

CASE NO.:

Appeal (civil) 4123-24 of 2002

PETITIONER:

HANS RAJ AND SONS

RESPONDENT:

STATE OF JAMMU AND KASHMIR AND ORS.

DATE OF JUDGMENT: 17/07/2002

BENCH:

D.P. MOHAPATRA & DORAI SWAMY RAJU

JUDGMENT:

JUDGMENT

2002 Supp(1) SCR 199

The Judgment of the Court was delivered by

D.P. MOHAPATRA, J. Leave is granted in all the Special Leave Petitions.

The controversy raised in these cases relates only to the legality and validity of the levy of additional toll tax under Notification SRO 348 dated 20.8.82 on dry fruits like almonds, walnuts and walnut kernels. In view of the common questions involved in the cases they were heard together with a consent of learned counsel for the parties, and they are being disposed of by this judgment.

For the sake of convenience we will refer to relevant facts with reference to writ petition no. 660 of 1982 filed by M/s Mehta Foods Pvt. Ltd Against the State of Jammu and Kashmir represented by the Chief Secretary and the Secretary in Ministry of Finance of the Government of Jammu and Kashmir which is the subject matter of Civil Appeal arising out of SLP (C) No. 16852 of 1999. In the petition filed under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir before the High Court of Jammu and Kashmir the writ petitioner sought the following reliefs:

"It is, therefore, prayed that the Notification SRO 348 dated 20.08.1982 and Notification SRO 349 dated 20.08.1982 may be quashed by a writ of certiorari as the impugned Notification is ultra vires the statute and that it also violates the fundamental right of the petitioner under Article 19 (1)(g) and 14 of the Constitution of India and is otherwise ultra vires of Article 286 (i) of Constitution of India..

The Hon'ble Court may grant such other relief as the circumstances of the case may warrant."

The respondents contested the case. That case and the other connected matters were decided by a Full Bench of the High court by the Judgment rendered on 23rd August, 1999.

In the writ petition the petitioner questioned the validity and legality of the levy of additional toll tax @ Rs. 0.60 paise per kilogram on dry fruits including almonds, walnuts and walnut kernels, to be exported out of the State of Jammu & Kashmir through the barriers located at Lakhnupur, Jammu Railway Station, Manwal and other toll posts, as may be modified by the State Government from time to time. Alternatively the writ petitioner contended that even if the levy of toll tax is held to be valid, then the additional toll tax is not payable by him since the State Government by a notification had granted exemption from payment of toll tax to those who were engaged in the process of manufacture of dry fruits. The petitioner submitted that it was engaged in the business of sale and export of dry

fruits including almonds, walnuts and walnut kernel not only to places located outside the State of Jammu & Kashmir but also to foreign countries. The dry fruits referred to above were collected from the grower and before exporting them, they were subjected to various processes. After purchasing walnuts and bitter apricots in shell from different parts of the State, the raw material were transported to the petitioner's factories. In the factories the walnut and bitter apricot were subjected to various tests and processes which were both manual as well as mechanical. This was done with a view to ensure best quality materials are supplied to foreign markets.

Setting out the details of the processed undertaken by it the petitioner stated that the walnuts and bitter apricots in shell were first graded by a grading machine with a view to ensure size segregation; after completing the process of grading, the dry fruits in shell were sorted out manually, this was done so that the split walnuts, damaged nuts and spoiled nuts as also the oily nuts were separated. After completing the process of sorting, the walnuts were subjected to bleaching. They were treated with a chemical solution. This is meant to give them a luster and attractive appearance. It was the contention of the petitioner that it is this process of bleaching which completely transforms the original look of the nuts and renders the outer shell softer than the original one. After bleaching, the walnuts are put in another machine for drying. This is done with a view to attain retention of 3% of moisture content After drying, the nuts are sorted manually with a view to eliminate unwanted nuts. The walnuts are inspected again with a view to ensure quality control.

