

(1985) 07 AHC CK 0011
In the Allahabad High Court
Case No : Writ Petition No. 305 of 1985 (Tax)

Agra Bartan Bhandar Private Limited and Another	APPELLANT
Vs	
State of Uttar Pradesh and Others	RESPONDENT

Date of Decision : 12-07-1985

Acts Referred:

Constitution of India, 1950 — Article 141, 226

Citation : (1987) 65 STC 336

Hon'ble Judges : V.N. Khare, J; V.K. Mehrotra, J

Bench : Division Bench

Advocate : Bharatji Agrawal, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

V.K. Mehrotra, J.—On May 14, 1985, we had passed an interim order in this case after hearing Sri Vidya Bhushan Upadhyaya, learned standing counsel for the State of Uttar Pradesh. We had mentioned in that order that we would give our reasons for making the interim order later. We are doing so now.

2. The petition was presented in the court on May 8, 1985. The petitioners are Agra Bartan Bhandar Pvt. Ltd. and Anil Kumar Jain, its Director. The challenge in the petition is to the seizure of the goods from the shop of the petitioners on August 17, 1984 and to the demand of an amount representing 40 per cent of its value by way of security before its release. The petitioners have been impressing upon the respondents (namely, State of Uttar Pradesh; Sales Tax Officer, Mobile Squad, Agra and Deputy Commissioner, Sales Tax, Agra) the desirability of releasing the goods unconditionally.

3. Annexure 1 to the writ petition is a copy of the order seizing the goods. It recites that the survey that was made of the business premises/godown of the petitioners on August 17, 1984, revealed that goods substantially in excess of stocks mentioned in the books of account were found in stock. They could not be

explained by the petitioners to have been purchased within the State of Uttar Pradesh within the prescribed period nor was any reply given by the petitioners in regard to the irregularities pointed out in the show cause notice due to which the officer (Sales Tax Officer) had reason to believe that the entries of sale and purchase in the account books were doubtful in nature. Further that the presence of excess stock was indicative of the fact that there was intention to evade tax. The goods, according to the order, could be released only on furnishing security for 40 per cent of the value of the goods. Annexures 2, 3, 4 and 11 to the petition are communications addressed to the Sales Tax Commissioner, U.P., on behalf of the petitioners on August 18, September 8, September 11, 1984 and April 24, 1985, requesting him to look into the matter and for the release of the goods without any security. Annexure 5 is the communication addressed by the petition-ecto the Assistant Commissioner (Executive), Sales Tax, Agra, of September 20, 1984, with the same request. Annexure 6 is the letter of the same date addressed to the Sales Tax Officer, Mobile Squad, seeking unconditional release of the goods. On September 21, 1984 and thereafter, on September 28, 1984, the Assistant Commissioner, Sales Tax, wrote back to the petitioners, through annexures 7 and 10 to the petition, to get in touch with the Sales Tax Officer, Mobile Squad, Agra, for necessary action. These letters are in reply to a telegram and an application addressed by the petitioner to the Assistant Commissioner for release of the goods. Annexure 9 is a copy of a communication sent to the petitioner on September 22/25, 1984, by the Sales Tax Officer. In it the petitioner has been intimated that there was a survey made of its business premises by the Special Investigation Branch on August 17, 1984, whereafter goods not mentioned in the books of account of the petitioners and which had been found to have been brought from outside the State of Uttar Pradesh, were seized and directed to be released on furnishing security to the extent of 40 per cent of the value of the goods. No security had been furnished and in case it was not done forthwith, these goods, which had been entrusted to the supurdagi of the petitioners, would be removed by the department therefrom and kept in its own godown. It was indicated in the letter that the amount of security should be furnished and the goods got released thereafter else further action will follow.

