
(1991) 07 MAD CK 0086

In the Madras High Court

Case No : Writ Petitions No"s. 9281 and 9282 of 1991

Ramakrishna Lunch Home and another

APPELLANT

Vs

State of Tamil Nadu and others

RESPONDENT

Date of Decision : 18-07-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 17(1), 17(3)

Citation : (1991) 07 MAD CK 0086

Hon'ble Judges : S. Ramalingam, J

Bench : Single Bench

Advocate : C. Venkataraman, for the Appellant; R. Lokapriya, Government Advocate (T), for the Respondent

Judgement

S. Ramalingam, J.—W.P. No. 9281 of 1991 : The prayer in this writ petition is for a mandamus to forbear the second respondent from collecting sales tax, surcharge, additional sales tax and other amounts from the petitioner for the year 1989-90.

2. The necessary facts are as follows : The petitioner is rendering catering service transactions in a restaurant. By G.O. P. No. 570 dated June 10, 1987, catering service transactions effected in hotels and restaurants were exempted from payment of sales tax under the Tamil Nadu General Sales Tax Act (hereinafter referred to as "the Act"). The said notification reads as follows :

"No. II(1)/CTRE/70/87 - In exercise of the powers conferred by sub-section (1) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu hereby makes an exemption in respect of tax payable on the sale of food and drinks other than those falling under the First Schedule to the said Act, by any hotel, restaurant, sweet-stall or any other eating house other than those classified or approved by the Department of Tourism, Government of India."

3. Subsequently on March 25, 1989, G.O. P. No. 198 was issue, which reads as

follows :

"No. II(1)/CTRE/37(c)/89 - In exercise of the powers conferred by sub-sections (1) and (3) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu in supersession of the Commercial Taxes and Religious Endowments Department Notification No. II(1)/CTRE/46(a-16)/87, dated the 20th March, 1987, published at page 13, in Part II, Section 1 of the Tamil Nadu Government Gazette, Extraordinary, dated the 20th March, 1987; and in supersession of the Commercial Taxes and Religious Endowments Department Notification No. II(1)/CTRE/70/87, dated the 10th June, 1987, published at page 46 in Part II, Section 1 of the Tamil Nadu Government Gazette, dated the 24th June, 1987, hereby makes an exemption in respect of the tax payable on the sale of food and drinks other than those falling under the First Schedule to the said Act, by any hotel, restaurant, sweet-stall or any other eating house, whose total turnover does not exceed rupees ten lakhs, per annum.

2. The notification hereby made shall come into force on the 25th March, 1989."

There was an amendment to G.O. P. No. 198 dated March 25, 1989, by a notification made in G.O. P. No. 332 dated May 30, 1990, where the exemption limit was raised from rupees ten lakhs to Rs. 15 lakhs per annum. By G.O. P. No. 532 dated September 5, 1990, it was ordered as follows :

"No. II(1)/CTRE/170/90. - In exercise of the powers conferred by sub-section (3) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu hereby cancels the Commercial Taxes and Religious Endowments Department Notification No. II(1)/CTRE/37(c)/89, dated the 25th March, 1989, published at page 3 of Part II - Section 1 of the Tamil Nadu Government Gazette Extraordinary, dated the 25th March, 1989, as amended by Commercial Taxes and Religious Endowments Department Notification No. II(1)/CTRE/85 (a-11)/90 dated the 30th May, 1990, published at page 5 of Part II - Section 1 of the Tamil Nadu Government Gazette, Extraordinary, dated the 30th May, 1990."

Another notification bearing the same number G.O. P. 532, Commercial Taxes Department, dated September 5, 1990, was issued and it reads as follows :

"Sale of food and drinks other than those falling under First Schedule by any hotel, restaurant, etc. - Exemption (Tamil Nadu)

No. II(1)/CTRE/171/90. - In exercise of the powers conferred by sub-section (1) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu hereby makes an exemption in respect of the tax payable on the sale of food and drinks other than those falling under the First Schedule to the said Act, by any hotel, restaurant, sweet-stall or any other eating house, whose total turnover does not exceed rupees eighteen lakh and twenty-five thousand per annum.

