transfers the right to use any goods as the State Government may specify by notification, for any purpose, whether or not for a specified period, to any person for cash, deferred payment or other valuable consideration in the course of his business, shall also be exigible to tax.

In order to understand the controversy involved in the matter, it would be relevant to section 2(t) of the Act of 1994. Section 2(t) is reproduced as under :

"Section 2(t) "Sales" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes :-

(i) a transfer, otherwise than in pursuance of a contract, or property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods whether as goods or in some other form, involved in the execution of a works contract;

(iii) a delivery of goods on hire purchase or any system of payment by instalments;

(iv) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(v) a 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 purchase of these goods by the person to whom such transfer, delivery or supply is made, but does not include a transfer of the right to use any goods for any purpose (whether or not for a specified period), a mortgage, hypothecation, charge or pledge;

(vi) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."

Section 2(w) defines ''Taxable turnover'', which reads thus -

"2(w) ''Taxable turnover'', in relation to any period means that part of a dealer''s turnover for such period which remains after deducting therefrom -

(i) the sale price of goods declared tax free u/s 15 or exempted in whole u/s 17;

(ii) the sale price of goods mentioned in Part-II to VII of Schedule II which are in the nature of tax paid goods in the hands of such dealer;

(iii) the sale price of unginned cotton as specified in Part I of Schedule II and such other goods in the said part as the State Government may from time to time, by notification, specify, sold to a registered dealer who has declared in the prescribed form that the goods are for resale or for use by him in the manufacture of goods for sale by him;

(iv) the sale price of goods specified in Part-I of Schedule-II other than those referred to in sub-clause (iii), sold to a registered dealer who has declared in the prescribed form that the goods arc for resale by him;

(v) the amount arrived at by applying the following formula :-

rate of tax aggregate of sale prices ----------------------------------- 100 + rate of tax

Provided that no deductions on the basis of the above formula shall be made if the amount by way of tax collected by a registered dealer, in accordance with the provisions of this Act has been otherwise deducted from the aggregate of sale prices.

Explanation. - Where the turnover of a dealer is taxable at different rates, the aforesaid formula shall be applied separately in respect of such part of the turnover liable to a different rate of tax under sub-section (1) of section 9;

(vi) such other deductions as may be prescribed."

Section 9A defines ''Tax on right to use'' which reads as under :

"9-A. Tax on right to use. - Every dealer who transfers the right to use any goods, as the State Government may specify by notification, for any purpose (whether or not for a specified period) to any person for cash, deferred payment or other valuable consideration in the course of his business, notwithstanding anything contained in the provisions of clause (w) of section 2, shall on the total amount realized or realisable by him during the year by way of payment in cash or otherwise on such transfer, pay tax at the rate of 4 per cent, on the aggregate of such amount."

Clause 29-A of Article 366 of the Constitution by which the definition of ''sale'' was inserted in the Constitution reads as under :-

"(29-A) Tax on the sale or purchase of goods includes. -

(a) a tax on the transfer, otherwise than in pursuance of contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(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 these goods by the person to whom such transfer, delivery or supply is made."

Submission of the learned counsel for the petitioners is that the extended meaning given to the definition of word ''sale'' is ultra vires to Entry 54 of List II of VIIth Schedule of the Constitution and likewise section 9-A of the Act of 1994. The learned counsel has submitted that in fact the petitioners directed the Finance Company to supply certain goods and goods are purchased by the Company and they are leased out directly to the plant and machinery after payment of sales tax or in the course of payment of tax either under the Central Sales Tax Act or under the State Act; and therefore, the goods suffered tax and it cannot be made to suffer a tax twice over. Learned counsel submitted that even the extended meaning given to the definition of sale will not include leasing agreement and such leasing agreement cannot be exigible to sales tax. It is submitted that the goods had already suffered tax and hence it cannot be taxed twice over. Learned counsel invited our attention to the various passages in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, and recent decision in the case of Gannon Dunkerley and Co. v. State of Rajasthan 88 STC 204. It is not necessary to quote passages from the decision of their Lordships of Supreme Court given in the case of Builders'' Association of India (supra) and suffice it to say that the definition as given in Article 366(29A) had come up before Hon''ble Supreme Court and it was extensively examined by their Lordships and validity thereof has been affirmed.

