
Before Jawahar Lal Gupta & Ashutosh Mohunta, JJ

PIONEER AGRO EXTRACTS LTD. AND ANOTHER,—*Petitioners*

versus

THE STATE OF PUNJAB,—*Respondent*

C.W.P. No. 992 of 2001

27th September, 2001

Constitution of India, 1950—Arts. 226 & 266, Schedule VII, List II Entries 9, 42 & 54—Punjab General Sales Tax Act, 1948—Punjab Social Security Act, 2000—S. 3—Punjab Industrial Incentive Code, 1992—State Govt. imposing Cess in the nature of a tax for social security measures on ad valorem basis @ 10% of the tax payable on all the sales & purchases of goods made under the 1948 Act—Entries 9 & 42 of List II empower the State Legislature to provide relief to the disabled, helpless & the old but do not empower to levy a tax to collect funds for that purpose—Cess not relatable to Entry 54 which permits levy of taxes on the sale or purchase of goods—Cess levied for accretion to the Social Security Fund created under the 2000 Act—Art. 266 requires that all the revenues of the State must go to the Consolidated Fund of the State—Provisions of the 2000 Act eliminating the role of the Legislature & authorising the State Government to collect the tax and utilize the money as it deems fit—Violative of Constitutional mandate—Impugned levy of Cess & creation of the Security Fund held to be ultra vires the Constitution—State Government allowing exemption from payment of sales tax under the 1992 Code—Whether the State Government can be estopped from levying any other tax—Held, no.

Held, that the object of the State to provide assistance in the form of pension to senior citizens, widows, destitute women, dependent children and disabled persons, is laudable. However, it is the case of the State itself that the impugned Cess has not been levied on the sale or purchase of goods. Thus, it is not relatable to Entry 54 of List II. Entries 9 & 42 do not empower the State Legislature to levy the Social Security Cess. Thus, the levy is ultra vires.

(Para 43)

Further held, that the Cess has been levied to provide for the establishment of the Punjab Social Security Fund. The proceeds of the levy form the 'Fund'. Under Article 266 of the Constitution, the revenues of the State must go to the Consolidated Fund and not to any other including the Social Security Fund. The Scheme of the impugned Act is contrary to the provisions of Article 266 as also the other provisions of the Constitution. It is, thus, unsustainable. Since the Cess is an integral part of the Fund, the two cannot be divorced from each other. Thus, the impugned Act is declared unconstitutional.

(Para 43)

Further held, that the common problem in the country is 'deficit'. But let us remember the old saying-'the less a government costs, the more it is worth'. A rigid economy and free spending are self-contradictory concepts. To meet the resource crunch, we have to reduce the expenses. Not to levy tax on everything.

(Para 43)

Further held, that the plea of equitable estoppel based on exemption as raised on behalf of the petitioners cannot be sustained and is, thus, rejected.

(Para 43)

H.L. Sibal, Sr. Advocate with M/s. V.K. Sibal, K.L. Goyal,
L.R. Vasudev & Reeta Kohli, Advocates—*for the
Petitioners.*

Lakhwinder Bir Singh, Additional Advocate General,
Punjab— *for the respondent.*

JUDGMENT

Jawahar Lal Gupta, J

(1) Are the provisions of the Punjab Social Security Act, 2000, ultra-vires the Constitution as there is no Entry authorizing the State Legislature to levy Cess for Social Security and the proceeds do not go to the Consolidated Fund of the State ? This is the core of the controversy in this bunch of 23 Writ Petitions. Counsel for the parties

have referred to the facts on CWP No. 992 of 2001. These may be briefly noticed.

(2) The first petitioner is a company. The second is a shareholder. The company was incorporated under the Companies Act, 1956 on 20th January, 1993. It was registered under the Punjab General Sales Tax Act, 1948 and the Central Sales Tax Act, 1956 on 16th March, 1993.

(3) The Punjab Government notified a package of incentives for the growth of Industry in the State. On 1st February, 1993, the incentives were notified as the Punjab Industrial Incentive Code 1992. A copy of this notification is at Annexure P.3 with the writ petition. One of the incentives envisaged under the Code was exemption from payment of sales tax during a period of 7 to 10 years. On 5th September, 1994, the petitioner was granted exemption. A copy of the certificate is at Annexure P. 4 with the writ petition.

