
(1941) 09 MAD CK 0019
In the Madras High Court

The Province of Madras

APPELLANT

Vs

Boddu Paidanna and Sons

RESPONDENT

Date of Decision : 05-09-1941

Acts Referred:

Government of India Act, 1915 — Section 45A

Citation : AIR 1941 Mad 913 : (1941) ILR (Mad) 874 : (1941) 54 LW 452 :
(1941) 2 MLJ 607

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal arises out of a suit filed by the respondents in the Court of the District Munsif of

Vizianagaram for a declaration that the Madras General Sales Tax Act, 1939, and the Turnover and Assessment rules framed thereunder are ultra

vires the Provincial Legislature, a permanent injunction restraining the Provincial Government from collecting any tax from the respondents on the

sales by them of groundnut oil and groundnut cake and an order directing the refund of Rs. 163-11-0, the amount which the respondents alleged

they had been unlawfully compelled to pay in respect, of sales of groundnut oil and groundnut cake during the month of October, 1939. The

respondents are members of a joint Hindu trading family carrying on business at Vizianagaram. They purchase groundnuts in the shell, and having

decorticated the nuts they proceed to extract the oil from the kernels for the purpose of sale. Out of the residue they make groundnut cake, which

they also sell. The assessing authority constituted by the Madras General Sales Tax Act assessed the respondents to the tax imposed by the Act

both in respect of their purchases of groundnuts and their sales of groundnut oil

and groundnut cake. The assessing authority regarded the business of manufacturing groundnut oil and groundnut cake as distinct from their business as buyers of groundnuts.

2. The Government of India Act, 1935, vests in the Central Legislature the power of imposing duties of excise on goods manufactured or

produced in India, subject to certain exceptions which do not include the goods dealt in by the respondents. The power of imposing taxation on the

sale of goods is given to the Provincial Legislatures. When the respondents first came into Court their case was that a tax on the sale of goods is in

all cases an excise duty and therefore the Madras Legislature had exceeded its power in enacting the General Sales Tax Act. In view of the

decision of the Federal Court In re The Central Provinces and Berar Act XIV of 1938 (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18, where it

was held that an Act of a Provincial Legislature levying a tax on retail sales of motor spirit and lubricants was not ultra vires the Provincial

Legislature, it was impossible for the respondents to maintain that the Madras General Sales Tax Act was invalid in its entirety, but the question

whether a tax on the first sale of goods manufactured or produced within the Province constituted an excise duty remained open to them.

Consequently at the hearing the respondents confined themselves to this question in their attack on the validity of the Act. The respondents also

raised the question whether the assessing authority was entitled to impose the tax both on their purchases of groundnuts and their sales of

groundnut oil and groundnut cake, relying here on a proviso to Section 3 of the Act to the effect that in respect of the same transaction the buyer

and the seller shall not both be taxed, but only one of them, and that when the amount for which goods are bought by a dealer has been included in

his turnover, the amount of the sale price shall be excluded. They averred that the goods which they bought and the goods which they sold were

the same goods and therefore they could not be taxed both as buyers and sellers.

3. The District Munsif held that a tax on the first sale of goods manufactured in the Province was an excise duty within the meaning of the Act and

consequently granted a declaration"" to the effect that the Act and the rules framed thereunder in so far as they impose a tax on such sales are ultra

vires the Provincial Legislature. The District Munsif did not grant an injunction,

because he considered that there could be no reasonable doubt that the Provincial Government would honour a decree of a Court of law, and naturally this has been accepted to be the case. The District Munsif also accepted the respondents' plea that groundnut oil and groundnut cake were for the purposes of the Act the same goods as the groundnuts out of which they were made and therefore the respondents could not, in any event, be taxed both on their purchases of groundnuts and on their sales of the goods made therefrom. The result was that the claim for a refund of the Rs. 163-11-0 was accepted by the District Munsif.

4. The Provincial Government appealed to the District Court of Vizagapatam, but the Advocate-General of Madras applied for an order transferring the appeal to this Court. The application was not opposed and in view of the importance of the case this Court granted the application.

