Motibhai Lalloobhai & Co. vs Union Of India (Uoi) And Anr. on 5 November, 1953

Equivalent citations: AIR1957ALL84, AIR 1957 ALLAHABAD 84, 1956 ALL. L. J. 820

JUDGMENT

Mootham, J.

1. These are nine petitions under Article 226 of the Constitution in which the same point of law arises. In each case the petitioner is a firm which deals in tobacco and owns a ware-house licensed under Rule 140, Central Excise Rules, 1944, for the storage of tobacco on which duty has not been paid.

2. On 28-2-1951, Bill No. 13 of 1951 was introduced into Parliament to give effect to the financial proposals of the Central Government for the financial year 1951-52 which commenced on 1-4-1951.

Under Clause 7 of this Bill the proposed excise duty on unmanufactured tobacco, other than flue cured tobacco and tobacco used in the manufacture of cigarettes, was eight annas a pound and on tobacco used in the manufacture of biris it varied between six annas and nine annas a pound according to the quantity of tobacco used in the manufacture of a thousand biris.

A declaration was included in the Bill that it was expedient in the public interest that the provisions of certain clauses thereof, including Clause 7, should have immediate effect under the Provisional Collection of Taxes Act, 1931, As a consequence of this declaration the declared provisions of the Bill acquired the force of law under Section 4 (1) of the latter Act or 1-3-1951.

3. The Finance Act, 1951 (Act XXIII of 1951) became law on 28-4-1951, and during the period between 1-3-1951,. and that date the petitioners cleared large quantities of tobacco from their warehouses paying thereon excise duty at the rate specified in the Finance Bill.

No difficulty would have arisen if the rates of excise duty on tobacco proposed in the Bill had been incorporated in the Act, for, it is common ground that the duty demanded at the time the tobacco was cleared was paid in full. The proposed rates of excise duty were not however accepted by Parliament, and in lieu thereof it was provided in Section 7 (1) of the Act that the excise duty on unmanufactured tobacco of the class with which we are here concerned, namely other than flue cured, and not ordinarily used for manufacture of (a) cigarettes or (b) smoking mixture for pipes and cigarettes, but capable of being used for the manufacture of biris, was enhanced to fourteen annas a pound while the proposed duty on tobacco used for the manufacture of biris was abandoned.

The new rates were made effective by the amendment of the First Schedule to the Central Excise and Salt Act, 1944.

4. Sub-section (2) of Section 7 of the Finance Act, 1951, further provides that:

> "(2) The amendments made in the Central Excise and Salt Act, 1944, by Sub-section (1) shall be deemed to have had effect on and from the first day of March, 1951, and accordingly.
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> (a) refunds shall be made of all duties collected which would not have been collected if the amendments had come into force on that day, and
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> (b) recoveries shall be made of all duties which have not been collected but which would have been collected if the amendments had so come into force."

5. Demand was thereafter made on the petitioners by the Excise Department for payment of the amount by which the excise duty they had already paid on tobacco cleared between the 1st March and 27th April fell short of the amount payable under the Finance Act, 1951, less the amount of any refund to which they were entitled as a consequence of the abandonment of the proposed duty on unmanufactured tobacco used in the production of biris.

6. The petitioners objected to the payment of the deficit amount which has been demanded; and in these petitions they seek, firstly the issue of a writ in the nature of mandamus to command the Union of India and the Excise Authorities not to proceed with the levy, collection and realisation of the additional duty set out in the notices of demand, and, secondly, for the issue of a writ in the nature of certiorari to quash these notices of demand.

7. In our opinion the question of the liability of the petitioners for the payment of additional duty turns on the meaning and effect of Section 7 (2) of the Finance Act, 1951. It is not a dispute in these petitions that Parliament can enact legislation which has retrospective effect, and once this is conceded we can see no particular difficulty in construing this sub-clause. The first sentence of the sub-section reads as follows:

> "The amendments made in the Central Excise and Salt Act, 1944, by Sub-section (1) shall be deemed to have had effect on and from the first day of March 1951."

'Deeming' something to be other than what it is or was is a legislative device well known to lawyers. As Viscount Dunedin said in Commr. of Income-tax, Bombay v. Bombay Trust Corporation Ltd., 57 Ind App 49 at p. 55: (AIR 1936 PC 54 at p. 55) (A).

> "..When a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were."

In reality, the amendments of the First Schedule of the Central Excise and Salt Act made by Sub-section (1) of Section 7 or the Finance Act, 1951, did not become Eaw until 28-4-1951, but Parliament has expressly stated that they are to be treated as if they had become law on the preceding 1st March. It appears to us to follow, therefore, that the petitioner's liability for payment of excise duty is to be determined on the assumption that as and from the 1st March, 1951, the rates of duty were those set out in Sub-section (1) of Section 7.