2. The notification hereby made shall be deemed to have come into force on the 1st April, 1990."

3A. Mr. C. Venkataraman, learned counsel for the petitioner, would contend that by G.O. P. No. 570 dated June 10, 1987, a total exemption was granted in respect of sale of food and drinks by any hotel, restaurant and sweet-stall, other than those classified or approved by the Department of Tourism, Government of India and that exemption was in force till G.O. P. No. 198 dated March 25, 1989 was issued, whereunder the exemption was restricted to hotels and restaurants, with an annual turnover not exceeding Rs. 10,00,000. The learned counsel would contend that it was only for the first time after G.O. P. No. 198 dated March 25, 1989 was issued, the sale of food and drinks became assessable under the Act. Even though G.O. P. No. 198 dated March 25, 1989 might have undergone amendments by raising the limit from Rs. 10,00,000 to Rs. 15,00,000 and once again to Rs. 18,25,000, the fact remains that only by virtue of G.O. P. No. 198 dated March 25, 1989, the liability to pay tax in respect of transactions in hotels and restaurants came to be enforced. He would stress the phraseology employed in G.O. P. No. 198 dated March 25, 1989, whereunder G.O. P. No. 570 dated June 10, 1987 was ordered to be superseded.

4. The first contention of the learned counsel is that when G.O. P. No. 532 dated September 5, 1990 was issued and when by that Notification G.O. P. No. 198 dated March 25, 1989 was ordered to be cancelled, then, the gamut of the entire Notification in G.O. P. No. 198 dated March 25, 1989 came to be obliterated on and from September 5, 1990. In other words, he would contend that by issue of G.O. P. No. 532 dated September 5, 1990, G.O. P. No. 198 came to be abrogated or taken away or obliterated from the statute book and therefore, after September 5, 1990, one should read as if G.O. P. No. 198 dated March 25, 1989 never existed. He would contend that when once G.O. P. No. 198 itself is cancelled and if it was only by G.O. P. No. 198, the earlier notification made in G.O. P. No. 570 dated June 10, 1987 had been superseded, then, once G.O. P. No. 198 itself was cancelled, then G.O. P. No. 570 dated June 10, 1987 would revive and hold the field. He would also contend that the issue of separate notifications on the same day in G.O. P. No. 532 dated September 5, 1990 imposing a liability to tax, where the turnover exceeds Rs. 18.25 lakhs, cannot stand side by side with G.O. P. No. 570 dated June 10, 1987 and therefore, G.O. P. No. 532 dated September 5, 1990, imposing a liability to tax for transactions exceeding Rs. 18.25 lakhs should be declared as invalid.

5. It is true that by G.O. P. No. 532 dated September 5, 1990, G.O. P. No. 198 dated March 25, 1989, had been cancelled. The effect of cancellation is not to obliterate from inception the efficacy of G.O. P. No. 198 dated March 25, 1989. The cancellation is prospective and it would not affect any transaction, which had already commenced under the provisions of G.O. P. No. 198 dated March 25, 1989.

5A. But, if G.O. P. No. 198 dated March 25, 1989 is cancelled prospectively from

September 5, 1990, the question is by such cancellation, whether G.O. P. No. 570 dated June 10, 1987 would stand revived because it was only by G.O. P. No. 198 dated March 25, 1989, G.O. P. No. 570 dated June 10, 1987 was ordered to be superseded. He would submit that once G.O. P. No. 198 is cancelled, it would have the effect of automatically reviving G.O. P. No. 570. The learned counsel would rely on the decision of the Supreme Court in B.N. Tiwari Vs. Union of India (UOI) and Others, , wherein it was observed as follows :

"We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that in T. Devadasan Vs. The Union of India (UOI) and Another, , the final order of this Court was in these terms :

"In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid".

That, however, does not mean this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule in 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place., could revive. We are therefore of opinion that after the judgment of this Court in T. Devadasan Vs. The Union of India (UOI) and Another, , there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955, in its place. But it must be made clear that the judgment of this Court in T. Devadasan Vs. The Union of India (UOI) and Another, , is only concerned with that part of the instructions of the Government of India which deal with the carry forward rule; it does not in any way touch the reservation for scheduled castes and scheduled tribes at 12 1/2 per cent and 5 per cent, respectively; nor does it touch the filling up of scheduled tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes are not available in a particular year or vice versa. The effect of the judgment in T. Devadasan Vs. The Union of India (UOI) and Another, , therefore, is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes or filling up of scheduled tribes vacancies by a member of scheduled castes in a particular year, if a sufficient number of scheduled tribe candidates are not available in that year or vice versa. This adjustment in the reservation between scheduled castes and tribes has nothing to do with the carry forward rule from year to year either of 1952 which had ceased to exist or of 1955 which was struck down by this Court. In this view of the matter it is unnecessary to

consider whether the carry forward rule of 1952 would be unconstitutional, for that rule no longer exists."

