P L D 2015 Supreme Court 354

Present: Nasir-ul-Mulk, C.J., Amir Hani Muslim and Ijaz Ahmed Chaudhry, JJ

FEDERATION OF PAKISTAN through Secretary Ministry of Petroleum and Natural Resources and another---Petitioners

versus

DURRANI CERAMICS and others---Respondents

C.R.P. Nos. 335, 340 to 399 of 2014, decided on 15th April, 2015.

(On Review from the judgment of this Court dated 22-8-2014 passed in C.As. Nos.1540 to 1599 of 2013 and C.A. Nos.21 of 2014)

Salman Aslam Butt, Attorney General for Pakistan and Waqar Rana, Addl. Attorney General for Pakistan for Petitioners.

Abid S. Zuberi, Advocate Supreme Court for Respondent No.4 (in CRP No.335 of 2014).

Makhdoom Ali Khan, Senior Advocate Supreme Court for Respondent No.1 (in CRP No.352 of 2014).

Sardar Muhammad Ghazi, Advocate Supreme Court for Respondent No.1 (in CRP Nos. 355 and 356 of 2014).

Date of hearing: 15th April, 2015.

ORDER

NASIR-UL-MULK, C J.--The Federation of Pakistan filed these petitions for review of a common judgment of this Court disposing of a number of appeals filed by the Federation wherein judgment of the Peshawar High Court was impugned. Notice was given to the respondents by order dated 17-11-2014 in the following terms:

"Through these petitions the Federation of Pakistan seeks review of the judgment of this Court dated 22-8-2014, whereby the imposition of the Gas Infrastructure Development Cess [GIDC] was declared to be unconstitutional, in that the same was fee and not tax and therefore, could not have been imposed through a money bill; that it did not fall within the scope of Entry 51 of Part-I of the Federal Legislative List of the Constitution of Pakistan, 1973.

2. The learned Attorney General for Pakistan submitted that the findings on both

the questions need to be reversed. As regards the determination of cess as fee, the learned Attorney General submitted that there is no finding that any services were rendered to the respondents as quid pro quo for the levy. Reference was further made to the judgment of the Indian Supreme Court in The Hingir-Rampur Coal Co. v. State of Orissa (AIR 1961 SC 459) to contend that the public at large would benefit from the imposition of cess as it would ensure continuous supply of natural gas to them and thus, the benefit to the respondents would only be incidental. This question was raised, attended to and discussed in the judgment under review. The argument regarding primary and incidental benefit has also been discussed. After taking into consideration the facts and the attending circumstances it was held that the levy was in the nature of fee extending special benefits to a class of people as quid pro quo. Even in the cited judgment the Indian Supreme Court had reiterated that the question whether or not a particular cess is in the nature of fee or tax would be one of benefit to be determined according to the circumstances of each case. Since we have determined this question after taking into consideration all the circumstances, the conclusion drawn on the said point does not require to be reviewed.

3. As regards Entry 51, the learned Attorney General for Pakistan referred to Entry 26 of the Federal List of the Constitution of 1956, which reads:

"26. Duties of customs (including export duties); duties of excise (including duties on salt, but excluding alcoholic liquor, opium and other narcotics), corporation taxes and taxes on income other than agricultural income; estate and succession duties in respect of property other than agricultural land; taxes on the capital value of assets exclusive of agricultural land; taxes on sales and purchases; terminal taxes on goods or passengers carried by sea or air; taxes on their fares and freights; taxes on mineral oil and natural gas."

It was pointed out that the words "generation of nuclear energy" and "minerals" were included for the first time in the Constitution of 1962 in Entry 43(h) of the 3rd schedule, enumerating the powers of the Central Legislation, which read:

"43. Duties and taxes, as follows:

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

(h) Taxes on mineral oil, natural gas and minerals for use in the generation of nuclear energy;

(i) .....

It was thus contended that generation of nuclear energy was added with reference to minerals. That the similar Entry 51 of the Federal Legislative List of the 1973 Constitution restricts generation of nuclear energy to minerals and the word "and" appearing between the words 'natural gas' and `minerals', should be read as "or". When pointed out to the learned Attorney General for Pakistan that the judgment under review can still be maintained on the basis of determination that the cess was a fee, he submitted that the Federal Government had issued an Ordinance imposing cess which is under challenge before various High Courts on the ground that this Court had determined that the said levy is not covered by any Entry in Part-I of the Federal Legislative List. While maintaining the finding of this Court determining that the `cess' is a fee, we issue notice to the respondents to the extent of the submissions made regarding the findings of this Court with respect to Entry 51 of the Federal Legislative List.

4. The learned Attorney General further submitted that in view of the judgment under review the respondents have filed applications before the High Courts for refund of the amount of cess already paid. It was contended that since the burden has already been passed on to the ultimate consumers and the same is not refundable to the respondents. The learned Attorney may move a separate application in that respect."

