

Bakul Cashew Co. & Ors vs Sales Tax Officer Quilon & Anr on 12 March, 1986

Equivalent citations: 1987 AIR 2239, 1986 SCR (1) 610, AIR 1987 SUPREME COURT 2239, 1986 (2) SCC 365, 1987 TAX. L. R. 2000, (1986) 2 SUPREME 227, 1986 SCC(TAX) 385, 1986 UPTC 883, 1986 STI 7, (1986) 1 SCR 610 (SC), (1987) 62 STC 122, 1986 UJ(SC) 2 121, (1986) 159 ITR 565

Author: E.S. Venkataramiah

Bench: E.S. Venkataramiah, M.P. Thakkar

PETITIONER:

BAKUL CASHEW CO. & ORS.

Vs.

RESPONDENT:

SALES TAX OFFICER QUILON & ANR.

DATE OF JUDGMENT 12/03/1986

BENCH:

VENKATARAMIAH, E.S. (J)

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VENKATARAMIAH, E.S. (J)

THAKKAR, M.P. (J)

CITATION:

1987 AIR 2239

1986 SCR (1) 610

1986 SCC (2) 365

1986 SCALE (1) 380

ACT:

Promissory estoppel, plea of - Phrases used by Ministers which cannot form the basis for a plea of estoppel, detailed Sales Tax exemption granted retrospectively by the State Government by GOMS 127/73/ID dated 12.10.1973 withdrawn by a letter GOMS 143/73/ID dated 9.11.1973 issued under section 10(3) of the Kerala General Sales Tax Act, 1963 (Kerala Act 15 of 1963) as amended, validity of - Power of Government to cancel the earlier Notification vis-a-vis the right of the cashew Factory owners to secure the exemption.

HEADNOTE:

The appellants are Cashew Processors owning and/or

working cashew factories wherein nearly about 80 per cent of the raw nuts processed were being imported during the relevant time from African countries. The import of raw nuts were canalised through the Cashew Corporation of India and they were allotted to the appellants and various other factory owners who were engaged in the business of processing cashewnuts. There was delay in making the assessment of sales tax payable by them under section 5 of the Kerala General Sales Tax Act, 1963 during the period 1970 to 1974 and the Department commenced to make assessments in or about the year 1974. The Government in the meantime issued a Notification dated 12.10.73 granting exemption to cashew manufacturers for the period between September 1, 1970 and September 30, 1973 and had later cancelled it by Notification dated 9.11.73, that is within three weeks of the earlier Notification granting exemption.

The appellants filed a writ petition contending: (i) that the Government was precluded by the rule of promissory estoppel from claiming the purchase tax in respect of cashewnuts imported from African countries; and (ii) that the subsequent withdrawal of the exemption granted on 12.10.73 was bad. The Writ Petitions having been dismissed, the appellants have come up in appeal by way of special leave.

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Dismissing the appeal, the Court

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HELD : 1.1 The appellants in the instant case, are not entitled to any relief either on the principle of promissory estoppel or on the basis of the earlier Notification issued under section 10 of the Kerala General Sales Tax Act, 1963. [621 E-F]

1.2 The whole case of the promissory estoppel lacks the necessary factual foundation. In the instant case, the allegations made in the petition do not establish (i) that there was a definite representation by the Government to the effect that the Government will not levy the tax; (ii) that the appellants in fact altered their position by acting upon such representation; and (iii) that they had suffered from some prejudice sufficient to constitute an estoppel. [617 F-G]

1.3 In cases of this nature, the evidence of representation should be clear and unambiguous. It "must be certain to every intent." The statements that are made by ministers at such meetings, such as, "let us see", "we shall consider the question of granting of exemption sympathetically", "we shall get the matter examined", "you have a good case for exemption" etc. even if true, cannot form the basis for a plea of estoppel. The events that have taken place subsequently belie the fact of any such promise by the ministers. In fact the Cashew Corporation of India had made a representation to the Government of India on May 7, 1971 and the Government of India wrote to the State