As regards walnut kernels and bitter apricots the process and treatment is the same which is applicable to walnuts. After the process of grading, the walnuts and bitter apricots are soaked over-night in water. They are then shelled by the semi-skilled labourers for removing, the kernels with special emphasis on the object of obtaining maximum percentage of halves. After removing the kernels, they are dried by mechanical process. Later on, they are sorted out according to colour and size. This is achieved by use of motor driven conveyor belts. The halves thus removed are subjected to the process of gravity separation. By this process, the broken pieces are removed from the half pieces. Crumbs and dust is also removed. The pieces of crumbs which are left out go to the grading machine and are subjected to further grading. These different sizes are then cleaned. After all these processes are over, the net product is packed and exported outside the State. It is this process which according to the petitioner amounts to 'manufacture'. The petitioner contended that even if it be assumed that the tolls had been validly levied, then the petitioner is entitled to exemption under the notifications issued by the State Government, appended with the writ petitions. It was the further case of the petitioner that toll tax levied is in the nature of a fee, therefore, there has to be an element of quid pro quo i.e. there has to be a corresponding service to be provided by the State Government. As the petitioner used national highways for transporting its goods and the State Government is not spending any amount from the State funds for construction or maintenance of such highways the levy of toll tax by the State Government is not sustainable.

Refuting the allegation made by the petitioner the State and its Officers who were arrayed as parties in the writ petition submitted, inter alia, that the tolls levied in the case are not fee to which the principle of quid pro quo applies. The levy in the case is like a tax which is imposed by an Act of the Legislature, the concept of quid pro quo is alien to such a levy. The respondent placed reliance on the Full Bench decision of the Jammu & Kashmir High Court in the case of Girdhari Lai Anand Saraf v. Jammu and Kahsmir and Ors., AIR (1969) J & K 113. The further case of the respondents was that the petitioner is not entitled to any exemption as the activities allegedly undertaken by it is not covered by the term 'manufacture'.

In support of their respective cases the parties raised various questions which were considered in detail by the High Court in the impugned judgment

covering about 50 pages. The High Court has traced the development of the levy of tolls under the Levy of Tolls Act, 1995 (samvat 1938 A.D) (for short 'the Act'). The High Court has taken note of Section 3 of the Act in which it is inter alia provided that the Government may from time to time prescribe, annul or alter rates of tolls to be levied upon any road, ferry or bridge (in the State) and may place the collection of such tolls under such management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the ( Excise) revenue under the Jammu and Kashmir (Excise) Act, 1958.

The arguments raise in support of the challenge against the levy of additional toll tax were summed up by the High Court as follows:

- (i) that levy of tolls visualize an element of quid pro quo. This would involve examination of the distinction between tax and fee,
- (ii) that no toll tax can be levied as the petitioners are using national highways which highways are being maintained by the Central Government,
- (iii) that under the National Highways Act of 1956, the responsibility of maintaining the highways is on the State Government. If any levy is to be made by the State Government then there has to be a specific agreement between the Central Government and the State Government and this agreement has necessarily to be approved by the parliament. In the present case, it is submitted that no such agreement exists between the Central Government and the State Government and none has been placed before the Parliament , therefore, the State Government cannot levy any toll tax;
- (iv) that additional toll tax on dry fruits cannot be levied. By issuing notification a separate category is said to have been carved out for dry fruits and kernels. By creating this category, the petitioners have been discriminated.
- (v) That in any case, the walnuts are subjected to a manufacturing process. Therefore, walnuts themselves and other dry fruits including its kernels are except from the payment of toll tax.
- (vi) That the method of determining taxable turnover by weight, so far as sales tax is concerned, is not known to laws;

After discussing at length the merits of the contentions raised before it in the principles laid down in the several decisions of English Courts and the Supreme Court and different High Courts in this country, the High Court held that the toll in the present case has not been levied in respect of any particular road or service, it is being levied in consideration of all the conveniences, advantages and amenities which the petitioner is enjoying on account of having its business within the State. The consideration for the toll is to be found in the general amenities and advantages which the State provides. The High Court further held that this toll is in the nature of toll tax levied under the Act and for such levy the element of quid pro quo is to be presumed and that element is present in the case in hand.