4. In the writ petition, allegations about the wanton and disorderly conduct of the opposite parties, correctness of the accounts and the stocks and the inactivity of the departmental officers in respect of the representations made by the petitioners for release of the goods have been made. It has also been mentioned that in Writ Petition No. 971 of 1984 (A.K. International v. State of U.P. [1986] 60 STC 83 a Division Bench of this Court ruled on December 10, 1984, that in a case like the present where the breach, if any, could be of the nature contemplated by Section 15-A(1)(d) of the U.P. Sales Tax Act, the maximum penalty leviable would be one and one-half times of the amount of tax which would have been avoided so that Security to the extent of 40 per cent of the value of the goods could not be demanded. It has also been mentioned that on

the facts mentioned in the seizure order, the breach could not be attributed to Clause (o) or (q) of Section 15-A(1) so that the penalty to the extent of 40 per cent of the value of the goods contemplated by Clause (ix) of that section was not attracted at all.

5. We may (reproduce) Section 16-A(1) here. It is in these terms :

16-A. Penalties in certain cases.-(1) If the assessing authority is satisfied that any dealer or other person-

(a) has, without reasonable cause, failed to furnish the return of his turnover or to furnish it within the time allowed and in the manner prescribed, or to deposit the tax due under this Act before furnishing the return or along with the return, as required under the provisions of this Act; or

(b) has submitted a false return of turnover under this Act; or

(c) has concealed the particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover ; or

(d) has maintained or produced false accounts, registers or documents ; or

(e) has, without reasonable cause, failed to pay, within the time allowed, the tax assessed on him ; or

(f) fails to issue a bill or cash memo, in accordance with the provisions of Sub-section (4) of Section 8-A; or

(g) being liable for registration under this Act, carries on or continues to carry on business without obtaining registration or without furnishing the security demanded u/s 8-C; or

(h) makes a false verification or declaration on an application for registration or in connection with any other proceeding under this Act ; or

(i) refuses to permit or refuses or neglects to produce for inspection or examination any book, document or account, or refuses to allow copies to be taken in accordance with the provisions of Section 13 ; or

(j) obstructs or prevents an officer empowered u/s 13 or the officer-in-charge of a check post or barrier established u/s 28 from performing any of his functions under this Act; or

(k) refuses or neglects to furnish any information which may be in his knowledge or possession and which he has been required to furnish for the purposes of this Act, or furnishes information which is false in any material particulars ; or

(1) issues or furnishes a false certificate or declaration by reason of which a tax on sale or purchase ceases to be leviable under this Act or the Rules made thereunder ; or

(m) makes use of a prescribed form of declaration or certificate which has not

been obtained by him or by his principal or agent in accordance with the provisions of this Act or the Rules made thereunder ; or

(n) closes or leaves his place of business with a view to prevent inspection under this Act or the Rules made thereunder ; or

(O) imports or transports, or attempts to import or transport or abets the import or transport of any goods in contravention of the provisions of Section 28-A; or

(p) fails or refuses to stop or to keep stationary his vehicle or vessel when asked to do so by the officer-in-charge of a check post or barrier established u/s 28 or by an officer empowered u/s 13 ; or

(q) fails to obtain transit pass or to deliver the same, as provided in Section 28-B; or

(qq) realises any amount as sales tax, or purchase tax, where no sales tax or purchase tax is legally payable or in excess of the amount of tax legally payable under this Act; or

(r) otherwise acts in contravention of the provisions of this Act or the Rules made thereunder ;

it may, after such inquiry, if any, as it may deem necessary, direct that such dealer or person shall pay, by way of penalty, in addition to the tax, if any, payable by him,-

(i) in a case referred to in Clause (a), Clause (b) or Clause (e), a sum not less than ten per cent, but not exceeding twenty-five per cent of the tax due if the tax due is up to ten thousand rupees and fifty per cent of the tax due if the tax due is above ten thousand rupees ;

(ii) in a case referred to in Clause (c), Clause (d), Clause (1) or Clause (m), a sum not less than fifty per cent, but not exceeding one and one half times, of the amount of tax which would thereby have been avoided ;

(iii) in a case referred to in Clause (f), a sum of rupees fifty or double the amount of tax involved, whichever is greater, for the first default and rupees one hundred or four times the amount of tax involved, whichever is greater, for the second and each subsequent default;

