1962

December, 21.

BHOPAL SUGAR INDUSTRIES LTD. MADHYA PRADESH, AND ANOTHER

v.

D. B. DUBE, SALES TAX OFFICER, BHOPAL REGION, BHOPAL AND ANOTHER

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Sales Tax—Consumption by seller—Tax on sale of goods—Legislative competence—Government of India Act, 1935 (26 and 26 Geo. 5, Ch. 42), Sch. 7, Entry 54, List II—Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act, 1957 (M. P. 4 of 1958), ss. 2 (l), 3.

The first petitioner, a company, manufactures sugar and also sells motor spirit, high speed diesel oil and lubricants and maintains a petroleum pump in the State of Madhya Pradesh. In the assessment proceedings in respect of sales of motor spirit and diesel oil, the petitioner was sought to be assessed in respect of petroleum and oil consumed by the petitioner for its own motor vehicles out of the stock held by it. The petitioner challenged that part of the assessment on the grounds that the definition of "retail sale" by s. 2 (l) of the Act which seeks to render consumption by the owner of motor spirit liable to be taxed by virtue of s. 3 of the Act is beyond the legislative competence of the State and that the unconstitutional levy infringes the fundamental rights of the petitioner under Art. 19(1)(f) and (g) of the Constitution of India.

Held, that a sale for the purpose of entry "Tax on the sale of goods" requires the concurrence of four elements (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised; and that the transaction which does not conform to the traditional concept of sale cannot be regarded as one within the competence of the State Legislature to tax.

The State of Madras v. *Gannon Dunkerley & Co. (Madras) Ltd.*, [1959] S. C. R. 379, referred to.

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Held, further, that by s. 2(l) the normal concept of sale is sought to be enlarged by bringing in the consumption by the owner of the goods in which he deals which was not a "sales within the meaning of Entry 54, List II, Sch. 7 of the Government of India Act, 1935, and therefore, the order of the Sales Tax Officer which was founded on an ultra vires provision was itself unconstitutional and could not be sustained.

ORIGINAL JURISDICTION : Petition No. 85 of 1961.

Petition under Art. 32 of the Constitution of India for the enforcement of Fundamental Rights.

S. T. Desai, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the petitioners.

B. Sen, K. L. Hathi and *I. N. Shroff*, for the respondents.

1962. December 21. The Judgment of the Court was delivered by

Shah, J.

SHAH, J.—Bhopal Sugar Industries Ltd. (the first petitioner) is a public limited Company incorporated under the Indian Companies Act, 1913, and the second petitioner is a shareholder and a Director of the Company. The Company is a manufacturer of sugar and owns a fleet of motor trucks and other motor vehicles. The Company also carries on the business of selling motor spirit, high speed diesel oil, and lubricants and maintains a petroleum pump at Sehore in the State of Madhya Pradesh. Between April 1, 1959, and March 31, 1960, the Company used, for its motor vehicles 8908 gallons of petroleum, 40719 gallons of high speed diesel oil and lubricants of the value of Rs. 2,453-47 nP. The first respondent who is the assessing authority under the Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act, 4 of 1958, assessed the Company to pay sales tax in respect of motor-spirit and lubricants

used by the Company out of the stock held by it for its own vehicles, because in his view such consumption amounted to sales within the meaning of the Act.

By this petition under Art. 32 of the Constitution it is claimed that the definition of 'retail sale' in s. 2 (1) of the Act which seeks to render consumption by the owner of motor-spirit liable to tax under the Act by virtue of s. 3 is beyond the competence of the State Legislature and hence void and the order of the first respondent seeking to impose liability upon the Company for payment of tax infringes the fundamental rights of the Company under Art. 19 (1) (f) and (g) of the Constitution.

Section 2 (k) of the Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act defines a 'retail dealer' as meaning "any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased". Section 2 (l) defines 'retail sale' as meaning "a sale by a retail dealer of motor spirit or lubricant to a person for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased and includes the consumption by a retail dealer himself or on his behalf of motor spirit or lubricants sold to him for retail sale;" (The definition is followed by an explanation which is not material for the purpose of this appeal.) Section 3 is the charging section. It provides that subject to the provisions of the Act, there shall be levied on all retail sales of motor spirit and lubricants effected after the commencement of the Act, tax at the rates specified in the table set out therein.

The Company is registered under s. 4 of the Act as a retail dealer. By s. 2 (1) consumption by a retail dealer himself or on his own behalf of motor spirit or lubricants sold to him for retail sale is included in the definition of 'retail sale' Thereby the

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Legislature has attempted to enlarge the normal concept of sale, and has included therein consumption for his own purposes by the retail dealer of motor spirit and lubricants sold to him for retail sale, and by s. 3 such consumption is made taxable as sale. But this Court held in *The State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.* (1), that the expression 'sale of goods' in Entry 48, List II, in Sch. VII of the Government of India Act, 1935, has the same meaning as in the Indian Sale of Goods Act, 1930, and therefore in a transaction of sale of goods which is liable to tax there must be concurrence of the following four elements, viz :

(1) Parties competent to contract:

(2) mutual assent;

(3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and

(4) a price in money paid or promised.

