1954

March 16

HIMMATLAL HARILAL MEHTA

v.

THE STATE OF MADHYA PRADESH AND OTHERS.

[MEHR CHAND MAHAJAN C. J., MUKHERJEA, S. R. DAS, VIVIAN BOSE and GHULAM HASAN JJ.]

Constitution of India, arts. 19(1) (g), 226, 286 (1) (a)—Central Provinces and Berar Sales Tax Act (Act XXI of 1947), as amended by Act XVI of 1949—Explanation II to section 2(g)—Whether ultra vires *the Constitution—Threat to use coercive machinery of Act for realising tax—Whether infringement of fundamental rights under art. 19(1)(g) of the Constitution.*

Held, (i) that explanation II to s. 2(g) of the Central Provinces and Berar Sales Tax Act (Act XXI of 1947) as amended by Central Provinces and Berar Act (Act XVI of 1949) is *ultra vires* the State Legislature.

(ii) A threat by the State to realize tax from the assessee without the authority of law by using the coercive machinery of the impugned Act is a sufficient infringement of his fundamental right under art. 19(1)(g) and gives him a right to seek relief under art. 226 of the Constitution. The impugned Act, requiring the assessee to deposit the whole of the tax before he can get the relief provided by it, cannot be said to provide an adequate alternative remedy.

The State of Bombay v. *The United Motors (India) Ltd.* ([1953] S.C.R. 1069); *Raleigh Investment Co.* v. *The Governor-General in Council* (L.R. 74 I.A. 50); *Mohd. Yasin* v. *The Town Area Committee* ([1952] S.C.R. 572) referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 20 of 1952.

Appeal under article 132(1) of the Constitution of India from the Judgment and Order dated the 25th April, 1952, of the High Court of Judicature at Nagpur in Miscellaneous Petition No. 1623 of 1951.

N. P. Engineer (*R. S. Dabir* and *I. N. Shroff*, with him) for the appellant.

T. L. Shevde, Advocate-General of Madhya Pradesh, (*T. P. Naik*, with him) for respondent No. 1.

V. K. T. Chari, Advocate-General of Madras (*V. V. Raghavan,* with him) for the intervener.

1954. March 16. The Judgment of the Court was delivered by

MAHAJAN C. J.—This is an appeal by leave from a judgment of the High Court of Judicature at Nagpur dated the 25th of April, 1952, dismissing a petition under article 226 of the Constitution of India filed by the appellant questioning the *vires* of certain provisions of the Central Provinces and Berar Sales Tax Act, 1947.

The appellant represents a concern C. Parakh and Company (India) Limited, a company registered under the Indian Companies Act, 1913, having its head office at Bombay, and several branches in the State of Madhya Pradesh. The main business of the appellant company is that of cotton. The head-office of the appellant at Bombay sells cotton bales to several mills and individuals under the control and the system regulated by the Textile Commissioner at Bombay, and upon a contract of sale being completed the goods after being ginned and pressed are sent from Khamgoan and other places in the State of Madhya Pradesh and are actually delivered in Bombay and such other places outside the State of Madhya Pradesh as directed by the head office. The cotton bales are sent by rail under an insurance in favour of the appellant, and are delivered to the buyer by tender of railway receipt against the payment of price in Bombay.

Under the Central Provinces and Berar Sales Tax Act, 1947 (Act XXI of 1947), cotton was declared liable to sales tax on the 11th of April, 1949, and since that date the appellant commenced paying the tax in respect of the purchases made by it, and continued to pay it till the 31st of December, 1950. For the quarter ending on the 31st of March, 1951, the appellant declined to pay the tax in respect of the purchases made during that quarter, realizing that it could not be made legally liable for the payment of this tax in the State of Madhya Pradesh, the transactions done or effected in Madhya Pradesh not being "sales" within that State. Apprehending that the company

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may be subjected to the payment of the tax without authority of law, an application was preferred in the High Court of Judicature at Nagpur praying for an appropriate writ or writs which may secure to the company protection from the impugned Act and its enforcement by the State. It was alleged that Explanation II to section 2(g) of the Central Provinces and Berar Sales Tax Act, 1947, as further amended by Act XVI of 1949 was *ultra vires* and illegal.

This petition, along with a reference in another case (Miscellaneous Civil Case No. 258 of 1951 : A.I.R. 1952 Nag. 378), was heard by a Division Bench of the Nagpur High Court and it was held that Explanation II to section 2(g) of the Act was not enforceable because under the Constitution sales tax could only be collected in the State where the goods were delivered for consumption. It was further held that Explanation II as amended by the C. P. & Berar Act XVI of 1949 was not validly enacted because it made drastic changes in the rules of the Sale of Goods Act without obtaining the assent of the Governor-General as required by section 107 of the Government of India Act, 1935. It was observed that the mere production of the goods in a State is not enough to make the tax payable unless the goods are appropriated to a particular contract, and that to impose the tax at that stage would be tantamount to charging an excise duty and not a tax on the sale of goods. In spite of these findings the High Court declined to issue a writ and dismissed the petition made to it under article 226 of the Constitution on the ground that a mandamus issues only to compel an authority to do or abstain from doing some act, that it is seldom anticipatory and certainly never issues where the action of the authority is dependant on some action of the petitioner and that in the present case the petitioner had not even made his return and no demand for the tax could be made from him.

