

THE ENTRY TAX OFFICER, BANGALORE ETC. ETC.

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v.

M/S CHANDANMAL CHAMPALAL AND CO.

APRIL 18, 1994

[B.P. JEEVAN REDDY AND N. VENKATACHALA, JJ.]

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Constitution of India—Entry 52 in List II of Seventh Schedule/Karnataka Tax on Entry of Goods into local areas for consumption, use or sale therein Act, 1979—Section 3—Words ‘sale therein’—Meaning and scope—Tax on entry of goods into a local area—Where goods are sold within a local area for purpose of being taken out of that area and are actually taken out—No levy permissible under entry 52—Order of refund of amount paid in excess of legal liability—Held bad as it would amount to unjust enrichment of dealers who have passed on burden to purchasers/consumers.

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The controversy in the instant case was with reference to the scope and ambit of the Karnataka Tax on Entry of Goods into local area consumption, use or sale therein Act, 1979. It was submitted that when Entry 52 speaks of a tax on the entry of goods into a local area for consumption, use or sale therein, the words ‘sale therein’ must be given their due and natural meaning and should not be restricted to the sale for the purpose of consumption or use of the goods sold within the limits of the concerned local area.

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The High Court held that the levy created by Section 3 of the Karnataka Act is confined to entry of goods for consumption, use or sale within the particular local area. It held that where the goods brought within the local areas are not intended for use or consumption within that area but are meant to be and are taken out of the area for use or consumption elsewhere, no levy is permissible under the said Act. The court directed refund of amount which may be found to have been paid in excess of the liability, to the respondents. This appeal by Revenue has been filed challenging the said order.

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Allowing the appeal, this Court

HELD : 1.1. Where the goods are sold within a local area for the purpose of being taken out of that local area and are actually taken out,

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- A no levy is permissible under Entry 52. Octroi or any impost in the nature of that impost has always been looked upon with certain amount of disfavour. Acceptance of the State's contention in this case would ultimately result in driving up the price of these goods to the consumer. It would become another sales tax in effect. In the circumstances, the decision of the Karnataka High Court on the meaning of the words 'sale therein' in Section 3 of the Karnataka Act, is affirmed. [549-B-D]
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Burma Shell Oil Storage & Distributing Co. India Ltd. v. The Belgaum Borough Municipality, [1963] Supp. 2 SCR 216; *Hiralal Thakorlal Dalal v. Broach Municipality & Ors.*, AIR (1963) SC 1446 and *Municipal Council v. Parekh Automobiles Ltd.*, [1990] 1 SCC 367, relied on.

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1.2. In the instant case, the order of the Karnataka High Court in so far as it directed refund of the amount, which may be found to have been paid in excess of the legal liability, is not justified. Any such direction would amount to unjust enrichment of the respondents who are merely dealers and have passed on the burden to the purchasers/consumers. It is not alleged and / or established that they have not passed on the duty to the purchasers/consumers. The normal presumption is that they have done so. In the absence of any such allegation and proof, the direction of refund is not called for. [549-D-E, 550-C]

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State of MP v. Vyankat Lal, AIR (1985) SC 901; *Amarnath Om Prakash v. State of Punjab*, AIR (1985) SC 218 and *Indian Oil Corporation v. Municipal Corporation, Jullundhar*, [1993] 1 SCC 333, relied on.

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CIVIL APPELLATE JURISDICTION : Civil appeal Nos. 4263-64 of 1992 etc. etc.

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From the Judgment and Order dated 1.2.91 of the Karnataka High Court in W.P. Nos. 2505 and 2506 of 1991.

R.N. Narasimhamurthy, B.V. Acharya, M.Veerappa and K.H. Nobin Singh for the Appellants.

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Harish N. Salve, Ashok Kr. Sharma, Narender Kaushik, B.P. Gandhi, Mukul Mudgal, V. Balachandran and S. Aravindh for the Respondents.

H The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Leave granted in the S.L.P.

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2. Entry 52 in List-II of the Seventh Schedule to the Constitution, says Sri Narsimha Murthy, should not be confined to an impost, formerly known as 'octroi'. He submits that since it is a legislative entry, it must be liberally construed and full effect must be given to the words used therein. He says that when Entry 52 speaks of a tax on the entry of goods into a local area for consumption, use or sale therein, the words 'sale therein' must be given their due and natural meaning and should not be restricted to a sale for the purpose of consumption or use of the goods sold within the limits of the concerned local area. The submission is urged with reference to the scope and ambit of the Karnataka Tax on Entry of Goods into local areas for consumption, use or sale therein Act, 1979.

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3. The High Court of Karnataka has held following decisions of this Court in *Burma Shell Oil Storage & Distributing Co. India Ltd. v. The Belgaum Borough Municipality*, [1963] 2 S.C.R. 216, *Hiralal Thakorlal Dalal v. Broach Municipality & Ors.*, AIR (1963) S.C. 1446 and *Municipal Council v. Parekh Automobiles Ltd.*, [1990] 1 S.C.C. 367 that the levy created by Section 3 of the Karnataka Act on the sales effected within a local area is confined only to those sales of goods which are meant for consumption or use within such local area. In other words, it held that where the goods sold are not intended for use of consumption within the local area but are meant to be and are taken out of the area for use or consumption elsewhere, no levy is permissible under the said Act. It is this view Sri Murthy disputes. He submits that *Burma Shell*, *Hiralal Thakorlal* and *Parekh Automobiles* dealt with case where the levy was by the municipality/local authority, no doubt under an enactment of the State Legislature. In those cases, he says, there may be justification for taking a restrictive view and for construing the levy imposed by the municipality as one in the nature of octroi but where the levy is created by the State Legislature and the assessment and collection is also by the State Government, there is no reason to restrict the word 'sale' occurring in Section 3 of the Karnataka Act to sale of goods intended for use or consumption within the given local area. It is true, says the counsel, that the levy is at the stage of entry of goods into a local area but the levy is not by the local authority. The Karnataka Act, he says, bears no resemblance or similarity to a levy in the nature of octroi imposed by the local authorities and, therefore, it should not be subjected to the limitations applicable to a levy

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A by the local authorities.