The learned counsel''s attempt to show that certain observations appearing in the judgment of their Lordships of the Supreme Court, even if widely construed, cannot mean to cover the leasing out agreements within the scope of taxation. Learned counsel submitted that this question regarding lease out never came up for consideration and the learned counsel referred to various passages of the judgment; but that does not in any way enure to the benefit of the petitioners because the validity thereof has already been affirmed by the Hon''ble Supreme Court.

As per the extended definition of word ''sale'' in clause (d) of Article 366(29A) of the Constitution clearly says that even sale will include a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. 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. To the same effect is the definition given in the Act of 1994 u/s 2(t). Clause (vi) of Section 2(t) says that a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. Such leasing agreements for use of any goods shall also fall within the extended definition of the word ''sale'' as defined u/s 2(t) of the Act.

In fact, the decision given in the case of Builders'' Association of India (supra) came up for consideration subsequently in the case of Gannon Dunkerley and Company (supra) and their Lordships have reaffirmed that decision. Their Lordships of the Supreme Court in that context have observed and quoted a passage of decision given in the case of Keshav Mills Co. Ltd. v. Commissioner of Income Tax 56 ITR 365 which reads thus :

"When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constraint endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified."

After referring above passage, their Lordships observed as under :

"Having regard to the observations referred to above and the stand of the parties during the course of arguments before us, we do not consider it appropriate to reopen the issues which are covered by the decision in Builders Association of India and Others Vs. Union of India (UOI) and Others, and we will, therefore, deal with the matter in accordance with the law as laid down in that case that the expression ''tax on the sale or purchase of goods'' in Entry 54 of the State List includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also and the tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution is subject to the discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution."

In view of categorical assertion by their Lordships of Supreme Court, reaffirming the decision in Builders'' Association of India''s case, there is hardly any scope left for arguments that the extended meaning of ''sale'' given in section 2(t) can be construed otherwise, therefore, any transfer of property in goods for cash or deferred payment, or in any other form is exigible to tax and it cannot now be reopened to challenge on the basis of some stray observations appearing in this case. In pursuance of section 9A of the Act of 1994, the State Government has already issued a notification which reads as under:

"No. A-5-1-94/ST-v(37), dated 1st May, 1995 - In exercise of the powers conferred by section 9-A of the M. P. Vanijyik Kar Adhiniyam, 1994 (No. 5 of 1995), the State Government hereby specify following goods for the purpose of levy of tax under the said section, namely...............

(1) Plant and Machinery including cranes;

(2) All types of two wheeler, three wheeler and four wheeler, Motor Vehicles and Motor Vehicles with more than four wheels;

(3) Air conditioning equipment, air conditioners deep-freezers, cold storage plants, Refrigerator, Water Coolers;

(4) Video cassettes, video Cassettes recorders or Video Cassette projectors, Television sets;

(5) Computers;

(6) All kinds of furniture, crockery and utensils;

(7) Cinematographic and photographic equipments and appliances including camera, projectors, enlarging lenses;

(8) All types of tents including Shamiana and Camping equipments; and

(9) Motor Boats.

(2) This notification shall come into force with effect from 1st day of May, 1995."

This shows that any plant or machinery, if it is being leased out to say other person for consideration, then the same should be treated to be sale and exigible to tax. In this view of the matter, we do not find any justification in the arguments of the learned counsel for the petitioner that the definition of section 2(t) or section 9A of the Act of 1994 suffers from any invalidity. Likewise, suffice it to say that Constitution 46th Amendment Act, 1982 having already been held to be valid by their Lordships of the Hon. Supreme Court in the case of Builders'' Association (supra) and reaffirmed in Gannon Dunkerley''s case (supra), the arguments challenging the validity of that provision cannot survive.

In view of the above, we do not find any merit in both the writ petitions and accordingly they are dismissed, but without any orders as to costs.