(4) On 11th April, 2000, the Punjab Social Security Act (No. 11 of 2000) was enacted. By this Act, a Social Security cess was imposed. This Cess was to be levied on ad-valorem basis at the rate of 10% on the sale or purchase of goods. A copy is at Annexure P.5 with the writ petition. On 20th September, 2000, Section 3 of the Act was amended w.e.f. 11th April, 2000 by Punjab Act No. 18 of 2000. By the amendment, the rate of Cess was fixed at 10% of the sale/purchase tax, which was leviable under the provisions of the Punjab General Sales Tax Act, 1948.

(5) Aggrieved by the levy of the Cess, the petitioners in these cases have approached this court through this set of writ petitions. It is alleged that no tax can be levied or collected by the State "except by the authority of law." Entries 45 to 63 in List II of Schedule VII do not permit the levy of the impugned Cess. Thus, the levy is unconstitutional and beyond the legislative competence of the State. Even List III "does not have any entry under which the impugned Cess can be levied." Still further, the Cess violates the petitioners' right "to carry on business under Section 19(1) (g) of the Constitution." It is arbitrary. The petitioners having been granted exemption from payment of sales/purchase tax under the 1992 Code and the 1991 rules, the Cess "which is in the nature of tax on sales or purchase cannot be levied on exempted sales and purchases.....by giving it a different name and imposing it under a different act."

(6) The petitioners further allege that Entries 9 and 42 of List II and Entry 23 of the Concurrent List permit the State to enact a law with regard to Social Security. However, these entries do not permit the imposition of a Cess. Under Entry 54, "a tax/tax on sale/purchase of goods could be levied but that would have to be under the Punjab General Sales Tax Act, 1948 and the proceeds could not be apart for social security as these would have to be credited to the Consolidated Fund of the State and could be allocated for Social Security only through the Budget." The state has resorted to the device of enacting the impugned provisions "to avoid the proceeds of the Cess being credited to the Consolidated Fund of the State and the budgetary discipline imposed by the Constitution..." The action is violative of Articles 202, 203, 204 and 266 of the Constitution.

(7) The petitioners maintain that on the faith of the representation made by the State regarding exemption from payment of Sales Tax, they have invested crores of rupees and borrowed huge amounts from the Financial Institutions for setting up the projects. By way of instance, the Pioneer Agro claims to have invested Rs. 4.35 crores of its funds and raised loans to the extent of Rs. 9.48 crores. This having happened, the respondents are estopped from imposing the levy.

(8) On these premises, the petitioners pray that the impugned Act be declared unconstitutional and annulled.

(9) A written statement has been filed on behalf of the respondent by Mr. Ranjit Singh, Special Secretary, Department of Social Security etc. It is averred that the sales tax is imposed under the Punjab General Sales Tax Act, 1948. The Cess is imposed under the provisions of the impugned Act. The two are distinct levies with different aims and objects. These have been imposed under two different acts passed by the State Legislature. The Cess has been imposed for the purpose of social welfare. It is in public interest. The State Legislature was competent to enact the impugned Act. The petitioner "has been promised exemption from sales tax. The imposition of social security Cess which is not a sales tax, does not deprive the petitioner of the privilege of exemption from the sales tax. Consequently, the State has not backed out from the promise of exemption..." It has been imposed to render assistance in the form

of pension to senior citizens, widows, destitute women, dependent children and the disabled persons etc. The Cess "has not been levied on sale or purchase of goods but the formula for calculation of the Cess is that it is to be collected on the amount of tax involved in the sale and purchase of the goods. Tax on sale and purchase of the goods is to be calculated on the tax paid." The grounds raised by the petitioners have been controverted. On these premises, the respondents pray that the writ petitions be dismissed.

(10) Learned counsel for the parties have been heard. Mr. H.L. Sibal appearing for the petitioners contended that the impugned Act is beyond the legislative competence of the State Legislature. Exemption from payment of Sales Tax having been granted, the State is estopped from imposing the impugned Cess. In any case, no tax could be levied or collected for a 'Social Security Fund.' All taxes collected by the State must go to the Consolidated Fund. The impugned statute violates the constitutional mandate.

