
(1959) 10 MAD CK 0023

In the Madras High Court

Case No : Writ Petition No's. 14, 15, 20, 38, 67, 111, 118 to 121, 417, 418 and 500 of 1958

V. Baluswami Naidu and Sons

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 01-10-1959

Acts Referred:

Citation : (1960) 73 LW 177 : (1960) 11 STC 231

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Single Bench

Advocate : V. Thiagarajan, for Sundararajan and Sivaswami, T.T. Srinivasan, A.N. Rangaswami and R.S. Venkatachari, for the Appellant; The Advocate-General and The Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Rajagopala Ayyangar, J.—This batch of 13 writ petitions have been filed by several dealers in hides and skins questioning the levy of sales tax on their transactions for the assessment years 1956-57 and 1957-58. Some of them seek the issue of a writ of mandamus directing the assessing authority not to proceed with the assessment, whereas in the case of others (save W.P. No. 500 of 1958), the relief sought is the issue of a writ of certiorari to quash the order of assessment. W.P. No. 500 of 1958 seeks the issue of a writ of prohibition directing the assessing authority not to proceed further with the contemplated assessment. The basis on which the reliefs are sought is however identical. The dealers involved in these petitions have not taken out licences and on the provisions and the rules as they stood until the recent amendment to which I shall presently advert, unlicensed dealers in untanned hides and skins were held not liable to pay tax on their turnover. The sales tax on hides and skins was u/s 5 of the Madras General Sales Tax Act, 1939, to be only at such single point as may be prescribed. The "prescription" was originally contained in Rule 16(2) of the Madras General Sales Tax (Turnover and Assessment Rules, 1939, which

fixed the single point at which the tax on hides and skins could be levied and which ran:

(2) No tax shall be levied on the sale of untanned hides and skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

2. Based on this provision and other relevant provisions of the Sales Tax Act and the rules a Bench of this Court in *Noor Mohammed and Co. v. State of Madras* [1956] 7 S.T.C. 792, held that an unlicensed dealer in untanned hides and skins was not liable to pay tax on the turnover under the provisions of the Madras General Sales Tax Act, 1939.

3. The result of this decision was that while unlicensed dealers in hides and skins escaped sales tax, licensed dealers were liable to tax and the State Government undertook legislation to rectify this anomaly as it was the defect in the phrasing of the rules that led to this unintended escape from taxation. The relevant Sales Tax Rules were amended and two sets of provisions were introduced by amendments which were effected in June, 1955. The first was an amendment effected to the General Sales Tax Rules requiring every one dealing in hides and skins compulsorily to take out a licence and not leave it to their option as had been done under the previous rules. The second step taken was to amend Rule 16 of the Turnover and Assessment Rules (a portion of which I have quoted earlier) in which the use of the expression "licensed dealer" had led this Court to hold that unlicensed dealers were outside the taxation provision. By a Notification G.O. No. 2733, Revenue, dated 3rd September, 1955, Rule 16 was amended eliminating the words "licensed dealer" and prescribing the single point at which the tax would be levied from dealers of untanned hides and skins. It is unnecessary to set out this rule because it is common ground that if the rule applied the transactions of the petitioners would fall within its scope and render them liable to taxation.; As the Government desired to give retrospective effect to the rule from the commencement of the financial year 1955-56 a specific provision was inserted in the rule itself rendering it retrospective and to have effect from 1st April, 1955. The validity of this retrospective provision was challenged in *Guruviah Naidu v. State of Madras* [1958] 9 S.T.C. 145. This objection was repelled primarily on account of the provisions contained in Madras Act 1 of 1957 confirming the retrospective operation of this rule. *Guruviah Naidu v. State of Madras* was concerned with the validity of the rule between 1st April, 1955, to 3rd September, 1955, on which the rule was promulgated.

4. The petitions now before me however call in question the validity of the amendment by which rules 15 and 16 of the Turnover and Assessment Rules were amended by the Notification dated 3rd September, 1955, on the ground that the rules had not been validly made by conforming to the statutory requirements by which a rule under the Madras General Sales Tax Act, 1939, could be framed. In other words, the attack now is on the ground that the procedural requirements by which the rules could be framed were not observed

with the result that the amendment has not the force of a rule under the Madras General Sales Tax Act.

5. This being the point raised, it is necessary to advert to the provisions of the Madras General Sales Tax Act relevant for the formalities prescribed in making rules. The rules whose validity is now impugned are the rules which have been included in the Turnover and Assessment Rules. Section 3 is the charging section, particularly Sub-sections (1) and (2). Sub-section (4) of this Section as it stood on the date relevant to the present petitions ran:

3. (4) For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed:

Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under Sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed:

Provided that-

(i) in respect of the same transaction of sale, the buyer or the seller, but not both, as determined by such rules as may be prescribed, shall be taxed;

(ii) where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in Clause (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him.

