

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 11.11.2009

+ WP (C) No.1357 of 2007

SHIVA KANT JHA ...PETITIONER

Through: In person.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS

Through: Mr. A.S. Chandhiok, ASG with
Ms. Geetika Panwar,
Ms. Shikha Bhardwaj &
Mr. S.K. Dubey, Advocates
for Respondents 1 & 2.

Mr. Sanjeev Sabharwal, Advocate
for the Income Tax
Department/R-3.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J. (Oral)

1. The present petition under Article 226 of the Constitution styled as a Public Interest Litigation has been filed seeking multifarious reliefs including of declaration arising from the grievance of the petitioner about the mode and manner in which the governance of international treaties are sought to be made applicable to the citizens of India. It is the case of

the petitioner, who appears in person, that the powers and authority of the Central Government are being abused and are sought to be exercised in violation of the constitutional mandate by entering into Double Taxation Avoidance Agreements (more specifically in relation to the provisions relating to Mutual Agreement Procedure), ratification and adoption of Uruguay Round Final Act (WTO Treaty) and the provisions relating to the MAP set forth in the CBDT's Instruction as also under the Income Tax Rules 1962.

2. The petitioner took us through the pleadings and the various synopsis filed by him to firstly contend that in matters of taxation the mode adopted by the Central Government was impermissible. The petitioner is, however, conscious of the observations made by the Supreme Court in Union of India & Anr. Vs. Azadi Bachao Andolan & Anr. (2004) 10 SCC 1 pointed out by learned counsel for the respondents in which proceedings he had appeared. The question of Double Taxation Avoidance Treaties specifically forms subject matter of discussion and enunciation of law in that behalf *inter alia* is in the following paragraphs:

“19. When it comes to fiscal treaties dealing with double taxation avoidance, different countries have varying procedures. In the United States such a treaty becomes a part of municipal law upon ratification by the Senate. In the United Kingdom such a treaty would have to be endorsed by an order made by the Queen-in-Council. Since in India such a treaty would have to be translated into an Act of Parliament, a procedure which would be time-consuming and cumbersome, a special procedure was evolved by enacting Section 90 of the Act.

20. The purpose of Section 90 becomes clear by reference to its legislative history. Section 49-A of the Income Tax Act, 1922 enabled the Central Government

to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income on which, both income tax (including supertax) under the Act and income tax in that country, under the Income Tax Act and the corresponding law in force in that country, had been paid. The Central Government could make such provisions as necessary for implementing the agreement by notification in the Official Gazette. When the Income Tax Act, 1961 was introduced, Section 90 contained therein initially was a reproduction of Section 49-A of the 1922 Act. The Finance Act, 1972 (Act 16 of 1972) modified Section 90 and brought it into force with effect from 1-4-1972. The object and scope of the substitution was explained by a circular of the Central Board of Direct Taxes (No. 108 dated 20-3-1973) as to empower the Central Government to enter into agreements with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the Tax Authorities to exchange information for the prevention of evasion or avoidance of taxes on income or for investigation of cases involving tax evasion or avoidance or for recovery of taxes in foreign countries on a reciprocal basis. In 1991, the existing Section 90 was renumbered as sub-section (1) and sub-section (2) was inserted by the Finance Act, 1991 with retrospective effect from 1-4-1972. CBDT Circular No. 621 dated 19-12-1991 explains its purpose as follows:

“43. Taxation of foreign companies and other non-resident taxpayers.—Tax treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a level lower than what has been provided in the tax treaty.

43.1. Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-à-vis other taxpayers, Section 90 of the Income Tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial.”

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30. Though a number of interconnected and diffused arguments were addressed, broadly, the argument of the respondents appears to be as follows: by reason of Article 265 of the Constitution, no tax can be levied or collected except by authority of law. The authority to levy tax or grant exemption therefrom vests absolutely in Parliament and no other body, howsoever high, can exercise such power. Once Parliament has enacted the Income Tax Act, taxes must be levied and collected in accordance therewith and no person has the power to grant any exemption therefrom. The treaty-making power under Article 73 is confined only to such matters as would not fall within the province of Article 265. With respect to fiscal treaties, the contention is that they cannot be enforced in contravention of the provisions of the Income Tax Act, unless Parliament has made an enabling law in support. The respondents highlighted the provisions of the OECD Models with regard to tax treaties and how tax treaties were enunciated, signed and implemented in America, Britain and other countries. Placing reliance on the observations of Kier and Lawson ⁸ it was contended that in England it has been recognised that “there are, however, two limits to its capacity; it cannot legislate and it cannot tax without the concurrence of Parliament”. It is urged that the situation is the same in India; that unless there is a specific exemption granted by Parliament, it is not open for the Central Government to grant any exemption from the tax payable under the Income Tax Act.

