

C. W. MACKIE & CO., LTD.

v.

HUGH MOLAGODA, COMMISSIONER-GENERAL OF
INLAND REVENUE AND OTHERS

SUPREME COURT.

S. SHARVANANDA, C.J., ATUKORALE, J. AND TAMBIAH, J.

S. C. APPLICATION No. 85/85.

SEPTEMBER 20, 1985 AND OCTOBER 1, 1985.

Business Turnover Tax—Fundamental Right to equality—Articles 12(1) and 126(4) of Constitution—Turnover Tax Act, No. 69 of 1981—Order of Minister of Finance and Planning published in Gazette Extraordinary No. 247/11 of 1.6.1983—Excepted articles—Is order of Minister retrospective?—Is refusal to refund B.T.T. discriminatory?—Equality.

The order of the Minister of Finance and Planning (Gazette Extraordinary No. 247/11 of 1.6.1983) making certain items, amongst them rubber, excepted articles for the purpose of levy of Business Turnover Tax is not retrospective in operation. Any undertaking given by the Commissioner-General of Inland Revenue to make administrative arrangements not to recover turnover tax from rubber dealers up to 31.12.1982 would be illegal. The Commissioner-General is not empowered to grant exemption or waiver of such taxes which are legally due. There is no provision in the Turnover Tax Act, No. 69 of 1981 to refund any tax paid in accordance with the law. The only instance when a refund can be made is when a person has paid turnover tax in excess. The excess can be refunded (s.49).

In order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things:

- (1) that he has been treated differently from others,
- (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis.

Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is illegal in law. The Article 12(1) does not require the authorities to act illegally in one case because they have acted illegally in other cases. The Constitution only guarantees equal protection of the law and not equal violation of the law.

The Court cannot issue directions to the Commissioner-General to deduct the amount paid by the petitioner as B.T.T. from future taxes because that would amount to giving directions to act contrary to the law.

Before relief on a just and equitable basis can be granted under Article 126(4) the applicant must first establish infringement of his fundamental right to equality. To succeed the petitioner must establish discrimination in the performance of a lawful act.

Per Sharvananda, J. –

“Illegality and equity are not on speaking terms”.

Cases referred to:

- (1) *Venkata Subbiah Setty v. Bangalore Municipality* AIR 1968 Mysore 251.
- (2) *Ram Prasad v. Union of India* AIR 1978 Rajasthan 131.
- (3) *Chief Commissioner v. Kitty Puri* AIR 1973 Delhi 148, 153.
- (4) *Narain Dass v. Improvement Trust* AIR 1972 S.C. 865.
- (5) *Sioux City Bridge Company v. Dakota County, Nebraska* (1923) 200 U.S.441.

APPLICATION for alleged violation of the Fundamental Right of equality.

K. N. Choksy, P.C. with *Ronald Perera* for the petitioner.

Sarath Silva, D.S.C. with *A. Kathirasan, S.C.* for 1st to 3rd respondents.

November 1, 1985.

SHARVANANDA, C.J.

The petitioner is a Company carrying on business, inter alia, of a Rubber Dealer and Exporter.

After the enactment of the Turnover Tax Act, No. 69 of 1981 (herein referred to as the Act) on 12.11.81 and the regulations made thereunder, all local sales and transactions in rubber became liable for payment of Business Turnover Tax (herein referred to as B.T.T.). Prior to that Business Turnover Tax was payable on such sales and transactions under Part 12 of the Finance Act, No. 11 of 1963.

The petitioner states that it had paid a total sum of Rs. 2,109,001.43 as B.T.T. for all local sales and transactions of rubber for the period 1.4.80 up to 31.12.82.

By Gazette Extraordinary No. 247/11 dated 1.6.1983 (P1) the Minister of Finance and Planning made an order under section 8 of the Turnover Tax Act, making certain items, amongst them rubber, excepted articles for purposes of the said Act.