- (i) that there is no generic difference between a tax and fee. Compulsion is not a hallmark of distinction between the two. Again the money collected need not go in to a separate fund. If it goes in to a consolidated fund, the nature of collection is altered,
- (ii) that in this case, what is being collected, is a tax and not a fee. This is being collected in the exercise of sovereign power vested in the State. This levy was being charged before the Constitution came in to force,
- (iii) that even if the toll in question is treated as a fee, even then there has to be no corresponding rendering of service. This is because the

toll in question is in the nature of toll traverse and not toll thorough. In the case of toll traverse, here use of the soil is sufficient consideration for the levy of the toll;

(iv) that the petitioners are using not only the national highways but they are using State Highways also. Therefore. Even if the concept of quid pro quo is made applicable, even then the petitioners cannot succeed. This is because as indicated above in addition to the national highway, they are using State Highway and also the roads which are not part of 'national highway'.

(v) That the vesting of National Highway in the Central Government is only with a view to see that these are properly maintained. The ownership of soil remains with the State. On this reasoning also, the State Government can impose tax in question;

(vi) That the above conclusions were the subject matter of decision in the case of Girdhari Lal Anand Saraf v. State of J&K, AIR (1969) J&K 113. All these have been answered in favour of the State. The reasoning given by the Full Bench is a reasoning to which no exception can be taken. We respectfully concur with the view so expressed.

Some of the arguments which were not there before the earlier Full Bench in Girdhari Lal Anand Saraf's case (supra) are also answered against the petitioner. These are:

(i) that the requirement of laying a notification before the Parliament is not mandatory

(ii) that the activity which is carried on by the petitioners in the matter of making the dry fruit marketable does not fall within the concept of term 'manufacture'. What was said by the Supreme Courts of India and by other High Courts has already been noticed above. The activity in question being not covered by the term 'manufacture'. Therefore, the petitioners cannot seek exemption,

(iii) that the incidence of taxation remains the same. Merely because the turnover has been determined by taking the weight into consideration would not take the tax out of the purview of the Jammu & Kashmir General Sales Tax Act of 1962,

(iv) that the levy of additional toll tax is therefore valid. As to what should be the rate of tax is to be primarily determined by forums other than this court. Taking into consideration, the geometrical increase in state expenditure in all avenues it cannot be said that the additional toll tax is in any way violative of any constitutional provision."

In conclusion the High Court (Full Bench) passed the following order:

"In view of the above discussion the questions posed are answered against the petitioners and in favour of the State. The registry is now directed to list all writ petitions before the Division Bench so that these are disposed of by taking into consideration the facts of each individual case.

Thereafter in compliance with the above direction, the case was disposed of by the Division Bench by the order, which reads as follows:

"The issue involved in this petition and other connected petitions has been answered in favour of the state. It has been held that the levy of toll tax is in accordance with law. In view of the detailed reasons given by the Full Bench in writ petition 660/82 and other connected writ petitions enumerated in the title, these petitions are found to be without merit and are dismissed.

The interim directions shall stand vacated automatically."

Before considering the case on merits, the meaning of the expressions 'toll', 'toll thorough' and 'toll traverse' may be noted:

The expression 'toll' normally means a definite payment exacted by the state or the local authority, by virtue of sovereignty or lordship, or in return for protection, more especially, for permission to pass somewhere, do some act, or perform some function. Another meaning attributed to the term is a charge for the landing or shipping goods at a port, a charge made for transport of goods, esp. by railway or canal.

The expression 'toll thorough' means where a town prescribes to have toll for every beast that goes through their town. The term 'toll traverse', means where one claims to have an amount for every beast that is driven over his ground. (See The Shorter Oxford English Dictionary on Historical Principles, revised and edited by C.T Onions, Third Edition, Volume II, page 2206.