(iv) in a case referred to in Clause (g), a sum of rupees one hundred for each month or part thereof for the default during the first three months and rupees five hundred for every month or part thereof after the first three months during which the default continues :

Provided that where no security was demanded the penalty shall not exceed double the amount of registration or renewal fee payable for the assessment year during which the default was committed, if the dealer deals only in goods unconditionally exempt from tax u/s 4 and fifty rupees for every month or part thereof during which the default was committed subject to a maximum of five

hundred rupees per assessment year in the case of any other dealer ;

(v) in a case referred to in Clause (i), Clause (k), Clause (n) or Clause (r), a sum not exceeding rupees two thousand ;

(vi) in a case referred to in Clause (h) or Clause (j), a sum not exceeding rupees five thousand ;

(vii) in a case referred to in Clause (p), a sum not exceeding rupees one thousand;

(viii) in a case referred to in Clause (qq), a sum not less than the amount of tax realised or as the case may be, realised in excess but not more than three times the said amount ; and

(ix) in a case referred to in Clause (o) or Clause (q), a sum not exceeding forty per cent of the value of the goods involved.

Explanation.-The assessing authority includes an officer not below the rank of an Assistant Sales Tax Officer posted at the check post or an officer authorised to exercise powers u/s 13 or Section 13-A or both, as the case may be.

6. Learned standing counsel was heard by us on May 8, 1985 and thereafter on May 14, 1985. Before noticing and dealing with his submissions, we may mention that on May 7, 1985, M/s. Agra Bartan Bhandar Pvt. Ltd. had filed Writ Petition No. 304 (Tax) of 1985 in which too we had passed an interim order, after hearing the learned standing counsel, directing release of the goods on furnishing of security to the extent of one and one-half times of the tax leviable in similar circumstances. In that writ petition also seizure had been made on account of disparity found in the stock and the account books in consequence of a survey made at the business premises of the petitioner.

7. Three objections, in the main, were raised by the standing counsel against the grant of interim order in this case. Firstly, that the petitioners had not approached the authorities under the Act for seeking release of the goods before approaching this Court through the present writ petition ; secondly, that the facts, even as asserted by the petitioners, did not make out a case for unconditional release of their goods and, thirdly, that the court would not be justified in entertaining the prayer for an interim order until the respondents had filed their return in the petition;

8. Demand for security to the extent of forty per cent of the value of the goods can be made in a case where action is taken u/s 28-A of the Sales Tax Act. That section envisages seizure or detention of goods that are imported or received from outside the State without obtaining a declaration in terms of that provision and empowers an officer-in-charge of the check post or barrier through which the goods pass as well as any other officer authorised in that behalf to take action in the matter. The provisions of Sections 13 and 13-A of the Act have been made applicable to the proceedings under this provision. Sub-section (6) of

Section 13-A which is attracted on account of Section 28-A(7) enables a dealer to seek release of the goods by a representation made to the Commissioner of Sales Tax or to an officer other than the Commissioner authorised in that behalf. Section 32 provides for the payment of a small amount by way of fee on any application or representation made to the Commissioner or the other officer contemplated under Sub-section (7) of Section 13-A.

9. The argument of the learned standing counsel that no representation was made by the petitioner to the proper officer for release of the goods, deserves no serious consideration for as many as four representations were addressed to the Commissioner of Sales Tax in this respect as noticed earlier. The further argument that these representations do not indicate that the prescribed fee were paid in respect thereof is an objection of triviality. Besides, there is no material before us yet to conclude that the requisite fee was not paid.