Government on March 4, 1972 urging that the exemption prayed for by the cashew manufacturers may be favourably considered by the Government of Kerala. The Government of Kerala however rejected the said request. Then on further pressure being put upon it, it issued the notification dated October 12, 1973 and immediately thereafter withdraw it after it encountered severe public criticism. This conduct on their part is not consistent with the appellants' case that they had actually promised in the year 1971 to exempt the cashew trade from payment of the sales tax. [617 C-F]

2.1 The State Government had the necessary power to cancel any Notification earlier issued, which power of cancellation has been expressly conferred by section 10 (3) of Kerala General Sales Tax Act. The authority which can issue a

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Notification may certainly cancel it also. The State Government did so and cancelled the earlier Notification as there was a public hue and cry that the State Government had shown undue favour to the Kerala Cashewnut factory owners at a time when the State Government was passing through grave and difficult financial position. Moreover the transactions in question related to the past period. [618 H, 621 D-E]

2.2 An authority which has the power to make subordinate legislation cannot make it with retrospective effect unless it is so authorised by the Legislature which has conferred that power on it. The power of exemption in the instant case was exercised through a retrospective Notification which was a piece of subordinate legislation. Further on the date on which the notification was issued the Kerala Government had no such power under section 10 of the Act as it stood then to issue a notification granting exemption with retrospective effect. Such power was actually conferred on it later on by the Kerala Legislature only by way of amendment in 1980 by Kerala Act 19 of 1980. By the addition of the words "either prospectively or retrospectively" in sub-section (1) of section 10 the State Legislature has now conferred the necessary power on the State Government to grant exemption with retrospective effect. This amendment also suggests that earlier the Government had no such power to grant exemption with retrospective effect. [619 A-B; 620 B-C; 621 A-C]

Income Tax Officer v. M.C. Ponnose & Ors., [1970] 1 S.C.R. 678 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1725 (NT) of 1977.

From the Judgment and Order dated 1st December, 1976 of the Kerala High Court in O.P. No. 1740 of 1976.

P. Govindan Nair, Mrs. A.K. Verma, S. Sukumaran and D.N. Misra for the Appellants.

T.S. Krishnamurthy Iyer, Karunakaran Nambiar and V.J. Francis for the Respondents.

The Judgment of the Court was delivered by VENKATARAMIAH, J. This appeal by special leave is filed against the judgment dated December 1, 1976 in the petition bearing Writ Petition No. O.P. 1740 of 1976 on the file of the Kerala High Court filed by the afore-mentioned 26 appellants and 20 others. They prayed in the Writ Petition inter alia for the issue of a writ in the nature of mandamus to the State Government of Kerala to give effect to the notification issued by the State Government bearing No. G.O.MS. 127/73/ID dated October 12, 1973 under section 10 of the Kerala General Sales Tax Act, 1963 (15 of 1963) (hereinafter referred to as 'the Act') by which the State Government had retrospectively granted an exemption in respect of the tax payable under section 5 of the said Act by the cashew manufacturers in that State on the purchase turnover of cashewnuts imported from outside India through the Cashew Corporation of India for the period between September 1, 1970 and September 30, 1973 after quashing the subsequent notification bearing No. G.O.MS. 143/73/TD dated November 9, 1973 issued under section 10(3) of the Act cancelling the above said notification dated October 12, 1973. The appellants and the other persons who had filed the writ petition before the High Court are cashew processors owning and/or working cashew factories wherein nearly about 80 per cent of the raw nuts processed were being imported during the relevant time from African countries. The import of raw nuts was canalised through the Cashew Corporation of India and they were allotted to the appellants and various other factory owners who were engaged in the business of processing cashewnuts. It appears that there was delay in making the assessment of tax payable by them under section 5 of the Act during the periods 1970 to 1974 and the Department commenced to make assessments in or about the year 1974. The Government in the meanwhile had issued the notification dated October 12, 1973 granting exemption to cashew manufacturers for the period between September 1, 1970 and September 30, 1973 and had later on cancelled it by notification dated November 9, 1973 within about three weeks from the date on which the exemption had been granted. It is not necessary to refer to all the allegations made in the writ petition for purposes of this case since the only point urged before us relates to the right of the appellants to secure the exemption as stated in the notification dated October 12, 1973 by virtue of the rule of promissory estoppel. The appellants urged two contentions before the High Court in support of their plea : (i) that the Government was precluded by the rule of promissory estoppel from claiming the purchase tax in respect of cashewnuts imported from African countries and (ii) that the exemption that had been granted on October 12, 1973 could not be withdrawn by the subsequent notification issued on November 9, 1973. In support of first limb of their argument the appellants depended upon the representation which was alleged to have been made on behalf of the Government by the Chief Minister, the Industries Minister and the Revenue Minister at a meeting held on April 25, 1971 and in support of their second contention they depended upon section 10 of the Act. The Government contested the case of the appellants on both these points. The High Court upheld the case of the State Government and rejected the said contentions. It, however, directed the Kerala Sales Tax Appellate Tribunal to make assessments taking into account the other contentions