The appellant's contentions may be summarised as follows:

(1) An excise duty implies only a tax on the manufacture or production of goods before they leave the hands of the manufacturer or producer and

as such a tax can be imposed before any sale takes place, there is no conflict of power. The Federal Legislature has free scope to impose an

excise duty before a sale takes place, leaving the Provincial Legislature the power to impose a tax when a sale in fact takes place.

(2) The tax imposed by the Madras General Sales Tax Act is a tax on turnover and such a tax cannot be classified as an excise duty.

(3) The rules framed under the Act are intra vires and the respondents have not been subjected to double taxation, the two sides of their business being quite distinct.

(4) While a suit will lie for a declaration that the Act and the rules are ultra vires, if intra vires the validity of an assessment can only be raised before the tribunals constituted by the Act and not in a Court of law.

5. While not disputing that the rules fall within the scope of the Act, assuming the Act to be intra vires, the respondents join issue on all these

contentions. The most important question is the first of those just enumerated. If a tax on the first sale of goods manufactured or produced within

the Province is an excise duty then the Act is ultra vires to this extent, and there is a corresponding defect in the rules framed under the Act, which

means that the respondents cannot lawfully be taxed on their sales of groundnut

oil and groundnut cake, and the third and fourth questions will not arise. The third question is bound up with the first. In the course of the hearing, Mr. Venkatarama Sastriar intimated that his clients were only concerned with the levy of the tax on their sales.

6. The entry in the Federal List relating to duties of excise is Entry No. 45, which reads as follows:

Duties of excise on tobacco and other goods manufactured or produced in India except--

- (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;
- (c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.

7. The power of imposing excise duties on the excepted goods is given to the Provincial Legislature by Entry No. 40 of the Provincial List. If such

goods are manufactured or produced in the Province the Provincial Legislature may levy "duties of excise" on them; if manufactured or produced

elsewhere in India it may impose "'countervailing duties'" at the same or lower rates. The Entry in the Provincial List regarding taxes on sales is Entry

No. 48 and is in these words:

Taxes on the sale of goods and on advertisements.

The question of what is meant by a duty of excise was fully discussed in the judgments of the Federal Court in *The Central Provinces Case* (1939)

1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18. Broadly speaking, an excise is a duty imposed on goods manufactured or produced in the country as

opposed to a customs duty, which is levied on goods imported from other countries, but this broad distinction will not suffice here. In the United

Kingdom such taxes as the entertainment tax and the dog tax are regarded as duties of excise, and so are licence fees. Therefore a tax on the sale

of goods manufactured or produced within the United Kingdom would undoubtedly fall within the definition of excise, but it is to be remembered

that in the United Kingdom there is no division of legislative powers. Parliament stands alone. According to Blackstone, [Stephen's Commentaries

(1928) edition, Vol. IV, page 420] and economists excise duties may be imposed at any stage from manufacture to consumption, as was pointed

out in *The Central Provinces Case* (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18 although Gwyer, C.J., maintained that the primary and

fundamental meaning in English of an excise duty is still that of a tax on articles produced or manufactured in the taxing country and intended for

home consumption and that the Government of India Act, 1935 did not intend to give the words "duties of excise" an extended meaning. The

learned Chief Justice of India observed (page 47):

In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed

as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connexion with,

manufacture or production and extends no further.

8. He did not, however, proceed to discuss the problem whether a tax on the first sale, that is, the sale by the manufacturer or producer, is a duty,

imposed in connection with the manufacture or production, because the question did not arise in that case.

9. Sulaiman, J., was also of the opinion that the wider meaning given by commentators and economists and accepted in England may be

inapplicable to the Indian Constitution and in the course of his judgment said (page 77):

The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is

immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If a duty is imposed on the

goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which

they leave it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods

have been manufactured or produced. Nor can it be levied merely because the goods have been consumed or used or even destroyed. The right

to levy the duty would not at all come into existence before the time of the sale. It cannot at all be levied unless the goods are actually sold, and

may not be leviable if they are transferred in some other form. Thus a duty on goods manufactured or produced is distinct and separate from and

independent of a duty on their sale and, (except probably at the stage of the first

sale) there seems to be no good reason why the two may not co-exist without overlapping.