(11) Mr. Lakhwinder Bir Singh, the Additional Advocate General appeared for the State and submitted that the object for the imposition of the Cess is good. Thus, the levy is legal and should be sustained.

(12) The questions that arise for consideration are :—

- (i) Is the impugned Act *ultra-vires* the Constitution ?
- (ii) Is the State estopped from imposing the impugned Cess only because it has granted exemption from payment of sales tax ?

Reg. (I)

(13) The Act has been enacted "to provide for the establishment of the Punjab Social Security Fund with a view to render assistance in the form of pension to senior citizens, widows and destitute women, dependent children, disabled persons and to provide other similar social security measures." It embodies a measure to alleviate human hardship. To reduce the old man's misery. To provide succor to the suffering. To help the aged, decrepit, disabled, helpless and the old.

To take care of the needy. The object is laudable. It is certainly, as the aims and objects of the Act declare, a measure of social reform. It reflects the humane face of the Government.

(14) However, the crucial question is—Does the levy conform to the Constitutional requirements? Is it within the legislative competence of the State?

(15) It is apt to notice the relevant provisions of the impugned Act. These read as under :—

“2(b) ‘Fund’ means the Punjab Social Security Fund constituted under section 4 ;

(g) ‘Social Security measure’ means pension for old persons financial assistance to widows and destitute women, dependent children and disabled persons.

(2) The words and expressions used in this Act, but not defined, shall have the same meaning as assigned to them in the Punjab General Sales Tax Act, 1948.

(16) Section 3 provides for the levy of the impugned Cess. It reads as under :—

“Notwithstanding anything contained in any other law for the time being in force and subject to the rules made under this Act, there shall be levied for the purposes of this Act, a Cess on *ad-valorem* basis at the rate of ten per cent of the tax payable on all the sales and purchases of goods made under the Punjab General Sales Tax Act, 1948 effected after coming into force of this Act, except the goods declared to be of special importance in Inter-State trade or Commerce under section 14 of the Central Sales Tax Act, 1956.”
(Emphasis supplied).

4(1) There shall be constituted a Fund to be called the Punjab Social Security Fund, in the manner as may be prescribed.

(2) The Fund shall vest with the Government.

5(1) The Fund shall be applied for the purposes as may be prescribed.

(2) Without prejudice to the generality of the provision of sub-section (1), the Fund shall be applied for the following purposes, namesly :-

- (a) Old age pension scheme;
- (b) Financial assistance to the widows & destitute women;
- (c) Financial assistance to the dependent children;
- (d) Financial assistance to the disabled persons; and
- (e) Any other social security measures incidental to the above purpose as approved by the Government :
Provided that the Fund shall be utilized in order for the purposes specified in clauses (a) to (e).

6(1) The authorities empowered to assess, re-assess or collect tax under the Punjab General Sales Tax Act, 1948, shall assess, re-assess or collect the Cess levied under this Act from a dealer registered under the Punjab General Sales Tax Act, 1948, at the stage specified under the Punjab General Sales Tax Act, 1948.

(2) The Cess levied under sub-section (1) shall be collected in such manner, as may be prescribed.

(3) The authorities referred to in sub-section (1) shall deposit the proceeds of Cess collected from a dealer either in cash or by cheque in a specified account to be opened in a Scheduled Bank and operated by the Government.

8(1) The proceeds of Cess collected under sub-section (1) of section 6, shall be deposited in the Fund within such period from the date of collection of such Cess, as may be prescribed.

(2) The Government shall open account(s) in any of the Scheduled Banks for managing and carrying out the transactions with respect to the Fund.

(3) The Government may—

- (i) after meeting their obligations as specified in sub-section (2) of section 5, invest the surplus Fund including the Government securities in such manner, as it may deem fit;

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- (ii) constitute one or more advisory committees or engage suitable advisors to advise the Government for the efficient utilization of the Fund;
 - (iii) enter into and perform all such agreements, as it may think necessary or expedient for performing any of its functions; and
 - (iv) perform such other acts, as it may think necessary or expedient for the proper conduct of its functions and for carrying into effect the purposes of the Act.

