STATE OF KERALA AND ORS. A

v.

M/S. TRANVANCORE CHEMICALS AND MANUFACTURING CO. AND ANR. ETC. ETC.

NOVEMBER 11, 1998 B

[S.P. BHARUCHA, G.T. NANAVATI AND B.N. KIRPAL, JJ.]

Sales Tax :

Kerala General Sales Tax Act, 1963—Section 59A—Determination of rate of tax—By an amendment Section 59A was inserted—Power to determine rate of tax given to State Govt.—Challenged on the ground that it gives unguided power to determine rate of tax—No statutory right of appeal—High Court holding that it is unconstitutional being violative of Article 14—On appeal. Held, Section 59A gives absolute and final power to Government to determine rate of tax—No obligation to hear the dealer before imposing the tax—No statutory provision of appeal, revision etc.—Violative of Article 14 of the Constitution—Hence rightly struck down by High Court. C D

Constitution of India, 1950—Article 14—Kerala General Sales Tax Act, 1963—Section 59A—Held, violative of Article 14 of the Constitution. E

The respondents were manufacturers and sellers of various commodities. The assessing authorities as also the appellate authorities used to decide the question relating to the rate of tax leviable on the goods sold by various dealers or the entry under which a particular item would fall. By an amendment Section 59A was inserted in the Kerala General Sales Tax Act, 1963 and the power to determine the rate of tax applicable was given to the Government. The State Government in exercise of its power under Section 59A of the Act issued an order stating that the items of tinned goods were covered by Entry 6 of the First Schedule of the Act. One of the respondents wrote a letter to the Secretary, Board of Revenue stating that their product Horlicks has been classified in the past by all the successive officers as a milk product falling under Entry No. 3 of the First Schedule and, therefore, they were liable to pay tax at a lesser rate and not at the rate payable under Entry No. 6 of the First Schedule. The Secretary, Board of Revenue in his reply stated that the case at issue has already been examined F G H

A by the Government and have clarified that Horlicks would come under Entry 6 of the First Schedule to the Act. The respondent dealers filed writ petition in the High Court challenging the constitutional validity of Section 59A of the Act. The High Court held that Section 59A of the Act had all the features of deleterious vagueness and it was unconstitutional being violative of Article 14 of the Constitution. Hence the present appeal.

B

The appellant State contended that Section 59A is a piece of delegated legislation conferring power on the Government to decide any question regarding rate of tax; that the Section provided the limitations subject to which the power could be exercised; and that this power was in respect of C classification under the Schedule and not for levying a tax.

The contention of the respondent dealers was that the effect of Section 59A is that whenever a direction is issued under the said provision the statutory right of appeal etc. is taken away and the section itself contains no guidelines and gives unbridled powers to the Government.

D

Dismissing the appeals, the Court

HELD : 1.1. Section 59A of the Kerala General Sales Tax Act, 1963 is violative of Article 14 of the Constitution and the High Court was, therefore, E right in striking down the said provision. [659-F-G]

1.2. Section 59A of the Act gives absolute power to the Government to decide any question regarding the rate of tax leviable on the sale or purchase of goods in any manner it deems proper and finality is given to such a decision. Plain reading of Section 59A shows that if any question relating F to the rate of tax leviable under the Act on any goods is referred to the Government then its decision thereon, "*notwithstanding any other provision in this Act is final.*" This section does not indicate as to who can make a reference to the Government. There is no obligation on the Government to hear any dealer before it decides as to the rate of tax leviable on the sales G or purchase of any type of goods. In fact, by an omnibus order the Government decided rates of tax payable in respect of various items without any opportunity of being heard having been granted to any of the dealers. Lastly Section 59A clearly states that the decision so given by the Government shall be final and would have an over-riding effect. [657-F; D-E]