10. When we look at the relevant part of Section 15-A, which we have read earlier, we find that it is only when there is a breach of the provisions of Section 28-A that a penalty to an extent of 40 per cent of the Value of the goods can be imposed. And, it is then alone that an officer can require security to that extent as a condition for the release of the goods. What we find from the seizure memo (annexure 1 to the petition) is that the stocks in respect of the goods enumerated in that memo were found to be in excess of stocks reflected by the books of account during the course of survey of the business premises/godown of the petitioner on August 17, 1984. This indicated an endeavour by the dealer of evading tax. These facts have been denied as incorrect by the petitioners in the writ petition. That denial is, so far uncontroverted. Even assuming the facts mentioned in the order of seizure to be correct, can it be said that a case about breach of the provisions of Section 28-A has been made out ? The answer is a clear "No". In fact, there is no allegation in the order of seizure contained in the memo (annexure 1 to the writ petition) even suggesting breach of these provisions. How can then a demand of security to the extent of 40 per cent of the value of the goods be reasonably made ? Indeed, a demand to that effect will be wholly without jurisdiction. And, if a demand is made, in these circumstances, can it be urged with any justification that this Court should not entertain a prayer for grant of interim order ? We may add that the first petitioner is a registered dealer and is being regularly assessed to tax. Even if the goods were to be released unconditionally, the interest of the department was not at stake for the amount of penalty, if any, levied in respect of the alleged irregularity on the part of the petitioners, could always be realised from the dealer. Continued detention of the goods by the department, on the contrary, would result in holding up the business dealings of the first petitioner which could result in irreparable loss. The balance of convenience clearly is in favour of the dealer.

11. Coming now to the main submission of the standing counsel-a submission put forward with great emphasis before us-regarding the jurisdiction of this Court in entertaining the prayer for an interim order at this stage, we may notice first

the submission itself and then the authorities cited before us in that regard.

12. The standing counsel argued that until the respondents are given an opportunity of filing their return, the court, particularly in matters of public revenue, has no jurisdiction to grant an interim order. Also, that a petitioner under Article 226 of the Constitution could not be heard to pray for an interim order until the alternative remedy available to him had been exhausted.

13. Under Article 226 of the Constitution, this Court has, in appropriate cases, the discretion to protect a petitioner by an interim order. What is an appropriate case is to be judged by the court having regard to the circumstances brought before it. The discretion of the court will invariably be guided by relevant judicial considerations. The circumstances which may impel the court to grant an interim order without awaiting the return of the respondents, may be myriad. The principles on which the circumstances are to be weighed for the discretion to be exercised in favour of a petitioner, are fairly settled. The submission of the learned standing counsel, as presented before us, appears to us to be untenable on principle as also on precedent. There may be compelling circumstances necessitating immediate relief to the petitioners. When the existence of those circumstances is proved to its satisfaction, the court would be failing in its duty if it were to refuse interim protection to an applicant.

14. Let us now examine the decisions which were brought to our notice by the learned standing counsel in this regard.

15. *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, was a case in which the Supreme Court, speaking through A.P. Sen, J., ruled that where under the scheme of an Act there is a hierarchy of authorities before which the petitioner can get adequate redress against the wrongful acts complained of, he should be relegated to that remedy before approaching the High Court for redress under Article 226 of the Constitution. There, an order of assessment had been passed by the Assistant Sales Tax Officer against the petitioner raising huge pecuniary liability. The High Court of Orissa, before which the order of assessment was challenged through a petition under Article 226 of the Constitution, declined to intervene in the matter at that stage on its view that the petitioner had a right of appeal against the order of assessment and that the High Court was not satisfied that the case was one of inherent lack of jurisdiction in the assessing authority or that there had been violation of the principles of natural justice. That order was upheld by the Supreme Court saying that not only that the petitioner could seek redress against the order of assessment before successive higher authorities but that he could also seek stay of the amount of demand in excess of the amount of tax admitted to be payable by him by moving the Commissioner of Sales Tax. This decision does not advance the submission of the standing counsel in the present case, particularly, when we find that the Assistant Commissioner of Sales Tax directed the petitioners to approach the Sales Tax Officer, Mobile Squad and the repeated representations made to the Commissioner of Sales Tax remained un-responded, according to the

petitioners.