In this appeal it was argued by Shri Noshirwan Engineer, learned counsel for the appellant, that an illegal and unjust imposition operates as an illegal restraint on trade and violates fundamental rights,

that the High Court having held that the Constitution by article 286 thereof made delivery of the goods for consumption the decisive factor for determining which State should have the right of taxing such sales, and having thus found the provision of the Explanation to the definition of "sale" unconstitutional, should have issued a writ of mandamus restraining the respondent State from enforcing that part of the Act.

To appreciate the contentions of the learned counsel it is necessary to set out the relevant provisions of the Act which the High Court has declared *ultra vires* the State Legislature. Act XXI of 1947 defines the expression "sale" in section 2(g) of the Act in these terms :—

" 'Sale' with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payments or other valuable consideration, including a transfer of property in goods made in the course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge".

"Explanation (I)—"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."

Explanation (II)—"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are *actually* in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in the Central Provinces and Berar."

This provision was amended by the Central Provinces and Berar Act XVI of 1949 which came into force on the 11th of April, 1949, by which Explanation II of section 2(g) was amended as follows :—

Explanation (II)—"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed for the purposes of this Act, to have taken place in this

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Province—wherever the contract of sale or purchase might have been made—

(a) If the goods were *actually* in this Province at the time when the contract of sale or purchase in respect thereof was made, or

(b) In case, the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced or found in this Province at any time after the contract of sale or purchase in respect thereof was made."

Certain amendments were made in the Act by Act IV of 1951 which came into force on the 1st of April, 1951, but these are not relevant to the present inquiry.

As pointed out above, the High Court held that the new Explanation II was *ultra vires* the State Legislature and that the mere production of goods was not enough to make the tax payable unless the goods were appropriated to a particular contract. The correctness of this view can no longer be questioned by reason of the majority decision of this court in *The State of Bombay* v. *The United Motors (India) Ltd.*(1), wherein it was held that article 286(1) (a) of the Constitution read with the Explanation thereto and construed in the light of article 301 and article 304 prohibits the taxation of sales or purchases involving inter-State elements, by all States except the State in which the goods are delivered for the purpose of consumption therein and that the view that the Explanation does not deprive the State, in which the property in the goods passed, of its taxing power and that consequently both the State in which the property in the goods passes and the State in which the goods are delivered for consumption have the power to tax, is not correct.

The learned Advocate-General of the State did not in this situation, and very properly, challenge the correctness of the decision of the High Court on this point, and conceded that the Explanation was clearly *ultra vires* the State Legislature. He however contended that on the principle enunciated by the Privy

(1) [1953] S.C.R. 1069.

Council in *Raleigh Investment Co.* v. *The Governor-General-in-Council*(1), jurisdiction to question assessment otherwise than by use of the machinery expressly provided by the Act, was inconsistent with the statutory obligation to pay, arising by virtue of the assessment and that the liability to pay the sales tax under the Act is a special liability created by the Act itself which at the same time gives a special and particular remedy which ought to be resorted to, and therefore the remedy by a writ ought not to be allowed to be used for evading the provisions of the Act, especially a fiscal Act. It was also said that the conditions requisite for the issue of a writ of mandamus were not present in the case and that it was not within the scope and purpose of article 226 of the Constitution to decide an academic question.

In our opinion, the contentions raised by the learned Advocate-General are not well founded. It is plain that the State evinced an intention that it could certainly proceed to apply the penal provisions of the Act against the appellant if it failed to make the return or to meet the demand and in order to escape from such serious consequences threatened without authority of law, and infringing fundamental rights, relief by way of a writ of mandamus was clearly the appropriate relief. In *Mohd. Yasin* v. *The Town Area Committee*(2), it was held by this court that a licence fee on a business not only takes away the property of the licensee but also operates as a restriction on his fundamental right to carry on his business and therefore if the imposition of a licence fee is without authority of law it can be challenged by way of an application under article 32, *a fortiori* also under article 226. These observations have apposite application to the circumstances of the present case. Explanation II to section 2(g) of the Act having been declared *ultra vires,* any imposition of sales tax on the appellant in Madhya Pradesh is without the authority of law, and that being so a threat by the State by using the coercive machinery of the impugned Act to

(1) 74 I.A. 50.

(2) [1952] S.C.R. 572.

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realize it from the appellant is a sufficient infringement of his fundamental right under article 19(1) (g) and it was clearly entitled to relief under article 226 of the Constitution. The contention that because a remedy under the impugned Act was available to the appellant it was disentitled to relief under article 226 stands negatived by the decision of this court in *The State of Bombay* v. *The United Motors (India) Ltd.*(1), above referred to. There it was held that the principle that a court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the court with an allegation that his fundamental right had been infringed and sought relief under article 226. Moreover, the remedy provided by the Act is of an onerous and burdensome character. Before the appellant can avail of it he has to deposit the whole amount of the tax. Such a provision can hardly be described as an adequate alternative remedy.

For the reasons given above, we are of the opinion that the High Court, having held that the Explanation II to section 2(g) of the Act was *ultra vires,* was in error in dismissing the application on the ground that it was not entitled to relief under the provisions of article 226 of the Constitution. In the result therefore we allow this appeal with costs and direct an appropriate writ to issue restraining the first respondent from imposing or authorising imposition of a tax on the appellant in exercise of its authority under Explanation II held void.

Appeal allowed.

(1) [1953] S.C.R. 1069.