9. The Government may borrow and raise money in such manner as it thinks fit and secure the repayment of any money borrowed or raised, by mortgage, charge, standard security, lien or other security upon the whole or any part of Government assets (whether present or future) and also by a similar mortgage, charge, standard security, lien or security, guarantee for the performance of any obligation or liability, it may undertake or which may become binding on it.

10. The accounts of the Fund shall be audited by the Local Fund Examiner, Punjab”.

(17) Section 12 empowers the State Government to make Rules for carrying out the purposes of the Act. However, no rules were brought to our notice.

(18) A perusal of the above provisions shows that the Cess has been imposed “for the purposes” of the Act. It has to be charged “on *ad-valorem* basis at the rate of 10% of the tax payable on all the sales and purchases of goods made under the Punjab General Sales Tax Act, 1948....” The proceeds of the Cess shall go into the Punjab Social Security Fund. It shall be used for the payment of old-age pension and financial assistance to the needy or “as may be prescribed.” The Cess has to be levied and collected by the authorities empowered under the Punjab General Sales Tax Act, 1948. The manner of collection can be prescribed under the rules. The proceeds of the Cess have to be deposited in “a specified account in a Scheduled Bank.” This ‘account’ is ‘operated by the Government.’ The deposit may be made in the Fund “within such period as may be prescribed.” During the interregnum the government has the money at its disposal.

The Government has been empowered to invest the surplus funds "in such manner as it may deem fit." It can constitute advisory committees to advise it regarding the efficient utilization of the fund. Under Section 9, the Government has been empowered to borrow and raise money from the Fund providing security or mortgage etc. for any purpose. The accounts have to be audited by the Local Fund Examiner, Punjab.

(19) Mr. Sibal contended that the legislation is beyond the competence of the State Legislature. Is it so ?

(20) Cess, Fee and Tax constitute a common species. There is no 'generic difference' between one and the other. All are 'compulsory exactions of money by Public authorities.' The only difference lies in the fact that while a tax 'need not be supported by any consideration of service... a fee is levied essentially for services rendered...' In case of fee, there is necessarily an element of quid pro quo between the person who pays and the public authority that levies.

(21) In the present case, it has not been pleaded or even remotely suggested at the hearing that the levy is a fee. There is not even an averment that there is any element of quid pro quo. No assertion regarding any service to the payer has been made at any stage. The impugned 'Cess' is admittedly a tax.

(22) No tax can be levied or collected except by the authority of law. Article 265 of the Constitution makes a specific provision in this behalf. However, the law must be validly enacted. The statute should be within the legislative competence of the legislature imposing the levy. It must not contravene any provision of the Constitution. Thus, the real question is - Was the legislature competent to impose the impugned levy ? That too for accretion to the Social Security Fund ?

(23) Mr. Sibal referred to entries 9 and 42 of list II. The first of these authorizes the State legislature to enact a law providing for "Relief of the disabled and unemployable." Entry 42 empowers the State to legislate with regard to "pension payable by the state or out of the Consolidated Fund of the State."

(24) The entries are legislative heads. These provides the 'fields' of legislation. These have to be liberally construed. Each has to be given the widest scope. Yet, there is a well-recognized limitation.

Each Entry does not permit the levy of tax. Taxation is a distinct matter.' It cannot be deduced from a general Entry as an 'ancillary power.' To illustrate: the power to provide relief to the disabled or for grant of pension does not include the power to levy tax for that purpose. Entries 1 to 44 form one group. These embody the subjects on which the State Legislature can legislate. However, it cannot levy a tax while enacting a law relating to any of the fields covered by these Entries. Similarly, Entries 45 to 63 form another group and provide for the levy of taxes by the State legislature. Entry 66 empowers the State to levy fees.

(25) Entries 9 and 42 are not a part of the taxing provisions. Thus, the State legislature can make provision for "Relief of the disabled ..." and "State Pensions." However, while enacting such a law, it cannot levy a tax to collect funds for providing relief to the disabled or payment of state pensions. Thus, the impugned levy cannot be sustained with reference to these Entries.

