

(1996) 06 CAL CK 0010
In the Calcutta High Court
Case No : F.A.T. No. 1190 of 1990

State of West Bengal and Others

APPELLANT

Vs

M/s. Deekay Coconut Oil Industries and Another

RESPONDENT

Date of Decision : 05-06-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 265, 301, 304, 304(b)

Citation : 100 CWN 988

Hon'ble Judges : S.N. Chakraborty, J;S.B. Sinha, J

Bench : Division Bench

Advocate : Samarendra Dutta, for the Appellant; Pranab Kumar Paul, Rupen Mitra and Subrata Basu, for the Respondent

Judgement

Satya Brata Sinha, J.—This appeal is directed against the judgement and order dated. 18.4.1990 passed by a learned single Judge of this Court whereby and where under the said learned Judge allowed the writ application filed by the writ petitioner-respondent No. 1 declaring Section 2(4)(b)(ii) of the West Bengal Taxation Laws Amendment Act, 1987 (hereinafter referred to as the 1987 amendment Act) in terms whereof Section 6B(2)(e) of the West Bengal Finance (Sales Tax) Act, 1941 was deleted, as unconstitutional. The fact of the matter lies in a very short compass.

2. The petitioner No. 1 is a Company incorporated under the Indian Companies Act. 1956. In the year 1979 the State of West Bengal framed a(sic) for the purpose of grant of incentives to the Newly set up Industries; in terms whereof such industries were to enjoy tax holidays for five years within a Metropolitan area and for seven years outside such

3. The contention of the petitioner is that in view of the aforementioned scheme they were only entitled to enjoy tax holidays for the aforementioned period not only as regards payment of sales tax but also turnover tax in terms of the provisions of Section 6B(2)(e) of the said Act which was deleted with retrospective effect by reason of the 1987 Amendment Act.

4. it is contended that the petitioners were not being granted eligibility certificate for which they filed a writ application and the said writ application having been allowed, an eligibility certificate was granted in their favour.

5. The petitioners allegedly (sic) to or in furtherance of the made by the State set up the industry in the year 1980. and the (sic) sale from its manufacturing unit took place on 21.9.1982. According to the petitioners, they were entitled to such tax holidays till 1984 but by reason of the aforementioned 1987 Amendment Act which come into force with effect from 1.7.1987, the said benefit granted to them had been taken away and thus, the said Act should be held to be ultra vires Article 14 of the Constitution of India.

6. The learned trial Judge upon hearing the Counsel for the parties inter alia, held that the impugned Act was ultra vires Article 304 of the Constitution of India. It was held that the respondents being bound by the promise held out to the petitioner were liable to implement the same and thus the purported Amending Act was ultra vires Article 14 of the Constitution of India also.

7. Mr. Samarendra Dutta the learned Counsel appearing on behalf of the appellants, inter alia, submitted that despite such tax holidays the petitioners were liable to pay the turnover tax as there existed no provision for tax holidays in respect of turnover tax.

8. The learned Counsel in this connection has drawn our attention to the provision of Rule 3(66) of the West Bengal Sales Tax Rules and submitted that from a perusal thereof it would appear that the said Rule was applicable only in respect of a dealer who was liable to pay tax under Sections 4 and 8(3) of the said Act and thus, turnover tax which was payable in terms of Section 6B thereof was not exempted. It was submitted that the State is entitled to change its policy decision and in support of his aforementioned contention, reliance has been placed on the decisions of the Apex Court in *Arabind v. State of Gujarat* reported in 99 STC, page 333. It was further submitted that the power of the legislature to amend the law with retrospective effect is beyond any cavail of doubt and reliance in this connection has been placed in *Shantilal & Brothers v. State of Karnataka & Anr.* reported in 59 STC page 178. It was submitted that in view of the decision of the Apex Court in *Hoechst pharmaceuticals Ltd, & Anr. v. State of Bihar & Ors.* reported in 55 STC page 1 and the decision of this Court in *The Century Spinning Mfg. Co, & Ors. v, State of West Bengal & Ors.* reported in 73 STC page 277, the validity of the turnover tax cannot be questioned. The learned Counsel also pointed out that the learned trial Judge has committed an, error in holding that the Act is ultra vires Article 304 of the Constitution of India. The learned Counsel submits that it was wrongly stated that turnover tax was demanded pursuant to the order of the High Court which is incorrect inasmuch as only Sales Tax was demanded.

