National Agricultural Co-Operative ... vs Union Of India & Ors on 25 March, 2003

Equivalent citations: AIR 2003 SUPREME COURT 1329, 2003 (5) SCC 23, 2003 AIR SCW 1743, 2003 TAX. L. R. 516, 2003 (3) SCALE 414, 2003 (4) ACE 86, (2003) 3 SCR 1 (SC), (2003) 3 JT 217 (SC), 2003 (3) JT 217, (2003) 128 TAXMAN 361, 2003 (3) SLT 635, (2003) 174 TAXATION 409, (2003) 260 ITR 548, (2003) 2 KER LT 890, (2003) 3 MAD LJ 107, (2003) 3 SUPREME 617, (2003) 3 SCALE 414, (2003) 4 INDLD 411, (2003) 181 CURTAXREP 1, (2003) 104 DLT 876, AIRONLINE 2003 SC 464

Author: Ruma Pal

Bench: Ruma Pal, B.N. Srikrishna

```
           CASE NO.:
Appeal (civil)  6170 of 2001

PETITIONER:
National Agricultural Co-operative Marketing Federation of India Ltd. & Anr.

RESPONDENT:
Union of India &  Ors.

DATE OF JUDGMENT: 25/03/2003

BENCH:
RUMA PAL & B.N. SRIKRISHNA.

JUDGMENT:
```

J U D G M E N T RUMA PAL, J The appellant No. 1 is a co-operative society registered under the Multi State Co-operative Societies Act, 1984 with its registered office in Delhi. It is the apex society of a chain of Co-operative Societies which operate at different territorial levels. The chain starts with the farmers who become members of village co-operative societies, the village societies become members of primary marketing co-operative societies (District Societies) and District Societies become members of the State Co-operative Societies (Apex Societies).

The issue raised by the appellants relates to the construction and Constitutional validity of section 80 P (2) (a) (iii) of the Income Tax Act, 1961 and grant of deduction of the profits made by societies by the marketing of agricultural produce. Under the Income Tax Act, 1922 (hereinafter referred to as the 1922 Act) exemption was granted in respect of profits and gains of business of co-operative societies including societies engaged in the marketing of the agricultural produce of its members. The Income Tax Act, 1961 continued this exemption under Section 81 (1) (c) which read:

> 81. Income of co-operative societies.

Income-tax shall not be payable by a cooperative society-

(i) in respect of the profits and gains of business carried on by it, if it is

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

(c) a society engaged in the marketing of the agricultural produce of its members".

By the Finance Act (No. II) 1967, Section 81 was omitted and its provisions re-enacted as Section 80P of the 1961 Act. The relevant extract of Section 80P is :

> 80-P (1) Where, in the case of an assessee being a co-operative society, the gross total income includes any income referred to in sub- section (2), there shall be deducted, in accordance with and subject to the provisions of this section, the sums specified in sub- section (2), in computing the total income of the assessee.
>
> (2) The sums referred to in sub-section (i) shall be the following namely:-
>
> (a) in the case of a co-operative society engaged in
>
> (i) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) the marketing of the agricultural produce of its members, or
>
> (iv) xxx xxx xxx
>
> (v) xxx xxx xxx
>
> (vi) xxx xxx xxx
>
> (vii) .. the whole of the amount of profits and gains of business attributable to any one or more of such activities".

(emphasis supplied) According to the appellant, prior to 1994 several High Courts as well as this Court had construed Section 81(1)(c) and Section 80 P (2)(a)(iii) and held that the benefit of exemption was available to all the co-operative societies from the village to the Apex Level. This was also the view taken by the Kerala High Court as expressed in CIT V. Kerala State Cooperative Marketing Federation . The view was reversed by a Bench of this Court in Assam Cooperative Apex

Marketing Society v. CIT (Additional) when it held that the object of Section 81 was to encourage basic level societies and that therefore, the phrase "produce of its members" must refer to agricultural produce actually "produced by its members". It was held that unless this interpretation were given, co-operative societies of traders would also become entitled to exemption which could not have been the intention of Parliament.

According to the appellant, as a result of the decision in the Assam Co-operatives case, the appellant No. 1, who had enjoyed the deduction under Section 80 P till then, was reassessed to tax on its profits and the assessments in respect of the assessment year from 1986-87 to 1994-95 were re-opened.