31. In our view, the contention is wholly misconceived. Section 90, as we have already noticed (including its precursor under the 1922 Act), was brought on the statute-book precisely to enable the executive to negotiate DTAC and quickly implement it. Even accepting the contention of the respondents that the powers exercised by the Central Government under Section 90 are delegated powers of legislation, we are unable to see as to why a delegatee of legislative power in all cases has no power to grant exemption. There are provisions galore in statutes made by Parliament and State Legislatures wherein the power of conditional or unconditional exemption from the provisions of the statutes are expressly delegated to the executive. For example, even in fiscal legislation like the Central Excise Act and Sales Tax Act, there are provisions for exemption from the levy of tax. ⁹ Therefore, we are unable to accept the contention that the delegatee of a legislative power cannot exercise the power of exemption in a fiscal statute.”

3. The petitioner, thus, fairly states that though the aspect sought to be urged by him is covered by these observations his grievance is that the enunciation of law in this behalf is

not correct. The petitioner informs us that his endeavour to seek review of this judgement and then file a curative petition has been unsuccessful. We have put to the petitioner that once the aspect of mode and manner of implementation of treaties relating to double taxation forms subject matter of the aforesaid adjudication, it is not permissible for us to go into this question and the hierarchy of courts must be respected where the enunciation of law by the highest court is binding on us. The petitioner states that these are in the nature of observations which are obiter and does not reflect the ratio. We are unable to accept this plea on a bare reading of the judgement.

4. The second aspect urged by the petitioner arises from the plea relating to the procedure to be adopted by the Government of India while entering into treaties. It is the submission of the petitioner that the requirement is of such treaties to be placed in Parliament and approval sought once they have a ramification on the various aspects of municipal governance of the country. Petitioner submits that this issue was not really discussed in Union of India & Anr. Vs. Azadi Bachao Andolan & Anr. case (supra) though there are some stray observations. The observations which are sought to be relied upon by the respondents are contained in para 18 of the judgement:

“18. The power of entering into a treaty is an inherent part of the sovereign power of the State. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for the entry into an international

treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is, qua the State, competent to represent the State in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

5. A perusal of the aforesaid shows that the highest court has taken a categorical view that in matters of entering into a treaty, the executive power of the Union is vested in the President to be exercised in accordance with the Constitution there being no mandate to lay the same before the Parliament. Such treaties by their own force are not binding on Indian nationals and the power to legislate in respect of treaties lies with the Parliament whereupon legislation can be made. Once again, we are unable to persuade ourselves to agree with the petitioner that the observations can be categorized as stray observations.
6. We may note that learned counsels for the respondents both in the counter affidavit and only before us have sought to canvas a case of gross delay and laches on the part of the petitioner in approaching the Court and thus the petitioner being disentitled to the adjudication of his grievance. The answer to this on behalf of the petitioner is that this is continuing cause of action and especially where

no bar of limitation arises nothing precludes the Court from examining the same. This aspect we are not required to analyze in view of our opinion that by and large the matters sought to be raised by the petitioner are covered by observations of the Supreme Court albeit not reflecting the correct legal position as per the petitioner.

7. One of the serious challenges sought to be raised by the petitioner is that the system of governance in our country has to be satisfied on the touchstone of the Constitution. The Parliament, the Executive and the Judiciary are all creations of the Constitution which is supreme. It is, thus, the submission of the petitioner that it can never be pleaded on behalf of the respondents or portrayed in different forums that this basic touchstone is not to be satisfied while entering into international treaties. In this behalf the petitioner seeks to refer to the principle of "*Reductio ad absurdum*" to canvas the proposition that where one assumes a claim for the sake of argument and derive an absurd or ridiculous outcome then the natural conclusion is that the original claim must have been wrong as it led to an absurd result. As an illustration the petitioner submits that could an executive through a treaty establish any highest legislative or judicial body for India in some foreign land whose writ would run on the constitutional organs of the Republic India or could as per treaty terms our President or the Prime Minister be bidden to stand on the Bench at the command of any foreign power. The

petitioner has also referred to the report published as “Report of the Peoples’ Commission on GATT” on the constitutional implications of the Final Act embodying the results of Uruguay Round on Multilateral Trade Negotiations.