6. The expression "prescribed" which is used in Sub-section (4) was defined in Section 2(f) to mean "prescribed by rules made under this Act". Section 19 of the Act is the provision empowering the State Government to make rules to carry out the purposes of the Act and Sub-section (2) of Section 19 enacts:

19. (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for-

(a) all matters expressly required or allowed by this Act to be prescribed.

7. Sub-sections (4) and (5) of Section 19 are also of relevance and I shall therefore quote them.

19. (4) The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication for a period of not less than four weeks.

(5) All rules made under this section shall be published in the Fort St. George Gazette and upon such publication shall have effect as if enacted in this Act.

8. I shall now set out the facts on the basis of which the point raised in these petitions has to be decided. The rules which were published in G.O. No. 2733 on 3rd September, 1955, were laid on the table of the Legislative Assembly and

were approved by that House but prior thereto, the making of the rule did not conform to the requirements of Section 19(4)-previous publication for a period of not less than four weeks. Though the learned Advocate-General attempted to state that the impugned rules should be deemed to have complied with the formalities required by Section 19(4) of the Act, when the same were published in the Fort St. George Gazette, it is clear that this was not factually correct as is clear even from the admission in the counter-affidavit that the Government took the view that the compliance with Section 19(4) was unnecessary in the case of the Turnover and Assessment Rules, which had been approved by the resolution of the Legislative Assembly under the proviso to Section 3(4) of the Act which I have already extracted.

9. The very short question that arises is as regards the interpretation of Section 3(4) of the Act, namely, whether when that Sub-section uses the words "in accordance with such rules as may be prescribed ", the reference is to the rules made by the State Government under the rule-making power u/s 19 or whether it is a special type of rule which need not conform to the requirements of Section 19(4). In other words, the point raised is whether the prescription by rule u/s 3(4) has to conform to the single requirement of being approved by a resolution of the Legislative Assembly or whether when the expressions "prescribed" and "rules" are used in Section 3(4) and the proviso, the reference is to Section 19 and to the terms of Sub-section (2)(a) "all matters expressly required or allowed by this Act to be prescribed." This question is really not *res Integra* but has been concluded in favour of the petitioners by a decision of a Bench of this Court in *Rangaswami Chettiar and Co. v. Government of Madras* [1957] 8 S.T.C. 222. I shall extract a short passage from this judgment to elucidate the position. At page 232 of the report occurs this passage:

The net result of these provisions, therefore, is that in regard to the rules u/s 3(2) [now Sub-sections (3) and (4) of Section 3] regarding the determination of turnover the procedure prescribed both by the proviso to that Sub-section as well as that pointed out in Section 19 (4) have to be followed. In making this observation we have in mind the procedure prescribed by Section 19(4) which is attracted to the rules made u/s 3(2) by reason of the inclusion in Section 19 (2) (a) of " all matters expressly required or allowed by this Act to be prescribed."

10. I need only mention that a very similar view has been taken of these provisions by a Full Bench of the Andhra Pradesh High Court in *Sreeramulu Chetti v. State of Andhra* [1958] 9 S.T.C. 215. In the judgment of that High Court, Jaganmohan Reddy, J., who answered the reference observed at page 221:

Sub-section (4) as well as Sub-section (5) of Section 3 merely provide for the determination of the turnover and assessment, levy and collection of taxes in accordance with such rules as may be made under the Act. They do not specify the authority empowered to make rules prescribing the matters referred to therein. All that they do is to expressly specify the matters required or allowed to be prescribed by the rules. These provisions are not independent and self-

contained. It cannot be said that any rules made under the said provisions by any authority not specified therein will have the statutory force merely on their being approved by a resolution of the Legislative Assembly. The authority empowered to make rules under Sub-sections (4) and (5) of Section 3 is the authority referred to in Section 19, namely, the State Government. Sub-section (2)(a) of Section 19 clearly empowers the State Government to make rules for all matters expressly required or allowed by the Act to be prescribed, one of such matters being those specified in Sub-sections (4) and (5). In other words, a plain reading of the provisions of Section 19 would itself show that the rules relating to all matters expressly required or allowed by the Act to be prescribed by the rules such as those under Sub-sections (4) and (5) of Section 3 as well as rules authorised to be made under the other provisions of Sub-section (2) of Section 19...can only be made after previous publication for a period of not less than four weeks. The exercise of that power by the Government to make rules is itself subject to the condition that these rules are made only after previous publication and in so far as the rules relating to matters specified in Sub-section (4) of Section 3 are concerned, they must also be approved by a resolution of the Legislative Assembly. It is after complying with these pre-requisites that the rules have to be published in the Gazette under Sub-section (5) of Section 19 and upon such publication they will have effect as if enacted under that Act.