Following the decision of this Court in Assam Co- operatives case (supra), the Kerala High Court reversed its earlier view while deciding the issue raised by the Kerala Co- operative Marketing Federation in respect of a subsequent year and denied the Kerala Federation the deduction under S.80 P. The Kerala Federation impugned the decision of the High Court under Article 136. In these circumstances the view expressed in Assam Cooperatives came to be re- considered by a larger Bench in 1998. This Court by its decision in Kerala Cooperative Marketing Federation Ltd. & Ors. V. Commissioner of Income Tax overruled Assam Cooperatives and held that the word 'of' in Section 80P (2)

(a) (iii) had been too restrictively construed in Assam Cooperatives. On an interpretation of the provisions of Section 80P and having regard to the object with which the provisions had been introduced, it was held that the legislature did not intend to limit the scope of exemption only to primary societies and that the phrase 'produce of its members' must be construed as including any society engaged in marketing agricultural produce 'belonging to' its members. It said:

> The language adopted in Section 80-P(2)(a)(iii) with which we are concerned will admit the interpretation that the society engaged in marketing of agricultural produce of its members as agricultural produce "belonging to" its members which is not necessarily raised by such member. Thus, when the provisions of Section 80-P of the Act admit of a wider exemption there is no reason to cut down the scope of the provision as indicated in Assam Coop. Apex Marketing Society Case".
>
> This decision was given in December 1998. Immediately thereafter, Section 80P(2)(a)(iii) was sought to be amended by the Income Tax Act (2nd Amendment) Bill No. 169 of 1998. Clause 8 of the Bill which is relevant for our purposes, reads:
>
> "Amendment of section 80P. In section 80P of the Income-tax Act, in sub-section (2), in clause (a), for sub- clause (iii), the following sub-clause shall be substituted, and shall be deemed to have been substituted with effect from the 1st day of April, 1968, namely: -
>
> (iii) the marketing of agricultural produce grown by its members."

The reason for this amendment has been stated in Clause 6 of the Statement of Objects and Reasons as:

> " 6 Clause 8 seeks to amend section 80P of the Income-tax Act. Under the existing provision, profits derived by a cooperative society engaged in the marketing of agricultural produce of its members are fully deductible in computing the taxable income under Section 80P(2)(a)(iii) of the Income-tax Act. The deduction was intended for primary cooperative societies marketing the agricultural produce of their farmer members. In the case of Kerala State Cooperative Marketing Federation vs. Commissioner of Income-tax, the Hon'ble Supreme Court held that the use of words "of its members" in the relevant clause would mean the agricultural produce belonging to the members and not necessarily grown by them. The interpretation given to the use of the words in the provision is not in accordance with the legislative intent of the existing provision. In respect of income arising from transactions with non-members, the cooperatives are not different from other assessees, and such cooperatives are required to be taxed in the same manner as companies or other assessees engaged in marketing of agricultural produce. If an amendment in section 80P(2)(a)(iii) is not made, it is likely to have serious impact on revenues. The proposed amendment, therefore, replaces the words "of its members" by the words "grown by its members". The amendment seeks to restrict the deduction to the profits derived by a cooperative society engaged in the marketing of agricultural produce grown by its members".

The Bill was passed after obtaining the assent of the President and became the Income Tax (2nd Amendment) Act, 1999 (Act No. 11 of 1999).

The appellants impugned this amendment before the Delhi High Court under Article 226. They prayed for a declaration that the 1999 Amendment Act in so far as it seeks to retrospectively amend Section 80P (2)(a)(iii) of the Income Tax Act, 1961 was unconstitutional, and for an order to restrain the respondents from seeking to assess or re-assess the appellant society in respect of any previous year prior to the date of the enactment of the Amendment Act.

