

(1991) 07 KAR CK 0046
In the Karnataka High Court
Case No : Writ Petition No. 14437 of 1986

Sree Venugopal Swamy and Co.

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 16-07-1991

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 5 (1), 5 (3-C)

Citation : (1991) 2 KarLJ 599 : (1993) 89 STC 547

Hon'ble Judges : M.N. Venkatachaliah, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; Shimoga Subbanna, Government Pleader, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The petitioner has challenged the validity of section 5(3-C) of the Karnataka Sales Tax Act, 1957, ("the Act", for short) as substituted by the Karnataka Sales Tax (Amendment) Act, 1986, with effect from April 1, 1986. The impugned provision reads thus :

"(3-C) Notwithstanding anything contained in sub-section (3), in the case of sale of any of the goods mentioned in column (2) of the Eighth Schedule which has already been subjected to tax under clause (a) of sub-section (3) by a dealer liable to tax under this Act, a tax at the rate specified in the corresponding entry of column (3) of the said Schedule shall be levied at the point of last sale in the State on the taxable turnover of sales of such dealer in each year relating to such goods."

2. The petitioner is a dealer in refined oil found as item No. 9 in the Eighth Schedule to the Act. It also found a place at the same time as item No. 35 in the Second Schedule to the Act. According to the petitioner it purchased refined oil in the course of inter-State trade or commerce. It also purchased refined oil manufactured within the State of Karnataka. The items stated in the Second Schedule to the Act are the subject of a single point tax at the stage of first sale. Until the introduction of the impugned provision refined oil was subjected to tax

at the point of first sale. By virtue of the impugned provision the same refined oil when sold in the State is again subjected to tax at the point of last sale. This according to the petitioner brings about discrimination between similarly situated dealers.

In addition the provision is a measure which affects the inter-State trade in the said goods. The petitioner contends that the impugned provision is violative of articles 14, 301 and 304(b) of the Constitution. Article 304(b) of the Constitution is attracted because the amendment Act by which the impugned provision was brought into the Act did not receive President's assent even though the said provision affects the inter-State trade.

3. Therefore, we have to consider whether the impugned provision is invalid because of the contravention of these provisions of the Constitution.

4. The alleged discrimination has been explained by the learned counsel for the petitioner thus :

When the goods in question is manufactured in the State and the same is sold to a dealer within the State it will be the first sale. A tax u/s 5(3)(a) is attracted to the said transaction of sale. Thereafter the said dealer sells the goods to a consumer in the State which will be the last sale and consequently the levy under the impugned provision is also attracted. In case, the manufacturer directly sells the goods to the consumer there will be only one sale in the State, turnover of which is taxed only u/s 5(3)(a) No tax is levied on the said turnover under the impugned provision. Similarly, a dealer like the petitioner who purchases the goods in question from a manufacturer outside the State and then sells the same to the consumer in the State, the sale in the State will be the only sale by the dealer to the consumer attracting only section 5(3)(a). However, in case, the petitioner purchases similar goods from a local manufacturer and then sells it to a consumer in the State both transactions will be taxed, the first one u/s 5(3)(a) and the next one under the impugned provision. Therefore, the petitioner contends that the very same goods may be subjected to tax differently depending upon the number of the sales.

5. On the same analogy stated above, article 304(a) also is invoked on the ground that the goods manufactured in the State is subjected to tax twice over, while the goods imported from another State is subjected to a single point levy.

6. As will be clear from the very explanation offered by the learned counsel for the petitioner the levy of the tax on the turnover of the goods depends upon the number of dealings in the State. The law by itself on the face of it does not make any discrimination. The levy of tax under the impugned provision is incidental to the mode of dealing in the goods. If the importer of the goods in the State actually sells the goods to another dealer and the said dealer then sells the goods again, there will be two sales in the State. It cannot be assumed that always the dealer who imports the goods from another State would sell the same directly to the consumers. A manufacturer in the State, according to Sri