10. In excepting the first sale, Sulaiman, J., had in mind the decision of the High Court of Australia in *The Commonwealth and Commonwealth Oil*

Refineries Ltd. v. South Australia (1927) 38 Com.L.R. 408 to which we shall refer presently.

11. In the opinion of Jayakar, J., a tax on the sale of goods manufactured or produced in a country is an excise duty, but he considered that by the

insertion of Entry No. 48 in the Provincial List Parliament meant to reserve to the Provincial Legislature the power of imposing a tax on sales for

the purposes of consumption, and the only question in *The Central Provinces Case* (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18 was whether

a tax levied by the Provincial Government on the sale to the consumer was lawful. Jayakar, J., laid great stress on Entry No. 16 in Schedule I of

the Devolution Rules made u/s 45-A of the previous Government of India Act. The relevant portion of that entry read as follows:

16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs

and the levying of excise duties and licence fees on or in relation to such articles.

12. The learned Judge considered that there was no escape from the conclusion that the definition of "excise" in Entry No. 16 of the Devolution

Rules and the expression "duties of excise" in Entry No. 40 of the Provincial List in the present Act bear a wide signification, and include all duties

levied on the consumption of the excisable commodity in the Province at any stage from production to sale. He expressed his conclusion in these

words (page 116):

On a careful review of the whole question, I am therefore inclined to hold that Parliament intended:

(1) That, as regards goods centrally excisable, taxes on their sale within the Province for purposes of consumption, when such taxes are in no way

connected with their production, manufacture, etc., within the Province, but are imposed on their sale in the Province merely as existing articles of

trade and commerce, should be exclusively within the competence of the Provincial Legislature.

(2) That, save as aforesaid, all duties of excise on those goods whether levied

and collected at the stage of manufacture, production or any subsequent stage upto consumption (exclusive of sale in the Province as stated above), should remain exclusively within the competence of the Centre. A corollary of this rule will be that the residuary powers, if any, of levying and collecting excise duties on those goods (save on their sales as aforesaid) will remain exclusively within the competence of the Central Legislature.

13. As we read the judgments delivered in the Central Provinces Case (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18 the learned Chief Justice of India was of the opinion that a tax on the sale of a commodity cannot be an excise duty unless it is connected with its manufacture or production, but he expressed no opinion on whether a tax on the sale by the manufacturer or producer should be classified as an excise duty. Sulaiman, J., was substantially in agreement with the learned Chief Justice in his definition of excise duty, but he thought it probable that a tax on the first sale should be classified as an excise duty. Jayakar, J., was definitely of the opinion that a tax on the first sale was an excise duty and taxes on subsequent sales, excluding the last sale, should be similarly classified. He made an exception in the case of the last sale, because Entry No. 48 in the Provincial List indicated that this was the intention of Parliament. It cannot be disputed, in fact it has been conceded by both sides, that the judgments of the Federal Court in The Central Provinces Case (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18 leave, open the question whether a tax on the sale by the manufacturer or producer constitutes an excise duty, but, of course, even when obiter the observations of the Federal Court must be treated with great respect.

14. At this stage it will be convenient to discuss the judgments delivered by the High Court of Australia in The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1927) 38 Com.L.R. 408. The constitution of the Australian Commonwealth has been built on different lines from those of the Indian constitution and in interpreting the Government of India Act, 1935 the Court can only have regard to the provisions contained therein; but this does not mean that the Court is precluded from examining the judgment in The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1927) 38 Bom.L.R. 408 in order to see

whether they throw light on the meaning to be attached to the words "excise duties" used in the Government of India Act, 1935, and we consider that these judgments do render great assistance in solving the first of the problems with which this Court is now confronted. The Act of the South Australian Parliament imposed a tax of three pence on every gallon of motor spirit sold within the State (excluding spirits sold for delivery in or transportation to any place outside the State) and the vendor was authorised to add the amount of the tax to the price agreed to be paid. Six of the seven judges who constituted the Court were of the opinion that the Act was ultra vires, because it violated the power of the Commonwealth Parliament to impose duties of excise. With the one exception the learned Judges were all of the opinion that a tax on the first sale amounted to an excise duty. The basis of their decision was that a tax on the first sale was a tax on the production of the article.