By letter dated 23.11.83, the petitioner's auditors wrote to the Assessor of the Turnover Tax, requesting a refund of the total sum of Rs. 2,109,001.43, which had been paid by the petitioner as Turnover Tax, on the basis that the aforesaid order made by the Minister of Finance under section 8 of the Business Turnover Tax Act, that rubber be treated as an excepted article, had retrospective operation and the Turnover Tax under that Act should never have been levied in respect of rubber and that consequently all Turnover Tax which had been paid, prior to the publication of the aforesaid Gazette Extraordinary No. 247/11 dated 1.6.1983, should be refunded. By his letter dated 25th October, 1984, the Deputy Commissioner, Unit 2, replied that the order making rubber an excepted article was not retrospective but applied only from 1st June 1983 and therefore the question of refund did not arise.

Thereafter the petitioner wrote letter dated 18.3.85 to the Commissioner-General of Inland Revenue enclosing (a) copy of a letter dated 10.1.83 sent by the Sri Lanka (All Ceylon) Rubber Dealers' Association to the Commissioner-General of Inland Revenue and

(marked P10A) (b) copy of a letter dated 24.1.83 sent by the then Commissioner-General of Inland Revenue to Secretary, Sri Lanka (All Ceylon) Rubber Dealers' Association (marked P10B) and asked for a refund of the Business Turnover Tax duly paid by it. P10B runs as follows:

Department of Inland Revenue,
Inland Revenue Building,
Colombo 2.
24th January, 1983.

The Secretary,
Sri Lanka (All Ceylon) Rubber Dealers' Association,
285, Grandpass Road,
Colombo 14.

Sir,

Turnover Tax on Rubber

I refer to your letter of 10th January, 1983.

1. Administrative arrangements will be made not to recover any turnover tax on rubber from rubber dealers up to December 31, 1982.

I confirm the position set out in your letter of 10th January, 1983 relating to the passing down of the refund of turnover tax made to Shippers.

2. The scheme of taxation of the plantation sector is being reviewed for the Budget 1983. Your representations will be given careful consideration in formulating the scheme.

Yours faithfully,
Sgd. J. A. F. Felix,
Commissioner-General of Inland Revenue.

The petitioner states that from the contents of the aforesaid letters P10A & P10B it was clear that: (a) on 5.1.83 a deputation from the Sri Lanka Rubber Dealers' Association had met His Excellency the President and the members of the Cabinet Sub-Committee on Economic Development and urged the abolition of the turnover tax on rubber and after a full discussion "on your suggestion it was agreed that you will make administrative arrangements not to recover any turnover tax on rubber from the rubber dealers up to December 31, 1982," and (b) the then Commissioner-General of Inland Revenue agreed to make administrative arrangements not to recover any

turnover tax from rubber dealers up to December 31, 1982. The petitioner further states that it was and it is not a member of the Sri Lanka (All Ceylon) Rubber Dealers' Association, and was unaware of the agreement until it wrote this letter dated 18.3.85 (P10)

The 1st respondent (the present Commissioner-General of Inland Revenue) by letter dated 20.3.83 (P11) wrote to the petitioner stating that the petitioner had paid the turnover tax as it was legally due and as there was no provision in the Turnover Tax Act for refunds as His Excellency the President had not ordered a refund of Turnover Tax already paid, no refund of the tax already paid by the petitioner could be made. The 1st respondent further added:

"Your claim then can only be considered on an extra legal basis and I have therefore forwarded your submissions together with my observations to the Secretary, Ministry of Finance, in December 1984. I have received no directions in regard to this matter thereafter. In the circumstances, I regret, I am unable to grant you a refund as requested and would advise you to pursue this matter with the Secretary, Ministry of Finance and Planning."

By letter dated 24.6.85 (P15) the Deputy Commissioner of Inland Revenue informed the petitioner that the Deputy Secretary, Treasury had not sanctioned the refund. Though this letter was dated 24.6.85 it was received by the petitioner by registered post only on 11.7.85.