of the assesseees. This appeal by special leave is filed against the judgment of the High Court of Kerala in the said writ petition.

The allegations regarding the plea based on promissory estoppel are found in Paragraphs 10 & 11 of the petition which reads thus :-

"10. When the scheme of canalisation came to be introduced in September, 1970, the members of the cashew industry like the first petitioners were keen that the purchases of raw cashewnuts in the form of allotment from the said Corporation should not be subjected to tax under the said Act as was the case under the open general licence scheme. The then Chairman of the said Corporation, Shri M.C. Sarin, as also its Managing Director Shri Z.K. Joseph assured the members of the cashew industry that such purchases would not be exigible to tax under the said Act. In a meeting held on the 25th April 1971 where Shri Z.K. Joseph of the said Corporation was also present the representatives of the industry were assured by the Chief Minister Shri Achuta Menon, the then Industries Minister Shri N.E. Bellaram and the then Revenue Minister Baby John that no tax would be levied under the said Act on the turnover of African raw nuts.

11. Subsequently, for three years, the Respondents did not initiate assessment proceeding against the allottees like the first petitioner and gave the allottees to believe that no tax would be levied on such purchases, relying upon which the allottees have quoted prices for exports and made huge commitments. If such imports were to be regarded as taxable purchases by the respondents, the allottees, like the first petitioner would not have made commitments with the foreign buyers. In fact, as late as 12th October, 1973, a notification was issued by the fourth respondent, a copy of which is hereto annexed and marked Exh. 'A' under section 10 of the said Act giving effect to such representations. The said notification was published in Kerala Gazette on 23rd October, 1973, clearly stating that the exemption to such purchases was being accorded on the ground of public interest. Without assigning reasons or showing any change of circumstances, in less than twenty days, another notification was issued on 9th November, 1973, a copy of which is hereto annexed and marked Exh. 'B' withdrawing the said exemption."

In the counter-affidavit filed on behalf of the State Government it is stated in Paragraphs 18 & 19 thus :

"18. The averments in para 11 are denied. The Cashew Corporation of India wrote to the Government by Memorandum dated 3.5.1971 that cashew industry may be exempted from payment of tax under the Kerala General Sales Tax Act on their purchases of imported raw cashewnuts. The Ministry of Foreign Trade also addressed a communication to the State Government dated 4.3.1972 that the matter may be sympathetically considered. The cashew manufacturers and exporters' Associations also moved the Government in this behalf by memorandum dated 6.3.1972. The

