Instalment Supply Ltd., New Delhi vs State Of Delhi And Ors. on 4 May, 1956

Equivalent citations: AIR1956P&H177, [1956]7STC586(P&H), AIR 1956 PUNJAB 177

JUDGMENT

Kapur, J.

1. This is an application by a joint stock company carrying on the business of financing purchases of vehicles by persons who wish to purchase such vehicles without investing the full price needed for the purchase.

2. The point in controversy is the right of the State to recover sales tax on these transactions, and the assessments in dispute are for quarters ending 31-12-1951 and 31-3-1952. The other assessments which are given in para 9 of the petition are not now in dispute us they have been decided to the satisfaction of the petition.

3. The West Bengal Sales Tax Act has been extended to the whole of the Delhi State by a notification issued under the Part C States (Laws) Act of 1950. 'Sale' has been defined in Section 2(g) of the Act as extended to Delhi:

> "2(g) 'Sale' means any transfer of property in E oods for money consideration and includes a transfer of property in goods supplied in execution of a contract but does not include a mortgage, hypothecation, charge or pledge; and any grammatical variations of the expression 'sale' shall be construed accordingly;
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> Explanation (1): A transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding that the seller retains a title' to any goods as security for payment of the price, be deemed to be a sale."

The petitioner took objection to the constitutionality of Expln. (1) and the submission is that it is an ad--

dition to Entry 54 in the State List (List II) in Sch. 7 of the Constitution. This entry runs as under:

> "Taxes on the sale or purchase of goods other than newspapers." The corresponding Entry in the 7th Schedule of the Government of India Act, 1935, was 48 which was as under: "Taxes on the sale of goods and on advertisements."

3a. According to the Constitution (Art. 265) no tax shall be levied or collected except by authority of law. In construing taxing statutes a strict interpretation is to be placed and as is said by Maxwell on the Interpretation of Statutes, p. 288, statutes which impose pecuniary burden, also, are subject to the same rule of strict construction.

It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. See also -- 'Attorney-General v. Seccombe', (1911) 2 KB 688 (A); -- 'Russell v. Scott', (1948) AC 422 (B); and -- 'Cape Brandy Syndicate v. Inland Revenue Commrs.', (1921) 1 KB 64 (C).

4. In 'Canadian Eagle Oil Co. Ltd. v. The King', 1946 AC 119 (140) (D), Viscount Simon L. J. quoted with approval the following passage from a judgment of Rowlatt J. in (1921) 1 KB 64 (71) (C) :

> "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Further, in a case of reasonable doubt the construction most beneficial to the subject is to be adopted: see Maxwell on Interpretation of Statutes p. 288 and -- Inland Revenue Commrs. v. Wolfson', (1949) 1 All ER 865 (E).

5. Another principle of construction given at p. 291 of Maxwell on Interpretation of Statutes is:

> "It is to be observed, however, that all exemptions from taxation increase the burden on other members of the community and should therefore be deprecated."

6. I am fully alive to another principle that taxing Acts like penal Acts are not to be so construed as to furnish a chance of escape and a means of evasion: see Maxwell on Interpretation of Statutes p. 291. At the same time it is illegitimate to force on the language of a statute a strained construction merely because it may otherwise lead to a result which to some minds may appear to be unjust: see -- Howard De Walden v. Inland Revenue Commrs.', (1942) 1 KB 389 (397) (F).

7. In the matter of construction of constitutional law there is a statement in Weaver on Constitutional Law p. 77 which refers to the Constitution of the United States. The rule is stated as follows :

> "In interpreting the Constitution recourse may be had to the common law of England in force in the United States at the time of the Revolution. Many principles of

> Government were adopted directly from this source and it has been presumed that the statesmen who wrote the Constitution adopted these principles with the fixed technical meaning they had acquired in legal and constitutional history. "The interpretation of the Constitution' said Justice Brewer is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' To which statement Chief Justice Taft has added, 'The language of the Constitution cannot be interpreted safely except by reference to the com-
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> mon law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to ratification of the conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary'."

8. The words "tax on the sale of goods" were used in Entry 48 of List II of Sch. 7 of the Government of India Act and the British Parliamentary draftsmen must have been aware that the words "sale of goods" had come to have a legal connotation, and it would be proper therefore to presume that the expression was used in the sense in which it was understood by English lawyers and also in India.