By its application dated 23rd July 1985, to this court, under Article 126 of the Constitution the petitioner states that B.T.T. had not been charged or recovered from the rubber dealers who are members of the Sri Lanka (All Ceylon) Rubber Dealers' Association up to 31.12.82 and that the petitioner had paid a sum of Rs. 2,109,001.43, as B.T.T. on rubber up to date and that, in the circumstances, the 1-3rd respondents (namely Commissioner-General of Inland Revenue, Secretary, Ministry of Finance and Planning, Deputy Secretary to the Treasury respectively) had wrongfully refused to refund the said sum of money or to set it off against future, other taxes payable by the petitioner.

The petitioner complains that the denial of the refund of the turnover tax paid by it was mala fide and constitutes unlawful discrimination and that the 1-3rd respondents have in refusing to refund the turnover tax paid by the petitioner whilst not collecting or enforcing the

payment of the turnover tax from other dealers in rubber, who are similarly placed and liable to pay the said tax, acted in breach of the petitioner's constitutional right to equal treatment. The petitioner grounds his application on the plea that there has been a violation of its fundamental rights of equal protection of the law guaranteed to it by Article 12(1) of the Constitution.

The 1st respondent in his affidavit states by way of explanation of the aforesaid letter P10A and P10B that—

"The Sri Lanka (All Ceylon) Rubber Dealers' Association had made representations that certain dealers in rubber had not added the Turnover Tax to their local sales and as such encountered difficulty in making quarterly payments of such taxes. Therefore an administrative arrangement was made not to recover such taxes up to 31.12.82 under the provisions of the Act until this scheme of taxation of the plantation sector is reviewed in the Budget. The letter P10(B) is not an exemption or waiver of such taxes. The Commissioner-General of Inland Revenue is not empowered under the Act to grant any such exemption or waiver of taxes that are legally due."

The 1st respondent, whilst denying the allegation of mala fide and unlawful discrimination and violation of the petitioner's fundamental right of equality before the law and equal protection of the law further states—

- (1) that the turnover tax in respect of local sales of rubber was subject to Business Turnover Tax for the periods in respect of which the petitioner is seeking a refund... and the order P1 made by the Minister operates from the date it was published in the Gazette and has not affected the legal liability to pay taxes in respect of the period prior to such publication;
- (2) that according to the records of the Department of Inland Revenue for the period 13.11.81 to 31.12.82, twenty-five rubber dealers other than the petitioner have paid turnover tax on local sales of rubber;
- (3) that no refunds have been made to any rubber dealer in respect of Business Turnover Tax or Turnover Tax lawfully paid for the period in respect of which the petitioner is claiming a refund;

- (4) that I am not empowered by law to refund such taxes that have been lawfully paid and the decision not to refund such taxes has been made bona fide in compliance with legal provisions; and
- (5) that action will be taken to recover Turnover Taxes that are payable on local sales of rubber for the period prior to the publication of P1 from every person in default of such taxes."

Section 2 of the Turnover Tax Act provides that –

"subject to the other provisions of this Act there shall be charged for the period November 13, 1981 to December 31, 1981 and for every quarter commencing on or after January 1, 1982 from every person who –

- (a) carries on any business in Sri Lanka; a tax (hereinafter referred to as the "turnover tax") in respect of the turnover made by that person from that business....computed at such rate as the Minister may fix by order published in the Gazette."

Section 4(1) provides "the Minister may, if he is of opinion that it is essential for the economic progress of Sri Lanka, exempt by Order published in the Gazette, any business or such business, as may be specified, which is carried on by any person, from the turnover tax."

Section 10 provides "the turnover tax in respect of any quarter shall be paid not later than the fifteenth day of the month following the end of that quarter. Any tax not so paid shall be deemed to be in default and the person by whom such tax is payable.... shall be deemed to be a defaulter for the purposes of this Act."

Section 31 states that any turnover tax shall be a first charge on the assets of the defaulter.

Section 33(2) "where any turnover tax is in default, the Commissioner-General may issue a certificate to the G.A., A.G.A., Fiscal, Dy. Fiscal or tax collector containing particulars of such tax and the name of the defaulter and the officer to whom such certificate is issued shall be empowered to cause.... the tax to be recovered from the defaulter named in the certificate by seizure and sale of his movable property."

