
(1975) 08 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No's. 1014 of 1972 and 47 and 237 of 1973

Sri Dharampal Mehta and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-08-1975

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1975) 08 PAT CK 0002

Hon'ble Judges : S.N.P. Singh, C.J.; S.K. Jha, J

Bench : Division Bench

Advocate : B.C. Ghose, Radha Raman and A.B. Ojha, for the Appellant; T.K. Jha, Government Advocate and Jagannath Jha, S.B.N. Singh, Government Pleader II and Shambhu Nath Jha, Md. Khaleel and G.S. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Jha, J.—In all these applications under Article 226 of the Constitution of India the petitioners have made a prayer for issuance of an appropriate writ striking down the entry relating to imposition of sales tax on items enumerated in paragraph 1(ii) and (iii) of the State Government Notification No. S. O. 351 dated the 28th March, 1972 and the whole of the Government Notification No. 349 of the same date as being illegal and invalid and of a writ of mandamus commanding the respondents not to give effect to those notifications and the notices issued to the different petitioners in pursuance of the aforesaid notifications. Copies of the notifications aforesaid and the notices issued have been marked variously as different annexures to the 3 writ applications ; it is, however, not necessary to give the numbers of those annexures.

2. In a nutshell the effect of these notifications is to impose a special sales tax on cooked food, including Indian sweets, tea and coffee, when sold as beverages, dahi and lassi at the rate of 10 per cent in respect of a dealer whose annual gross turnover during the preceding financial year exceeded Rs. 1,00,000. It is

worthwhile to mention here that previously by two Notifications bearing Nos. STGL-J-2042/68-12568-F. T. and STGL/68-12570-F.T. dated the 27th December, 1968, published in the Bihar Gazette dated the 28th December, 1968, these items had been exempted from the levy of either general sales tax or special sales tax by the State Government under the powers conferred on it by Section 4(3) of the Bihar Sales Tax Act, 1959 (Bihar Act 19 of 1959). The two impugned notifications have been made effective from the 1st day of April, 1972 and in pursuance thereof notices have been issued by the commercial taxes department to the petitioners to produce their account books from the 1st April, 1972, onwards. All the petitioners claim to be dealers having an annual gross turnover exceeding Rs. 1,00,000 each during the preceding financial year and thus they feel aggrieved by the notifications which have been challenged in these writ applications and the notices issued thereunder.

3. At the outset I must indicate that, although in the petitions the vires of the impugned notifications were challenged on numerous grounds, in the course of argument, Mr. B.C. Ghose, the learned counsel appearing for the petitioners, did not attack the validity of the impugned notifications but merely addressed us on the point that no sales tax on the items enumerated above should be charged from the petitioners. In other words, the only argument that was advanced was that the special sales tax imposed by virtue of the two notifications dated the 28th March, 1972, should not be imposed on the petitioners as those notifications were inapplicable to their cases. It was submitted on behalf of the petitioners that they were hoteliers and they also carried on restaurant business at different places in the State of Bihar and, as such, cooked food and other items which were served by them to their customers and guests were inclusive of service charges. Cooked food and service were indivisible at least in the case of those hoteliers whose annual gross turnover was over Rs. 1,00,000 inasmuch as it was contended, the supply was not of goods merely but was inclusive of charges for rendering service. And, where service is indivisible and charges therefore cannot be severed from the items sought to be subjected to tax then in that case such articles would not attract the provisions of the said two notifications. In support of his contention, Mr. Ghose relied upon a decision of the Supreme Court in the case of *The State of Punjab Vs. Associated Hotels of India Ltd.*, . But before advertent to that case and the principle of law to be applied in the instant cases, it is necessary to state the facts obtaining in these writ applications.

4. In C.W.J.C. No. 1014 of 1972 there are three petitioners, in C.W.J.C. No. 47 of 1973 they are forty-eight in number and in C.W.J.C. No. 237 of 1973 the petitioner is only one. The facts as stated in each of the petitions are *mutatis mutandis* the same. It is stated in all the petitions that the petitioners are hoteliers and also carry on restaurant business at different places in the State of Bihar. The petitioners, as part of their business, receive guests for the purpose of lodging and to make their lodging comfortable they provide several amenities to such customers including service of meals (cooked food), sweets, tea, coffee,

dahi, lassi, etc., as and when demanded by such customers. In most of the cases (underlining is mine) the bill of such stay of customers is inclusive and charged in a consolidated manner for boarding and lodging including service of sweets, tea, coffee, dahi and lassi. In the case of restaurant business the customers get principally the amenities of service along with the items of food demanded by them and the bill paid by them is one and indivisible in respect of price of eating materials as well as the service which includes items like linen services by liveried bearers, etc. The petitioners have been running the hotel and the restaurant business and had been paying sales tax on almost all raw materials required for cooking food and preparation of sweets including dahi and lassi at varying rates prescribed by the Government. These are the relevant and essential facts as alleged in the petitions.

