

DEVI DASS GOPAL KRISHEN LTD. AND ANR.

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v

STATE OF JAMMU AND KASHMIR AND ANR.

DECEMBER 1, 2000

[B.N. KIRPAL, DORAISWAMY RAJU AND BRIJESH KUMAR, JJ.]

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Constitution of India -Articles 301 and 304 - Discrimination—Local manufactures of edible oil exempted from sales tax—Outside manufactures not exempted—Tax raised to 8% from 4%—Outside manufacturers realizing tax at the rate of 4%—Exemption in favour of local manufacturers declared invalid by Court with prospective effect from 1.4.1997—Outside manufacturers claiming parity and seeking exemption from payment of enhanced rate till 31.3.1997—Held, cannot be granted—Jammu and Kashmir General Sales Tax Act, 1962—Section 4(1)—Sales Tax.

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The appellants manufactured edible oil in the State of Punjab and Haryana and sold the same in the State of Jammu and Kashmir. Initially sales tax was levied on edible oils in the State of Jammu and Kashmir at the rate of 1%, which was subsequently raised to 4% in the year 1989. By a notification dated March 7, 1991 issued under Section 5 of the Jammu and Kashmir General Sales Tax Act, 1962, all units manufacturing edible oil in the State of Jammu and Kashmir were granted exemption from sales tax. However, those manufacturing edible oil outside the State of Jammu and Kashmir were denied such benefit. Later on, by another notification dated 27.6.1994 the sale tax in respect of edible oil was further enhanced to 8%.

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The appellants filed a writ petition before the High Court assailing the total exemption granted to manufacturers within the State contending that it was hit by the provisions of Articles 301 and 304 of the Constitution of India.

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While the writ petition filed by the appellants was still pending before the High Court this Court in *Shree Mahabir Oil Mills & Anr. v. State of J & K & Ors.*, [1996] 11 SCC 39 held that the unconditional exemption from sales tax granted by the State to the edible oil produced within the State, while subjecting the same produced in other States to sales tax at the rate of 8%, was discriminatory and violative of Article 304(a) of the Constitution of India. This Court, however, directed that the declaration of invalidity of the

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A notification dated 7.3.1991 would take effect only on and from 1.4.1997 and that the notification would be effective and operative till 31.3.1997.

The appellants thereafter, claiming parity with the local manufacturers, prayed that they should also be exempted from depositing the balance amount of sales tax for the period prior to 31.3.1997. The appellants claimed that they had been realizing sales tax only at the rate of 4% instead of 8% and it would be unjust to recover the balance 4% from them. The High Court rejected the prayer of the appellants.

The appellants filed the present appeal against the order of the High Court.

Dismissing the appeal, the Court

HELD : 1. The mere fact that the appellants had not been realizing the sales tax at the rate of 8% but only at the rate 4% would not justify their demand that they may not be required to deposit balance 4% of the sales tax. At no stage in any proceeding whatsoever there had been any interim order from any Court or any other direction of any authority, by reason of which or in consequence whereof the appellants may not have been required to realize the sales tax at the rate of 8% but only at the rate of 4%. It was their voluntary act that they opted not to realize the sales tax at its full rate of 8% but only to the extent of 4%. [330-D, E]

2. The manufacturers of edible oil in the State of Jammu and Kashmir were exempted from payment of sales tax by virtue of notification dated 7.3.1991 issued under S.5 of the Act. Exemption from payment of the sales tax is permissible under the said provision. That being the position, the local manufacturers had no reason or right in law to realize the sales tax from the customers and therefore they had not realized the same. But so far it concerns the appellants they had not been enjoying any such concession nor there was any order in operation by virtue of which they were not required to realize the whole amount of sales tax. On the other hand, under law they were required to realize at the rate of 8%, throughout, which has not been found to be illegal by any court. [330-G, H, 331-A, B]

3. It has nowhere been challenged that sales tax could not be levied nor the rate of tax. As a matter of fact, exemption granted to the manufacturers of edible oil within the State of Jammu and Kashmir was impugned. Therefore, it would not be open for the appellants to contend that they were not liable

to pay sales tax. [330-A, B]

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Shree Mahabir Oil Mills & Anr. v. State of J & K Ors., [1996] 11 SCC 39, referred to.

Texamco Ltd. and Anr. v. State of A.P. and Anr., [2000] 1 SCC 763 and *Shree Cement Ltd. and Anr. v. State of Rajasthan and Ors.*, [2000] 1 SCC 765, distinguished.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7050 of 2000.

From the Judgment and Order dated 4.2.99 of the Jammu and Kashmir High Court in L.P.A. No. 317 of 1997.

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R.F. Nariman, Ramesh Singh and Ms. Vanita Bhargava for the Appellants.

M.L. Varma, Ashok Mathur and G.M. Kawoosa for the Respondents.

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The Judgment of the Court was delivered by

BRIJESH KUMAR J. Leave granted.