Section 33(4) "where any turnover tax is in default and the Commissioner-General is of opinion that recovery by means provided in subsection 2 is impracticable or inexpedient, he may issue a certificate to a District Court. . . . containing the particulars of such tax and the name of the person by whom the tax is payable and the court shall thereupon direct a writ of execution to issue to the fiscal authorising and requiring him to seize and sell any property movable or immovable of the defaulter."

Section 34 provides for "proceedings for recovery of turnover tax in default before a Magistrate where the Commissioner-General is of the opinion that the recovery by seizure and sale is impracticable or inexpedient."

Section 49 provides that "if it is proved to the satisfaction of the Commissioner-General by claim duly made in writing within three years after the end of a quarter that any person has paid turnover tax in excess of the amount with which he was properly chargeable for that quarter, such person shall be entitled to have refunded the amount so paid in excess."

Section 56 provides that "the Commissioner-General, Inland Revenue, shall be in charge of the Administration of this Act."

It is to be borne in mind that the only instance in which provision is made by the Act for a refund of any turnover tax that had been paid is when any person had paid turnover tax in excess of the amount with which he is properly chargeable (vide section 49). There is no provision for refund of turnover tax under any other circumstances. Counsel for the petitioner was unable to point to any provision of the Act which enables the Commissioner-General to make the refund of the sum of Rs. 2,109,001.43 which the petitioner had duly paid in discharge of its statutory liability under the Act.

But Counsel states that the petitioner is not claiming under the Act. The powers of a public official like the Commissioner-General of Inland Revenue are not unlimited. There are legal limits to his powers; his powers are spelt and defined by the Act, and he cannot act outside or in excess of the powers vested in him by the Act, he cannot exercise those powers for extraneous purposes. When any question of refund of the turnover tax paid under the Act arises his power to make such

refund has to be looked for within the framework of the Act. As pointed out earlier, the only instance of refund provided for by the Act is that referred to in section 49 of the Act, viz. turnover tax paid in excess.

It is not disputed that the sum of Rs. 2,109,001.43 claimed by the petitioner does not represent any turnover tax paid in excess of the amount with which he was properly chargeable. The said sum was what was lawfully due from it as turnover tax for the period in question and was lawfully paid by the petitioner in the discharge of its legal liability. If the petitioner's prayer is that the Commissioner-General of Inland Revenue should be directed by this court to make a refund of this Rs. 2,109,001.43 paid by the petitioner as turnover tax on rubber up to 31.12.1982, we have to look for justification outside the Act to make the refund. Counsel for petitioner invoked the jurisdiction of this court under Article 126 (4) of the Constitution to make such directions as it may deem just and equitable in respect of the petition preferred under Article 126 (2) to warrant the refund set off against future taxes.

The power of this court to issue such directions stems from proof of the infringement of a fundamental right. It is only on such an infringement that this court will have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances. This preliminary fact has to be established by the petitioner to warrant the invocation of this equitable jurisdiction. In the instant case, the petitioner pleads breach of its right to equality as the basis of its application. Article 12(1) of the Constitution provides "all persons are equal before the law and are entitled to the equal protection of the law." The essence of the right of equality guaranteed by Article 12(1) and the evil which the article seeks to guard against is the avoidance of designed and intentional hostile treatment or discrimination on the part of those entrusted with administering the law. In order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis.

But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law. I respectfully agree with what the court said in *Venkata Subbiah Setty v. Bangalore Municipality* (1).

“Article 14 (corresponding to our Article 12) cannot be understood as requiring the authorities to act illegally in one case, because they have acted illegally in other cases.”

In *Ram Prasad v. Union of India* (2) the latter court quoted with approval the above statement of the law in *Venkata Subbiah Setty v. Bangalore Municipality* (*supra*) and added—

“that the guarantee under Article 14 cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases. No one can contend that a wrong must be extended to him as well in order to satisfy the provisions of Article 14.”

In *Chief Commissioner v. Kitty Puri* (3), the court observed:

“But the respondent No. 1 cannot contend that because the society and the government have illegally shown favour to some person, then this court must compel them to commit another illegality to show favour to respondent No. 1 in the same way. This is not the meaning of equality guaranteed by Article 14 of the Constitution.”