In Wharton's Law Lexicon 14th Edition, pages 999-1000, the terms 'toll' 'toll-thorough' and 'toll traverse', are defined as under:

"By s.3 toll includes any rate or other payment payable under the special Act for any passenger, animal, carriage, goods merchandise, articles, matters or things conveyed on the railway. See RAILWAY, and Hunt v. Great Northern Railway Co., (1851) 10C.B.900.

Toll-thorough means, when a town prescribes to have toll for such a number of beasts, or for every beast that goes through the town, or over a bridge or ferry belonging to it.

Toll-traverse means, toll taken for every beast driven across a man's land. He may prescribe and distrain for it via regia.

In Black's Law Dictionary, Seventh Edition, the term 'toll' has been described as " 1. A sum of money paid for the use of something esp., the consideration paid to use a public road, highway, or bridge, 2. A charge for a long-distance telephone call."

In Halsbury's Laws of England, 4th Edition, page 96 para 138 dealing with 'tolls at common law' it is stated that the common law recognizes two classes of tolls payable under a grant to presumed grant from the Crown in respect of the passage of a highway or bridge, namely tolls traverse and tolls thorough. A toll traverse is a toll taken in respect of the original ownership of the land crossed by the public (even if now perhaps severed from it), the land having been at the date of the grant the grantee's private property, and having been then dedicated by him to the public in consideration of the toll to be taken. It is further stated therein that a toll thorough is independent of any ownership of the soil by the original grantee, the consideration necessary to support it being usually the liability to repair the particular highway or bridge.

Dealing with "tolls under statute" at page 97 para 139 it is stated that highway and bridge tolls may be payable under statute. In the case of an independent statutory undertaking engaged in the maintenance of a bridge, the power to revise the amount of the tolls may be in the undertakers' discretion, or the tolls may only be subject to a requirement that they are to be reasonable in amount.

It is clear from the above that though tolls are of different types and may be levied in different situations, it ordinarily means the amount which the government, or a local authority or a person duly authorised by the government may collect for passage of carriages and vehicles over a road or bridge. This meaning is by no means exhaustive. There provision for levy and collection of tolls is made under the legislative enactment or a subordinate legislation then the levy is to be governed strictly according

to the provisions of the statute or rules or any other instrument, as the case may be.

As noted earlier, in the writ petitions the petitioners questioned the validity of levy of additional toll tax by the State Government under the Notification SRO 348 Dated 20th August, 1982. Relevant portion of the said Notification is extracted hereunder:

"In exercise of the powers conferred by Sub Section (1) of Section 3 of the Levy of Tolls Act Samvat 1995 (VIII of 1995) (1938 A.D.) and in supersession of notification SRO 341 dated 19-08-1982 the Government hereby direct that additional toll tax shall be levied at Rs. 0.06 per kg. On dry fruit including almonds, walnuts and walnut kernels thereof exported out of state through lakhapur, Jammu Rly. Station Manual and other toll posts as may be notified by the Govt. from time to time in addition to the toll payable in terms of SRO 115 dated 31-03-1982."

The Levy of Tolls Act, 1995 (1938 A.D.) was enacted with a view to consolidated in one Act the provisions of levy of tolls upon public roads and bridges in Jammu and Kashmir State, Section 3 under which the Notification has been issued reads as follows:

"Rate of tolls to be levied:(1) The Government may from time to time prescribe, annul or alter rates of tolls to be levied upon any road ferry or bridge [in the State] and may place the collection of such tolls under such management as may appear to it proper, and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to their if employed in the collection of [Excise] Revenue under the Jammu and Kashmir [Excise] Act, 1958.

(a) The rates prescribed to be levied at the commencement of this Act, shall be rates mentioned in the first Schedule hereto annexed. The rates shall continue to be levied till they are annulled or altered in accordance with the provisions of this section.