8. The petitioner has drawn our attention to Chapter 7 of this report which deals with the Constitutionality of Final Act. It is the submission of the petitioner that due weightage ought to be given to this report compiled by three retired Judges of the Supreme Court and one retired Chief Justice of the High Court. The various aspects of the Constitution including in respect of federalism have been emphasized in this chapter. The Constitution like that of the US has been observed to have remarkable feature of review by judiciary as a basic structure of the Constitution and thus it has been observed that GATT Rules cannot supplant or supplement or even dilute the hard constitutional law of India with the Supreme Court of India remaining supreme and its writ not being whittled down by agreements entered into by the Union of India with other countries. There is also a discussion about the advisability of the treaty power of Central Government to submit to the Parliament lest Parliament be reduced to a powerless talking shop by a shrewd cabinet which presents a *fait accompli* to the House which may bark but not bite.
9. In our considered view, the admissibility of a procedure to be devised where such a treaty is to be placed before the

Parliament or requiring its approval is a matter to be left to the Government and the Parliament. It would not be within the domain of exercise of writ jurisdiction under Article 226 of the Constitution of India of this Court to issue any direction in that behalf. However, insofar as the fundamental question of any act of the Government in pursuance to an international treaty resulting in violation of any provision of the Constitution or not satisfying the test of being in compliance with the doctrine of basic structure is concerned, the respondents do not even dispute the said position and have drawn our attention to their counter affidavit where while dealing with the treaty making power of the Union executive and the Parliament it has been stated in para 1 “it is humbly submitted that the Government of India can only enter into a treaty in conformity with the constitutional provisions laid down in the Constitution of India”.

10. The submission of learned counsels for the respondents is that the petition is predicated on a hypothetical exercise seeking declaration in respect of various aspects for which no declaration is required. It is their contention that this Court is not required to declare as an abstract proposition that the provisions of Constitution of India must be adhered to because there is no lis in this behalf. It is submitted that no one can dispute that the Constitution of India is supreme.

11. The stand of the respondents, thus, is that WTO Agreement incorporates and carries forward the concept of most favoured treatment from all other member countries and is in furtherance of the consistent support by India of an orderly multilateral trading system. This is stated to be beneficial to the developing countries whose economic leverage is limited. Insofar as making a treaty, ratifying a treaty and acceding to the treaty is concerned, the same has to be in conformity with the powers conferred under Articles 73 and 246 of the Constitution of India. It is only when the executive places before the Parliament a law to be enacted, the same comes within the legislative competence domain and the Parliament is required to approve the law. The relevant provisions are reproduced hereinunder:

“73. (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

- (a) to the matters with respect to which Parliament has power to make laws; and
- (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in subclause

(a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State 1*** to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

.....

246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State ^{1***} also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State ^{1***} has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included ²[in a State] notwithstanding that such matter is a matter enumerated in the State List."

12. It is, thus, submitted that the executive power of the Union extends to matters to exercise of rights by virtue of any treaty or agreement with by virtue of Article 73 (1) (b) of the Constitution of India but that is "subject of course to constitutional limitations".
13. In our considered view, the aforesaid correctly set out the legal position as enunciated by the Supreme Court with which we are bound. The respondents have correctly admitted the legal position, the petitioner canvassing the same but having doubt over the stand of the respondents that in order to enact any law in pursuance to an international treaty, the same has to be placed before the Parliament in accordance with the aforesaid provisions and that even an exercise of executive function to enter into an

international treaty under Article 73 of the Constitution of India cannot be *de hors* the Constitution. The doubt in the mind of the petitioner should no more remain especially in view of what we have discussed hereinabove.

14. The petitioner, of course, has placed a lot of theoretical material before us which can possibly form the basis of an academic discussion or refers to a particular thinking on the polity of the nation. The same, however, is not a matter of adjudication arising from any lis and refers to an economic and political philosophy.
15. The aforesaid being the only aspects canvassed, the petitioner expressing the satisfaction with his pleas canvassed being discussed, we dispose of the writ petition with the aforesaid observations.

SANJAY KISHAN KAUL, J.

NOVEMBER 11, 2009
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AJIT BHARIHOKE, J.