H 2. Section 59A enables the Government to pass an administrative order

which has the effect of negating the statutory provisions of appeal, revision etc. contained in Chapter VII of the Act which would have enabled the appellate or revisional authority to decide upon questions in relation to which an order under Section 59A is passed. Quasi-judicial or judicial determination stands replaced by the power to take an administrative decision. There is nothing in Section 59A which debars the Government from exercising the power even after a dealer has succeeded on a question relating to the rate of tax before an appellate authority. The power under Section 59A is so wide and unbridled that it can be exercised at any time and the decision so rendered shall be final. It may well be that the effect of this would be that such a decision may even attempt to over-ride the appellate or the revisional power exercised by the High Court under Section 40 of the Act as the case may be. The section enables passing of an executive order which has the effect of subverting the scheme of a quasi-judicial and judicial resolution of the *list* between the State and the dealer. [657-G-H; 658-A-B]

Dadha Pharma Pvt. Ltd. v. *State of Kerala,* **(1990) 2 KLT 307, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4112-4145 of 1994 etc. etc.

From the Judgment and Order dated 15.11.90 of the Kerala High Court in O.P. Nos. 2300/85, 6362/82, 6523/83, 5445, 6055, 9691, 9697/84, 754, 2320, 4714, 5082, 6130, 6691, 10552, 10615, 9480/85 292, 400, 4796, 4807, 4896, 5071/86, 636, 1334, 1505, 2360, 2414, 2159, 3086, 3123, 3106/87, 4485, 4506, 7059/89.

K.N. Bhat, P. Krishna Moorthy, T.L.V. Iyer, Josoph Vellapalli, M.L. Verma, Raju Ramachandran, G. Prakash, Ms. Beena Prakash, M.T. George, B.B. Sawhney, Ms. Indra Sawhney, Roy Abraham, C.K. Sasi, Ms. Baby Krishnan, M.K.D. Namboodari, R.N. Keshwani, Ramesh Babu, N. Sudhakaran, C.N. Sree Kumar, S. Balakrishnan, S. Prasad, R. Sasiprabhu, V.J. Francis, P.N. Ramalingam, K.R. Nambiar and M.A. Firoz for the Appearing Parties.

The Judgment of the Court was delivered by

KIRPAL, J. Leave granted. Delay condoned.

A In these appeals the appellants are aggrieved by the common judgment of the Kerala High Court which has held Section 59A of the Kerala General Sales Tax Act, 1963 (for short 'the Act') as being invalid.

Respondents in these appeals, manufacture and sell various commodities B like copper sulphate, batteries, battery plates, electrical goods, laboratory apparatus, battery spare parts etc. If during the course of their assessment proceedings under the Act any question used to arise relating to the rate of tax leviable on the goods sold by various dealers or the entry under which a particular item sold by a dealer would fall the same used to be decided by the assessing and the appellate authorities under the Act. By an amendment C Section 59A was inserted in the Act with effect from 1st April, 1978. This section sought to give power to the Government to determine the rate of tax and it reads as follows:

> D "59A, Power of Government to determine rate of tax—If any question arises as to the rate of tax leviable under this Act on the sale or purchase of any goods, such question shall be referred to the Govt. for decision and the decision of the Government thereon shall, notwithstanding any other provision in this Act, be final."

E In exercise of the powers given by the said Section 59A the State Govt. issued orders, from time to time, purporting to clarify the rate of sales tax. On 23rd April, 1984, an order was issued by the State Govt. purporting to clarify the rate of sales tax on various items. One of the items contained in this order was tinned foods like Horlicks, Viva, Boost, Bournvita, Ovumalt etc. By this F order the Government stated that the said items of tinned food were covered by Entry-6 of the First Schedule of the Act.

M/s Parry and Company, one of the respondents in these appeals, wrote a letter dated 11th Dec., 1984 to the Secretary, Board of Revenue, with regard G to the classification of aforesaid item - Horlicks. It was stated in this letter that they were registered dealers since 30th June, 1957 and all along successive officers had accepted their classification of Horlicks as a milk product falling under Sl. No. 3 of the First Schedule and, therefore, they were liable to pay tax at a lesser rate and not at the rate of ten per cent which was payable under Sl. No. 6 of the First Schedule. To this letter the reply which was received was H to the following effect :

"No. OS 2661/85/TX/Ldis. Office of the Board of Revenue A

(Taxes) Trivandrum - 1
dated

31.1.1985

B

From

The Secretary,
Board of Revenue (Taxes),
Trivandrum

C

To

M/s Parry & Company Ltd.,
"DARE HOUSE" Post Box No.12,
Madras - 600001

Gentleman, D

Sub : Taxes - Sales tax rate of tax on Horlicks etc.