8. Sri A. P. Pande who appears for certain of the petitioners contends that the levy which the Excise Department is now seeking to collect is not an excise duty at all but is a direct tax on the petitioners and is, therefore, neither the tax sanctioned by Parliament, which authorised only the imposition of an excise duty, nor a tax which Parliament had power to impose under Item 84 of List I of the Seventh Schedule to the Constitution.

He argues that an excise duty is in essence an indirect tax, and that if, as in the present case, it is no longer possible for the persons who are called upon to pay it to pass it on to the purchaser of the goods, it is not an excise duty. Alternatively it is said that an excise duty is a tax on goods themselves and can be levied only on the (sic) who is in possession of the goods at the time the payment of duty is demanded.

Notwithstanding the able and succinct manner in which these arguments were advanced they are not, in our opinion, in point. Parliament did not enact simpliciter that an additional (sic) sould be paid on tobacco which had (sic) cleared. Had it done so it would have been arguable that the levy was in the nature of a (sic) tax--but it declared the enhanced duty to (sic) as one which came into force on the 1st(sic), and consequently it was a duty which (sic) opinion now be viewed in law as having been in force when tobacco was removed from the godowns of the petitioners at any time or times after that date.

A duty which, it is not in dispute, could properly be described as an excise duty on the day on which it came "into force does not as pointed out in Chhotabhai Jethabai & Co. (sic) of India, AIR 1952 Nag 139 (B), ceases to be a tax of that character merely because it is made retrospective in its operation. An excise duty is not strictly speaking a tax on goods; it is primarily a duty levied on the manufacturer or producer in respect of his commodity: Governor-General in Council (sic) of Madras. 1945 FCR 179 : (AIR 1945 (sic) (C).

Nor is it a tax, an essential feature of which is, that it is passed on to someone other than the person from whom it is demanded, for an excise duty is no less an excise, duty when it is paid by (sic) son who himself consumes the goods. Indeed (sic) as was said in the second Chhotebhai Jethabhai (sic) case, Misc. Petn. No. 1795 of 1951: (AIR 1952 (sic) 139) (B), the present duty is no new tax at all (sic) "it is merely an increase in the rate of the old (sic) payable when the old tax was paid."

9. Learned counsel who appeared in Petition No. 100 of 1952 has supplemented this argument by a number of further submissions. He has contended, first, that when Sub-section (2) of Section 7 speaks of "amendments" made in the Central Excise and Salt Act of 1944 by Sub-section (1) all that referred to is additions to or deletions from the list of dutiable articles, variations in the rate of

existing duty being excluded, and that in consequence Section 7(2) gives retrospective effect only to the change in the Schedule effected by Section 7 (1)(a).

We may say at once that we can see no ground for restricting the meaning of the term "amendment" in the manner suggested by learned counsel, nor for making any distinction between the changes in the First Schedule to the Central Excise and Salt Act which are effected by Sub-sections 1(a) & 1(b) of Section 7 both of which, in our opinion, constitute amendments of the original Schedule. The submission in our view is unarguable.

10. Secondly, counsel has argued that Section 7(2) is unconstitutional as it infringes the. provisions of Article 19(1)(f) of the Constitution, and reliance was placed on the case of Subodh Gopal Bose v. Behari Lal, AIR 1951 Cal 85 (D). We see no force in this argument for we can see nothing inherently unreasonable in giving retrospective effect to an enactment the object of which is to prevent a loss of revenue to the State which would otherwise occur. As Higgins, J., pointed out in Sargood Brothers v. The Commonwealth, (1910) 11 CLR 258 at p. 305 (E).

> "We have been reminded of the doctrine that Parliament is to be presumed not to interfere with vested rights but, in applying this principle, we should (sic) in, mind the nature of legislation which we have to consider. It is a custom tariff legisla tion in which it is the invariable and necessary prac tice to (sic) with vested rights, to validate past unlawful (sic), to make retrospective laws."

There is nothing unusual in a legislation of the nature now under consideration as is shown by the examples which are (sic) in the elaborate judgment of Hidayatulla, J.,in Misc. Petn. No. 1795 of 1951:

> (AIR 1952 (sic)139) (B).

11. In the third place, it is contended that payment of the present demand would constitute a form of double taxation and is therefore unconstitutional. Double taxation occurs when a person is subjected twice to the same tax. That is not in our opinion a correct way of viewing what has occurred in the present case.

All that (sic) be said is, we think, that the duty, in effect, is sought to be collected by in-

stalments; and no ground has been suggested which would enable us to hold that Parliament has not the power be enact double taxation if it so chose.