It is not to be ignored that the framers of the Constitution were trained and brought up in the atmosphere of English common law and English statute law, and as has been said by Chief Justice Taft in a passage which I have already quoted they thought and spoke in the vocabulary of English, common law. The use of the words "sale of goods" in Entry 48 of the Act of 1935 was interpreted by the Supreme Court in -- 'Sales Tax Oificer, Pilibhit v. Messrs. Budh Prakash Jai Prakash', 1954 SC 459 (AIR V 41) (G), and it was said by Venkataframa Ayyar J. at p. 461 :

> "Thus, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression sale of goods' in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title." and the same words having been re-enacted excepting as to the addition of the word "purchase", in my opinion the same interpretation should be given. See Maxwell on Interpretation of Statutes p. 38, arid in the present case the Acts are in pari materia.

9. In the case before the Supreme Court the question for decision was whether a State Legislature could enlarge the definition of the word "sale" and include forward contract, and it was held that the word "sale" did not include such forward contracts and to that extent the U. P. Sales Tax Act in that case was held to be ultra vires. It was also held that a State Legislature cannot by enlarging the definition of the word "sale" arrogate to itself a power which is not conferred upon it by the Constitution Act.

10. In the present case the petitioner has placed on the record a printed copy of the agreement which it gets executed in all transactions of hire-purchase which it enters into and there are four salient provisions to which it makes a reference.

It is submitted (1) that there is no sale when the agreement is entered into nor is there even an agreement to sell, (2) that ownership passes to the hirer when the hiring agreement comes to an end and the hirer exercises option of purchase, (3) thai the hirer has the right to determine the contract of hire and is not liable to pay any damages, and (4) that on a default being committed the owner under the agreement has the right to determine the contract and he can resell the motor vehicle and he would neither be liable to pay the surplus on resale nor be entitled to recover any shortfall.

The agreement is between the Company as owner and the hirer, and by the agreement the owner agrees to let and the hirer agrees to hire the

- vehicle on the conditions contained in the contract and the relevant conditions are:

> (1) The hirer shall pay a sum of Re. 1/- in consideration of the option to purchase;
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> (2) The hirer shall make an initial deposit by way or premium for granting the lease and this deposit is the absolute property of the owners. (We sent for some of the contracts which had been entered into and it was found that the Company takes about 25 per cent as deposit under this clause in the case of new vehicles.); and (3) The hirer undertakes to pay instalments and when all the instalments are paid the vehicle shall at the option of the hirer become his absolute property, But until then it remains the property of the owners.

11. At p. 2 of the agreement are given the conditions which form part of the agreement. Under para 2(b) of these conditions the hirer is responsible and liable to the owners for loss by reason of damage or destruction or loss **. Under para 3 the hirer agrees to pay interest at the rate of 1 per cent per mensem on the sums overdue, but this does not affect the rights of the owners to seize the vehicle and determine the agreement.

Paragraph 11 gives to the owners the right to negotiate any negotiable instrument given by the hirer by way of collateral security. The argument raised by the petitioner is that this agreement which is sought to be brought within the extended meaning of word "sale" as given in Expln. 1 of the Act is ultra vires and that the transaction that it enters into is not a 'sale' within the word as used in Entry 54 of the Constitution.

12. In England instalment purchasing agreements are of two kinds. Firstly, there are hire-purchase agreements under which the consumer hires goods, has the use of them as soon as he makes the contract, but does not become the owner of the goods until he has paid all the instalments and exercised an option of purchase by paying the last hire-instalment, as provided for in the agreement. The other kind arc instalment selling agreements by which the purchaser is bound to become the owner either at once or at a later date specified in the agreement, but he purchases on credit by

instalments and this is known as a credit-sale on payment.

The essential difference between the two types of the agreement is that the hire-purchase agreement is a contract whereby there is an entrustment of goods by an owner to a hirer giving the hirer a right to buy them at a later date, if he so wishes. Under a credit-sale agreement an owner sells his goods to a purchaser and the purchaser is bound to become the owner either at once or at a later date specified in the agreement.

13. According to English Law there are some terms which are implied in every hire-purchase agreement. It is implied that the owner shall give delivery and the hirer shall accept delivery at the agreed time or within a reasonable time after the making of the agreement and that there is an implied condition as to title and a warranty of quiet enjoyment and of fitness.

