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New Krishna Bhavan Vs. Commercial Tax Officer, No. Iv Circle (Addl.) Bangalore

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Court : Karnataka

Decided On : Dec-02-1959

Reported in : AIR1961Kant3; AIR1961Mys3; ILR1960KAR267

Judge : S.R. Das Gupta, C.J. and ;A.R. Somnath Iyer, J.

Acts : Constitution of India - Articles 13, 13(1), 13(2), 14, 19(1), 141, 246 and 286; Mysore Sales Tax Act, 1948 - Sections 3 and 3(1); Mysore Sales Tax (Amendment) Act, 1954; Mysore Sales Tax (Amendment) Act, 1957; Constitution of India (First Amendment) Act, 1951

Appeal No. : Writ Petn. No. 140 of 1958

Appellant : New Krishna Bhavan

Respondent : Commercial Tax Officer, No. Iv Circle (Addl.) Bangalore

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : T. Krishnarao and ;V.P. Anantha Krishnan, Advs.

Judgement :

S.R. Das Gupta, C.J.

1. The Petitioner before us is one of the Partners of Hotel New Krishna Bhawan, Malleswaram Bangalore. On 23-4-1958, he was served with a notice issued by the Commercial Tax Officer, calling upon him to produce the account books, vouchers etc., in support of his return in respect of the year 1956-57. The petitioner's contention be fore us in this petition is that in view of the fact that proviso to Sub-section (1) of Section 3 of the Mysore Sales Tax Act, 1948, as amended by Amending Act 25 of 1954, was held to he unconstitutional by a decision of the High Court of Mysore dated 27-9-1956, the petitioner is not liable to pay any sales tax. In order to understand this contention it would bo necessary to set out the material provisions of Section 3 of the Mysore Sales Tax Act, 1948, as amended by Act 25 of 1954. They are as follows :

3. (1) Subject to the provisions of this Act:

(a) every dealer shall pay for each year a tax on his total turnover for such year; and

(b) the tax shall be calculated at the following rates:

Rate ofTax.(1) In the case of everydealer whose total turnover is Rs. 7,500 and above, but not exceeding Rs. 10,000

Rs. 25/-per annum.

(2) In the case of everydealer whose total turnover exceeds Rs. 10,000 but does not exceed Rs. 25,000

The ratespecified in Item (1) on the turnover not exceeding Rs. 10.000 and two pies in therupee on the turnover exceeding Rs. 10.000.

(3) In the case of every Dealer whosetotal turnover exceeds Rs. 25,000

Therate specified in Item (2) on the turnover not exceeding Rs. 25,000 and three pies in therupee on the turnover exceeding Rs. 25,000.

Provided that if and to the extent to whichsuch turnover relates to article of rood and drink sold in a hotel, boarding house, restaurant or canteen, the tax shall be calculated at the following rates: --

(1) In the case of every dealer whose totalturnover is Rs. 7,500 and above,but not exceeding Rs. 10.000

Rs. 73 per annum.

(2) In the case of every dealer whose totalturnover exceeds Rs. 10,000 but does notexceed Rs. 36,000

The rate specified in Item (1) on theturnover nor exceeding Rs. 10.000 and threepies in the rupee on the turnover exceeding Rs. 10,000.

(3) In the case of every dealer whose totalturnover exceeds Rs. 36,000

The rate specified in Item (2) on theturnover not exceeding Rs. 36,000 and four andhalf pies in the rupee on the turnover exceeding Rs. 36,000.

It should be noted that the High Court of Mysore declared this provision to he unconstitutional as offending Article 14 of the Constitution, After the said decision was given the Mysore Sales Tax Act came to be further amended by Amending Act 18 of 1957. The said amending Act only validated collection and levy made under the said proviso but did not retrospectively affect the old Act. The present case, therefore, is not affected by the said amending Act.

2. The main contention of the petitioner in support of this petition is that the proviso to Sub-section (1) of Section 3 of the Act having been declared unconstitutional there is now no charging section in respect of the Hotel Keepers. Mr. T. Krishna Rao advocate, appearing for the petitioner urged before us that if there is a provision in a statute which offends the fundamental right guaranteed by the Constitution then the said provision is not nonest in the sense, that it does not exist in the Statute Hook, but becomes merely unenforceable.