The Delhi High Court dismissed the writ petition holding that the amendment was valid and that the legislature was competent to retrospectively take away a benefit granted earlier by an amendment of the law. However, the Court recorded the statement of the Solicitor General appearing on behalf of the respondent authorities that the amendment would apply only to assessments which were yet to be finalised. That the Legislature can enact laws retroactively is not in dispute. Nor is it disputed that the amendment is intended to be retrospective and that the amendment would at least prospectively exclude all cooperative societies except the primary society from the benefit of Section 80 P(2)(a)(iii) of the Income Tax Act. According to the appellants, the amendment cannot be considered to have retrospective operation in the absence of a validating provision nor could Parliament reverse the judgment of this Court by such statutory overruling. If the amendment is construed as having retrospective operation, then, it is submitted, the amendment is unconstitutional because it seeks to impose a tax on apex societies for the last 31 years. It was

contended that by denying the deduction to the apex societies, the farmers and the primary societies would be vitally affected as it would be reflected in the returns obtained by them. This would be contrary to the legislative intent which was to benefit all societies which market agricultural produce.

It is unnecessary to record the submissions of the respondents separately as they form part of our reasons for dismissing the appeal.

The Legislative power either to introduce enactments for the first time or to amend the enacted law with retrospective effect, is not only subject to the question of competence but is also subject to several judicially recognized limitations with some of which we are at present concerned. The first is the requirement that the words used must expressly provide or clearly imply retrospective operation . The second is that the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional . The third is apposite where the legislation is introduced to overcome a judicial decision. Here the power cannot be used to subvert the decision without removing the statutory basis of the decision .

There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. "Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re- enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them".

A validating clause coupled with a substantive statutory change is therefore only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent. By the impugned amendment, the legislature has substituted the word 'of" which occurred in Section 80P (2)(a)(iii) and which had been construed by this Court in 1998 as "belonging to" , with the phrase "grown by". The clear effect of the substitution, in keeping with general principles relating to amendments, would be that Section 80P(2)(a)(iii) must be read as if the substituted phrase were included from the date that the section was introduced in the statute viz. 1st April, 1968.

In making this change, the Legislature does not "statutorily overrule" this Courts decision in Kerala Cooperative Marketing Federation Ltd. as has been contended by the appellant. Overruing assumes that a contrary decision is given on the same facts or law. Where the law, as in this case, has been changed and is no longer the same, there is no question of the Legislature overruling this Court.

As has been held in Ujagar Prints V. Union of India "A competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating infactors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the legislature granting

legislative competence the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which the earlier judgment becomes irrelevant".

A somewhat similar situation arose in connection with Section 73 of the Bombay Municipality Boroughs Act, 1925 which allowed the municipality to levy "a rate on building or lands or both situated within the municipal Borough". Rule 350A made under that Act provided for the rate on land at a percentage evaluation based upon capital. The Rule was held to be ultra-vires in Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad on the ground that the word 'rate' as was understood in the legislative practice of India and used in Section 73 did not allow for an impost as provided under Rule 350A. A Validation Act was passed subsequent to the decision in Patel Gordhandas Hargovindas redefining the word 'rate' in Section 73 itself. The constitutionality of the Validation Act was challenged. In dismissing the challenge, this Court in, Shri Prithvi Cotton Mills Ltd. V. Broach Borough Municipality held that the legislature could exercise its undoubted powers of redefining the word 'rate' in Section 73 to validate the assessments earlier made under Rule 350A. The Court held that when a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively.

> "It is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances".

Once the circumstances are altered by Legislation, it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Similarly in M/s. Krishnamurthi & Co. v. State of Madras & Anr., the Madras General Sales Tax 1959 Act (as it stood) provided under Entry 47 for tax on "lubricating oils, all kinds of mineral oils (not otherwise provided for in this Act) quenching oil and greases w.e.f. 1.4.1964". The question was whether this entry covered furnace oil. The Madras High Court construed the phrase and came to the conclusion that it did not. The Legislature then enacted an Amendment Act in 1967. Entry 47 was amended so as to expressly provide that furnace oil would be subjected to tax. The Act was made effective from 1964. The Act was challenged as being unreasonable since it retrospectively made the dealers liable for sales tax which they had not passed on to others. The challenge was negatived and it was said that "The object of such an enactment is to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been found by the court to be vitiated by an infirmity. Such an amending and validating Act in the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending and validating Act to make "small repairs" is a permissible mode of legislation and is frequently resorted to in fiscal enactments".