9. Mr. Pranafa Pal, the learned Senior Counsel appearing on behalf of the respondents, on the otherhand, submitted that the petitioners do not question

the constitutionality of the turnover tax. The learned Counsel submits that from a perusal of Section 6B(2)(e) which was inserted with effect from 1.4.1979 by West Bengal Act No. IV of 1979; it would be evident that an excertion was created thereby inasmuch as the factors mentioned therein were not to be included in computation of gross turnover. Our attention was drawn to Section 5(2)(a)(vi) of the Act for the purpose of showing that in terms thereof such other sales as prescribed were not to be included and in that view of the matter Rule 3 comes into the picture in terms whereof promise was made for grant of tax holidays to newly set up SSI Units. According to the learned Counsel, in this view of the matter, the relief which was granted once, cannot be taken away by reason of the Amending Act which came into force with effect from 1.7.87 with retrospective effect. The learned Counsel submits that in any event such benefits could not be given to certain industries and denied to some other industries and on that score also Article 14 of the Constitution of India comes into play. The learned Counsel in the1 connection relied upon Lohia Machines Ltd. & Anr. v. Union of India & Ors. reported in 152 ITR 308 : 1985(2) SCC 197 and submitted that in that decision retrospective operation of an Act was not given effect to in the minority judgement.

10. In the. alternative it was submitted that even if Section- 6B(2)(e) of the Act is held to have been deleted, Rule 3 evidently refers to Section 4 and 8(3) of the Act and as by the terms of the later provision, only the registered dealer is liable to pay tax, the same would coyer turn over tax also. In this connection our attention has been drawn to Section 2(h)(b) of the said Act for the purpose of showing the meaning of the word "tax" also includes turn over tax". The learned Counsel submits that the word "tax" covering turn over tax" must be liberally construed and should be considered in the manner which would not frustrate the object. Reliance in this connection has been placed on Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, It was also pointed out that on the day of which Section 6B came (sic) force, section 2(h)(b) was also enacted which also goes to show that the word tax" would include "turnover tax".

11. The only question which, therefore, arises for consideration in this application is as to whether the petitioner was entitled to exemption from payment of turnover tax.

12. In our opinion, the Amending Act cannot be said to be violative of Article 304 of the Constitution of India. By reason of Clause (b) of Article 304 of Constitution of India, the legislature of a State, may by law, is entitled to impose such reasonable restriction on the freedom of trade or inter course with or within that State as may be required in public interest.

13. It is now well-known that a tax can. be levied in terms of Article 265 of the Constitution of India. It is also well known that the Court is loath to interfere with the fiscal legislation and/or a policy decision " adopted by the State which would have great repurcussion on the resources of the State. The court will not view a

statute dealing with fiscal matter in the same manner which would be done in the case of personal liberty.

14. A fiscal statute can be declared ultra vires inter alia on the ground of its being confiscatory in nature. No such case has been made out. In *J.R. S. Joshi's* case reported in 1977 40 STC 497, the Apex Court states:

A law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs.

15. A free flow of trade is although protected by a statute, the same cannot be said to be ultra vires Article 301 unless such free flow of trade is directly or materially impaired by a tax. It is beyond any cavil of doubt that regulatory or compensatory measures can be taken by the legislature in view of Article 304(b) of the Constitution of India. Normally a tax on the sale of goods does not directly and materially impede the free flow of movement of transport of goods.

16. It is not in dispute that the Supreme Court of India in *Hoechst Pharmaceuticals Ltd, & Anr. v. State of Bihar & Ors.* reported in 55 STC page J has held levy of turn over tax as valid. The said question came up for consideration also before this court in *Century Spinning Mfg. Co. & Ors. v. State of West Bengal & Ors.* reported in 73 STC 277 wherein this court, clearly held that turn over tax is a tax on sales and not on income. It further held that the provision of Section 6B are not violative of Article 301 and 304 of the Constitution.

17. Levy or imposition of a tax is not a restriction at all in the matter of carrying on of a trade.

18. It is also well known that the doctrine of promissory estoppel has several facts which, inter alia, are :- (a) there is no estoppel against a statute. See *Shabi Construction Company Vs. City and Industrial Development Corporation and Another*, and *Ram Nath Sahu v. Union of India* through Secretary, Ministry of Agriculture and Ors. reported in AIR 1996 Allahabad 19. (b) it is not a rigid rule, (c) a unilateral decision to withdraw is not ultra vires if the same would be in public interest and (d) doctrine of promissory estoppel cannot be applied in a case unless a positive representation is made. See *M/s. Mahalaxmi Rice Mills and others Vs. State of W.B. and others*,

19. Relief on the basis of doctrine of promissory estoppel can be denied inter alia on the ground of doctrine of ultra vires as also be all necessary ingredients for invoking the said doctrine are not pleaded and proved. (See *Calcutta Law Times* 1996 1HC page 187 and see *Sone Vanaspati Vs. State of Bihar and Others*)

20. It is now well known that doctrine of promissory estoppel is not a pure question of law and thus the petitioner is bound to plead and prove the requisite ingredients.