16. In *Siliguri Municipality and Others Vs. Amalendu Das and Others*, , A.P. Sen and M.P. Thakkar, JJ., while allowing an appeal by the municipality against an interim order granted by the Calcutta High Court restraining it from recovering of graduated consolidated rate on the annual value of holdings, observed, in paragraph 4 of the report, thus:

We will be failing in our duty, if we do not advert to a feature which causes us dismay and distress. On a previous occasion, a Division Bench had vacated an interim order passed by a learned single Judge on similar facts in a similar situation. Even so when a similar matter giving rise to the present appeal came up again, the same learned Judge whose order had been reversed earlier, granted a non-speaking interlocutory order of the aforesaid nature. This order was in turn confirmed by a Division Bench without a speaking order articulating reasons for granting a stay when the earlier Bench had vacated the stay. We mean no disrespect to the High Court in emphasizing the necessity for self-imposed discipline in such matters in obeisance to such weighty institutional considerations like the need to maintain decorum and comity. So also, we mean no disrespect to the High Court in stressing the need for self-discipline on the part of the High Court in passing interim orders without entering into the question of amplitude and width of the powers of the High Court to grant interim relief. The main purpose of passing an interim order is to evolve a workable formula or a workable arrangement to the extent called for by the demands of the situation keeping in mind the presumption regarding the constitutionality of the legislation and the vulnerability of the challenge, only in order that no irreparable injury is occasioned. The court has, therefore, to strike a delicate balance after considering the pros and cons of the matter lest larger public interest is not jeopardized and institutional embarrassment is eschewed.

17. These observations, in our opinion, do not lend support to the argument of the learned standing counsel in this case, nor do the following observations made earlier in paragraphs 2 and 3 ;

2. We are constrained to make the observations which follow as we do feel dismayed at the tendency on the part of some of the High Courts to grant interlocutory orders for the mere asking. Normally, the High Courts should not, as a rule in proceedings under Article 226 of the Constitution grant any stay of recovery of tax save under very exceptional circumstances. The grant of stay in such matters, should be an exception and not a rule.

3. It is needless to stress that a levy or impost does not become bad as soon as a writ petition is instituted in order to assail the validity of the levy. So also there is no warrant for presuming the levy to be bad at the very threshold of the proceedings. The only consideration at that juncture is to ensure that no prejudice is occasioned to the rate payers in case they ultimately succeed at the conclusion of the proceedings....

18. The essence of the observations, to our mind, is that an interim order staying recovery of tax should not normally be made on the mere filing of the writ petition making out a prima facie case but that the question of balance of convenience and the likelihood of irreparable injury to a party should also be kept in mind.

19. Union of India (UOI) and Others Vs. Oswal Woollen Mills Ltd. and Others, is a case where the Calcutta High Court had passed an interim order in a petition filed before it by M/s. Oswal Woollen Mills Ltd. which had its registered office at Ludhiana in the State of Punjab and the respondents Union of India (through the Secretary, Ministry of Commerce, New Delhi), the Chief Controller of Imports and Exports, New Delhi, the Deputy Chief Controller of Imports and Exports, Amritsar, the State Trading Corporation of India, New Delhi, were all outside the jurisdiction of the Calcutta High Court excepting for the Collector of Customs, Calcutta. The principal respondents against whom the primary relief were sought were located at New Delhi. Only one of interlocutory reliefs was sought in respect of a consignment of beef tallow which had arrived at Calcutta port. The Supreme Court, while vacating the stay order granted by the Calcutta High Court and allowing the appeal of the Union of India, observed that:

...An inevitable result of the filing of writ petitions elsewhere than at the place where the concerned offices and the relevant records are located is to delay prompt return and contest

20. and further that:

...such writ petitions are often deliberately filed in distant High Courts, as part of a manoeuvre in a legal battle....

