Supreme Court of India
Moulin Rouge Pvt. Ltd vs The Commercial Tax Officers & Ors on 12 November, 1997
Bench: S.P. Bharucha, Suhas C.Sen

PETITIONER:
MOULIN ROUGE PVT. LTD.

Vs.

RESPONDENT:
THE COMMERCIAL TAX OFFICERS & ORS.

DATE OF JUDGMENT: 12/11/1997

BENCH:
S.P. BHARUCHA, SUHAS C.SEN

ACT:

HEADNOTE:

JUDGMENT:

THE 12TH DAY OF NOVEMBER,1997 Present:

Hon'ble Mr. Justice S.P.Bharucha Hon'ble Mr. Justice Suhas C.Sen S.B. Sanyal, Sr. Adv. and B.B.Singh, Adv. for the appellant N.Santosh Hegde, Sr. Adv., J.R. Das, D.K.Singh, D.Krishnan, for M/s. Sinha & DAs, Advs. with him for the Respondents.

J U D G M E N T The following Judgement of the Court was delivered: SEN,J, The Appellant, Moulin Rouge, is a company registered under the India companies Act. Its business consists of running a restaurant at 20, park Street, Calcutta-16. Apart from food and drink, it provides the customers with various services and amenities. The restaurant is air-conditioned. It provides upholstered cushioned seating subdued lighting and also music. High class crockery and cutlery are provided. The restaurant also employs highly trained individual attention is given to the customers . The customers cannot take away and food from the restaurant fro home consumption. Even unused or unconsumed portions of food and drink are to allowed to be taken away by the customers. There is no sale of any food or foodstuff across the counter.

This Court in the case of State of Punjab vs. Associated Hotels of India Ltd. (1972) 1 SCC 472 held that a transaction between a hotelier and a visitor to hotel was essentially of service. As part of the amenities incidental to that service, meals are provided in the hotel at stated hours. The Revenue

was not entitled to split up the bills of the hoteliers on the ground that the bills included not only charges for lodging but also charges for foodstuff with a view to bring the latter under the province of Punjab General Sales Tax Act. It si to be noted that the case dealt with the question of levy of sales tax on supply of food by a hotel to its residents.

The case of the appellant is that, on legal advice, and on the basis of the aforesaid judgment is did not collect nay sales tax for food and drinks provided by it to its customers. The appellant had no liability to pay or to collect any sales tax on the food and drinks supplied by it as these were not separately charged for but were include in the bills for various services and amenities provided by it to its customers. However, On 26.4.78, the commercial Tax Officer passed an ex-parte, best judgment assessment in respect of the four quarters ending on 31.3.74, 31.1.75 31.3.76 and 31.3.77 imposing sales tax and penalty on the appellant. Since the appellant failed to pay the tax demanded, a certificate case was started. The appellant's case is that is not liable to pay sales tax on food and drink sold by it in its restaurant. The principals laid down in the case of Associated Hotels (supra) apply in full force to its case.

The question of leviability of food sold by a restaurant to its customers directly came up for consideration in the case of Northers India Caterers (India) Ltd. vs. Lt.Governor of Delhi (1978) 4 SCC 36 decided on September 7, 1978. That was a case under Bengal Finance (sales Tax) Act, 1941 as extended to the Union Territory of Delhi. The question was whether service of meals to casual visitors in the restaurant was taxable as a sale - (a) when the charges were lump sum per meal or (b) when they were calculated per dish. It was held that Revenue was not entitled to split up the transaction into two parts, one of service and the other of sale of foodstuffs. An approach similar to the case of the hotels was adopted. It was explained that the classical legal view was that when a number of services were concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need. What the customer paid of included more than the price of the food as such. It included all that entered into the conception of service. It did not contemplate the transfer of the general property in the of supplied as a factor to the service rendered. It was ultimately held that the service of meals to visitors in the restaurant of the appellant was not sale of food and was not taxable under the Bengal Fiance (Sales Tax) Act, 1941. The position would be the same whether a charge was imposed fr the meal as a whole or according to the dishes separately ordered.

As a result of these two judgments, food served by a hotelier to its boarder or by a restaurant to its customer could not be subjected to sales tax. The Legislature tried to retrieve the situation for the State by passing the constitution (Forty-sixth Amendment) Act, 1982 by which sub- clause 29A was inserted in the definition of "tax on the sale or purchase of goods" by amending Article 366 of the Constitution. as a result of this amendment, tax on sale or purchase of goods was given an expanded meaning to include a tax on the supply by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other articles for human consumption or any drink.

Following the insertion of clause 29A in Article 366, of the constitution, the Bengal Fiance (Sales Tax) Act, 1941 was amended. The definition of "sale" in Section 2(g) (iii) was amended to include, inter alia, any supply, by way of or as part of any service or in any other manner whatsoever, of

goods being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service was for cash, deferred payment or other valuable consideration, and such delivery, transfer or supply of any goods was deemed to be a sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply was made. Section 26A was also inserted into the Act.