Ref: Your letter dated 11.12.1984

The case at issue has already been examined previously and Govt. in E
GO Rt.314/84/TD Dt. 23.4.1984 have clarified that Horlicks would come under Entry 6 of the First Schedule to the K.G.S.T.Act, 1963.

Yours faithfully
Sd/-
(Secretary [Taxes]" F

It is in view of such decisions taken by the State Govt. in determining the entries under which different items would fall, in exercise of its power under Section 59A of the Act, that the respondents in these appeals filed different writ petitions in the Kerala High Court challenging the constitutional G validity of Section 59A. The main contention of the dealers was that Section 59A gave the Govt. arbitrary and unguided power in determining the rate of tax applicable to different items and, furthermore, the said power had in fact been exercised in an arbitrary manner.

The High Court in the impugned judgment referred to an earlier bench H

A decision of that Court in *Dadha Pharma Pvt. Ltd.* v. *State of Kerala,* (1990) 2 KLT 307. That was a case by way of revision before the High Court under Section 41 of the Act. The High Court had to deal with the applicability of Section 59A in that case. As it was exercising limited jurisdiction of tax revision it obviously could not pronounce on the constitutional validity of Section 59A. The Court observed that if literal meaning was given to the B words used in that Section then such literal interpretation would render the Section vulnerable to attack of being vague and uncertain and as one taking away guaranteed rights. The Court, however, read down the section in a drastic manner and sought to provide some safeguards against the arbitrary exercise of power by the Govt. In the present case the High Court, exercising C its jurisdiction under Article 226 of the Constitution, felt unfettered and proceeded to examine the constitutional validity of the said provision. After analysing the provision and seeing the manner in which the power had been exercised under Section 59A of the Act, the High Court came to the conclusion that the said section had all of the features of deleterious vagueness and it was unconstitutional being violative of Article 14 of the Constitution. D

On behalf of the appellants it was contended by Mr. K.N. Bhat, learned senior counsel, that Section 59A is a piece of delegated legislation conferring power on the Govt. to decide any question regarding rate of tax. The section, it was submitted, furnishes the limitations subject to which the power could E be exercised. This power, it was contended, was in respect of classification under the Schedule and not for levying a tax.

On the other hand the learned counsel for the respondents submitted that the effect of Section 59A is that whenever a direction is issued under the said provision the statutory right of appeal etc. is taken away and the F section itself contains no guidelines and gives unbridled powers to the Govt. to act in any manner it feels like.

Like other taxing statutes the Kerala General Sales Tax Act contains elaborate provisions relating to assessment of tax and filing of appeals and G revisions to the higher authorities. Chapter IV deals with assessment, collection and levy of tax. Section 17 contains the procedure which is to be followed by the assessing authority. If the assessing authority does not accept the return as submitted by the dealer then he is under an obligation to give a reasonable opportunity to the dealer of being heard before finalising the assessment. In the event of the dealer being aggrieved by the assessment H order so passed Chapter-VII contains provisions for appeals and revisions.

Appeal to the Appellate Assistant Commissioner is filed under Section 34; Section 36 gives the power to the Deputy Commissioner to revise an order on an application being made and power of revision is also given to the Board of Revenue under Section 38 of the Act. Section 39 is a provision which provides for appeal to the Appellate Tribunals against certain orders. Section 40 enables an appeal to be filed to the High Court by any person objecting to an order affecting him which was passed by the Board of Revenue under Section 37, while Section 41 gives a person right to file a revision in the High Court from an order passed by the Tribunal under Section 39 of the Act. It is apparent from reading of these provisions that questions like the rate of tax or the entry under which sale of particular goods are to be taxed can be raised and determined before various quasi judicial and judicial authorities. There is a right of appeal and revision which is given to a person who is aggrieved by any order.