Government directed the Board of Revenue (Taxes) to submit a report in the matter. The matter was engaging the attention of the Board of Revenue and the State Government from some time. In view of very heavy stakes involved in the matter, the Government had to analyse the entire situation, especially with reference to the very high amount of the Revenue involved. It was reported that the grant of exemption will involved loss of revenue of at least one crore of rupees per annum. After consideration of the matter the State Government decided to reject the request of exemption prayed for. The Cashew Corporation of India and the Government of India were given a reply communicating the decision of the State Government in February, 1973. Thereafter the Kerala State Cashew Development Corporation requested the Govt. to re-examine the decision as the levy of tax would be heavy burden on the industry. The Government passed an order (Ext.A) granting the exemption for the period 1.9.1970 to 30.9.1973. It was resolved then that tax should be levied from 1.10.1973 onwards. There was considerable criticism about the grant of exemption especially in the context of the grave and difficult financial position of the State. After mature consideration, by notification dated 9.11.1973 (Ext.B) the earlier Government order dated 12.10.1973 (Ext.A) was cancelled.

19. The allottees were not given to believe that no tax would be levied on such purchases....."

In the reply affidavit filed on behalf of the appellants the above allegations made in the counter-affidavit are denied.

The allegations in the appeal do not contain any information about who was present at the so called meeting, what representation was actually made, whether any of the appellants acted on the basis of the said representation and how he was prejudiced thereby. No material in the form of documents in support of that plea that they altered their price structure relying upon the alleged representation was also produced by the appellants. The appellants were owners of existing factories. None of them is shown to have established any new factory relying on the representation of any of the ministers. They were carrying on the business in their factories already. It is not their case that they would have closed down their factories but for the alleged representation made to them. Nor it is their case that they gave up a more advantageous project and diverted their capital towards the cashewnut factory believing that the Government would grant exemption from payment of tax and had suffered any loss thereby. It is contended that the officer who had filed the counter-affidavit could not have known what transpired at the alleged meeting. The same plea is available against the appellants too. The person who has sworn to the affidavit on behalf of the appellants also does not say that he was present at the meeting or that he had any personal knowledge about what transpired at the meeting. He does not give any material details about what actually transpired there. In cases of this nature the evidence of representation should be clear and unambiguous. It 'must be certain to every intent'. The statements that are made by ministers at such meetings, such as, 'let us see', 'we shall consider the question of granting of exemption sympathetically', 'we shall get the matter examined', 'you have a good case for exemption' etc. even if true, cannot form the basis for a plea of estoppel. Moreover, the events that have taken place subsequently belie the fact of any such promise by the ministers. It

is seen that the Cashew Corporation of India had made a representation to the Government of India on May 7, 1971 and the Government of India wrote to the State Government on March 4, 1972 urging that the exemption prayed for by the cashew manufacturers may be favourably considered by the Government of Kerala. The Government of Kerala however rejected the said request. Then on further pressure being put upon it, it issued the notification dated October 12, 1973 and immediately thereafter withdrew it after it encountered severe public criticism. This conduct on their part is not consistent with the appellants' case that they had actually promised in the year 1971 to exempt the cashew trade from payment of the tax. The allegations made in the petition do not establish

(i) that there was a definite representation by the Government to the effect that the Government will not levy the tax; (ii) that the appellants in fact altered their position by acting upon such representation, and (iii) that they had suffered some prejudice sufficient to constitute an estoppel. Hence the whole case of promissory estoppel lacks the necessary factual foundation. It is, therefore, unnecessary to consider the question of law whether the plea of promissory estoppel can be raised against a legislation which levies tax and whether an assessee can claim exemption from a tax levied by the legislature merely on the basis of a representation of a minister.

We shall now proceed to consider the plea relating to the power of the Government to cancel the notification issued under section 10(1) of the Act.

During the relevant period section 10 of the Act read thus :

"10. Power of Government to grant exemption and reduction in rate of tax : (1) The Government may, if they consider it necessary in the public interest, by notification in the Gazette, make an exemption or reduction in rate in respect of any tax payable under this Act :

(i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales or purchase by successive dealers, or

(ii) by any specified class of person, in regard to the whole or any part of their turnover. (2) Any exemption from tax, or reduction in the rate of tax, notified under sub-section (1). -

(a) may extend to the whole State or any specified area or areas therein,

(b) may be subject to such restrictions and conditions as may be specified in the notification.