In support of that proposition he cited before us two decisions of the Supreme Court reported in Bhikaji Narain v. State of M. P., (S) : [1955]2SCR589 and Sundararamier and Co. v. State of Andhra Pradesh, : [1958]1SCR1422 . On the authority of these two decisions Mr. T. Krishna Rao, further contended that the said proviso which specifies the rate at which the Hotel Keepers should be charged, becomes only unenforceable and not honest. The result therefore, according to him, is that in respect of Hotel Keepers the provision in the Mysore Sales Tax Act fixing the rates at which their turnover would be taxed is unenforceable end the said Hotel Keepers, therefore, cannot he charged with sales tax under the Mysore Sales Tax Act. The position, he conceded, would no doubt he different if the proviso, offending Article 14 of the Constitution, as was held by Mysore High Court, is to be held as non-existent. In that event, the Hotel Keepers would be liable to be taxed under Clauses (a) and (b) of Sub-section (1) of Section 3, i.e., at the general rates specified in Clause (b).

3. The main question, therefore, which has to he decided in this petition is whether or not a provision in a Statute which is unconstitutional, offending the fundamental rights guaranteed to the citizens, is non-existent or is merely unenforceable. Mr. T. Krishna Rao, as already mentioned, relied on the two Supreme Court decisions in support of his contention that such a provision becomes unenforceable and not honest. On the other hand the learned Government Pleader appearing for the State relied on a subsequent decision of the Supreme Court reported in Deep Chand v. State of U. P., : AIR1959SC648 , wherein, according to the learned

Government Pleader, the majority of the Judges took a. different view.

I have, therefore, to find out what is the view of the Supreme Court on this point whether there is a conflict between the earlier view expressed in the decisions on which Mr. Krishna Rao relies and the later view on which the learned Government Pleader relies and if so, which of the said two views is binding on this Court.

4. In the case reported in (S) : [1955]2SCR589 , their Lordships of the Supreme Court inter alia, held that if a law which was existing at the time when the Constitution came into force was violative of Article 19(1)(g). for having imposed restrictions which could not be justified as reasonable Under Clause (6) as it then stood under Article 13(1) of the Constitution the existing Law became void 'to the extent of such inconsistency'. Nevertheless, their Lordships further held, after 18-6-1951, when Clause (6) was amended, the impugned Act ceased to be inconsistent with fundamental right guaranteed by Article 19(1)(g) read with amended Clause (6) of that Article and it became operative again. In the course of his judgment, Section R. Das, Acting Chief Justice as he then was, observed as follows:

'The true position is that the impugned law became as it were eclipsed for the time being by the fundamental right. The effect of the Constitution (First Amendment) Aet, 1951, was to remove the shadow and to make the impugned Aet free from all blemishes or infirmity.'

*****'All Laws, existing or future, which are inconsistent with the provisions of part III of our Constitution are, by the express provision of Article 13, rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes. They existed for the purposes of pre-constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens.

It is only against the citizens that they remained in dormant or moribund condition. In our judgment, after the amendment of Clause (6) of Article 19 on 18-6-1951, the impugned Act ceased to be unconstitutional and became revivified and enforceable against citizens as well as against non-citizens. It is true that as the amended Clause (6) was not made retrospective the impugned Act could have no operation as against citizens between 26-1-1950 and 18-6-1951 and no rights and obligations could be founded on the provisions of the impugned Act during the said period whereas the amended Clause (2) by reason of its being expressly made retrospective had effect even during that period.

But after the amendment of Clause (6) the impugned Act immediately became fully operative even as against the citizens.'

In the case reported in : [1958]1SCR1422 , the same view seems also to have been held by their Lordships of the Supreme Court. Venkatarama Ayyar, J., who delivered the judgment of the Court observed as follows:

'The result of the authorities may thus be summed Up: Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement oE the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the Constitutional bar is removed and there is no need for a fresh legislation to give effect thereto.'