2. The learned Attorney General for Pakistan appeared on behalf of the Federation, Mr. Makhdoom Ali Khan, learned Senior Advocate Supreme Court for all respondents except Karachi Electric Company which was represented by Mr. Abid S. Zuberi, ASC. Civil Misc. Application No.1804 of 2015 for impleadment of Karachi Electric Company as respondent in Civil Review Petition No.335 of 2014 is allowed.

3. The learned Attorney General for Pakistan again made an attempt to reargue that the 'cess' was in fact a 'tax' and not 'fee' as held in the judgment under review. Additionally he referred to Article 73(4) of the Constitution to contend that where a question arises whether a Bill is a Money Bill the decision of the Speaker of the National Assembly would be final. It was thus argued that once the Speaker had certified that the levy was validly included in the Money Bill the determination attained finality and thus could not be reopened by this Court. Mr. Makhdoom Ali Khan, learned Advocate Supreme Court responded that in the order of 17-11-2014 it was held that determination of the levy as fee in the judgment under review was not to be reopened and notice was given only as regards the finding on Entry No.51 of the Federal Legislative List of the Constitution 1973; that the point based on Article 73(4) of the Constitution was neither urged at the hearing of the petitions nor taken up during preliminary hearing of the review petitions as it does not find any mention in the order of 17-11-2014; that in any case if the argument prevails it would only lead to undoing of the determination of the nature of the cess which has now attained finality in view of order dated 17-11-2014.

4. We agree with Mr. Makhdoom Ali Khan that in paragraph 2 of the order reproduced above the argument regarding the nature of the cess as fee or tax was rejected and it was held that the finding on the point does not require review. The review petitions to the extent of determination that the cess was a fee stand dismissed, thus making submission now on the same point would amount to a second review which is not permissible under the Supreme Court Rules.

5. As regards the point based on Article 73(4) of the Constitution the same was never taken up either before the High Court or before this Court in the appeals, nor was urged at the first hearing of these petitions. Rather, it was not taken up even in the review petitions but added as a ground through C.M.A. No.1480 of 2015 filed recently on 26-3-2015, much after the time limitation for filing of review was over. Even otherwise we are not persuaded by the argument of the learned Attorney General in that the certificate by the Speaker of the National Assembly providing that a Bill is a Money Bill would only be relevant if proceedings arise in the Parliament. Such a certificate would not prevent the Court from examining whether a particular item could have validly been included in a Money Bill. It does not create a bar on the jurisdiction of the Court to determine true nature of the levy (see Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879)).

6. The learned Attorney General then reiterated the arguments advanced by him earlier with reference to the Entries in the Legislative Lists of 1956 and 1962 Constitutions referred to in the order reproduced above. He contended that tax on mineral used in the generation of nuclear energy was not included in the Federal Legislative List of the Constitution of 1956; that it was added in the Constitution of 1962 and was thus to be considered an item separate from taxes on mineral oil and natural gas; that the said addition in the Constitution of 1962 was only restricted to minerals used in the generation of nuclear energy and would not thus extend to mineral oil and natural gas. It was pointed out that it was now included in the same terms in the Constitution of 1973. Mr.Makhdoom Ali Khan responded that as already held in the judgment under review the words are to be given their ordinary meanings while interpreting a particular provision of statutory law; that extrinsic tools, like legislative history, can be brought in aid only when statutory provision is ambiguous; that there was no ambiguity in the relevant Entry of the Legislative List and if the legislature had intended to restrict "generation of nuclear energy" to 'minerals' it would have used "or" instead of "and" between the words "natural gas" and "minerals". The learned counsel argued that the relevant Entry No.43(h) of the Constitution of 1962 was a fresh entry and cannot be considered as an amendment of Entry No.26 of the Federal List of the Constitution of 1956.

7. In the judgment under review while interpreting Entry No.51 of the Federal List of the Constitution of 1973 we have given the word "and" its ordinary meaning and have not agreed with the learned Attorney General's argument that the same should be read as "or". This was based on the rule that the words should be given their ordinary meaning unless the context otherwise require. The historical perspective narrated by the learned Attorney General would have been relevant had Entry No.51 been ambiguous. The words

used in the said Entry do not pose any difficulty in interpretation or lead to any absurdity when given their ordinary meaning. Reference to historical perspective would thus not to be required to find out true meaning of Entry No.51. We would therefore maintain the construction already placed on Entry No.51 in the judgment under review. No case is therefore made out for review of the judgment on any ground.

8. The learned Attorney General also brought to our notice that the respondents have now filed applications/petitions before the High Court for refund of the cess already paid to the Government. It was argued that since the burden of the cess had already been passed on to the ultimate consumers by the respondent companies, they are not entitled to its refund. Mr. Makhdoom Ali Khan however submitted that in a number of cases the burden had not been passed on to the consumers. We have nothing before us to determine whether or not the cess had been passed on to the consumers. Perhaps it would be appropriate that we leave it to the High Court to determine the question on case to case basis. With these observations the review petitions are dismissed.

MWA/F-6/S Petitions dismissed.