2. This appeal arises out of judgment and order dated 4.2.1999 passed by the Division Bench of Jammu & Kashmir High Court, dismissing the appeal and refusing the prayer of the appellants to the effect that they may not be required by the respondent to deposit the balance amount of sales tax for the period prior to March 31, 1997.

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3. The brief facts are that the appellants sell their product namely, mustard/edible oil in the State of Jammu and Kashmir while the manufacturing takes place in the State of Punjab & Haryana. Section 4(1) of Jammu & Kashmir General Sales Tax Act, 1962 is the charging provision for the levy of Sales Tax in the State of Jammu and Kashmir. The State Government issued Notification under the aforesaid provision from time to time levying sales tax, initially @ 1% in the year 1982. The rate of tax was however increased to 4% applicable to all categories of manufacturers of edible oil viz. inside and outside the State of Jammu and Kashmir. Later on by means of Notification No. SRO-93/90-91 dated March 7, 1991 issued under Section 5 of the Jammu and Kashmir General Sales Tax Act, exemption from payment of sales tax was granted to all the units manufacturing and carrying on business in edible oil in the State of Jammu and Kashmir. The result was that manufacturers of the

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A State of Jammu and Kashmir were not required to pay any sales tax whereas outside manufacturers had been paying sales tax at the rate of 4% as enhanced by means of a Notification issued in 1989.

B 4. Later on the rate of sales tax was further enhanced to 8% by Notification SRO-124/1994 dated June 27, 1994. The appellants, namely, the manufacturers from outside the State felt discriminated against and raised a grievance that total exemption granted to the manufacturers within the State was hit by provisions of Article 301 and 304 of the Constitution as it created tax barriers affecting the free flow of trade and commerce within the territory of India. However, on perusal of the order passed by the learned Division
C Bench, it appears that while the writ petition filed by the appellants was still pending in the High Court, the said grievance raised by the manufacturers from outside the State, came to be considered by this Court in the case of *Shree Mahavir Oil Mills & Anr. v. State of J & K and Others*, [1996] 11 SCC 39. It was held that “by exempting unconditionally the edible oil produced within the State of Jammu & Kashmir altogether from sales tax, even if it is
D for a period of ten years, while subjecting the edible oil in other States to sales tax at 8%, the State of Jammu & Kashmir has brought about discrimination by taxation prohibited by Article 304 (a) of the Constitution.” The operative part of the order reads as follows :

E “We declare that the exemption granted by Notification No. SRO 93 of 1991 to local manufacturers/producers of edible oil is violative of the provisions contained in Articles 301 and 304(a). At the same time, we direct that : (a) the appellants shall not be entitled to claim any amounts by way of refund or otherwise by virtue of or, as a consequence of, the declaration contained herein and (b) that the declaration of
F invalidity of the impugned notification shall take effect on and from 1.4.1997. Till that dated, i.e. upto and inclusive of 31.3.1997, the impugned notification shall continue to be effective and operative”
(Para 27)

G The provisions of Article 142 of the Constitution were also invoked by this Court while passing the above order so as to mould the relief to suit the exigencies of the situation.

H 5. Shri R.F. Nariman, learned senior counsel, appearing for the appellants, submits that while moulding the relief with the aid of Article 142, the interest of only two parties was taken into consideration, namely, the manufacturers in the State of Jammu and Kashmir and the State but not that of the outside

manufacturers, inasmuch as it has been directed that they shall not be entitled to claim any amount by way of refund and declaration of the invalidity of the impugned notification would take effect from 1.4.1997. It is further submitted that during all this period, the appellants have been realizing sales tax only at the rate of 4% and since it has not been realized at the rate of 8% the appellants should also not be required to deposit the balance, namely, the remaining 4% of the sales tax.

6. At one hand, it is submitted that invalidity of the notification of exemption has been given effect to w.e.f. 1.4.1997, namely, the manufacturers within the State are to be treated exempted from payment of sales tax upto 31.3.1997 under a notification found to be invalid, whereas the appellants are called upon to deposit the remaining 4% of the sales tax. It is submitted that in the event of extending the benefit of exemption of an invalid notification upto a particular period to the local manufacturers, it was only just and fair not to realise the remaining 4% of the sales tax from the appellants. This amount has also not been realized by the appellants from the customers. Learned counsel for the appellants further submits that a wider perspective relating to scope and limitation of exercise of power under Article 142 of the Constitution of India is involved. He has, however, and in our view rightly, not argued on the wider issue said to be involved relating to the scope and limitation of Article 142 of the Constitution. Several years have passed since the pronouncement of Judgment by this Court in the case of *Shree Mahavir Oil Mills & Anr.*, (supra). Whether the powers under Article 142 of the Constitution have been rightly exercised and in accordance with law or not would not be a matter to be gone into, in this appeal and at this stage. That is a final order passed in an appeal. Hence, it would be only a futile exercise to advert to that aspect of the matter in this case.

7. The appellants however focused on the point that once the manufacturers of the State of Jammu & Kashmir have been exempted from payment of sales tax all together up to 31.3.1997, the appellants should also have been given the benefit and they should not have been required to deposit the remaining 4% of the tax liability more particularly when the amount was not realised by them from the customers.