4. On the other hand, it is contended by Sri Harish Salve, learned counsel for the respondents that all the submissions now raised by Sri Murthy are concluded against him by the several decisions of this Court. He points out that *Hiralal Thakorlal* first came up before a three-Judge Bench comprising K.K. Mathew, Krishna Iyer and A.C. Gupta, JJ. and the matter was referred to a Constitution Bench precisely to resolve and decide the true meaning and scope of the words 'sale therein' occurring in Entry 52. Para 3 of the order of reference reads thus:

C "3. The short point is whether a person who brings goods into a
D taxable territory and sells it there for being taken outside the
territory for consumption or use is liable to pay octroi. We have
E been taken, by council on both sides, through the judgment of this
Court and while we are inclined to the view that the thrust of the
judgment is in favour of limiting taxability to such sales within the
territory as are intended to be consumed or used in part or in
F whole within the territory there are observations which strike a
different note. A plain reading of the words used impose no
qualification of the expression "sale therein" but the judicial construction based on the history of octroi has also been an input in the interpretative exercise in *Burma Shell*. Be that as it may, we feel that there are blurred areas of sale within the territory which may attract a tax under Entry 52 left uncertain by the decision of this Court. We, therefore, regard this case as requiring further clarification particularly because the point is of some substance and affects municipal finances and the business community in the whole country."

5. It is in pursuance of the said reference that the matter came up before the Constitution Bench which re-affirmed the law laid down in *Burma Shell*. The very same question has again been raised in *Parekh Automobiles*, but once again the three-Judge Bench affirmed the principle of *Burma Shell* and *Hiralal Thakorlal*. Sri Salve submits that at this distance of time the matter should not be allowed to be re-agitated.

6. While we cannot deny the force and substance in the submissions urged by Sri Narasimha Murthy. We do not find it possible to give effect to it in the light of the decisions referred to by Sri Salve. It is true that

Burma Shell, Hiralal Thakorlal and Parekh Automobiles were concerned with State enactments which empowered the Municipalities to levy the impost, all the sale a close reading of the said decisions does indicate that they have read the words 'sale therein' occurring in Entry 52 of List-II as meaning 'a sale of goods within a local area for consumption or use therein' - though as a matter of fact, in a given case, the goods may be taken out and consumed there. The decisions clearly say that where the goods are sold within a local area for the purpose of being taken out of that local area and are actually taken out, no levy is permissible under entry 52. It is not possible to distinguish the said decisions on the grounds suggested by Sri Murthy. There is yet another reason. Octroi or any impost in the nature of that impost has always been looked upon with certain amount of disfavour. Acceptance of the State's contention in this case would ultimately result in driving up the price of these goods to the consumer. It would become another sales tax in effect. In the circumstances, we are inclined to - indeed we have no option but to - affirm the decision of the Karnataka High Court on the meaning of the words 'sale therein' in Section 3 of the Karnataka Act. At the same time, we find it not possible to agree with the Karnataka High Court insofar as it directed refund of the amount, which may be found to have been paid in excess of the legal liability, to the respondents. Any such direction would amount to unjust enrichment of the respondents who are merely dealers and have passed on the burden to the purchasers/consumers. The dealers themselves have not suffered any loss. They merely passed on the liability. In such cases, this Court has been refusing to refund the tax. See *State of Madhya Pradesh v. Vyankat Lal*, A.I.R. (1985) S.C. 901 and *Amarnath Om Prakash v. State of Punjab*, AIR (1985) S.C. 218.

7. An identical question was considered by a Division Bench of this Court comprising J.S. Verma and A.S. Anand, JJ. in *Indian Oil Corporation v. Municipal Corporation, Jullandhar*, [1993] 1 S.C.C. 333 with respect to entry tax itself. After holding that the levy of duty was not justified in law, the Bench dealt with the question of refund in para 23 in the following words :

"23. Before parting with the appeal, we would however, like to take note of the submission made on behalf of the Municipal Corporation with regard to the question of refund of the octroi duty, already deposited by the appellant. The question of refund, in our

A opinion, does not arise. The IOC has collected the octroi duty from its dealers and agents, who have in turn passed on the burden to the consumer. Thus, having collected the octroi duty, there is no equity in favour of the IOC to claim a refund of the same. Learned
B counsel for the appellant also conceded that the question of refund, in the facts and circumstances of the case, does not arise and we, therefore, hold that the appellant shall not be entitled to any refund of the octroi duty already deposited by the appellant with the Municipal Corporation."

C 8. We are in respectful agreement with the above principle. In this case also, it is not brought to our notice that the respondents have alleged and/or established that they have not passed on the duty to the purchasers/consumers. The normal presumption is that they have done so. If they say otherwise, it is for them to allege and establish the same. In the absence of any such allegation and proof, the direction of refund is not
D called for.

E The appeals are accordingly allowed to the extent indicated above. The directions of the High Court "to re-do the orders in accordance with the law and in the light of this order" and the further direction to the authorities "to refund the amount to which each of the petitioners is entitled within three months" as well as the directions to the said effect in the several orders under appeal are set aside. There shall be no order as to costs.

A.G.

Appeal allowed.