5. Mr. T. Krishna Rao strongly relied On these two decisions of the Supreme Court, and particularly on the observations made therein to which I have just now referred. In the later decision of the Supreme Court in : AIR1959SC648 , on which the learned Government Pleader relied, the majority of the Judges expressed the view that there is a clear distinction between the two clauses of Article 13. According to their Lordships under Clause (1) a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas no post Constitution law can be made contravening the provisions of Part III and therefore, the law, to that extent though made, is a nullity from its inception.

Their Lordships further held that the doctrine of eclipse has no application to post-Constitution laws

infringing fundamental rights as they would be ab initio void in toto or to the extent of their contravention of the fundamental rights. Their Lordships considered the earlier decision of the Supreme Court reported in (S) : [1955]2SCR589 and the observations made therein but held that the said decision was given on Article 13(1) of the Constitution and it is no authority on the construction and scope of Article 13(3) of the Constitution. After referring to the observations of Das, J., to which I have referred, their Lordships held as follows:

'The aforesaid passages arc only the re-statement of the law as enunciated in Keshavan v. Stale of Bombay, : 1951CriLJ680 reaffirmed in Behrarn Khurshid Pesikaka v. State of Bombay, : 1955CriLJ215 , and an extension of the same to meet a different situation. A pro-Constitution law, stating in the words of Das, J., as he then was, exists notwithstanding that it does not exist with respect to the future exercise of the fundamental rights. That principle has been extended in this decision, by invoking the doctrine of eclipse. As the law existed on the statute book to support pre-constitution Acts, the Court held that the said law was eclipsed for the time being by one or other of the fundamental rights and when the shadow was removed by the amendment of the Constitution, the impugned Act became free from all blemish or infirmity. The Legislature was competent to make the law with which Pesikaka's case, : 1955CriLJ215 , was concerned at the time it was made. It was not a case of want of legislative power at the time the Act was passed, but one wherein the case of a valid law supervening circumstances cast a cloud.'

6. This being the state of the decision of the Supremo Court on this point, the questions which we have to determine are (a) whether or not there is a conflict of views on the point at issue between the earlier decisions and the later decision of the Supreme Court and (b) if so, which of those views is binding upon us. The learned Government Pleader contended before us that there is in fact no conflict between the views expressed in the case reported in (S) : [1955]2SCR589 and : AIR1959SC648 and the view taken by the majority of the Judges in the case reported in : AIR1959SC648 .

This contention of the learned Government Pleader finds some support from the observations of Suhba Rao, I., who delivered the majority judgment in : AIR1959SC648 . His Lordship did not expressly dissent from the view expressed by S. R. Das, J., who delivered the judgment of the Court, in the case reported in (S) : [1955]2SCR589 . but held that those observations relate to a pre-constitution law. This seems to be clear from the following observations of Subba Rao, J., in the said case:

'A pre-Constitution law, stating in the words of Das, J., as he then was, exists notwithstanding that it does not exist with respect to the future exercise of the fundamental rights. That principle has been extended in this decision by the doctrine of eclipse.

xxxxxIt was not a ease of want of legislative power at the time the Act was passed, but one where in the case of a valid law supervening circumstance cast a cloud.'

7. This is the way in which the majority of the Judges of the Supreme Court in : AIR1959SC648 interpreted the said earlier decision of the Supreme Court in (S) : [1955]2SCR589 and in my opinion we are bound by that interpretation.

8. But the same thing cannot be said with regard to the other decision of the Supreme Court reported in : [1958]1SCR1422 . In that case the section with which their Lordships were concerned, i.e., Section 22 of the Madras Act, was inserted by the Adaptation Order o the President of India after the Constitution, although the Act itself was pre-Constitution Act. The contention with which their Lordships were concerned in that case, so far as it relates to the present question, was that no action can he taken under Section 22 of the Madras Act, because it was, when it was enacted, repugnant to Article 286 of the Constitution and was therefore void.