Again when the question arose whether factory and other buildings were 'houses' for the purpose of levy of house tax, the High Court held that the word 'house' could not be construed to include factories and other buildings. Pending the appeal from the High Court's decision before this Court, the word 'house' was legislatively redefined to include factories and other buildings with retrospective effect. This Court in Govt. of Andhra Pradesh vs. Hindusthan Machine Tools rejected the challenge to the amendment holding that this was a permissible legislative exercise. It was held that the Legislature had not overruled or set aside the judgment of the High Court but had removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances. This enunciation of the law has been noted with approval by the Constitution Bench in State of Tamil Nadu v. Arroran Sugar Mills .

The appellant has relied on this Court's decision in Madan Mohan Pathak V. Union of India to contend that what the legislature had done in the present case was to statutorily overrule the decision of this Court in Kerala Marketing. In Madan Mohan Pathak a settlement had been arrived between the Life Insurance Corporation and its employees, inter-alia with regard to bonus payable to its class III and IV employees. Subsequent to the settlement, the Payment of Bonus Act, 1976 came into force which considerably curtailed rights of employees to bonus in industrial establishments. Although the Payment of Bonus Act was not applicable to the Life Insurance Corporation, the Central Government issued a directive to the LIC that it should not make payment of bonus to its employees without getting the same cleared by the Central Government. The LIC issued a circular stopping the payment of bonus. The employees' association challenged this by way of a petition under Article 226 and prayed for a writ directing the LIC to act in terms of the settlement. The writ petition was allowed. While the appeal was pending before the Division Bench, Parliament enacted the Life Insurance Corporation Modification of Settlement, 1976. By the Act, the settlement deprived the class III and class IV employees of the annual cash bonus to which they were otherwise entitled under the settlement in respect of certain years. However, despite this statutory interpretation, the Division Bench did not interfere with the order of the Single Judge and dismissed the appeal. After this, somewhat unnecessarily, the employees of LIC assailed the constitutional validity of the 1976 Act under Article 32 before this Court. One of the grounds taken was that the impugned Act deprived the class III and IV employees of their vested rights under the settlement and was in violation of Article 19(1)(f) of the Constitution. This Court allowed the writ application holding that since the LIC had not pressed its appeal before the Division Bench despite the 1976 Act, it could not be absolved from its obligation from carrying out the writ of mandamus issued by the Single Judge of the High Court. It also held that the judgment of the High Court was not based upon any defect in any statutory provision, which could have been removed by the legislature as was the case in Prithvi Cotton Mills (supra). In other words as long as the judgment stood it could not be disregarded or ignored by LIC.

The decision is an authority for the principle that a judicial decision which has become final inter partes, cannot be set at naught by legislative action, a principle that is well entrenched. Therefore, if, as has been contended by the appellant, the High Court in 1981 had in proceedings between the appellant and the Revenue held that the appellant was entitled to the benefit of the deduction under Section 80P(2)(a)(iii) of the Act, and the Revenue has not impugned the High Court's decision, that decision binds the parties for the assessment years in question and cannot be reopened because of

the 1998 amendment. This principle, however, does not in any way detract from the principle that the Legislature may "cure" the statute so that it more correctly represents its intention. Such curative legislation does not in fact touch the validity of a judicial decision which may have attained finality albeit under the pre-amended law. The main thrust of the appellant's argument has been to the constitutionality of the amendment. The substitution in 1998 of the phrase "grown by" in Section 80P(2)(a)(iii) of the Act to operate from 1968, it is argued, amounts to a new levy and an unforeseen financial burden imposed on Apex Societies like the appellant with effect from the past 30 years. If this were so doubtless the Court may have considered the amendment to be excessively and unreasonably retrospective violating the appellants fundamental rights under Articles 19(1)(g) and 14 of the Constitution . But in fact the grievance is unfounded.

The test of the length of time covered by the retrospective operation cannot by itself, necessarily be a decisive test. Account must be taken of the surrounding facts and circumstances relating to the taxation and the legislative background of the provision. To recapitulate the legislative background of the particular statutory provision in question before us - the first authoritative interpretation of Section 80P (2)(a)(iii) was made in 1994 in Assam Cooperatives when it held that the word "of" must be construed as "produced by". Therefore, the law as it stood from 1968 was, by this decision, required to be read in precisely this manner and presumably assessments of Apex Societies were commenced and concluded on this basis. The situation continued till 1998 till this Court reversed Assam Cooperatives in Kerala Cooperative Marketing Federation Ltd. . Before the assessment year was over, by the 1998 Amendment the word "of" was substituted with " grown by". In real terms therefore there was hardly any retrospectivity, but a continuation of the status quo ante. The degree and extent of the unforeseen and unforeseeable financial burden was, in the circumstances, minimal and cannot be said to be unreasonable or unconstitutional.