The inequality complained of by this petitioner in this case is only an inequality in the matter of illegal treatment. The Constitution only guarantees equal protection of the law and not equal violation of law. One illegality does not justify another illegality.

In the exercise of its powers under Article 126(4) of the Constitution this court can issue a direction to a public authority or official commanding him to do his duty in accordance with the law. It cannot issue a direction to act contrary to the provisions of the law or to do something which in law, would be in excess of his powers.

In *Narain Dass v. Improvement Trust* (4), it was stated that while, administering section 56 of the Punjab Town Improvements Act, there had been hostile discrimination against the appellant, because lands under orchards belonging to persons similarly placed had been exempted whereas the appellants had been refused exemption. Rejecting the complaint of unequal treatment, the Supreme Court of India, said that –

“If the appellants had failed to bring their case within section 56 of the Act, then merely because some other party had erroneously succeeded in getting his lands exempted ostensibly under that section that by itself would not clothe the appellant with a right to secure exemption for their lands. The rule of equality before the law or of the equal protection of the laws under Article 14 could not be invoked in such a case.”

Counsel for the petitioner submitted that this court is vested with power under Article 126(4) to grant such relief of making such directions as it may deem just and equitable in the circumstances and that if the circumstances disclosed by the petition exhibit inequality of treatment this court can grant relief even at the cost of breach of the law. I do not agree with this contention. Before we come to the grant of relief under Article 126(4) the infringement of fundamental right should be first established. In this case the petitioner pleads infringement of the fundamental right to equality. To succeed in the plea the petitioner has to establish discrimination in the performance of a lawful act. The doctrine of equality is intended to advance justice according to law, by avoiding hostile discrimination. Justice is not advanced if breach of the law is to be countenanced in the process. As stated earlier Article 12 does not guarantee equal violation of the law. The petitioner's argument involves the Commissioner-General transgressing the law, doing something in excess of his powers. The making of the refund of Rs. 2,109,001.43 duly paid by the petitioner as turnover tax or setting off this amount against petitioner's future tax liability is not warranted by the provisions of the Act. The Commissioner-General does not have the legal power to do either. Even though the Commission-General had unlawfully refrained from recovering any turnover tax from other rubber dealers, the petitioner's contention involves calling upon the Commissioner-General to commit another illegality in line with the other illegality. The rule of equality before the law or equal protection of the law under Article 12(1)

cannot be invoked in such circumstances. In the exercise of its jurisdiction to grant relief or give such directions as this court may deem just and equitable, this court cannot lend its sanction or authority to any illegal act. Illegality and equity are not on speaking terms.

Counsel relied heavily on the American case of *Sioux City Bridge Company v. Dakota County, Nebraska* (5) in support of his submission that the court can depart from the requirement of the statute to ensure equality of treatment. It was held in that case that intentional and arbitrary assessment of the property of one owner for taxation at its true value, in accordance with the State Constitution and laws, while all other like property is systematically assessed much lower was a violation of the equal protection of the laws and that the owner aggrieved by the discrimination was entitled to have his assessment reduced to the common level, since "by no judicial proceeding can we compel reassessment for the great mass of such property at its true value as the law requires." The court in that case, held that the right of the tax-payer whose property alone is taxed at 100% of its true value is to have his assessment reduced to the percentage or that value for which others are taxed, namely 55%, even though this was a departure from the requirement of the statute. The conclusion was based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. That case is distinguishable from the petitioner's case. Whilst the petitioner in this case is asking for a refund of the tax which he has paid in terms of the law, in the *Sioux's case (supra)* the prayer was not for such a refund of tax already lawfully paid on the basis of full value, as required by the State Law, but to have the assessment reduced to the same proportion of its full value that other similar properties were assessed. The Supreme Court in that case determined the future liability of the appellant in keeping with the requirement of uniformity. The court stressed that it sanctioned the departure from the requirements of statute only because it was impossible to secure both the standard of the true value and the uniformity and equality required by law. The relevant statute law in that case required that there should be uniformity in the basis of assessment. It was regarded as manifestly unjust that the appellant's property should be assessed at its true value while other property in the district was assessed at 55% of its true value. I do not however