(26) Is there any other source of power? Are the provisions of the Act referable to any Entry in List II authorizing the impugned levy? Reference has not been made to any taxing Entry in List III.

(27) A perusal of Section 3 of the Act shows that it is in essence a levy on the sale and purchase of goods. The Cess, which is in the nature of a tax, is charged at the rate of 10% of the sales tax or 1% of the value of the goods sold or purchased. Thus, it may be possible to say that the Cess is essentially a levy on the sale or purchase of goods. It should fall squarely within the ambit of Entry 54 which permits levy of "taxes on the sale or purchase of goods ..." Yet, the question that arises is - Can the legislature levy Sales Tax and the impugned Cess on the same transaction? Is it a tax on tax?

(28) The respondent State has categorically pleaded in the written statement that the "Cess has not been levied on sale or purchase of the goods." Still further, it is not the case of the respondents that the levy is a 'Surcharge' on the Sales Tax. Thus, the impugned levy cannot be sustained with reference to Entry 54.

(29) Despite the above, let us assume for the sake of argument that the levy is referable to Entry 54. Yet, it is not the end of the matter. A perusal of S. 3 of the Act shows that the Cess is levied "for

the purposes of this Act.” It is to be collected for accretion to the Social Security Fund. It is an integral part of the Fund. In fact, the proceeds have to be deposited “in a specified account to be opened in a Scheduled Bank and operated by the Government.” This is the requirement of S. 6(3). Is this in conformity with the provisions of the Constitution ?

(30) Art. 266 *inter-alia* provides that the “revenues received by the Government of a State...shall form ‘the Consolidated Fund of the State.’” Under Clause (3) “no moneys out of the Consolidated Fund...shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.” Under Article 283(2), “the custody of the Consolidated Fund...and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made the Legislature of the State...” Then by virtue of the provisions in Chapter III and more particularly of Articles 202 to 204, the “appropriation out of the Consolidated Fund of the State” has to be voted by the legislature. The executive can only spend what the legislature sanctions. The ‘Consolidated Fund’ cannot be operated by the government as it may choose to. The Constitution does not confer that freedom on the executive.

(31) Thus, the mandate of the Constitution is clear. The scheme is simple. All revenues collected by the State as taxes must go into the ‘Consolidated Fund of the State.’ These must be utilized to meet the grants made by the Assembly. No money can be withdrawn from the Consolidated Fund ‘except under appropriation made by law passed’ in accordance with the provisions of Article 204. The Appropriation Act gives legal sanction to the grants voted by the Legislature. The money has to be utilized in accordance with the directions of the legislature. The revenue collected by the State has to be subjected to the democratic process of demand and debate in the Assembly. The amount can then be utilized by the government in accordance with the allocation made by the legislature. Not otherwise. The reason is simple. The taxpayer’s money is in trust with the State. It should be spent in accordance with the will of the elected representatives of the people. Thus, the ‘revenues’ cannot go into any fund like the ‘Social Security Fund.’ The money cannot be drawn or utilized by the executive at its will and pleasure.

(32) It is true that the tax is collected by the local authorities as well. Like Octroi. It is levied in accordance with the relevant law on the 'entry of goods into a local area for consumption, use or sale therein.' It is credited to the funds of the local authority. It is used by the authority for the 'purpose of local self government.' But the Octroi or the House tax collected by the Municipal Council does not form a part of the 'revenues of the State.' It is different from the Tax collected by the State. Articles 243W and 243X are clear. Consequently, the Constitution does not require that it should form a part of the Consolidated Fund of the State. It is on this basis that the levy of Cess for the benefit of local authorities has been sustained by courts. Like the payment of Cess under the Madras Commercial Crops Markets Act, 1933, for the purchase of groundnuts in '*Shanmugha Oil Mill vs. Market Committee* (1),. Such instances can be multiplied.

(33) What is the position in the present case ?