Thus, their Lordships were concerned in that case with a section which was inserted after the Constitution. Nevertheless, their Lordships repelled the contention that the section was a nullity, as it was unconstitutional and must be treated as non-cast and the impugned Act could not infuse life into it. Venkatarama Ayyar, J., who delivered the judgment of the Court in that case observed as follows :

'Thus, a legislation on a topic not within the competence of the Legislature and a legislation within its competence but violative of constitutional limitations have both the same reckoning in a Court of Law; they are both of them unenforceable. But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes? This question has been the subject of consideration in numerous decisions in the American Courts, and the preponderance of authority is in favour of the view that while a law on a matter not within the competence of the Legislature is a nullity, a law on a topic within its competence but repugnant to the constitutional prohibitions is only unenforceable.'

His Lordship finally summed up the result of the authorities on this point by saying that where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the Statute Book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the Statute Book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigors when the Constitutional bar is removed and there is no need for a fresh legislation to give effect thereto. This decision does not appear to have been considered or dealt with by Subba Rao, J., in his judgment in the case reported in : AIR1959SC648 . It seems to me, therefore, that there is a conflict between the views expressed in (S) : [1955]2SCR589 and in : AIR1959SC648 .

9. The next question, which we have to determine is which of these two views is hiding on us. Mr. T. Krishna Rao urged before us that the view expressed by the majority of the Judges in the case reported in : AIR1959SC648 cannot he said to he the view expressed by the Court. He contended that the actual decision in that case did not proceed on that view and it was therefore merely obiter dicta. Mr. T. Krishna Rao contended that no doubt the law declared by the Supreme Court, by virtue of Article 141 of the Constitution, shall be binding on all Courts within the territory of India, but the view expressed by the majority of the judges on this point in the said case cannot be said to be the law declared by the Supreme Court, firstly because the said view was not necessary to be expressed for the purpose of deciding the said case and secondly because, the remaining two Judges reserved their opinion on this point and did not express any view.

Mr. T. Krishna Rao urged that if all the Judges had expressed their views on that point then it could have been contended that the view expressed by the majority was the law declared by the Supreme Court. That not being the position Mr. T. Krishna Rao further contended, it cannot be said that the view expressed by the majority of Judges on this point in the said case was the law declared by the Supreme Court and as such binding on this Court.

10. In my opinion, the view expressed by the majority of the Judges on this point in the case reported in : AIR1959SC648 is binding on this Court, as the law declared by the Supreme Court. It is not necessary, in my opinion, for a proposition of law declared by the Supreme Court to he binding on this Court that the actual decision of the case should proceed on that proposition. Nor is it necessary, for such proposition to be the law declared by the Supreme Court that all the Judges shall express their views one way or the other on the point. In my opinion, if the majority of Judges of the Supreme Court in a particular case express a view on a proposition of law then that view of the majority of the Judges would he the law declared by the Supreme Court. that being my view, the opinion expressed by the majority of the Judges In the said case shall be held to be the law declared by the Supreme Court and binding on this Court.

11. The next question which arises for consideration is which of the two views -- one expressed in : [1958]1SCR1422 and the other in : AIR1959SC648 -- will be binding on us. On this point again there is no doubt some difficulty. But in my opinion, it is the latest pronouncement of the Supreme Court which would be binding on us. When, in my opinion, the Supreme Court expressed its view on any particular point of law such expression of view shall be considered as overriding all contrary views expressed on the point in earlier decisions of the same Court. That being my conclusion on these questions this contention of Mr. T. Krishna Rao fails.

12. The learned Government Pleader no doubt contended before us that even if it were held that the particular provision in question was merely unenforceable and not honest even then the petitioner would be liable to be taxed under Section 3(1)(a) and (b) of the Mysore Sales Tax Act. In view of my decision that the proviso to the said section which is opposed to fundamental rights guaranteed by the Constitution is honest and not unen-forceable, it is not necessary for me to go into this question.

13. The result, therefore, is that this petition fails and is dismissed. Each party will bear its own costs.

A.R. Somnath Iyer, J.

14. I agree.

15. Petition dismissed.

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