14. Such agreements have been the subject-matter of several decisions in England and it has been held under the Factors Act, 1889, Section 9, that a person having agreed to buy goods means a person who has bound himself by agreement to buy, and does not include a person who has an option to buy the owner being bound to sell if that option is exercised : -- 'Helby v. Matthews', 1895 AC 471 (H).

In that case the owner of a piano agreed to let it on hire, the hirer to pay rent by monthly instalments on terms very much similar to the one that are contained in the present agreement. The hirer receiving the piano paid a few instalments and pledged it with a pawnbroker, as security for advance, and it was held that under the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full; that by putting it out of his power to return the piano he had not become bound to buy. There are certain observations of Lord Herschell L. C. which are relevant to the issue. At p. 475 his Lordship said :

> "An agreement to buy imports a legal obligation to buy. It there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy." and at p. 477 his Lordship said :
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> "This is undoubtedly true if the words 'agreement to sell' be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, bo said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy,** ".

Lord Watson at p, 479 said:

> "These stipulations, in my opinion, constitute neither mere nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour, that if, he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property, The only obligation which is

> laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing, or to pay a price for it. There is no purchase and no agreement for purchase, until the hirer actually exercises the option given him."

15. In -- 'McEntire v. Crossely Brothers, Ltd.', 1895 AC 457 (I), the contract was of a different kind. It provided that on failure to pay any of the instalments or if the lessee became bankrupt the lessors could elect either to recover the full balance remaining due or instead to resume possession of the engine and sell it and, after retaining out of the purchase-money, all expenses and the balance remaining due, pay the surplus (if any) to the lessee. One instalment was paid and then the lessee became bankrupt. It was held that under the agreement the property in the engine did not pass to tne lessee but remained with the lessors.

In this case it was pointed out by Lord Herschell L. C. that contracts must be construed as a whole and that in spite of an express provision to the contrary property in hired goods may pass, if read as a whole the other provisions lead to that conclusion.

It is important to note that in this case although there was a provision that on the failure to pay any of the instalments the lessor could recover the full balance remaining due or resume possession and sell the hired goods and pay the surplus to the hirer, the transaction was still considered to be one of hiring and no title was held to pass, and a contract such as this was not held to be a sale and the terms of the agreement were held to exclude the notice that the hirer had become the owner.

This case does not in any way help the State because in spite of the power left in the owner to either seize the goods and sell them and pay the surplus, if any, or recover the balance, the transaction was still held to be one of hiring and not o£ sale.

16. In -- 'Belsize Motor Supply Co. v. Cox', (1914) 1 KB 244 (J), there was an agreement of hire-

purchase and during the currency of the agreement while there was a sum due on account of hire, the hirer without the consent of the owners pledged the vehicle to a pledgee who took it in good faith and without notice of the owners' rights. The owners demanded that it was not an agreement which fell within the words "having agreed to buy" of Section 25, Sub-section (2), Sale of Goods Act, and that the pledgee got no better title than the hirer. Channell J. held that the case fell within the rule laid down in 1895 AC 471 (H).

17. In -- 'Modern Light Cars, Ltd. v. Seals', (1934) 1 KB 32 (K), there was a hire-purchase agreement with an option of purchase and payment was to be made by instalments and promissory notes were executed for the total amount. During the currency of the agreement the hirer sold the car, and it was held that the agreement was merely a hire-purchase agreement and was neither a sale on credit nor an agreement to sell, nor a bill of sale and that the promissory notes were only a collateral security for the instalments and not in payment thereof and the owners were held to be entitled to get possession of the motor-car and the case was held to fall within the rule laid down by the House

of. Lords in 1895 AC 471 (H).

18. In -- 'Staffs Motor Guarantee Ltd. v. British Wagon Co. Ltd.', (1934) 2 KB 305 (L), there was a very much similar agreement to the one in the present case and it was held that the agreement was a valid hire-purchase agreement and could not be treated as a bill of sale to secure the repayment of the loan. The same view was taken in -- 'Olds Discount Co. Ltd. v. Kretf, (1940) 2 KB 117 (M), where also a transfer of the goods taken on hire under a hire-purchase agreement was held not to be covered by Section 25, Sub-section (2), Sale of Goods Act.