11. These are therefore clear authorities for the position that the prescription u/s 3, which is what Rules 15 and 16 of the Turnover and Assessment Rules are, must comply with the double condition, namely, conformation to the provisions of Section 19(4) and receiving the approval of the Legislative Assembly. As it is common ground that Rules 15 and 16 have not conformed to the requirements of Section 19(4) and if the interpretation placed upon Section 3(4) were applied, the rules would appear to be invalid.

12. On this part of the case, the learned Advocate-General who appeared for the State urged three points: (1) the decision of the Bench in Rangaswami Chettiar & Co. v. Government of Madras [1957] 8 S.T.C. 222 requires reconsideration; (2) when once a rule is published in the Fort St. George Gazette as a rule, there is an irrebuttable presumption that the provisions of Section 19(4) were complied with and that it is not permissible to go behind the statutory presumption; (3) by reason of Section 19(5) the rules must be treated as part of the Act and their validity could not therefore be challenged.

13. So far as the first point is concerned, the decision of the Bench is binding upon me and I cannot therefore accede to the argument. In fact the learned Advocate-General wanted merely to have the contention noted so that he might be in a position to urge this point if the matter were taken up in appeal. Before considering the second of the points, it will be convenient to dispose of the last. Without entering into the controversy that surrounds the interpretation of the words "shall have effect as if enacted in this Act" in Section 19(5) it is sufficient to point out that Section 19(5) assumes that the rules are validity promulgated

and only such rules "have effect as if enacted in the Act". In other words, Section 19(5) has reference to the content of the rule and not to the manner of promulgation or the formalities necessary to frame a rule.

14. I shall now take up for consideration the second point urged by the learned Advocate-General. When Section 19(4) referred to the rules being made after previous publication, it was a reference to Section 7 of the General Clauses Act (Act 1 of 1891) which enacts :

Where, by an Act to which this Chapter applies, a power to make rules is expressed to be given subject to the conditions of the rules being made after previous publication, the following provisions shall apply, namely :-

(a) the authority having the power to make the rules shall, before making them, publish a draft of the proposed rules;

(b) the publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Central Government or, as the case may be, the Provincial Government prescribes;

(c) there shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration;

(d) the authority having power to make the rules and, where the rules are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft, before the date so specified;

(e) the publication in the Official Gazette of a rule purporting to have been made in exercise of a power to make rules after previous publication, shall be conclusive proof that the rule has been duly made.

15. The argument of the learned Advocate-General was based on the fact that the rule was published in the Official Gazette and that this publication attracted the terms of Section 7(e) of the General Clauses Act, which I have extracted earlier. In my judgment his argument is wholly without force. Whether or not the publication should purport to have been made in exercise of the power to make rules it cannot certainly apply to a case where the Government never intended to invoke or comply with the provisions of Section 7 of the General Clauses Act. I have already drawn attention to the fact that in paragraph 3 of the counter-affidavit filed by the State in this case it is admitted that the Government proceeded on the basis that for a rule to be made u/s 3(4) of the Act, the only formality to be complied with was to have the resolution approved by the Legislative Assembly and that they did not consider it essential to conform to the requirements of Section 19(4) of the Act. In these circumstances, I consider that the second point raised by the learned Advocate-General should also be rejected.

16. This however does not conclude the case in favour of the petitioners because the main argument of the learned Advocate-General was based on the validation of these rules by Section 9 of the Madras General Sales Tax, Sales of Motor Spirit Taxation and Entertainments Tax (Amendment) Act, 1957. This section enacts :-

Section 9. Tax may be assessed or collected and licence fees levied or collected for the year 1955-56 notwithstanding the retrospective operation of the amendments to the Madras General Sales Tax Rules, 1939 and the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 and all assessments made, taxes collected and licence fees levied for the year 1955-56 shall be deemed to have been made, collected or levied, as the case may be, as if those rules as amended were in force at all relevant times :

Provided that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not been enacted.

17. It was on the basis of the validation effected by this provision that I upheld in *Guruviah Naidu v. State of Madras* [1958] 9 S.T.C. 145, the retrospective operation of Rules 15 and 16 of the Turnover and Assessment Rules, so as to permit a valid assessment to sales tax for 1955-56. Based on the terms of Section 9 and the statutory validation of these rules the argument of the learned Advocate-General was twofold: (1) Though Section 9 uses the words "notwithstanding the retrospective operation of the amendments" the validation was not confined to the objection based upon the notification of the 3rd September, 1955, being retrospective in its operation but it had a more extended operation and the language employed was sufficient to effect a statutory confirmation of the rules and validate them whatever be the nature of the defects from which the rules suffered. (2) In *Guruviah Naidu v. State of Madras* [1958] 9 S.T.C. 145, this Court has held that by reason of Section 9 the rules were validly enacted to enable an assessment to be made on dealers for the year 1955-56. If the rules were valid and effective for 1955-56, then it logically followed that the rules would be valid and effective for the subsequent years also.