(34) The money collected by the State as Cess goes into "the Punjab Social Security Fund." It "vests with the Government." It can be kept in a Scheduled Bank. The time within which the proceeds of Cess shall be deposited in the Fund has to be laid down by the government in the Rules. After deposit, the account is to be operated by the government. The surplus can be invested by the government 'in such manner as it may deem fit.' It can borrow from the Fund against security. The accounts of the Fund are to be audited by the Local Fund Examiner only. Not by the Comptroller and the Auditor General or the Accountant General. The Government and its officers have protection against prosecution and other legal proceedings for action taken in good faith. The Statute also authorizes the government to make Rules to carry out the purposes of the Act.

(35) Thus, the State Government can collect the tax and utilize the money as it deems fit. The executive has complete control. The role of the Legislature is completely eliminated. In this process, the constitutional mandate is clearly violated.

(36) It is undoubtedly true, as was observed by Justice Holmes that legislature must be allowed 'some play in the joints.' In the words of Justice Frankfurter "there are good reasons for judicial self-restraint

if not judicial deference to legislative judgment.” Yet, despite the desire to ‘reconstruct’ and the reluctance to ‘destory’, we find no reason to justifiably overlook the violation of the constitutional mandate.

(37) In view of the above, it is held that the levy of the Cess and creation of the Fund are *ultra vires* the Constitution. The first question is, accordingly, answered in favour of the petitioners.

Reg. (ii)

(38) Mr. Sibal submitted that the State has granted exemption from payment of Sales Tax as also the ‘Surcharge’ to attract ‘Industry.’ Then it has devised a method to collect funds for populist measures like ‘Sangat Darshans.’ The Counsel contended that having granted exemption from payment of sales tax, the State is estopped from imposing the impunged Cess. Is it so ?

(39) The sales tax is a levy on the sale and purchase of goods. It forms a part of the revenues of the State. In accordance with the policy of granting incentives, the State has allowed exemption to the petitioners. However, this cannot, by itself, preclude the State from levying other taxes. It appears difficult to invoke the principal of ‘equitable estoppel’ as enunciated in the case of *M/S Moti Lal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh* (2), and to say that the State was estopped from levying the impunged Cess. Still further, it is the state’s own case (in Para 5 of the written statement in CWP No. 1306 of 2001) that “the imposition of the Social Security Cess which is not Sales Tax... does not deprive the petitioner of the privilege of exemption from Sales Tax.”

(40) Thus, the exemption as granted to the petitioner is from payment of sales tax. That remains unaffected.

(41) There is another aspect of the matter. Sales Tax is levied on the sale and purchase of goods. Every dealer does not have exemption from payment of tax. The grant of exemption to some dealers cannot deprive the State Legislature of its plenary power to legislate. Thus, the contention cannot be accepted.

(42) No other point was raised.

(43) In view of the above, it is held that—

- (i) The object of the State to provide assistance in the form of pension to senior citizens, widows, destitute women, dependent children and disabled persons, is laudable. However, it is the case of the State itself that the impugned “Cess has not been levied on the sale or purchase of goods.” Thus, it is not relatable to Entry 54 of List II. Entries 9 and 42 do not empower the State Legislature to levy the Social Security Cess. Thus, the levy is *ultra vires*.
- (ii) The Cess has been levied to provide for the establishment of the Punjab Social Security Fund. The proceeds of the levy form the ‘Fund.’ Under Article 266 of the Constitution, the revenues of the State must go to the Consolidated Fund and not to any other including the Social Security Fund. The Scheme of the impugned Act is contrary to the provisions of Article 266 as also the other provisions of the Constitution. It is, thus, unsustainable. Since the Cess is an integral part of the Fund, the two cannot be divorced from each other. Thus, the impugned Act is declared unconstitutional.
- (iii) The common problem in the country is ‘deficit’. But let us remember the old saying — ‘the less a government costs, the more it is worth.’ A rigid economy and free spending are self-contradictory concepts. To meet the resource crunch, we have to reduce the expenses. Not to levy tax on everything.
- (iv) In the circumstances of these cases, the plea of equitable estoppel based on exemption as raised on behalf of the petitioners cannot be sustained and is, thus, rejected.

(44) Accordingly, the Writ Petitions are allowed. However, the parties are left to bear their own costs.
