

M. P. Cement Manufacturers Association v. State of M.P. [(2004) 2 SCC 249]

-RISHABH VYAS & MOKSH RANAWAT¹

Date of Judgment: 09/12/2003

Judges: Ruma Pal & P.Venkatarama Reddi

1. Facts

Madhya Pradesh Upkar (Sanshodhan) Adhyadesh, 2001 (hereinafter referred to as the ‘Ordinance’), promulgated on 29th June 2001, has made an amendment to Madhya Pradesh Upkar Adhiniyam 1981 (the 1981 Adhiniyam), initially by an ordinance. ‘Ordinance’ entitled the State Government to levy a cess @ 20 paise per unit on the captive power producer and on the total units of electrical energy produced. Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2001 (hereinafter referred to as ‘the Amending Act’) has subsequently replaced the Ordinance. The provisions of the 2001 Ordinance and Act are identical. M. P. Cement Manufacturers Association and others had challenged the validity of the aforementioned ordinance and the amending act before the apex court on the ground that the state government is not authorized to levy cess on the production of the electricity, hence amendment is unconstitutional.

2. Procedural History

The matter is before the Supreme Court through clubbing of different civil appeals from High Court of Madhya Pradesh [Article 133 (1) (b)] and Special Leave Petition [Article 136].

3. Issues

The amending act has been challenged on three grounds and following are the issues formulated on the basis of the grounds:

- Whether the state government is empowered to impose a cess on the production of electrical energy, which is, covered exclusively by Entry 84 of List-I to the Seventh Schedule of the Constitution.

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- Whether the Ordinance was passed without fulfilling the mandatory pre-condition of consultation with the Electricity Regulatory Commission as provided under Section 12 (3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000.
- Whether the levy of cess on production of electrical energy is violative of Article 14 of the Constitution.

4. Rules

- A) Amendment in 2001, Section 3 of the 1981 Adhiniyam was substituted to provide for payment of an Energy development cess by producers of electricity as well.

“Section 3: Levy of energy development cess

(1) Every distributor of electricity energy shall pay to the State Government at the prescribed time and in the prescribed manner an energy development cess at the rate of one paise per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month:

Provided that no cess shall be payable in respect of electric energy, -

(i) (a) sold or supplied to the Government of India for consumption by that Government; or

(b) sold or supplied to the Government of India or a railway company for consumption in the construction, maintenance or operation of any railway administered by the Government of India:

(ii) sold or supplied in bulk to a Rural Electric Co- operative Society registered under the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961).

Explanation: For the purpose of this sub- section 'month' means such period as may be prescribed.

2. Every producer producing electrical energy by his captive power unit or diesel generator set of capacity exceeding 10 Kilowatt in total shall pay to the State

Government an energy development cess at the rate of 20 paise per unit on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month:

Provided that no cess shall be payable in respect of **electrical energy produced** by

(i) the Government of India for consumption by that Government;

(ii) the Government of India or a railway company for consumption in the construction, maintenance or operation of any railway administered by the Government of India;

(iii) the State Government for consumption by that Government;

(iv) a Rural Electric Co-operative Society registered under the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961);

(v) the local bodies including Municipal bodies and Panchayats for consumption in public street lamp or lamps in any market place or water works or any other places of public resort maintained by such bodies:

Provided further that the amount of energy development cess shall be collected by the Madhya Pradesh State Electricity Board and the amount so collected shall be made available to the State Government.”

B) Violation of Section 12(3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000, by the respondent State, reads as under:

“Section 12(3): The State Government shall consult the Commission in relation to any policy directive which it proposes to issue or any legislation is proposed to be enacted affecting the Electricity Industry it shall duly take into account the recommendation if any, given by the Commission within such reasonable time as the State Government may specify.”

C) The two competing entries in the Seventh Schedule to the Constitution are Entry 84 of List-I and Entry 53 of List-II. They are

*“List-I, Entry 84: Duties of excise on tobacco and other goods manufactured or **produced in India** except;*

- *alcoholic liquors for human consumption.*
- *opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.*

*List-II, Entry 53: **Taxes on the consumption or sale of electricity.**”*

5. Analysis

i. Whether the state government is empowered to impose a cess on the production of electrical energy, which is, covered exclusively by Entry 84 of List-I to the Seventh Schedule of the Constitution.