A transaction which does not conform to this traditional concept of sale cannot be regarded as one in respect of which the State Legislature is competent to enact an Act imposing liability for payment of tax. It was observed at p. 407 :

> "A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be *intra vires*, be one relating in fact to sale of goods, and accordingly, the Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales."

In *Gannon Dunkerley & Company's case* (1), this Court was called upon to consider whether in a

(1) [1959] S.C.R. 379.

building contract which is one, entire and indivisible, there is sale of goods. It was held by the Court that the Provincial Legislature was not competent under Entry 48, List II, Sch. VII of the Government of India Act, 1935, to impose tax on the supply of materials used in such a contract treating it as a sale. The decision of the Court did not rest upon any peculiar character of a building contract. It was held on the larger ground canvassed in that case, that the expression 'sale of goods' within the meaning of relevant legislative entry had the same connotation as 'sale of goods' in the Indian Sale of Goods Act, 1930, and therefore the State Legislature had no power to enact legislation to levy tax under Entry 48 of List II in respect of transactions which were not of the nature of sales of goods strictly so called; and a building contract not being a transaction in which there was a sale of materials by the contractor who constructed the building, the State was not competent to enact legislation to impose tax on the supply of materials used in a building contract treating it as a sale. It was therefore, held that the definition of sale in the Madras General Sales Tax Act IX of 1939 was to the extent of the extension invalid.

In *Gannon Dunkerley & Company's case* (1), the validity of s. 2 (h) (ii) of the Madras General Sales Tax Act, 1939, as amended by Act XXV of 1947, in so far as it included goods included in a works contract fell to be determined, in the light of the competence of the Provincial Legislature under Entry 48, List II, in Seventh Schedule of the Government of India Act, 1935. Under the Constitution the relevant entry conferring legislative power upon States to tax sale of goods in Entry 54, List II. As the scheme of division of legislative power under the Constitution has remained unaltered, the principle of *Gannon Dunkerley's case* (1), applies

(1) [1999] S. C. R. 379.

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in adjudging the validity of the provisions of the Madhya Pradesh Act 4 of 1958.

Consumption by an owner of goods in which he deals is therefore not a sale within the meaning of the Sale of Goods Act and therefore it is not 'sale of goods' within the meaning of Entry 54, List II, Sch. VII of the Constitution. The legislative power for levying tax on sale of goods being restricted to enacting legislation for levying tax on transactions which conform to the definition of sale of goods within the meaning of the Indian Sale of Goods Act, 1930, the extended definition which includes consumption by a retail dealer himself of motor spirit or lubricants sold to him for retail sale is beyond the competence of the State Legislature. But the clause in the definition in s. 2 (1) "and includes the consumption by a retail dealer himself or on his behalf of motor spirit or lubricant sold to him for retail sale" which is *ultra vires* the State Legislature because of lack of competence under Entry 54 in List II, Sch. VII of the Constitution is severable, from the rest of the definition, and that clause alone must be declared invalid.

The Sales Tax Officer has sought to impose liability for payment of tax in respect of motor spirit and lubricants consumed by the company for its own vehicles relying solely upon the definition in s. 2 (1) of the Act. He has observed :

> "The definition under the said section clarifies the retail sale and consumption by a retail dealer. Since the retail sale has been clearly defined and consumption by self has been included in the retail sale; I do not agree with the contention of dealer's counsel (that the goods consumed for the vehicles of the dealer are not liable to tax under s. 3) and taxed on

the goods consumed by the dealer, as above."

The order of the Sales Tax Officer founded upon a part of the statute which is *ultra vires* cannot be sustained.

Counsel for the State of Madhya Pradesh contends in this petition that the Company is not the owner of the motor spirit and lubricants in which it deals : it is merely a commission agent for sale in respect of the goods supplied to it by the Caltex (India) Ltd., and on that account consumption for his own purpose of goods belonging to his principal amounts to sale within the meaning of the first part of the definition of s. 2 (1) of the Act. But the Sales Tax Officer has not decided the case under the first part of the definition of 'retail sale' : he has expressly founded his decision on the second part of the definition. In the circumstances we do not feel called upon to express any opinion on the question whether the Company is liable to pay sales tax in respect of goods consumed for its motor-vehicles during the period in question. If it is competent to the Sales Tax Officer to adopt a proceeding, to bring to tax consumption of goods by the Company for its own vehicles, relying upon the first part of the definition of 'retail sale' in s. 2 (1), because of the terms of the agreement and other relevant surrounding circumstances, it will be open to him to do so.

The petition will therefore be allowed and a writ will issue declaring that the order of assessment made by the first respondent dated December 26, 1960, in so far as it relates to levy of tax on motor spirit and lubricants consumed during the period of assessment for the vehicles of the Company is invalid. The respondents will pay the costs of this petition to the Company.

Petition allowed.