6. It would, therefore, be seen that the Supreme Court made the distinction between supersession of a rule and substitution of a rule. They noticed the fact in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, that a new rule 16 was substituted for the old rule. It was held that if for any reason, a new rule is struck down, it would not have the effect of reviving a rule, which originally stood and which was substituted by the new rule 16. They held that in the case before them, namely, *Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co.*, , there was an earlier notification of the year 1119 and a later prohibition order of the year 1950 and they noticed that the later notification of the year 1950 did not have the sanctity of the law and therefore, it is non est. It was in that context, they distinguished the earlier decision in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, cited supra and held that if for want of legislative competency or otherwise, the later prohibitory order of 1950 is held to be invalid, that would not make the earlier 1119 order also invalid, even though 1950 order is only replacement of 1119 order. It was held that 1119 order has not suffered from any infirmity and merely because 1950 order suffer from infirmities, it would not have the effect of declaring the 1119 order also non est.

7. The next decision referred to by the petitioner is the decision in *State of Maharashtra Vs. The Central Provinces Manganese Ore Co. Ltd.*, . The facts of this case were that Explanation II to section 2(g) of the Central Provinces and Berar Sales Tax Act was amended by Act 16 of 1949 and if it were to be held that the amendment was ineffective, whether the unamended law could be applied at all after the purported amendment. The Supreme Court has observed as follows :

"In the case before us, although the word "substitution" is used in the amending Act, yet, the whole legislative process termed substitution was itself abortive. The whole of that process did not take effect as the assent of the Governor-General, required by section 107, Government of India Act, was lacking. Such ineffectiveness was the very reason why, in the case of *Shriram Gulabdas* [1952] 3 STC 343 AIR 1952 Nag 378 it was held that the previous law stood unaffected by the attempted legislation called substitution."

The Supreme Court held that though the amendment became ineffective, the original unamended provisions would apply to the assessments in question. Relying on the above decision, the learned counsel would contend that because G.O. P. No 198 dated March 25, 1989 was cancelled by G.O. P. No. 532 dated September 5, 1990, it would have the effect of reviving G.O. P. No. 570 dated June 10, 1987.

8. It has to be seen immediately that here, there is no question of an amending Act being made, which is found to be beyond the legislative competency or abortive because of want of sanction. But, it is a case of one notification being

issued in supersession of another notification and cancellation of the subsequent notification. As stated earlier, the cancellation of G.O. P. No. 198 dated March 25, 1989 is only prospective. G.O. P. No. 198 was not obliterated from the statute book. If G.O. P. No. 198 remained in force and was being issued in supersession of G.O. P. No. 570 dated June 10, 1987, the question is, whether on G.O. P. No. 198 being cancelled, G.O. P. No. 570 dated June 10, 1987 would revive. A similar question came up for consideration before the Supreme Court in the decision in *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, wherein the Supreme Court posed the question that if the notification impugned in that writ petition were to be merely quashed, whether it would revive the earlier notification. The notification which was quashed by the Supreme Court was dated March 1, 1981 and that was issued in supersession of an earlier notification dated July 15, 1977. It was canvassed before the Supreme Court that if the notification dated March 1, 1981 is quashed, it would have the effect of reviving the superseded notification dated July 15, 1977. In the light of the arguments, the Supreme Court observed as follows :

"..... If the impugned notifications are merely quashed, they being notifications granting exemptions, the exemptions granted under them will cease. Will such quashing revive the notification dated July 15, 1977 which was in force prior to March 1, 1981 under which total exemption had been granted ? We do not think so. The impugned notification dated March 1, 1981 was issued in supersession of the notification dated July 15, 1977 and thereby it achieved two objects - the notification dated July 15, 1977 came to be repealed and 10 per cent ad valorem customs duty was imposed on newsprint. Since the notification dated July 15, 1977 had been repealed by the Government of India itself it cannot be revived on the quashing of the notification of March 1, 1981. The effect of such quashing of a subsequent notification on an earlier notification in whose place the subsequent notification was issued has been considered by this Court in *B.N. Tiwari Vs. Union of India (UOI) and Others*, . In that case the facts were these : In 1952 a "carry forward" rule governing the Central services was introduced whereby the unfilled reserved vacancies of a particular year would be carried forward for one year only. In 1955 the above rule was substituted by another providing that the unfilled reserved vacancies of a particular year would be carried forward for two years. In *T. Devadasan Vs. The Union of India (UOI) and Another*, the 1955 rule was declared unconstitutional. One of the questions which arose for consideration in this case (*B.N. Tiwari Vs. Union of India (UOI) and Others*,) was whether the 1952 rule had revived after the 1955 rule was struck down. This Court held that it could not revive. The following are the observations of this Court on the above question :

"We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that in *T. Devadasan Vs. The Union of India (UOI) and Another*, the final order of this Court was in these terms :

"In the result the petition succeeds partially and the carry forward rule as

modified in 1955 is declared invalid."

That however does not mean that this Court held that the 1952 rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in *T. Devadasan Vs. The Union of India (UOI) and Another*, there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place."