(3) The Government may, by notification in the Gazette, cancel or vary any notification issued under sub-section (1)."

As regards the power of Government to cancel the notification which had been issued earlier, the High Court has upheld the power of the Government to do so. We think that the High Court was

right in taking that view. The liability to pay sales tax arose at the point of time when the purchases were made. The power of exemption in the instant case was exercised through a retrospective notification which was a piece of subordinate legislation. It has been held by this Court that an authority which has the power to make subordinate legislation cannot make it with retrospective effect unless it is so authorised by the legislature which has conferred that power on it. The law on the above point is neatly summarised in *Income Tax Officer v. M.C. Ponnosse & Ors.* [1970] 1 S.C.R. 678 at pages 681-682 thus :

"Now it is open to a sovereign legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are - in the words of Willes, J. in *Phillips v. Eyre* (40 Law J. Rep (N.S.) Q.B. 28 at p.37) - 'no doubt prima facie of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.' The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by the person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect; (see *Subba Rao, J. in Dr. Indramani Pyarelal Gupta v. W.R. Nathu & Others* (1963 S.C.R. 721) - the majority not having expressed any different opinion on the point; *Modi Food Products Ltd. v. Commissioner of Sales Tax U.P.* (A.I.R. 1956 All. 35); *India Sugar Refineries Ltd. v. State of Mysore* (A.I.R. 1960 Mys. 326) and *General S. Shivdev Singh & Anr. v. The State of Punjab & Others* (1959 P.L.R. 514)."

In the instant case on the date on which the notification was issued the Kerala Government had no such power under section 10 of the Act as it stood then to issue a notification granting exemption with retrospective effect. Such power was actually conferred on it later on by the Kerala Legislature only by way of amendment in 1980 by Kerala Act 19 of 1980. Now section 10 of the Act reads thus :

"10. Power of Government to grant exemption and reduction in rate of tax - (1) the Government may, if they consider it necessary in the public interest by notification in the Gazette, make an exemption or reduction in rate, either prospectively or retrospectively in respect of any tax payable under this Act:-

(i) On the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers, or

(ii) by any specified class of persons in regard to the whole or any part of the turnover. (2) Any exemption from tax, or reduction in the rate of tax, notified under sub-section (1), -

(a) may extend to the whole State or to any specified area or areas therein, -

(b) may be subject to such restriction and conditions as may be specified in the notification.

(3) The Government may by notification in the Gazette cancel or vary any notification issued under sub-section (1)."

(emphasis added) By the addition of the words 'either prospectively or retrospectively' by the aforesaid amendment, the State Legislature has now conferred the necessary power on the State Government to grant exemption with retrospective effect. This amendment also suggests that earlier the Government had no such power to grant exemption with retrospective effect.

Hence the impugned notification which granted exemption on October 12, 1973 for the earlier period between September 1, 1970 and September 30, 1973 was ineffective. It was also not shown that relying upon the notification during the period between October 12, 1973 and November 9, 1973 the appellants had done any act which attracted the rule of estoppel. The authority which can issue a notification may cancel it also. Section 10(3) of the Act confers such power of cancellation expressly. The State Government did so and cancelled the earlier notification as there was a public hue and cry that the State Government had shown undue favour of the Kerala cashewnut factory owners at a time when the State was passing through grave and difficult financial position. Moreover the transactions in question related to the past period.

Hence the appellants are not entitled to any relief either on the principle of promissory estoppel or on the basis of the earlier notification issued under section 10 of the Act.

We agree with the High Court that the appellants had not made out any case. The appeal is dismissed.

Before concluding we may refer to a submission made on behalf of the appellants that by virtue of the amendment by Act 103 of 1976 to the Central Sales Tax Act, 1956 by the introduction of section 2(ab) in it they are entitled to certain relief. We have not considered the effect of the said amendment on the transactions in question. We express no opinion on it. It is open to the appellants to raise the point in the assessment proceedings or in any other proceedings under the Act which may be pending now.

There will be no order as to costs.

S.R.

Appeal dismissed.