5. Counter-affidavits have been filed on behalf of the respondents in C.W.J.C. No. 1014 of 1972 and C.W.J.C. No. 47 of 1973. In the course of the arguments the learned Government Advocate on behalf of the respondents prayed for some time to file counter-affidavit in C.W.J.C. No. 237 of 1973, which request we did not accede to. In so far as C.W.J.C. No. 1014 of 1972 is concerned, the counter-affidavit was filed when the hearing of the cases started and, therefore, we thought it fit not to entertain such a belated counter-affidavit, which was against the rules of this court. Thus, the only counter-affidavit which we have looked into is that filed in C.W.J.C. No. 47 of 1973. It stated on behalf of the respondents that the statement made by the petitioners to the effect that in most of the cases the bill of such stay of customers is inclusive and charged in a consolidated manner for boarding and lodging was not admitted. It has further been stated in paragraph 8 of the counter-affidavit that the petitioners' business is that of running a restaurant where a customer takes his meal constituting either of items of food of his choice or a fixed menu, that the primary function of the restaurants is to serve meals and snacks desired by a customer and that there was no question of incapability of splitting of the bills into separate charges regarding service and meals in the restaurant business.

6. From the statements in the writ petitions as recapitulated by me earlier, it would be seen that there is no clear assertion as to which of the petitioners and to what extent is running a hotel business where only visitors and guests for lodging are put up and entertained and, again, the statement to the effect that in most of the cases the bill of stay of customers is inclusive of service charges is rather a vague one. It is, therefore, difficult to hold on the materials on record as to which of the petitioners is doing hotel business and to what extent only where lodging facilities for guests and visitors are provided inclusive of cost of meals. It is a different matter if any of the petitioners can prove before the competent authorities of the commercial taxes department that any part of his business is wholly qua a hotelier. He may then certainly be entitled to the relief regarding that part of his business. Scanty as the materials are and when it has been categorically stated in paragraph 8 of the counter-affidavit of C.W.J.C. No. 47 of 1973 that the petitioners' business is that of running a restaurant only, it is

difficult for me to hold in exercise of our writ jurisdiction that any of the petitioners is either wholly or partly (which part is distinct) engaged in the business of a hotelier.

7. Faced with this difficulty, Mr. Ghose urged that even in the cases of restaurants the principle to be applied would be the same and that the ratio of the Judgment of the Supreme Court in the *The State of Punjab Vs. Associated Hotels of India Ltd.*, covers the cases of restaurants with equal force as those of hoteliers. In my view, this submission of the learned counsel is rather a sweeping generalisation of the principle laid down by their Lordships meant to apply to the cases of hoteliers where service of the hoteliers, in the performance of which meals are served as part of and incidental to, such amenities, is regarded as essential in all well-conducted hotels. The bill prepared by the hotel is one and indivisible, not being capable, by approximation, of being split up into one for residence and the other for meals. It was such type of cases that their Lordships were seized with in the *The State of Punjab Vs. Associated Hotels of India Ltd.*, . The learned counsel's endeavour to apply this principle to the case of restaurant does not seem to be warranted by the decision of the Supreme Court in that case.

8. For appreciating the distinction between the two classes of business or transaction, it is necessary to give an outline of the facts of the *The State of Punjab Vs. Associated Hotels of India Ltd.*, . In that case the company claiming immunity from sales tax carried on business as hoteliers and conducted several hotels. Besides conducting hotels, it also carried on restaurant business and as part of its business as hoteliers the company received guests in its several hotels, to whom, besides furnishing lodging, it also served several other amenities, such as public and private rooms, bath with hot and cold running water, linen, meals during stated hours, etc. The bill tendered to the guests was an all-inclusive one, that is to say, a fixed amount for stay in the hotel for each day and did not contain different items of each of the amenities aforesaid. Such was, however, not the case in its restaurant business where a customer took his meals consisting either of items of food of his choice or a fixed menu. The primary function (underlining is mine) of such a restaurant was to serve meals desired by a customer, although, along with the food, the customer got certain other amenities too, such as service, linen, etc. The bill which the customer paid was for the various food items which he consumed or paid definite rate for the fixed meal, as the case may be, which presumably took into account service and other related amenities. The assessee-company as hoteliers had been registered as a dealer under the Punjab General Sales Tax Act, 1948 and had been filing quarterly returns and paying the sales tax under that Act. The company applied for a declaration that it was not liable to pay sales tax in respect of the meals served in the Cecil Hotel belonging to the company to the guests coming there for stay. The exemption claimed by the company in that case was based upon the factors that (i) the hotel received guests primarily for the purpose of lodging, (ii) when so received, the management provided them with a number of amenities incidental to such lodging and with a view to render their stay in the hotel