Srinivasan, would normally sell the goods to a dealer who in turn would sell the same in retail. We can take judicial notice of the fact that a similar procedure is normally adopted by those who bring in goods from another State and before the imported goods reach the consumer, mostly the goods would have undergone more than one dealing in the State. This apart, the taxing provision nowhere levies tax in respect of the same transaction twice over. The sales tax is a tax on the sale or purchase. While section 5(3)(a) selects the first point of sale for the levy, the impugned provision selects the last sale for the levy. Both are independent of each other. However, the impugned provision refers to section 5(3)(a) for the purpose of identifying the subject-matter of levy under the impugned provision. The impugned provision reads as if it is an exception or supplemental to section 5(3)(a). The goods which are enumerated in the Eighth Schedule are treated as a class apart for the purpose of levy of tax under the Act at two stages and this provision, if at all, is comparable to section 5(1) of the Act wherein certain goods are subjected to the tax under multiple points. The goods falling u/s 5(1) suffer tax at various stages of its dealings and the illustrations given by Sri Srinivasan while attacking the impugned provision could as well apply to the cases falling u/s 5(1), but section 5(1) has stood the test of time.

7. It is well-known that a taxing provision cannot be attacked as discriminatory, just because, due to fortuitous circumstances or a particular situation some persons included within a group may get some advantage over others. In *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, the Supreme Court has, inter alia, pointed out two twin principles governing the situation : (i) The burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. However, greatest freedom is available to the Legislature in the matter of classification. The burden is : "proving not possible "inequality" but hostile "unequal" treatment". (ii) A discrimination that results by fortuitous circumstances or due to situations not brought out by the law, itself is not a ground to stigmatise it as a hostile discrimination.

The phrases "possible inequality" and "hostile unequal treatment" used by the Supreme Court in contradiction to each other brings out the test to apply articles 14 and 304(a) of the Constitution. In *Writ Petitions Nos. 14375 to 14381 of 1988 and connected matters (Galaxy Theatre v. State of Karnataka)* [Reported in [1992] 86 STC 305 (Kar).] a Bench of this Court observed at para 19, that when a tax levy is attacked as discriminatory, the harsh realities of discrimination, its oppressiveness and palpable injustice or hostility by such a levy has to be clearly brought out by the petitioners who attack the levy as discriminatory.

The contention of the petitioner in the instant case is based entirely on hypothetical illustration; in fact the pleading in the writ petition is quite general. No de facto discrimination has been established; even otherwise the rate of tax under the Eighth Schedule during the year in question was only 2 per cent. which in no way can be considered as oppressive. The impugned provision by itself does not create any discrimination as already pointed out and therefore it cannot

be characterised as causing hostile discrimination. Consequently this contention is rejected.

8. Re : Article 304(b) : This attack based on article 304(b) is again rooted in the earlier contention. Because of the alleged discrimination against locally manufactured goods, it is contended that the goods brought into the State stood favoured, thus the impugned provision adversely affected the inter-State trade; therefore the impugned provision should have been assented to by the President. In view of our finding on the first ground that there is no discrimination and the alleged burden caused by the impugned provision is the result of fortuitous circumstances depending upon the number of dealings in the said goods this contention also has to fail. Sri Srinivasan, learned senior counsel, relied upon the decision of the Supreme Court in *Indian Cement and Others Vs. State of Andhra Pradesh and Others*, The State of Andhra Pradesh issued a notification reducing the rate of sales tax in respect of cement manufactured by the factories situated in the said State and sold to the manufacturing units situated within the said State for the purpose of manufactured of cement products. At the same time the tax leviable in respect of the sales of cement in the course of inter-State trade or commerce was also reduced. Similar notifications were issued by the State of Karnataka also. The petitioners contended that by virtue of the notifications the trade in the cement produced in the State of Tamil Nadu was adversely affected. This contention was upheld since the notification on the face of it reduced the rate of tax in respect of the inter-State sale transactions. The Supreme Court held both the notifications as violative of articles 301 and 304 of the Constitution, since these notifications created a local preference which is contrary to the scheme of Part XIII of the Constitution. However, in a subsequent decision a larger Bench of the Supreme Court in *Video Electronics Pvt. Ltd. v. State of Punjab* confined the decision in *Indian Cement and Others Vs. State of Andhra Pradesh and Others*, to the facts of the said case alone. At page 106 of STC (835 of AIR) the Supreme Court held that :

"In respect of the decisions aforesaid relied on behalf of the petitioners, on examination of the observations in *Indian Cement and Others Vs. State of Andhra Pradesh and Others*, , to the contrary to which stated hereinbefore on this aspect, must be confined to the facts of that case alone as the said decision had no occasion to consider it in the full light."