19. As to what is taxable for the purchases of sales tax has been laid down by the Supreme Court in a case to which reference has already been made, namely 1954 SC 459 (AIR V 41) (G). Dealing with this matter Venkatarama Ayyar J. said at pp. 461- 462:

> "The position therefore is that a liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of contract are liable to be assessed to sales tax on the ground that they are in the same position as sale price.
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> The power conferred under Entry 48 to impose a tax on the sale of goods can therefore be exercised only when there is a sale under which there is a transfer of properly in the goods, and not when there is a mere agreement to sell. The State Legislature cannot, by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of 'sale' in Section 2(h) of Act 15 of 1948 must, to that extent, be declared ultra vires."

Thus, in order that a transaction be taxable under Entry 48 of Sch. 7 of the Constitution Act of 1935 there should be a completed sale under which there is transfer of property in the goods and not when there is a mere agreement to sell and a State Legislature cannot enlarge the definition of the word "sale".

20. In Madras the distinction between a hire-purchase agreement and a contract of sale was brought out in -- 'Auto Supply Co. Ltd. v. V. Raghunatha Chetty', 1929 Mad 884 (AIR V 16) (N). A motor-bus was delivered under a hire-purchase agreement which contained inter alia the following terms: The hirer was to pay Rs. 1,I40/- and thereafter Rs. 226/- every mouth for eleven months, the hirer acknowledged that he held the vehicle as a bailee of the owners and did not have any property in it until he exercised his option of purchase and the owners could terminate the contract of hiring and forthwith recover possession when there was a default in the payment of instalments. The hirer did commit a default and the owners terminated the hiring and claimed possession of the motor-bus.

It was held that the initial payment of Rs. 1,140/- was not by way of advance of rent but only as an instalment and that at the termination, of the agreement because of default, the hirer was not entitled to the routine of the initial payment. At p. 885 Coutts-Trotter C. J. held that this was a

hiring with an option to purchase by the hirer on the fulfilment of the stipulated conditions and was not a sale which would pass the property in the bus to the hirer and that the case fell within the rule in (1895) AC 471 (H). At p. 886 the distinction was pointed out by Anantakrishna Ayyar J. in the following words:

> "In a contract of sale for a price payable by instalments, the purchaser has no option of terminating the contract and returning the chattel, --whereas, in a contract of hire-purchase, the hirer has such an option. In the case of a hire-purchase contract, the hirer has got an option to purchase, which he may exercise or not, according to his sweet will and pleasure; but in 'the case of a contract of sale, the purchaser has become the owner of the chattel, but the price is by agreement payable by instalments. This distinction has neen well pointed out in the judgment of the House of Lords in the case of (1895) AC 471 (H)."

21. In a later case -- 'Messrs. Masseys (1930) Ltd. v. Krishnaswami Ayyar', 1935 Mad 603 (AIR V 22) (NA), the same distinction was again pointed out in regard to hire-purchase agreement with an option to the hirer to purchase. The hirer was to make an initial payment and then pay certain monthly instalments. The agreement also gave the hirer the right to terminate the hiring at any time by delivering up the goods to the owner.

The terms of the contract there were not very different from those that are in the case now before me and the case was held to fall within the class of cases embraced by (1895) AC 471 (H), the agreement was held to be a hire-purchase agreement and not an agreement by way ot purchase and the owner was held entitled besides delivery of possession to recover arrears of rent up to the date of termination of the hiring by notice.

22. In a still later Madras case, -- 'Gannan Dunkerley & Co. v. State of Madras', 1954 Mad 1130 (AIR V 41) (O), the question for dete-mina-tion was the meaning of the words "sale of goods" as used in Item 48 of List II and it was held that it means the contract whereby the property in the goods is wholly transferable by the seller to the buyer and it was also held that the legislative powers of a Provincial Legislature to levy a tax on the sale of goods is restricted to transactions of sale as understood by the Parliament of the United Kingdom in the law relating to sale of goods.

In order to constitute a sale there must be an agreement to sell by which alone the property does not pass and an actual sale by which the property passes: See Benjamin on Sale p. 1. "Sale of goods' according to the Madras case therefore means a contract whereby the property in the goods is actually transferred by the seller to the buyer and this was also the definition given to the words "sale of goods" by the Supreme Court in -- 'Poppatlal Shah v.

State of Madras', 1953 SC 274 (275) (AIR V 40) (P), by Mukherjea J. who said:

> "In the legal sense, it imports passing of property in the goods and it is in this sense that the word is used in the Sale of Goods Act."