12. Substantially the same argument was put in another form by Sri A. P. Pande who urged that as sooon as any of the petitioners obtained a clearance certificate in respect of tobacco removed from their warehouse he obtained thereby a right to be exempted from payment of any further duty in respect of the same goods, and that right is a fundamental right which cannot be interfered with by ex (sic) facto legislation.

There is however no fundamental right to exemption from payment of taxes. There is a fundamental right to acquire, hold and dispose of property, and we have earlier given reasons for holding the view that Section 7, Finance Act, does not contravene that right. Article 31(2) of the Constitution provides that no property shall be taken possession of or acquired for public purposes unless the law provides for compensation for the property so taken possession of or acquired, but there is a proviso to that Article, to be found in Clause (5) (b) (1), which declares that nothing in Clause (2) shall affect the provisions of any law which the State may make for the purpose of imposing or levying any tax or penalty.

A similar argument to the one now addressed to us was advanced in the Supreme Court of the United States in the case of Patton v. Brady, (1901) 46 Law Ed 713 at p. 719 (F), and was answered by Brewer J. in these words :

> "But why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the Government has ceased. They are, as said in Cooley on Taxation, p. 1 : 'The enforced proportional contribution of persons & property, levied by the authority of the state for the support of the government and for all public needs', and so long as there exists public needs just so long exists the liability of the individual to contribute thereto.
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> The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order 'to provide for the common defence' and 'promote the general welfare'."

This passage was quoted with approval by Jayakar, J., in In re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, 1939 FCR 18 at p. 109: (AIR 1939 FC 1 at pp. 36-37) (G), where again a similar argument was advanced. We think the argument must be rejected.

13. Fourthly, learned counsel attached great importance to the words which have not been collected' in Clause (b) of Sub-section (2) of Section 7, his argument being that the effect of these words is wholly to remove the case of the petitioners from the ambit of the sub-section. Power is given, it is said, by this clause to recover all duties which would have been collected if the amendments had come into force on the 1st March except in those cases in which duty at the rate specified in the Finance Bill had been collected.

14. In our judgment this argument is not well founded. The sub-section must be read as a whole, and when that is done its meaning is we think clear. The sub-section first of all declares that the amendments effected by Sub-section (1) of the same section shall be deemed to have had effect on and from the first day of March, 1951. It then proceeds to state the procedure which is to be followed in the two different situations which necessarily have arisen, namely where duty has been collected in excess of the amount payable under the Act and where, duty at the rates now prescribed has not been collected.

The fallacy in the argument addressed to us lies we think in this, that Clause (b) does not as is. argued, refer to 'duties', but to 'duties which have not been collected'. The true view in our opinion is that the phrase "duties which have not been collected" is no more than the converse of the phrase "duties collected", in the preceding Clause (a).

The construction sought to be put upon Clause (b) ignores the significance of the expression "all duties", an expression which can only mean duties on the rates prescribed in Sub-section (1) of Section 7 "All duties which have not been collected' includes the whole or any part of a duty which has not previously been collected, and Clause (b) in our opinion presupposes or assumes that duty may have already been paid at a lower rate than that for which provision is now made in the Act.

In our opinion the learned Junior Standing Counsel is right when he argues that Clause (b) covers, and was intended to cover, exactly the kind of situation which has arisen in the petitions which are now before us.

15. On behalf of the respondents it has also been contended that even if Parliament had not the power to enact Section 7 of the Finance Act 1951, under the power vested in it by Item 84 of List I of the Seventh Schedule to the Constitution, it undoubtedly had that authority under Item 97 of the same List which, read with Article 246, confers upon it power to make laws with respect to, "Any other matter not, enumerated in List II or List III including any tax not mentioned in those Lists."

16. Little was said by learned counsel in answer to this argument, and as we are of opinion that the duty in question is one which Parliament could impose under the power of legislation vested in it under Item 84, it is not necessary for us to express a final opinion on the submission.

We are constrained to say however that, as at present advised, we are of the view that as the tax is admittedly not a tax mentioned in List II or III, the power of Parliament to impose it could be challenged successfully only on the ground that it was incompetent to do so, a claim which would appear difficult to substantiate in view of the clear terms of Item 97.

17. In Petition No. 100 of 1951 learned counsel says that in any event the amount of the duty now demanded, Rs. 15,443/4/-, has been wrongly calculated and that the amount cannot exceed Rs. 10,907/12/-. The learned Junior Standing Counsel has given an undertaking that the amount of duty claimed will be recalculated, and that if any mistake has been made it will be corrected.

18. For the reasons we have stated we are of opinion that these petitions must be dismissed. We assess the costs at one hundred rupees in each case. The interim orders of stay are discharged.