In the said *Video Electronics*" case the Supreme Court has pointed out the need to harmonise the power given to the State Legislature to levy tax and the general restrictions on the State's power under Part XIII of the Constitution. At page 100 of STC (831 of AIR), it was observed that :

"It has to be examined whether difference in rates per se discriminates so as to come within articles 301 and 304(a) of the Constitution. It is manifest that free-flow of trade between two States does not necessarily or generally depend upon the rate of tax alone. Many factors including the cost of goods play an important role in the movement of goods from one State to another. Hence the mere fact

that there is a difference in the rate of tax on goods locally manufactured and those imported would not amount to hampering of trade between the two States within the meaning of article 301 of the Constitution. As is manifest, article 304 is an exception to article 301 of the Constitution. The need of taking resort to exception will arise only if the tax impugned is hit by articles 301 and 303 of the Constitution. If it is not, then article 304 of the Constitution will not come into the picture at all. See the observations in *State of Madras Vs. N.K. Nataraja Mudaliar*, of the report. It has to be borne in mind that there may be differentiations based on consideration of natural or business factors which are more or less in force in different localities. A State might be led to impose a higher rate of tax on a commodity either when it is not consumed at all within the State or if it is felt that the burden falling on consumers within the State, will be more than that and large benefit is derived by the revenue (sic). The imposition of rates of sales tax is influenced by various political, economic and social factors. Prevalence of differential rates of tax on sales of the same commodity cannot be regarded in isolation as determinative of the object to discriminate between one State and another. Under the Constitution originally framed, revenue from sales tax was reserved for the States."

Thereafter, while considering article 304 it was observed at page 101 of *STC* (832 of *AIR*) that :

"The object is to prevent discrimination against the imported goods by imposing tax on such goods at a rate higher than that borne by local goods. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale of which it is levied. Every differentiation is not discrimination. The word "discrimination" is not used in article 14 but is used in articles 16, 303 and 304(a). When used in article 304(a), it involves an element of intentional and purposeful differentiation thereby creating economic barrier and involves an element of unfavourable bias. Discrimination implies an unfair classification. Reference may be made to the observations of this Court in *Kathi Raning Rawat Vs. The State of Saurashtra*, where Chief Justice Shastri at page 442 of *SCR* (at pages 443-44 of *AIR*) of the report reiterated that all legislative differentiation is not necessarily discriminatory. At page 448 of the Report, Justice Fazal Ali noticed the distinction between "discrimination without reason" and "discrimination with reason". The whole doctrine of classification is based on this and on the well-known fact that the circumstances covering one set of provisions or objects may not necessarily be the same as those covering another set of provisions and objects so that the question of unequal treatment does not arise as between the provisions covered by different sets of circumstances."

However, Sri Srinivasan referred to a decision of this Court reported in *Kamat & Co. v. State of Karnataka* [1991] 80 *STC* 226 *SC* at page 232 to contend that a Bench of this Court has followed the *Indian Cement and Others Vs. State of Andhra Pradesh and Others*, as governing the fact situation.

9. The fact situation in the said decision was entirely different. The impugned notification involved therein specifically chose one trader for a beneficial treatment and therefore the contention of other traders attacking the said notification as discriminatory was upheld. The discrimination was patent in the said case. Nowhere the Bench of this Court observed that Indian Cement and Others Vs. State of Andhra Pradesh and Others, has to be preferred to Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, . Even otherwise it should be noted that the decision in Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, is by a larger Bench of the three Judges while the decision in Indian Cement and Others Vs. State of Andhra Pradesh and Others, was by a Bench of two Judges.

10. In view of the above conclusion of ours nothing survives for further consideration. Writ petition is accordingly dismissed.

11. Writ petition dismissed.