(b) the power to annul or alter the rates vested in the Government under the foregoing provisions of this section may be exercised from time to time after publication in the Government Gazette. The amendment and alteration shall have the same force and effect as if they had been contained in the first Schedule.

(c) the persons under whose management the tolls are levied at the commencement of this Act shall levy the tolls prescribed and shall be held to have been appointed for collection of tolls under the provisions of this Act.

(d) The Government may, from time to time, notify the commodities in respect of which tolls may be levied on ad valorem basis, subject to a maximum of 15% of the value of purchase."

In the Schedule to the Act are enumerated vehicles of different types and the rates at which the toll is to be charged in respect of the same. The Schedule bears the heading "Through Traffic up and down crossing the Domell Toll Stations per trip each way". From the contents of the Schedule it is clear that the statute contemplates levy of toll for crossing upon different roads and bridges in the State and the state is vested with the power to prescribe by Notification the toll rate of the levy and the manner of collection of the same. The scheme of the Statute does not envisage levy of toll on goods or on any transaction of sale thereof. It is clearly a levy upon user of public roads and bridges in the State. The scheme fits in with the concept of tolls, be it toll traverse or toll thorough, to be levied in lieu of the advantage or privilege provided by the State Government for user of roads and bridges lying within the State. For the purpose of the levy the agency which has constructed the roads or bridges in question or the source of finance for implementation of the project are

not relevant. On a *prima facie* reading of the Notification no. 348 in the context of the provision in Section 3(1), it is manifest that the Notification is not in conformity with the power vested in the State Government under the Section. On a plain reading of the Notification it is clear that the intention is to levy toll on dry fruits including almonds, walnuts and walnut kernels exported out of the State through certain exit points by road or railways. The power to impose such a levy does not flow from the power vested in Section 3 of the Act in purported exercise of which the Notification has been issued.

A Constitution Bench of this Court in the case of *A. V. Fernandez v. The State of Kerala*, [1957] SCR 837 observed:

"It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities."

In that case this Court noted with approval, the following observations of Lord Russel of Killowen in *Inland Revenue Commissioners v. Duke of Westminister*, (1936) A.C.I. 24:

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case."

The observations of Lord Russel in the aforementioned case were also referred by the Privy Council in the *Bank of Chettinad v. Income Tax Commissioner*, AIR (1940) P.C. 183. The Privy Council did not accept the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position.

A similar view was taken in *Commissioner of Wealth Tax, Gujarat-III, Ahmedabad v. Ellis Bridge Gymkhana*, [1998] 1 SCC 384, in which it was observed: "the rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all."

Again in the Case of *Diwan Bros. v. Central Bank of India, Bombay and Ors.*, [1976] 3 SCC 800, three Judge of bench of this Court, construing the principles of interpretation of fiscal statutes, quoted with approval, the observations in *A. V. Fernandez v. State of Kerala* (supra), and in *State of Maharashtra v. Mishri Lal Tarachand Lodha*, [1964] 5 SCR 230, in which it was observed:

"The Act is a taxing statute and its provisions therefore have to be construed strictly, in favour of the subject-litigant".

Following the ratio in the afore-mentioned decisions it was observed:

"These observations manifestly show that the courts have to interpret the

provisions of a fiscal statute strictly so as to give benefit of doubt to the litigant. The principles deducible from the decisions referred to above are well established and admit of no doubt."

From the discussions in the foregoing paragraphs, the position that emerges is that the Notification No. SRO 348 in which the additional toll tax was levied was clearly beyond the purview of Section 3 of the Act. Further, the finding of the High Court that in the context of facts and circumstances of the case, processing of the dry fruits like almonds, walnuts and walnut kernels did not come within the expression 'manufacture' cannot be said to be erroneous. The judgment of the High Court upholding the levy of additional toll tax in the case is also unsustainable.

According, the appeals are allowed. The judgment of the High Court under challenge is set aside. It is made clear that this judgment will have only prospective operation and any amount collected as toll/ additional toll tax under the impugned notification need not be refunded. Parties to bear their respective costs.