15. In citing this case and in an endeavour to find support for his argument that even a tax on the first sale is not an excise duty the learned

Advocate-General laid great stress on this passage in the judgment of Isaacs, J., (page 426):

Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the articles sold or

are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed

merely with respect to the sale of the goods as existing articles of trade and commerce, independently of the fact of their local production, a licence

or tax on the sale appears to me to fall into a classification of Governmental power outside the true content of the words "excise duties" as used in

the Constitution. Such taxing regulations are, in my opinion, not "withdrawn" from the States, however they might stand in presence of relevant

Commonwealth Legislation respecting foreign or inter-state trade. I agree with the reasoning in *Peterswald v. Bartley* (1904) 1 Bom.L.R. 497.

Therefore, if the taxation by the State Act u/s 4 were simply on motor spirit as an existing substance in South Australia and not subject to any

foreign or inter-state operation of trade or commerce it would not be open to the challenge here made. That, however, is not the nature of the

Legislation.

16. These remarks do not help the learned Advocate-General. The distinction which Isaacs, J., here draws is the distinction between the stage of

production and the stage when the goods produced have become part of what has been described as the general stock of the Province. In other

words, if the tax is imposed while the goods are in the hands of the producer, it is a tax on the production and therefore an excise duty; but if the

tax is imposed after the goods have left his hands it is not. This is made clear by the following passage in the judgment of Isaacs, J., (page 430):

The first sale of motor spirit, after its production either by primary or later processes, is naturally and in the ordinary course of business a sale by

the producer, and a sale by him is certainly included. A tax on that sale, so described, is essentially a burden and a tax on the production of the

goods? Production of motor spirit is with a view to sale; and the tax, having direct reference to a sale so described as to be intimately related to

production, is a matter which affects the producer as such, because it burdens the trade for which his production is the essential preparation. A tax

laid expressly on the production alone of goods would affect every one who produced them even for personal use or consumption. But it is all one

in reality whether the tax is expressed to be on production followed by sale, or, as here, on the sale immediately following production.

17. Higgins, J., also said that a tax on the sale of an article is a tax on the article itself and in accepting the definition in Mill's Political Economy, 4th

Edition, Vol. II, page 434, that "taxes on the sale of consumable commodities are simply taxes on those commodities". Starke, J., said the same

thing.

18. The learned Advocate-General has accepted the proposition stated by the learned Chief Justice of India in The Central Provinces Case (1939)

1 M.L.J. (Supp.) 1 : (1939) F.C.R. 18 that a tax connected with the manufacture or production of goods within the Province constitutes an excise

duty, and in our opinion, the correctness of the proposition is not open to doubt. Therefore what the Court has to decide, in the first place, is

whether a tax on the sale of goods by the manufacturer or producer is so connected with their manufacture or production as to amount to an excise

duty. The High Court of Australia has said that a tax imposed on the first sale of goods is so connected with their production that it is an excise

duty and no reason has been advanced in the course of the arguments in this case to induce us to think otherwise. The tax operates on the goods

themselves and it is imposed before they leave the hands of the manufacturer or producer. In the normal course he is certainly not going to part

with his goods until a contract of sale has been entered into. This being the case it seems to us that the tax is intimately connected with the ,

manufacture or production of the goods. We hold that a Provincial Legislature in India has no power to tax a sale by the manufacturer or producer

as, for the reasons given, this would mean the imposition of an excise duty and the assumption of power vested only in the Centre.