8. So far as the above submission is concerned, it may have to be seen as to whether the levy of sales tax at the rate of 8% was within the competence of the State or not. The sales tax is levied by the State in exercise of its powers vested under the Jammu & Kashmir General Sales Tax Act, 1962 and in the

A present case, different notifications have been issued from time to time ultimately raising the rate of tax in question to 8%. It has nowhere been challenged that sales tax could not be levied nor the rate of tax. As a matter of fact, exemption granted to the local manufacturers was impugned. Therefore, it would not be open for the appellants to contend that they were not liable to pay the sales tax. It is also to be noticed that exemption from payment of tax as available to local manufacturers as well as its levy upon the appellants, till the time it was at the rate of 4%, was not objected to at all on any ground whatsoever. The appellants had been paying sales tax at the rate of 4% without raising any grievance. It was only after it was raised to 8% that the exemption was challenged in connection of which the case of the appellants is that at a point, it became unbearable that the appellants took up the matter, otherwise so far it was at the rate of 4% it was within their bearable limits. Be that as it may, the fact remains that at no point of time the liability to pay the sales tax or the rate of 8% was ever under cloud. The mere fact that the petitioners/appellants had not been realizing the sales tax @ 8% but only @ 4% would not justify their demand that they may not be required to deposit balance 4% of the sales tax. During the course of arguments, on being enquired, it has been clearly indicated that at no stage of any proceeding whatsoever there had been any interim order from any Court or any other direction of any authority, by reason of which or in consequence whereof the appellants may not have been required to realize the sales tax at the rate of 8% but only at the rate of 4%. It was by their voluntary act that they opted not to realize the sales tax at its full rate but only to the extent of 4%. It appears that they have been realizing the tax at the rate of 4% and continued with the same rate despite the enhancement to 8%. In such circumstances it is difficult to accede to the request made that the appellants may not be required to deposit the balance amount of the sales tax. The fact that the appellants did not choose to realize the full tax from the customers, though they were under obligation to do so, would be no good ground to exempt them from making the payment of the remaining amount of sales tax or to right off their liability.

G 9. So far the contention that such a concession has been given to the local manufacturers by virtue of an order passed in the case of *Shree Mahavir Oil Mills & Anr.* (supra) it may be indicated that the local manufacturers were exempted from payment of sales tax by virtue of Notification SRO 93/1991 issued under Section 5 of the Jammu and Kashmir General Sales Tax Act. Exemption from payment of sales tax is permissible under the said provision. H That being the position, the local manufacturers had no reason or right in law

to realize the sales tax from the customers and therefore they had not realized the same. But so far it concerns the appellants they had not been enjoying any such concession nor there was any order in operation by virtue of which they were not required to realize the whole amount of sales tax. On the other hand, under law they were required to realize at the rate of 8%, throughout, which has not been found to be illegal by any court but only exemption to local manufacturers has been faulted with.

10. As indicated earlier, it would not be open in these proceedings to go into the question, as to whether the invalidity of exemption given effect from April 1, 1997, was justified or not. Learned counsel for the applicants has placed reliance on the decision reported in [2000] 1 SCC 763, *Texmaco Ltd. and Anr. v. State of A.P. and Anr.* The petition was treated as a review petition. In the facts and circumstances of the case and considering the fact that liability to pay tax had arisen after the decision of the Court to which the petitioners were not the party and looking the provisions of the Andhra Pradesh General Sales Tax Act, they could not realize the amount of the sales tax from the customers therefore it was thought that they may not be required to deposit the said amount. In the present case however we find that there was no impediment in the way of the appellant to realize the sales tax at the full rate. In the other case also reported in [2000] 1 SCC 765 *Shree Cement Ltd. and Anr. v. State of Rajasthan and Ors.* the liability of payment of sales tax had arisen in view of the decision of the Court and before the decision they have not been realizing the tax. In the facts of the present case, the appellants shall derive no assistance from the said decision as well.

11. In view of the discussion held above in our view it is not a case for interference with the orders passed by the High Court of Jammu & Kashmir and to issue any such direction to the respondents not to realize the balance amount of the sales tax for the reason that it had not been realized by the appellants, nor due to the fact that exemption granted to the local manufacturers was quashed but w.e.f. a prospective date viz. 1.4.1997. It has also been noticed that in the case of *Shree Mahavir Oil Mills & Anr.* (supra), one of the provision made in the operative part of the order is to the effect that :

“(a) the appellants shall not be entitled to claim any amount by way of refund or otherwise by virtue of or, as a consequence of, the declaration contained herein.”

Conceding to the request made by the appellants in this case, would

A also amount to granting relief in the teeth of order quoted above. The appellants had been throughout under a statutory liability to realize the sales tax at the rate of 8%.

12. In the result the appeal fails and it is accordingly dismissed. No order as to costs.

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B.K.M.

Appeal dismissed.