21. Bengal Finance (Sales Tax) Act, 1941 is undoubtedly a fiscal statute. It is now well known that in the matter of levy of tax there cannot be any intendment

or hypothesis. Tax has been defined in Section 2(h)(b) to mean the tax payable u/s 5, Section 6B, Section 6C or Section 6D. The said provision was inserted with effect from 1.4.79 by West Bengal Tax Laws (Second Amendment) Act, 1979, by reason of Section 2(l)(d) of the West Bengal Act No. IV of 1979 read with notification No. 1274 PT dated 31.1.1979. However, it must be noted that the interpretation deals in Section 2 if prefixed by the words in this Act, unless there is anything repugnant in the subject or context. In any event, the definition of the word "tax" is not decisive in this case as the State is entitled to grant exemption "to one of the various taxes which may be levied on sales of goods."

22. Section 4 provides for incidence of taxation in terms whereof all dealers are liable to pay tax under the said Act on all sales effected after the date so notified. Sub-section (5) of Section 4 defines taxable quantum. Section 5 provides for the rate of tax. Section 6B which was inserted with effect from 1.4.1979 by Section 2(4) of the West Bengal Act No. IV of 1979 provides for liability for payment of turnover tax and the rate thereof.

23. Section 6B(2) provides that the turn over tax shall be levied on the part of the gross turnover of a dealer during any period which remains after deducting therefrom his turnover during that period on the factors enumerated therein. Clause (e) of Section 6B(2) referred to sale of goods which are generally exempted from tax under Sub-section (6) of Clause (a) of Sub-section (2) of Section 5. The said provision, as indicated hereinbefore, was omitted with retrospective effect by Section 2(4)(B)(ii) of the West Bengal Taxation Laws (Amendment) Act, 1987.

24. Sub-clause (vi) of Clause (a) of Sub-section (2) of Section 5 refers to such other sales as may be prescribed. The said provision was inserted with effect from 4.6.1961 by Bengal Finance (Sales Tax) (Amendment) Act, 1961 by Section 3(2) of West Bengal Act No. XIV of 1961. It is, therefore, evident that Section 6B having been inserted later on could not have been contemplated to be within the purview of Rule 3.

25. Rule 3 of Bengal Sales Tax Rules 1941 provides that in calculating his taxable turnover, a dealer liable to pay tax under Sections 4 or 8(3) of the Act may inter alia deduct from his gross turnover to his turnover on the following, viz.

Sales by a newly set up small scale industry of goods manufactured by it during the period of five- years, if the said industry is situated within the area of the Calcutta Metropolitan District as described in the Schedule to the Calcutta Metropolitan Planning area (use and Development of Land) Control Act, 1965, or seven years, if it is obtained elsewhere in West Bengal since the date of its first sale of such manufactured goods.

26. It is now well known that a provision providing for exemption or exception has to be strictly construed and the same is not required to be construed in favour of the subject. See AIR 1996 SC 524. The provisions of the Act and the rules have to be construed keeping in view the aforementioned ratio. Thus

construed, in our opinion, turnover tax u/s 6B cannot be read into Rule 3(6B) of the Rules. Furthermore, turnover tax is not levied on all dealers. It is levied only on the dealers whose turnover exceed Rs. 25 lakhs.

27. In *Arbind v. State of Gujarat* reported in 99 STC 333, the Apex Court has clearly held that the Government is entitled to change its policy decision.

28. The question which now arises for consideration is as to whether the State has" the jurisdiction to rescind Section 6B(2)(e) with retrospective effect. A statute which is clarificatory in nature may be given effect to with retrospective effect.

29. There cannot be any doubt whatsoever that turnover tax is a separate tax. No promise as such appeared to have been made out by the State for grant of exemption in respect of payment of Turnover Tax.

30. Rule 3 evidently refers to Section 4 and Section 8(3). It does not refer to Section 6B.

31. However, Section 6B(2)(a) as has been submitted by Mr. Paul would come within the purview of Rule 3(66) in view of Section 5(2)(a)(v).