comfortable including meals at fixed hours, (iii) the transaction between the company and such a guest was one for the latter to stay and not one of sale of foodstuffs supplied as one of the incidental amenities, (iv) the bill given by the company and paid by the guests was one and indivisible, i.e., a fixed amount per day during their stay in the hotel and did not consist of separate items in respect of the several amenities furnished to them including meals served to them and (v) the transaction so entered into did not envisage any sale of food since the guests could not demand a rebate or deduction if they were to miss a meal or meals nor were they entitled to carry away or deal with in any manner, the food served at their table and it was, on the contrary, the management which had the right to deal with such unconsumed remainder as it liked. Such a position, therefore, being inconsistent with a sale under which the property in the whole must pass to the purchaser and who could deal with the remainder in any manner he liked, it was this part and sort of business in respect of which immunity was claimed by the company from sales tax. As would appear from the report of the case, at the High Court stage, as reported in *State of Punjab v. Associated Hotels of India Ltd.* [1967] 20 S.T.C. 1, when the matter came up before a learned single Judge of the High Court See *Associated Hotels of India Ltd. v. Excise and Taxation Officer, Simla* [1966] 17 S.T.C. 555, Narula, J., held that the supply of meals to the residents in the petitioner's hotel did not amount to sale of foodstuffs within the meaning of Section 2(h) of the Punjab Act but that the supply of meals and other eatables to the casual and other non-resident visitors was sale of foodstuffs. On a Letters Patent Appeal by the State, the only question for decision was whether the decision of Narula, J., on the first point was correct. The Division Bench of the High Court held that the view of Narula, J., that no sale of food took place in the company's hotels was correct. This view of the High Court was sustained by the Supreme Court. At no point of time did the company in that case claim any exemption in respect of the meals served in its restaurant business. That point was never raised at any stage of the case. It is in this background that the Judgment of the Supreme Court in the case of *The State of Punjab Vs. Associated Hotels of India Ltd.*, has to be appreciated. The distinction between the two classes of business is, in my opinion, plain. While in the hotel business guests are received primarily for the purpose of lodging, such is not the case with restaurant business. In one case the dominant object of the business is service-in the other case it is sale to customers. So also, it will be seen that the transaction between a hotelier and its guests is one for the latter to stay and not one of sale of foodstuffs supplied. Again, it will be noticed, the transaction entered into by a hotelier does not envisage any sale of food, for the guests are not entitled to carry away or deal with in any manner the food served on their table nor are the guests entitled to claim any rebate or deduction for missing any of their meals. It is the management which has the right to deal with such unconsumed remainder. In the restaurant business, it is pertinent to point out, the primary purpose is to supply the foodstuffs either according to the choice of the guests or according to their fixed meal. The bill which the customer pays in such cases is for the various food items which he consumes. He may also

get the foodstuffs, pay its price and take it to any place he likes. This makes all the difference. The ownership in the foodstuffs passes to the customer the moment the foodstuffs are supplied and the price thereof is paid to the restaurant. The primary purpose of such a transaction is supply of foodstuffs and it may merely be incidental to take into account service or other related amenities. Again, it is worthwhile to notice that there is no difference between the price of a foodstuff supplied to customers who eat their meals in the restaurant on its tables and that of a foodstuff purchased by customers to be taken away with them to deal with such foodstuff as they like. I am unable, therefore, to stretch the ratio of the Supreme Court Judgment in the case of *The State of Punjab Vs. Associated Hotels of India Ltd.*, so as to cover the cases of restaurant business also, as the learned counsel for the petitioners wants me to do. The learned counsel laid great stress on and repeatedly invited our attention to, paragraph 17 of the Judgment of the Supreme Court, where it has been laid down :

The transaction between a hotelier and a visitor to his hotel is thus one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. The revenue, therefore, was not entitled to split up the transaction into two parts, one of service and the other of sale of foodstuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for foodstuffs served to him with a view to bring the latter under the Act.

It was contended that the aforesaid part of the Judgment of the Supreme Court was equally applicable to the cases of restaurant business. Judging in the light of the background heretofore mentioned, I am unable to find any merit in the contention put forward by the learned counsel for the petitioners.

9. I have already stated earlier that the statements made in the writ petitions are not quite clear as to which of the petitioners is engaged in a business called hotel and to what extent. It is thus not possible for me to give any relief to the petitioners in these writ applications. Needless to add that when they submit their returns under the Bihar Sales Tax Act, 1959, the petitioners may claim exemption in respect of such business which they claim to be a part of their business as hoteliers and if they are able to establish such a fact before the department, certainly they would be entitled for exemption in respect of such part of the business only; such an exemption the commercial taxes authorities would surely grant to them in view of the decision of the Supreme Court in the case of *The State of Punjab Vs. Associated Hotels of India Ltd.*, .

10. As the position stands, however, I do not find any merit in these applications. These applications are, therefore, dismissed with the aforesaid observations. In the circumstances of the case, there will be no order as to costs.

S.N.P. Singh, C.J.

11. I agree.