It is hardly likely on the given facts, that assessments had been concluded on the basis of the decision in Kerala Marketing and the period for reopening such assessments had become time barred. In any event the 1998 amendment cannot be construed as authorizing the Revenue authorities to reopen assessments when the reopening is already barred by limitation. The amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of any such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provision authorises the Income-tax Officer to commence proceedings which before the new Act came into force,had, by the expiry of the period provided become barred. Different considerations would arise if, by the amendment even final assessments were unambiguously sought to be opened . That is not the case here. The concession of the Solicitor General on behalf of the Revenue that the amendment would apply only to assessments which were yet to be finalised could not of course be a relevant consideration in upholding the amendment if it were found to be constitutionally infirm . But it was an unnecessary concession, since having regard to the limited operation of the amendment, it could only apply to pending assessments in the sense that it could not revive a power lost by efflux of time.

The final submission of the appellant as to the possible adverse economic impact of the amendment on farmers and primary societies is not a consideration which is relevant to a decision on its validity particularly when neither the factual basis for such assertion is laid nor the persons on behalf of

whom the appellant seeks to take up cudgels, are before us.

We therefore dismiss the appeal without any order as to costs.

193 ITR 624 201 ITR 338 SC: 1994 (Supp.) 2 SCC 96 231 ITR 814: 1998 (5) SCC 48 S.S. Gadgil v. M/s Lal & Co.: AIR 1965 SC 171, 177 ; J.C. Jani, Income Tax Officer,Circle-IV, Ward-G Ahmedabad v.Induprasad Devshanker Bhatt, AIR 1969 SC 778, 781 Rai Ramkrishna & Ors. v. The State of Bihar (1964) 1 SCR 897, 915; Jawaharmal v. State of Rajasthan & Ors. [1966] 1 SCR 890, 905; Supreme Court Employees Welfare Association vs. Union of India & Anr. 1989 (3) SCC 488, 517 Shri Prithvi Cotton Mills Ltd. vs. Broach Borough Municipality & Ors. 1969 (2) SCC 283; Lalitaben v. Gordhanbhai & Anr. 1987 (Supp) SCC 750 para 15; Janapada Sabha Chhindwara v. The Central Provinces Syndicate Ltd. 1970 (1) SCC 509; Indian Aluminium Co. & Ors. v. State of Kerala & Ors. 1996 7 SCC 637 Shri Prithvi Cotton Mills v. Broach Borough Municipality 1969 (2) SCC 283 Supra 1989(3) SCC 488 at 517 1964 (2) SCR 608 Supra (1973) 2 SCR 54 (1975) 2 SCC 274 (1997) 1 SCC 326 para 16 1978 (2) SCC 50 S.R. Bhagwat v. State of Mysore; 1995 (6) SCC 16 paras 12, 15, 18; Re: Cauvery Water Disputes Tribunal 1993 Supp. (1) SCC 96 (II) Para 76. M/s Ujagar Prints & Ors. v. Union of India & Ors. 1989 (3) SCC 488, 517 Rai Ramkrishna & Others V. The State of Bihar 1964 (1) SCR 897 at 915 Jawaharmal v. State of Rajasthan: 1966 (1) SCR 890, 905 Supra Supra S.S. Gadvil v. Lal & Co. AIR 1965 SC 171, p.177 : See also J.P. Jani v. Induprasad Devshankar Bhatt: AIR 1969 SC 778, 781; K.M. Sharma v. Income Tax Officer, Ward 13(7), New Delhi (2002) 4 SCC 339 Commercial Tax Officer v. Biswanath Jhunjhunwalla & Anr.(1996) 5 SCC 626 The collector of Customs, Madras v. Nathella Sampathu Chetty and Anr: 1962 (3)SCR 786, 825; Sanjeev Coke Manufacturing Co. v. M/s. Bharat Coking Coal Ltd. & Anr.; 1983 (1) SCC 147, paragraph 25