Plain reading of Section 59A shows that if any question relating to the rate of tax leviable under the Act on any goods is referred to the Govt. then its decision thereon, *notwithstanding any other provision in this Act is final"*. This section does not indicate as to who can make a reference to the Govt. There is no obligation on the Government to hear any dealer before it decides as to the rate of tax leviable on the sales or purchase of any type of goods. In fact, as we have noticed earlier, by an omnibus order dated 23rd April, 1984 the Govt. decided rates of tax payable in respect of various items without any opportunity of being heard having been granted to any of the dealers. Lastly section 59A clearly states that the decision so given by the Govt. shall be final and would have an over-riding effect.

There is no warrant in our opinion in trying to read down the provisions of Section 59A. The works of the said provision are clear and unambiguous. The said section gives absolute power to the Govt. to decide any question regarding the rate of tax leviable on the sale or purchase of goods any manner it deems proper and finality is given to such a decision.

Section 59A enables the Govt. to pass an administrative order which has the effect of negating the statutory provisions of appeal, revision etc. contained in Chapter VII of the Act which would have enabled the appellate or reversional authority to decide upon questions in relation to which an order under Section 59A is passed. Quasi-judicial or judicial determination stands replaced by the power to take an administrative decision. There is

A nothing in Section 59A which debars the Government from exercising the power even after a dealer has succeeded on a question relating to the rate of tax before an appellate authority. The power under Section 59A is so wide and unbridled that it can be exercised at any time and the decision so rendered shall be final. It may well be that the effect of this would be that such a decision may even attempt to over-ride the appellate or the revisional B power exercised by the High Court under Section 40 of the Act as the case may be. The section enables passing of an executive order which has the effect of subverting the scheme of a quasi-judicial and judicial resolution of the *lis* between the State and the dealer.

C We are unable to agree with the submission of Mr. Bhat that the section furnishes a limitation subject to which the power can be exercised. The section does not contain any guidelines as to at what stage the power can be exercised and nor does the exercise of such a power make it amenable to the appellate or revisional provisions provided by the Act. It is no doubt true that in certain enactments of other States the Govt. has the power but such D power is not unbridled. For example under Section 49 of the Delhi Sales Tax Act, 1975, power has been given to the Commissioner of Sales Tax to determine certain disputed questions. The said section reads as under:

> "49 Determination of disputed questions - (1) If any question arises, E otherwise than in proceedings before a court, or before the Commissioner has commenced assessment or reassessment or a dealer under section 23 or section 24, whether for the purposes of this Act.-
>
> (a) any person, society, club or association or any firm or any branch or department of any firm is a dealer; or
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> F
>
> (b) any particular thing done to any goods amounts to or results in the manufacture of goods within the meaning of that term as given in clause (h) of section 2; or
>
> (c) any transaction is a sale, and if so, the sale price therefore; or
>
> G
>
> (d) any particular dealer is required to be registered; or
>
> (e) any tax is payable in respect of any particular sale, or if the tax is payable, the rate thereof;
>
> the Commissioner shall, within such period as may be prescribed, H make an order determining such question.

Explanation—For the purposes of this sub-section, the Commissioner shall be deemed to have commenced assessment or reassessment of a dealer under section 23 or section 24, when the dealer is served with any notice by the Commissioner under section 23 or section 24, as the case may be.

(2) The Commissioner may direct that the determination shall not affect the liability of any person under this Act as respects any sale effected prior to the determination.

(3) If any such question arises from any order already passed under this Act or under the Bengal Finance (Sales Tax) Act, 1941, as then in force in Delhi, no such question shall be entertained for determination under this section; but such question may be raised in appeal against or by way of revision of such order."

The aforesaid section itself provides that a question for determination must arise otherwise than in proceeding before a Court or before the Commissioner has commenced assessment or re-assessment. Furthermore sub-section 2 enables the Commissioner to direct that the determination of the question shall not affect the liability of any person under that Act in respect to any sale effected prior to the determination. No such safeguard or guideline as provided in said Section 49 of the Delhi Sales Tax Act is present in the main provision.

We are in complete agreement with the view of the Kerala High Court that Section 59A of the Act is violative of Article 14 of the Constitution and the High Court was, therefore, right in striking down the the said provision. For the aforesaid reasons these appeals are dismissed with costs.

S.V.K.I. Appeals dismissed.