> "26A validation and exemption - (1) For the purposes of this Act, every transaction by way of supply of the nature referred to i sub-clause
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> (ii) of clause (g) of section 2 shall be deemed to be, and shall be deemed always to have been, a transaction by way of sale. with respect to which the person making such supply is the seller and the person to whom such supply is made, is the purchaser; and notwithstanding any judgment, decree or order of any court, tribunal or authority, no imposition of tax on any sch transaction before the coming into force of section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983, shall be deemed to be invalid or ever to have been invalid, and accordingly
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> (i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under this Act shall be deemed always to have been validly levied or collected in accordance with this Act;
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> (ii) no suit or other proceeding shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any sch tax which has been collected;
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> (iii) recoveries shall be made in accordance with the provisions of this Act of all amounts which would have been collected thereunder as tax as aforesaid if this section had been in force all the material times.
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> (2) Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempted from the aforesaid tax -
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> (a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978 and before the commencement of section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983 and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or
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> (b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of

January, 1972 and before the commencement of section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983 and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time :

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case may be clause (b) shall lie on the person claiming the exemption under this sub- section."

On 24.8.81, the appellant moved a writ petition under Articles 226 of the Constitution alleging that is was not liable to pay a sales tax in view of the aforesaid judgment of the Supreme Court in Norther India Caterers (India) Ltd. (Supra). the High Court issued a rule nisi on the writ petition and passed an order of injunction restraining the Sales Tax officer from proceeding with the aforesaid certificate cases. The writ petition was ultimately transferred to the West Bengal Taxation Tribunal. The Tribunal following its decision in the case of Nimai Chandra Guin vs. Commercial Tax Officer, Manicktola & Ors. 75 STC 322 dismissed the writ petition in view of the amended definition of ""sale" give in section 2(g) of the Bengal Fiance (Sales Tax) Act with retrospective effect. It was, however, pointed out by the Tribunal that the petitioner's case cam in clause (a) of sub-section (2) of Section 26A of the Act. Therefore, the petitioner was entitled to tax exemption from September 7, 1978 till the coming into force of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act 1983. However, in order to take advantage of this provision, the petitioner must provide that it did not collect sales tax during the period in question.

Mr. Sanyal, on behalf of the appellant, has contended that Section 36A of the Bengal Act has made an artificial distinction between supply of food by a restaurant in clause

(a) supply of food by any other body by whatever name called in clause (b). I clause (a) a restaurant or an eating house has been exempted from tax fro food supplied on or after the 7th September, 1978 and before the commencement of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983 provided no tax had been collected by the restaurant or that eating house from its customers. Clause (b) grants a similar exemption to food supplied by a body other than restaurant or an eating house for a longer period of time i.e. on or after the 4th January, 1972 to the commencement of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983. Mr. Sanyal contends that an invidious distinction has been made in the period of exemption for restaurant under clause (a) and a hotel under clause (b) of Section 26A(2). According to Mr. Sanyal, there is no rational basis for this distinction as the underlying principle behind these two decisions was the same.

This contention of Mr. Sanyal must fail for two reason. the question of constitutional validity of Section 26A was not raised before the tribunal and cannot be agitated in appeal against the order of the tribunal. In any event that allegation that an invidious and irrational distinction has been made between a hotel and a restaurant is without any merit. The judgment in the case of M/s. Associated Hotels of India Ltd. (supra) was delivered on 4th January, 1972. After this Judgment, sales tax could not be levied by the Revenue nor collected by the hotel on sale of foodstuff when such sale

constituted part of the services rendered by it its residents. Therefore, even though the levy was validated retrospectively by sub-section (1) of Section 26A, exemption from payment of tax on such sales was given by clause (b) of sub-section (2) of Section 26A from the date of that judgment to the date of the passing of the Amendment Act.

Sale of foodstuffs by a restaurant to its customers was dealt with in the case of Norther India Caterers (India) ltd. (supra) where the judgment was pronounced on September 7, 1978. The exemption in clause (a) of Section 26A (2) to the restaurants or the eating houses has been given from the date of that judgment. When Section 26A validated the levy of tax with retrospective effect the legislature took care to ensure that the persons who had not collected tax on the basis of the aforesaid two decisions of this Court will not be burdened with tax with retrospective effect. Since the two judgments were delivered on two different dates, two different periods of time were fixed for granting exemption to two different classes of sellers. Restaurant and eating houses were granted exemption fro the date of the judgment in Norther India Caterers (India) Ltd. case i.e. September 7, 1978. Others were granted exemption on and from 4th January, 1972 i.e. the date of the judgment in the case of M/s Associated Hotels of India Ltd.. The classification has been based on an intelligible basis. There is no irrationality about it. The same principles may have been followed both the judgment bu the two judgments dealt with two different classes of assessees.

Mr. Sanyal, however, contended that his client had stopped paying and collecting sales tax on foodstuff supplied to its customers on and from 4th January, 1972 relying upon the principle laid down in the case of M/s. Associated Hotels of India Ltd.. That may be so. But the Associated Hotel's case did not deal with sales may by a restaurant. The retrospective operation of the Act is bound to affect many tax payers prejudicially in many different ways. But that will not make the provision unconstitutional. The legislature has decided to grant relief to two classes of tax payers from the burden of this retrospective levy of tax. For this purposes, it has drawn a justifiable distinction between hotels and restaurants and has decided to grant exemption to them from two separate dates based on two separate judgments of this Court.

In our opinion, the legislature has made a valid classification for the purpose of granting exemption to hotels and to restaurants on the basis of the two dates of the aforesaid two judgments.

The case of the appellants is without any merit and is dismissed. The appellant must pay costs of this appeal assessed at Rs. 1,700/-