In *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, also this Court has taken the view that once an old rule has been substituted by a new rule, it ceases to exist and it does not get revived when the new rule is held invalid.

The rule in *Mohd. Shaukat Hussain Khan Vs. State of Andhra Pradesh*, is inapplicable to these cases. In that case the subsequent law which modified the earlier one and which was held to be void was one which according to the court could not have been passed at all by the State Legislature. In such a case the earlier law could be deemed to have never been modified or repealed and would, therefore, continue to be in force. It was strictly not a case of revival of an earlier law which had been repealed or modified on the striking down of a later law which purported to modify or repeal the earlier one. It was a case where the earlier law had not been either modified or repealed effectively. The decision of this Court in *Shri Mulchand Odhavji Vs. Rajkot Borough Municipality*, is also distinguishable. In that case the State Government had been empowered by section 3 of the Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949) to impose octroi duty in towns and cities specified in Schedule I thereof and section 4 authorised the Government to make rules for the imposition and collection of octroi duty. These Rules were to be in force until the city municipalities made their own rules. The rules framed by the municipality concerned were held to be inoperative. Then the question arose whether the rule of the Government continued to be in force. The court held :

"The Government rules, however, were to cease to operate as the notification provided "from the date the said Municipality put into force their independent by-laws". It is clear beyond doubt that the Government rules would cease to apply from the time the respondent-Municipality brought into force its own bye-laws

and rules under which it could validly impose, levy and recover the octroi duty. The said notification did not intend any hiatus when neither the Government rules nor the municipal rules would be in the field. Therefore, it is clear that if the bye-laws made by the respondent-Municipality could not be legally in force for some reason or the other, for instance for not having been validly made the Government rules would continue to operate as it cannot be said that the Municipality had "put into force their independent bye-laws". The trial Court, as also the District Court were, therefore, perfectly right in holding that the respondent-Municipality could levy and collect octroi duty from the appellant-firm under the Government rules. There was no question of the Government rules being revived as in the absence of valid rules of the respondent-Municipality they continued to operate. The submission of counsel in this behalf therefore, cannot be sustained."

In the cases before us we do not have rules made by two different authorities as in *Shri Mulchand Odhavji Vs. Rajkot Borough Municipality*, and no intention on the part of the Central Government to keep alive the exemption in the event of the subsequent notification being struck down is also established. The decision of this Court in *Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co.*, does not also support the petitioners. In that case again the question was whether a subsequent legislation which was passed by a Legislature without competence would have the effect of reviving an earlier rule which it professed to supersede. This case again belongs to the category of *Mohd. Shaukat Hussain Khan Vs. State of Andhra Pradesh*, . It may also be noticed that in *Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co.*, the ruling in the case of *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras* and *Another*, has been distinguished. The case of *State of Maharashtra Vs. The Central Provinces Manganese Ore Co. Ltd.*, is again distinguishable. In this case the whole legislative process termed substitution was abortive because, it did not take effect for want of the assent of the Governor-General and the court distinguished that case from *B.N. Tiwari Vs. Union of India (UOI) and Others*, . We may also state that the legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, "substitution" or "supersession". It depends upon the totality of circumstances and the context in which they are used."

9. The above decision is a clear authority for the proposition that if a notification is superseded by a later notification and if the later notification came to be quashed, which in law, would mean that the later notification had never existed, it would not have the effect of reviving the notification, which by the later notification was superseded.

9A. The later Notification G.O. P. No. 198 dated March 25, 1989 had not been quashed by any competent court; nor has it been held that it is without jurisdiction. The Government itself has chosen to cancel G.O. P. No. 198 dated March 25, 1989 to have with prospective effect. Under these circumstances, it

cannot be contended that by cancellation G.O. P. No. 198 dated March 25, 1989, there is an automatic revival of G.O. P. No. 570 dated June 10, 1987, because the same had already been superseded, and therefore, had ceased to exist. What did not exist after March 25, 1989 cannot be infused with life or resurrected, merely because G.O. P. No. 198 is cancelled.

10. The second submission of the learned counsel for the petitioner that there are two notifications, namely, G.O. P. No. 198 dated March 25, 1989 and G.O. P. No. 532 dated September 5, 1990 and both cannot co-exist, cannot also be sustained because, for the reasons already stated, G.O. P. No. 570 dated June 10, 1987 is not revived by cancellation of G.O. P. No. 198 dated March 25, 1989. No other point having been raised, this writ petition is dismissed. There will be no order as to costs.

11. W.P. No. 9282 of 1991 : For the reasons stated in W.P. No. 9281 of 1991, this writ petition, which raises similar points as in W.P. No. 9281 of 1991 is also dismissed. There will be no order as to costs.

12. Writ petitions dismissed.