Explaining the challenged amended Section 3(2) of 1981 Adhiniyam:

Section 3(2), introduced by the amendment of the 1981 Adhiniyam provide for the levy of cess ‘on the electrical energy produced’ by the producers. The phrase ‘whether for sale or supply’ merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word ‘whether’ after the phrase ‘energy produced’ means that the cess would apply on units produced for whichever of the alternatives mentioned after the word ‘whether’, namely, sale or supply or consumption as the case may be. There is no reason to assume that the words used did not reflect the intention of the Legislature. The imposition envisaged is on the production of electricity units. The charge is on generation and not on the sale or consumption of electricity.

There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub-Section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under Section (1) and sub-section (2) were identical, the same language

should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject matter of levy as far as producers were concerned.

The proviso to Section 3(2) has made exception from payment of the cess 'on electrical energy produced' in five cases. This would show that the general application of Section 3(2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3(2), what would be subjected to tax would be electrical energy produced by the five categories mentioned under the proviso. Although in categories (i), (ii), (iii) and (v) the exemption is granted with reference to the utilisation of the electrical energy produced, under exception (iv). Significantly, all electrical energy produced by a Rural Electrical Co-operative Society registered under the M.P. Co-operative Societies Act, 1960 is exempted. The difference of language between the aforementioned proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 also establish that the legislative intent of using term 'production' and 'consumption or sold' in respective provisos are for different purposes. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities. However under proviso to sub-section (2) of Section 3, the exception is of electrical energy produced by specified authorities.

The intention of the Legislature was to levy cess on the production of electricity is also borne out from the Statement of Objects and Reasons which accompanied the Act which replaced the Ordinance. It says:

"With a view to impose cess on the electricity generated by the producers from their Captive Power Plants/Diesel Generating Sets for self consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (No. 1 of 1982) suitably."

There can be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State admittedly was incompetent to impose.

In accordance with the 7th Schedule of the constitution, only Union is empowered to make laws in respect to categories mentioned in List I. Entry 84 of List I allow the Union to impose tax on the production of goods. Entry 84 read as follows:

“Duties of excise on tobacco and other goods manufactured or produced in India...”

The term ‘other goods’ can be given its widest meaning and it includes production of electricity.² However under List II of the 7th Schedule state has given power, to make laws in respect to categories mentioned in List II. State Government is empowered under Entry 53 of List II to levy duties or tax on sale or consumption of electricity. Entry 53 read as follows:

“Taxes on the consumption or sale of electricity.”

Subject to the above entries, it is very evident that the constitution has not empowered the state to levy tax on production or manufacture of any goods. The terminology used in Section 3(2) of 1981 Adhiniyam reads as follows:

“Every producer producing electrical energy by his captive power unit or diesel generator set of capacity exceeding 10 Kilowatt in total shall pay to the State Government an energy development cess at the rate of 20 paise per unit on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month....”

Section 3(2) imposes a cess on the production of electricity and not on the consumption or sale.

The interpretation of the amendment by the High Court and as canvassed by the respondents that the cess was actually on sale and consumption and that production was merely the measure of tax is unacceptable. Such a construction is contrary to the express words of the statute. As to understand the intention of a provision its language should be considered. In Section 3(1) and Section 3(2) two different terms has been used, i.e. levy on Consumption and imposition on production respectively.

The Constitution Bench of the apex court has said that:

“The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be

² S. Sundaram Pillai & Ors. v.V.R. Pattabiraman & Ors. [(1985) 1 SCC 591

obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature³.

The plain language of the Section 3(2) provides that the legislature intention was to impose cess on production and not on consumption or sale, which the state is incompetent to do.

ii. Whether the Ordinance was passed without fulfilling the mandatory pre-condition of consultation with the Electricity Regulatory Commission as provided under Section 12 (3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000.

Section 3(2) of the 1981 Adhiniyam is challenged on the ground of violation of Section 12(3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (hereinafter referred to as 'Sudhar Adhiniyam'). Section 12(3) of the sudhar adhiniyam reads as follows:

“The State Government shall consult the Commission in relation to any policy directive which it proposes to issue or any legislation is proposed to be enacted affecting the Electricity Industry it shall duly take into account the recommendation if any, given by the Commission within such reasonable time as the State Government may specify.”