agree with the proposition of law accepted in that case that statute law can be disregarded or departed from, in order to satisfy the requirement of equality. The ratio decidendi of that case should be confined to the special facts of that case. The jurisdiction to grant such relief or make such directions "as it may deem just and equitable in the circumstances" calls for the exercise of discretion judicially. It will not be a proper exercise of judicial discretion—and a court of law will not lend its authority to such exercise—if it will conduce to carrying into effect that which is prohibited by law. The first duty of a court is to administer justice according to law, the law enacted by Parliament.

The Commissioner-General's powers and duties in relation to B.T.T. are defined by the Act. The Act is exhaustive of his powers and duties in relation to B.T.T. His statutory duty requires him to recover every rupee which might be lawfully exigible from each individual taxpayer as B.T.T. The Commissioner-General being a statutory body exercising statutory powers under statutory restrictions and conditions cannot arrogate to himself a power which the law has not endowed him with. He cannot exercise a dispensing power which the Act has not invested him with. Section 56 of the Act places the Commissioner-General in charge of the administration of the Act. Sections 31-39 of the Act provides the machinery for the recovery of such tax in default. A statutory duty is cast on the Commissioner-General of putting the machinery in motion whenever such tax is in default and it is not for him to waive recovery of the tax in circumstances not permitted by the Act. It would, therefore, appear that when the former Commissioner-General by his letter dated 24th January 1983 (P10(B)) gave an undertaking to the Sri Lanka (All Ceylon) Rubber Dealers Association that—

"Administrative arrangements will be made *not to recover* turnover tax from rubber dealers up to December 31, 1982."

He was usurping a power which he did not in law possess. The Act confers power on the Commissioner-General to recover default tax. The nature of the power is such that it is coupled with a duty. A mandatory duty is cast on him to exercise that power for the benefit of the State, whenever the circumstances warrant such exercise. It is ultra vires for him to agree to renounce that power in circumstances not warranted by the Act. No judicial countenance can be given to the assumption of the Commissioner-General that it is a matter resting on his discretion whether the B.T.T. should be recovered or not. The

claim strikes at the fundamental relationship that exists between the legislature and the executive. Charged as he was with the administration of the Turnover Tax Act, it was his bounden duty to recover all B.T.T. in default. He could not fetter his future executive action by any agreement with a defaulting tax-payer and bind himself not to recover tax in default. He could not refuse to recover such tax. It was as far back as 1688 that in England the Bill of Rights provided—

- (1) That the pretended power of suspending of laws or the execution of laws, by legal authority without consent of parliament is illegal.
- (2) That the pretended power of dispensing with laws, or the execution of laws, by regal authority, . . . is illegal.

When Parliament imposes B.T.T. it is the duty of the Commissioner-General to assess and levy it upon and from those who are liable in law.

This court, acting on constitutional principles cannot give legal recognition to the unconstitutional action of the Commissioner-General in agreeing not to recover B.T.T. which the law mandated him to recover. The petitioner's contention involves this court lending its sanction to the illegal action of the Commissioner-General. Taxes are imposed by Parliament and if a subject fails to be liable to such taxes, whether he should in fact be taxed or not is not a matter left to the discretion of the Executive. The courts cannot condone any attempt at frustration of the law by the executive. It is basic to the Constitution that the Executive should carry out the mandate of the Legislature.

The 1st respondent, the present Commissioner-General has, in his affidavit, stated that the letter P10 (B), is not an exemption or waiver of such taxes and that the Commissioner-General of Inland Revenue is not empowered under the Act to grant any such exemption or waiver of taxes that are legally due, and has assured that action will be taken to recover Turnover Taxes that are payable on local sales of rubber for the period prior to the publication of P1 from every person in default of such taxes.

The petitioner's application fails and is dismissed with costs.

ATUKORALE, J.—I agree.

THAMBIAH, J.—I agree.

Application dismissed.