23. In -- 'Suraj and Sons v. J. O. Brien', 1951 All 759 (AIR V 18) (Q), where the agreement was that the hirer could continue the hiring for a full period of ten months but could during that period return it to the owner and it was only if he kept the goods for full ten months and regularly paid the instalments that he could become the owner of the property, it was held that this was an agreement of hiring.

24. In -- 'Bhimji N. Dalai v. Bombay Trust Corporation Ltd.', 1930 Bom 306 (AIR V 17) (R), a slight distinction was drawn because the hirer there was bound to pay the whole of the purchase price of a car by instalments and had no option to return the car after the payment of any of the instalments, and the contract was held to be one of sale and not of hire-purchase. (1895) AC 471 (H) and other English cases that I have already quoted above were distinguished by Wadia J. because in all those cases there was option of purchase and there was none in the Bombay case.

25. That property in the goods hired under a hire-purchase agreement does not pass to the hirer is shown by another test and that is that a hirer of f oods under such an agreement can be convicted of reach of trust notwithstanding that he may have lawful possession of them, if he fraudulently converts them to his own use: See Laws of England, Edn. 2, Vol. 16, p. 543, para 809. This no doubt is under Larceny Act, but the law in India is not different.

26. In -- 'Silas Moses v. Emperor', 1915 Bom 206 (AIR V 2) (S), where a motor-car was entrusted to a hirer under a hire-purchase agreement containing a term that the hirer shall not during the hiring, assign, underlet or part with the possession of the same, and the hirer "mortgaged" the car for different sums to different persons, the hirer was held to be guilty of an offence of criminal breach of trust: so also in -- 'Emperor v. C. J. Cadd', 1923 All 598 (AIR V 10) (T), where a hirer under a similar agreement sold lorry before the instalments were paid, it was held that the hirer was guilty of criminal breach of trust.

27. A preliminary objection was taken that this Court should not interfere at this stage and, that the matter should be considered after the case is stated to the Court in accordance with the provisions of the Sales Tax Act and reliance was placed on -- 'Lachhman Das Nayar, In the matter of, 1953 Punj 55 (AIR V 40) (U), where a Bench of this Court held under the Income-tax Act that the machinery of that Act should be used to approach this Court and not a petition under Art. 226. All that was held in that case was that an action of the Income-tax Officer Under Section. 34, Income-tax Act should not be challenged under Article 226.

A similar view was taken in a case under the Punjab Sales Tax Act, but the Supreme Court has held in -- 'Himmatlal Harilal v. State of Madhya Pradcsh', 1954 SC 403 (AIR V 41) (V), that a threat by the State to realise tax from the assessee without the authority of law is an infringement of Article 19(1)(g), and in a more recent case, -- 'Bengal Immunity Co. Ltd. v. State of Bihar', 1955 SC 661 ((S) AIR V 42) (W), the Supreme Court of India again held that where there is a certain infringement of the rights of a citizen under a law which is ultra vires of the powers of the Legislature a remedy by way of a writ under Article 226 is available to the party aggrieved.

28. I would, therefore, hold that-

(1) the State Legislature has not the power to enlarge the meaning of the words "sale of goods" by going beyond the meaning attached to it by its definition in the Sale of Goods Act, because it is in that sense that these words were used in Item 48 of Sch. 7 of the Constitution Act, 1935; and (2) under the rule laid down by the Supreme Court where there is a certain infringement of the rights of a citizen by levying a tax which is ultra vires of the Legislature the remedy under Article 228 is available to the citizen.

29. Counsel for the State relied on the provisions of the Motor Vehicles Act under which the hirer is described in the registration papers as the owner but this description in the Motor Registration Department cannot convert a transaction which is not a sale within the words "sale of goods" into a sale. The question is one of interpretation of these words which cannot be affected by what is done under another Act.

30. It was next contended that the real nature of the transaction is that there are two sales one by the Dealer to the Company and the other by the Company as a Dealer to the hirers. It is not on this basis that the tax has been levied. Besides in the present case we are only concerned with the constitutionality of the explanation on which alone we have given our opinion and which is the point we are deciding. As to whether the tax is leviable at any other stage or point is not before us.

31. I would, therefore, allow this petition and issue a mandamus to the State to forbear from enforcing its notice for the realisation of sales tax. The petitioner will have its costs of these proceedings. Counsel fee Rs. 300/-.

Bhandari, C.J.

32. I agree.