18. As regards the first point, the learned Advocate-General referred me to the decisions which have dealt with the effect of mistaken assumptions contained in statutes. Based on these decisions the point urged was that the fact that the Legislature mistakenly assumed that the only defect in the rules promulgated in G.O. No. 2733 dated 3rd September, 1955, was the provision therein for their retrospective operation, was really irrelevant and would not control the operation of the validating section. In this connection he particularly relied on the decision of the Privy Council in *E.H. Battat v. King* [1951] A.C. 519. The question which the Privy Council was called on to decide was the proper interpretation of Section 5 of the Indemnity and Validating Ordinance (No. 1 of 1946) of the Singapore Colony. This section read (to quote only the relevant words):

All laws, proclamations, orders, rules, regulations and legislative Acts whatsoever

made or issued during the war period by or with the assent of any British or Allied military authority shall be deemed to have been validly made from the date of promulgation in the area concerned notwithstanding that any such law, proclamation, order, rule...may have repealed or amended or been inconsistent with any law previously in force.

19. The contention urged before the Privy Council and which was rejected by their Lordships was that the validity given by this provision "was limited to those promulgations" which would have been invalid only by reason of their having repealed or amended or been inconsistent with any law previously in force. The submission of counsel was that the law under which the appellant had been convicted had been validly enacted and that consequently it would not fall within the restricted validation which according to learned counsel Section 5 was intended to effect. Lord Tucker delivering the judgment of the Privy Council repelled this contention saying (at page 530):

The draftsman here is clearly envisaging the possibility of existing proclamations de facto in force being invalid in law and is intending to give them the force of law. The fact that he enumerates certain specified defects which might otherwise have rendered such instruments invalid does not, their Lordships think, limit the generality of the earlier words, which are sufficient to validate all the enumerated instruments provided they in fact been made or issued in the period in question by or with the assent of the appropriate British or Allied military authority.

20. Basing himself on this passage and the interpretation of the validating provision which found acceptance at the hands of the Privy Council the learned Advocate-General wanted to read Section 9 as if the words "notwithstanding the retrospective operation of the amendments to the Madras General Sales Tax Rules, 1939 etc." were omitted. I agree with the learned Advocate-General so far, but the omission of these words however does not help him to the extent needed, because there are no positive words in Section 9 of Act 1 of 1957 as were found in Section 5 of the Indemnity and Validating Ordinance which the Privy Council had to deal with in the case just now referred to. In the latter Section there was first a positive provision effecting validation of all rules made during a particular period and then followed the clause commencing with the word "notwithstanding" so that if the reasons set out following the word "notwithstanding" were omitted there would still remain the positive validation effected by the earlier portion of the section. But if Section 9 of Madras Act I of 1957 were read without reference to the retrospective operation, the section would read :

Taxes may be assessed or, collected and licence fees levied or collected for the year 1955-56...and all assessments made,, taxes collected and licence fees levied for the year 1955-56 shall be deemed to have been made, collected or levied, as the case may be, as if those rules as amended were in force at all relevant times.

21. Still it would be seen that even if Section 9 were in this form which is the utmost assistance which the learned Advocate-General could derive from the decision in *E.H. Battat v. The King* [1951] A.C. 519, there would be no statutory confirmation or validation of the rule to enable a valid assessment to be made for any year other than 1955-56. The decision relied on by the learned Advocate-General does not in my judgment permit the court so to read the section as to eliminate the reference to the assessment year 1955-56 which forms as it were the essential part of the validation provision. I therefore reject the first submission of the learned Advocate-General on this part of the case.

22. His second submission was as I stated earlier based upon the illogicality involved in the statute having confirmed the validity of the rule in regard to the assessment for the year 1955-56 leaving the validity of the rule open to challenge for subsequent years. The argument was that the legislature could not have validated the rule only in so far as it related to the period upto 31st March, 1956 and not confirm the validity of that rule for the later period. Here again I am unable to agree with the submission of the learned Advocate-General. The question is not one of logic but rather of interpretation of the words used. It was certainly open to the State Legislature to have effected a confirmation of a more extensive nature. But the Legislature did not do so, but expressly confined the validation of the rule so as to permit assessment being made for one particular year. It would not be interpretation but an act of legislation for the court to say that notwithstanding that Section 9 in terms restricts the scope of the validity of the rule to the assessment year 1955-56 and regularises the assessment for that year it has validated the rule for the subsequent years also. The language of Section 9 precludes the argument advanced by the learned Advocate-General.

23. The result is that these writ petitions succeed and the rule nisi issued will be made absolute. There will be no order as to costs in any of these petitions.