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Court : Orissa

Decided On : Jun-19-1986

Reported in : [1987]66STC51(Orissa)

Judge : B.N. Misra and ;L. Rath, JJ.

Appeal No. : Original Jurisdiction Case No. 344 of 1978

Appellant : Nooka Raju

Respondent : State of Orissa

Advocate for Def. : Standing Counsel (C.T.)

Advocate for Pet/Ap. : R. Sharma, Adv.

Disposition : Application dismissed

Judgement :

B.N. Misra, J.

1. The petitioner is a dealer in cement under the Associated Cement Company Limited having its place of business at Berhampur. On enactment of the Orissa Additional Sales Tax Act, 1975 (Orissa Act 24 of 1975) (hereinafter referred to as the 'Act'), which came into force with effect from 1st April, 1975, the petitioner became liable to pay additional sales tax according to the provisions of the Act. On

account of this additional liability, he has challenged the constitutionality of the Act in this writ application. According to the petitioner, the provisions of the Act put unreasonable restrictions on his fundamental rights and are confiscatory in nature. It is submitted that the Act does not come within the ambit and scope of entry 54 of List II of the Seventh Schedule of the Constitution of India. The Act is also challenged on the ground that it does not permit the burden of additional tax to be passed on to the customer. The petitioner has accordingly prayed that the Act should be declared ultra vires and unconstitutional.

2. A counter has been filed on behalf of the State justifying imposition of the additional tax. It is stated the Act does not contravene any of the provisions of the Constitution and that similar Acts passed by various other States in India have been upheld by the Supreme Court and other High Courts.

3. At the outset it would be useful to refer to the following provisions of the Act :

Section 2. (1) The tax payable by a dealer for a year under the Orissa Sales Tax Act, 1947 (hereinafter referred to as the said Act) shall be increased by an additional tax at the rate of-

(a) two per cent of the tax, if his gross turnover for that year does not exceed one lakh of rupees ;

(b) three per cent of the tax, if his gross turnover for that year exceeds one lakh of rupees but does not exceed five lakhs of rupees ;

(c) five per cent of the tax, if his gross turnover for that year exceeds five lakhs of rupees .:Section 2. (3) Notwithstanding anything contained in the said Act, no dealer referred to in Sub-section (1) shall be entitled to collect the additional tax payable under this Act.

Section 3. (1) Any dealer who collects the additional tax payable under this Act, in contravention of the provisions of Sub-section (3) of Section 2 shall be punishable with fine which may extend to one thousand rupees.

(2) No court inferior to that of a Judicial Magistrate of the first class shall try an offence under this Act.

4. Mr. Sharma, learned counsel appearing for the petitioner, submitted that imposition of the additional tax under the Act is in excess of the powers of legislation, unconstitutional and confiscatory and that the liability to pay the tax having been fixed on the dealer, it is unreasonable that he should be obliged to pay the tax irrespective of whether he has earned any profit during the year. Mr. Patnaik, learned standing counsel, submitted that similar provisions under the Tamil Nadu Additional Sales Tax Act (14 of 1970) were considered and upheld by the Supreme Court in the decision reported in AIR 1974 SC 2272 (S. Kodar v. State of Kerala). It is further pointed out that the points urged in the present writ application had been urged before the Supreme Court and had been answered in the following manner :

The appellants contend firstly that the Legislature of Tamil Nadu has no power to enact the Act as the tax imposed by the Act is a tax on the income of the dealer and that the imposition of such a tax is outside the scope of entry 64 of List II. Secondly, they contend that the provision of the Act, in so far as it prohibits a dealer from collecting the tax from purchaser, is an unreasonable restriction upon their fundamental right to carry on trade under Article 19(1)(g) and of their right to hold property under Article 19(1)(f). Thirdly, they submit that the provisions of the Act are violative of their fundamental right under Article 14 in that they impose different rates of tax on the sale of same goods according to the turnover of the dealer.

As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. The object of the Act, as is clear from its provisions, is to increase the tax on the sale or purchase of goods imposed by the Tamil Nadu General Sales Tax Act, 1959 and the fact that the quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that the additional tax is to be imposed only if the turnover of a dealer exceeds Rs. 10 lakhs. It is in reality a tax on the aggregate of sales effected by a dealer during

a year. The additional tax, therefore, is an enhancement in the rate of the sales tax when the turnover of a dealer exceeds Rs. 10 lakhs a year and it is a tax on the aggregate of the sales effected by the dealer during the year. The decision in *Ernakulam Radio Company v. State of Kerala* [1966] 18 STC 445 at 449 (Ker), which was affirmed by a Division Bench of the Kerala High Court in *Kilikar v. Sales Tax Officer* [1968] 21 STC 252 took that view. The same view was taken by the Andhra Pradesh High Court in *A.S. Ramachandra Rao v. State of Andhra Pradesh* [1969] 24 STC 133. This is the correct view. Entry 54 in List II authorises the State Legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis.

As regards the second contention that the provisions of the Act are violative of the fundamental rights of the appellants under Article 19(1)(f) and 19(1)(g), as the tax is upon the sale of goods and is not shown to be confiscatory, it cannot be said that the provisions of the Act impose any unreasonable restrictions upon the appellants' right to carry on trade. It is, no doubt, true that every tax imposes some restriction upon the right to carry on a business; but it would not follow that the imposition of the tax in question is an unreasonable restriction upon the appellants' fundamental right to carry on trade. Generally speaking, the amount or rate of a tax is a matter exclusively within the legislative judgment and as long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness is outside the judicial ken.

But it was contended that as the dealer is prohibited from passing on the incidence of tax to the purchaser, the additional tax, unlike sales tax, is a tax on income of the dealer which he must pay whether he makes any profit or not and is, therefore, an unreasonable restriction on his fundamental rights under Article 19(1)(g).

The legal incidence of a tax on sale of goods under the Tamil Nadu General Sales Tax Act, 1959, falls squarely on the dealer. It may be that he can add the tax to the price of the goods sold and thus pass it on to the purchaser. But it is not necessary that the dealer should be enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sales of goods.

5. The principles enunciated in the aforesaid decision have full application to the facts of this case. No authentic material has been placed before the court to show how the additional tax is confiscatory in character. The grievance of the petitioner that the Act does not permit him to pass on the liability to the customer cannot be a ground to strike down the Act, because as pointed out above it is not necessary that the dealer should be enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sale of goods. On consideration, we find that the provisions of the Act do not infringe any fundamental rights of the petitioner and are not unconstitutional.

6. In the result, this writ application which has no merit is rejected. Parties will bear their own costs.

L. Rath, J.

7. I agree.

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