There can be no doubt that a State legislature cannot be fettered from exercising its plenary powers of legislation within the ambit of the legislative heads specified in the lists (II) & (III) of the 7th Schedule to the Constitution, unless the prohibition is contained in the Constitution itself.⁴

The first question, therefore, is whether Section 12(3) does in fact impose any fetter on the power of State to legislate. Sub-section (3) refers to ‘any policy directive which it proposes to issue’ or ‘any legislation proposed to be enacted affecting the Electricity Industry’. It does not stop the State from enacting the legislation but merely states that prior to any legislation being proposed, the Government shall ‘duly take into account the recommendation, if any, given by the Commission’. It was and is open to the State Legislature to repeal this law. As long it continues

³ *Madhuram Agrawal v. State of Madhya Pradesh* [(1999) 8 SCC 667]

⁴ *Maharaj Umeg Singh and Others v. The State of Bombay and Others* [(1955) (2) SCR 164]

to be operative, it must be assumed that it was not a mere exercise in futility and some effect must be given to the words of the sub-section (3) of Section 12. As per reading of the sub-section, it is a mandate to the policy makers who, before proposing legislation, are required to consult the State Regulatory Commission.

However the consequence of non-consultation in terms of Section 12 (3) of the Sudhar Adhiniyam would not be an incompetent piece of legislation but, legislation introduced in breach of a statutory requirement to consult an expert statutory body. The statutory requirement for consultation with a body of experts before proposing legislation will serve as an in-built safeguard against a challenge under Article 14 of the Constitution. Therefore not complying with the any statutory compliance wouldn't render the act unconstitutional.⁵

iii. Whether the levy of cess on production of electrical energy is violative of Article 14 of the Constitution.

The challenge that Section 3(2) of the 1981 Adhiniyam is violative of Article 14, on the ground that; the cess of 20 paise is excessive, or there was such non-consultation under Section 12 (3) of the Sudhar Adhiniyam or other grounds pertaining to Article 14 is not required to be decided. In the first place the state was not authorized to levy such cess as to levy tax on production of electricity under Section 3(2) is under the Union list and not under state list hence, ultra vires to the constitution. Therefore no question arises to the validity of the same on the ground that the cess was excessive or no consultation was made.

6. Conclusion

Doubtless, while considering a challenge to the constitutionality of a statutory provision, the Court will lean in favour of upholding its validity.⁶ But this does not mean that in this process of leaning the Court must perform verbal gymnastics to overcome a patent lack of legislative competence. Section 3(2) of the Upkar Adhiniyam, 1981 as introduced by the Amendment Act, 2001 is ultra vires the Constitution as being outside the legislative competence of the State. The constitution has demarcated the powers between the Union and the state for the purpose of making laws under the basic structure of federalism. In furtherance of the federalism, separate

⁵ *Narayanan Sankaran Mooss v. The State of Kerala and another* [(1974) 2 SCR 60]

⁶ *State of Karnataka v. Ranganatha Reddy* [(1977) 4 SCC 471]

Lists have been provided under the 7th schedule of the grundnorm. List I provides for the subjects on which only Union can enact laws and under List II only state can formulate laws. Under Entry 84 union has been given power to levy tax on production or manufacture of goods. However in the present matter state of Madhya Pradesh made an amendment by which it had levied a cess on the production of electricity.

Respondents have argued that the cess is levied on consumption or sale of electricity, which the state is allowed to impose under the Entry 54 of List II. However the argument doesn't stand valid as the term used under Section 3(2) is 'production', whereas in Section 3(1) term used is 'consumption or sale'. If the legislative intent were to levy cess under section 3(2) on 'consumption or sale' then why the term production was used. Different terminologies evidently establish that legislative intent was different for the purpose of imposition of cess. The same can be established by the proviso attached to the section 3(2), as it also uses the term 'production'. Supreme Court has also held previously that in taxation matters, plain language of the act will be enough to determine the meaning or intent behind the legislation⁷. The term 'production' and 'consumption or sale' connotes different meaning and used for different purposes. Former is used for the 'creation' of something and later is used for the 'utilization' of the creation. It will be unwise to use the term 'creation' and 'utilization' to signify the same or similar meaning.

The Supreme Court has taken the plain interpretation of language used in Section 3(2) of Upkar Adhinyam, 1981 and differentiated the term 'production' and 'consumption or sale'. In consequence of which Court held that the cess under section 3(2) was levied on the production of electricity and not on the consumption or sale of electricity. By establishing that cess was imposed on the production of electricity, state was not competent to levy such cess, therefore the amendment was ultra vires the constitution and hence void.

⁷ *Madhuram Agrawal V. State of Madhya Pradesh* [(1999) 8 SCC 667]