21. Observing further the learned Judges said :

...While we do not wish to say that a drastic interim order may never be passed without hearing the opposite parties even if the circumstances justify it, we are very firmly of the opinion that a statutory order such as the one made in the present case under Clause 8-B of the Import Control Order ought not to have been stayed without at least hearing those that made the order. Such a stay may lead to devastating consequences leaving no way of undoing the mischief. Where a plentitude of power is given under a statute, designed to meet a dire situation, it is no answer to say that the very nature of the power and the consequences which may ensue is itself a sufficient justification for the grant of a stay of that order, unless, of course, there are sufficient circumstances to justify a strong prima facie inference that the order was made in abuse of the power conferred by the statute....The only appropriate order to make in such cases is to issue notice to the respondents and make it returnable within a short period. This should particularly be so where the offices of the principal respondents and relevant records lie outside the ordinary jurisdiction of the court....On the facts and circumstances of the present case, we are satisfied that no interim relief should have been granted by the High Court in the terms in which it was done.

22. In *Samarias Trading Co. Pvt. Ltd. Vs. S. Samuel and Others*, an ex parte interim order was made by the Calcutta High Court on an oral application made by the counsel for the petitioners who undertook to make a written application within the next few days. The Supreme Court was informed by Sri S.S. Ray, Advocate, that a practice of obtaining interim order on oral application subject to undertaking being given proposing to file written application later had always been in vogue in the Calcutta High Court. The Supreme Court noticed that this practice was not followed by any other High Court in the country. It felt that the practice, to put in mildest term, was unhealthy and likely to lead to harm and abuse. The practice, in the words of O. Chinnappa Reddy, J., who spoke for the court, "which we now propose to forbid in the exercise of our powers under Article 141 of the Constitution". We need not deal with this decision any further for it does not touch the question which we are considering.

23. *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, is a decision to which we wish to advert in greater detail for in it the aforesaid decisions have been referred to and upon the observations made wherein great emphasis was laid by the standing counsel. But, first the facts of that case:

24. Dunlop India Limited, a manufacturer of tyres, tubes and other rubber products claimed exemption under a notification dated April 6, 1984, of the Government of India issued under Rule 8(1) of the Central Excise Rules, 1944. It was denied the benefit of the notification by the Government. Dunlop India, which was claiming exemption to the extent of Rs. 6.05 crores, filed a petition under Article 226 of the Constitution in the Calcutta High Court and sought an interim order restraining the Central excise authorities from levying and collecting excise duty. A learned single Judge made an interim order allowing benefit of exemption to an extent of Rs. 2,93,85,000 on the company's furnishing a bank guarantee for that amount on his view that a prima facie case had been made out in favour of the company. The goods were directed to be released on the bank guarantee being furnished. This order was confirmed in appeal by a Division Bench with the modification that the Collector of Central Excise was allowed to encash 30 per cent of the bank guarantee. The Assistant Collector of Central Excise assailed the order in the Supreme Court by special leave. The Supreme Court passed an order on November 15, 1984, vacating the interim orders granted by the Calcutta High Court. On November 30, 1984, the judgment reported in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, was rendered by the Supreme Court. In it, the Supreme Court referred to several earlier decisions and after noticing the facts of the case before it observed (in paragraph 7 of the report), inter alia, that:

...We do not have the slightest doubt that the orders of the learned single Judge as well as Division Bench are wholly unsustainable and should never have been made. Even assuming that the company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient

justification for granting the interim orders as was done by the High Court. There was no question of any balance of convenience being in favour of the respondent-company. The balance of convenience was certainly in favour of the Government of India....We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and interim order of this magnitude had been granted for the mere asking....

25. It is clear that the Supreme Court has reiterated in this case the basic principles which should govern the grant or otherwise for an ex parte interim order and has laid down in this case, as in its earlier decisions, that mere existence of a prima facie case would not justify the grant of an interim order without taking into consideration the question of balance of convenience as well. This decision, in our opinion, does not lay down, as was canvassed by the learned standing counsel that while entertaining a petition under Article 226 of the Constitution, the High Court was not empowered to grant an ex parte interim order or that in matters involving public revenue, an ex parte interim order should never be granted. We find no merit in the objection of the learned standing counsel to the grant of an interim order of the nature made by us.