32. Section 6B(1)(a) evidently provides for payment of turnover tax in the event the gross turn over of the dealer exceeds 25 lakhs of rupees. Such tax is to be payable in addition to tax u/s 5 and 6D, from the 1st day of June, 1987 at the rates specified in Sub-section (3) or such part of his turnover as specified in Sub-section (2). Sub-section (2) provides that the turnover tax shall be levied on that part of the gross-turnover of the dealer during any period which remains after deducting therefrom its turnover during that period on certain sales as mentioned in different sub-sections. Clause (e) of the said provisions undoubtedly referred to sale of goods which are generally exempted from tax. Therefore, it is evident that when Clause(e) referred to Section 5(2)(a)(vi) only, it referred to the goods as may be prescribed inasmuch as otherwise the words such other sales as may be prescribed as contained in Clause(9) of Sub-section (2) of Section 6B become otiose. Furthermore, as indicated hereinbefore, Rule 3(66) which was inserted in the year 1975 could not have been intended to cover turnover tax which was levied much later on. It is now well known that in the matter of interpretation of statutes, the history of legislation also plays a vital role.

33. It has to be borne in mind that there is no provision for exemption of turnover tax in the 1954 Act in respect of the small scale industries. Section 4 AAA of the 1954 Act relating to imposition of turnover tax is a self-contained code, which separately provides for exemption of such tax by rules prescribed therefor but admittedly no such rule has been made. In absence of such a rule the question of grant of any exemption in relation to the turnover tax would not have arisen. It may be noticed that the Governor has merely empowered to issue a notification in terms of Section 4 AA of the 1954 Act relating to exemption of

Sales Tax payable u/s 4 thereof Which covers only grant of exemption in respect of payment of Sales Tax as regards specified small-scale industries but such a notification cannot be said to be a rule in terms of Section 4 AAA(2)(d). It may be noticed that even Mr. Pal did not argue that the writ petitioner-respondent No. 1 was entitled to such exemption under such notification. 34. Thus, as by reason of the said provision no exemption could be claimed by the writ petitioners for deduction from its turnover for the purpose of Turnover Tax, it did not derive any right to claim exemption from payment of such tax. Had the intention of the legislature been to bring Turnover Tax within the purview of Rule 3(66) it could have said so expressly, the word "tax" will have a different meaning in different context. Rule 3(66) does not levy any tax but only exempts computation to certain tax in the gross turnover in relation, to certain goods specified therein.

35. We are, therefore,,of the opinion that Rule 3(66) did not encompass with its ambit Turnover Tax.

36. In Lohia Machine Ltd. (Sic) reported In 52 ITR 308, the Supreme Court was concerned with the effect of Section 80(j) of the Income Tax Act vis-a-vis Rule 19A of Rules.

37. The said question does not arise in the instant case. The Judgement of Sen. J. upon which strong reliance has been placed by Mr. Pal is a minority Judgement, and thus, the said judgement cannot be relied upon as an enunciation of rule of law that the Act withdraw with retrospective effect.the benefit of the relict unequivocally granted by the Parliament to an assessee to qualify for such a relief is unconstitutional. The said decision has no application to the fact of the present case.

38. In the instant case, as indicated hereinbefore. Rule 3 had no application in relation to turnover tax. Exemption under Rule 6B(2)(1) was in relation to goods which apart from the goods mentioned in different clauses therein, were required to be specifically.

39. In Lohia (supra), several decisions had been cited to show that even a fiscal statute can be amended with retrospective effect. See Jawhar Mal v. State of Rajasthan reported in AIR 1966 SC 764 at 772. The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc., Krishnamurthy & Co. v. State of Madras reported in 1973 31STC 178 at page 186 and State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others,

40. in Shantilal Brothers v. State of Kamataka reported in 59 STC page 179.jagannath Sethy.J. (as His Lordship then was) clearly hold that a validating Act may be given a retrospective effect.

41 In Bajaj Tempo (supra) reported in ITR 196 ITR 188 upon which also strong reliance has been placed by Mr. Pal has no application in the present case. In that case, it was held that a reasonable and purposive construction is necessary to make the provision meaningful while adopting a literal construction would result

in defeating the very purpose of Section. 15C of the Indian Income Tax Act. No exception can be taken to the aforementioned ratio. Having regard to the provision of the Act. we are satisfied that the legislature of the State was entitled to delete Section 6B(2)(e) with retrospective effect and no discrimination has been committed thereby.