19. Where an entry in the Provincial List overlaps an entry in the Federal List, the Federal List must prevail. Where the interests can be reconciled

this must be done, because obviously Parliament could never have intended that there should be a conflict. Entry No. 45 in the Federal List and

Entry No. 48 in the Provincial List can be reconciled by reading into Entry No. 48 of the Provincial List a power to tax all sales subsequent to the

sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have

become part of the general stock of the Province. On this basis the Provincial Legislature can levy a tax on the sale by the person who obtains the

goods from the manufacturer or producer and so on when the goods pass from hand to hand. It has been said that there is nothing to prevent the

manufacturer or producer opening a shop to sell his goods retail. This is so, but it is exceptional and as pointed out by Sulaiman, J., on Privy

Council authority it is the pith and substance of the Act which is the decisive factor.

20. It is now necessary to decide whether the Madras General Sales Tax Act does impose a tax on first sales. The learned Advocate-General has

said that the tax is imposed on a dealer's turnover and that it is not in reality a tax on sales. In this connection he has pointed to an argument

advanced by the Advocate-General of India in *The Central Provinces Case* (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18 to the effect that the

only power given to the Provincial Legislature by Entry No. 48 is a power to impose a tax on turnover. The contention of the Government of India

was that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act constituted an infringement of the power of the

Central Legislature and the argument of the learned Advocate-General of India was advanced in support of this contention. The Federal Court

refused to accept the argument, but this does not mean that this decision implied that a tax on turnover does not mean a tax on sales. Under the

Madras General Sales Tax Act, the tax is undoubtedly based on the dealer's turnover. "Turnover" is defined by Section 2 (1) as meaning the

aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable

consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on land in

which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, is excluded from his turnover. By an amending Act,

which received the assent of the Governor on the 4th March, 1940, the tax is now Rs. 4 per month if a dealer's turnover does not exceed Rs.

20,000 and one-quarter of one per cent. of the turnover if it exceeds Rs. 20,000. Any dealer whose turnover in any year is less than Rs. 10,000 is

not liable to pay the tax for that year.

21. A tax on a dealer's turnover is, in effect, a tax on his purchases or sales as the case may be. Whether the Legislature makes him pay a tax on

each transaction or whether it makes him pay a lump sum when the sales for a particular period have been ascertained, the result is the same--a tax

on his purchases or sales. The whole includes the part. And the very title given to the Act implies that it is a tax on sales. Moreover it is to be

remembered that a Legislature cannot do indirectly that which it has no power to do directly. In fact the learned Advocate-General did not appear

to be pressing his second point, although he did suggest that the Court should accept the contention of the learned Advocates-General of India in

The Central Provinces Case (1939) 1 M.L.J. 1(Supp.) : (1939) 1 F.C.R. 18 that Parliament merely intended to give to the Provinces the power to

impose a tax on turnover and not a power to tax individual transactions, but in doing so he overlooked the fact that the decision in The Central

Provinces Case (1939) 1 M.L.J. (Supp.) 1 : (1939) 1 F.C.R. 18 makes such an argument untenable. Notwithstanding that the tax imposed by the

Madras General Sales Tax Act is based on turnover, we hold that it is in fact a tax on sales and that in so far as it imposes a tax on the first sales of

goods manufactured or produced within the Province, it is ultra vires the Provincial Legislature. This means that we consider that in calculating a

dealer's turnover for the purposes of the Act the sale by him of goods which he has manufactured or produced must be excluded.

22. In view of these findings it is not necessary for us to decide the third and fourth questions stated by the learned Advocate-General.

23. As it has not been suggested that in ordering the refund of Rs. 163-11-0 the District Munsif committed any error, assuming his decision on the

main issue to be correct, the decree passed by him will stand. Consequently the appeal will be dismissed with costs and a certificate for two

counsel granted. A memorandum of cross-objections has been filed by the respondents, but they have not pressed it and it will also be dismissed,

in this case without costs.

24. As this judgment involves a substantial question of law as to the interpretation of the Government of India Act, 1935, a certificate will issue in

accordance with the provisions of Section 205 of that Act.