(2002) 09 GAU CK 0034

In the Gauhati High Court

Case No : Writ Petition (C) No''s. 2025, 3279, 3365, 3366, 3367, 3368, 3369, 3370, 3825, 3826, 3827, 3828, 3829, 3830, 4109, 4352, 4412, 4413, 4414, 4415, 4816, 4817, 4818, 5153, 5200, 5349, 5350, 5351, 5352, 5354, 5355, 5595, 5596, 5650, 5651, 5653, 5709, 5933, 60

Bajrangpur Tea Company (P.) Ltd. APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 03-09-2002

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 46, 46(7), 72
Assam General Sales Tax Rules, 1993 — Rule 43(3), 43(6), 43(7)

Citation : (2002) 3 GLR 535 : (2003) 1 GLT 396

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : A.K. Saraf, O.P. Bhati, S.K. Kejriwal, S. Kejriwal, M. Hazarika, S. Saikia, D. Baruah and S.K. Agarwal, for the Appellant;

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—In this batch of writ petitions, the writ petitioners seek to challenge the validity of the provisions of Rules 43(3), 43(6)(c) and 43(7)(j)(iii) of the Assam General Sales Tax Rules as brought in by the amendment to the Rules published by notification dated 11th September, 2000. The more specific challenge, insofar as the aforesaid Rules are concerned, is in respect of the requirement imposed by the said Rules on the concerned dealers to obtain a Despatch Note in Form-35 for transportation of goods outside the State of Assam from a place within the State and for production of the aforesaid Despatch Note in Form-35 at the checkgates.

2. For the purposes of the present case, it will be necessary to consider the lead arguments advanced on behalf of the petitioners by Dr. A.K. Saraf, learned Sr. counsel, though all the counsels appearing for the writ petitioners have been heard. Mr. K.N. Choudhury, learned Sr. counsel appearing on behalf of the respondents has also been heard.

3. The arguments advanced on behalf of the petitioners are two-fold. The requirement of obtaining a Despatch Note in Form-35 as enjoined by the provisions of the aforesaid Rules is contended by the petitioners to be beyond the Rule making power and, therefore, ultra vires the provisions of the Act as well as the provisions of Article 246 of the Constitution. Additionally, the aforesaid requirement under the Rules has been challenged on the ground that the same is violative of Article 301 read with Article 304 as enshrined in Part-XIII of the Constitution.

4. Dr. Saraf, in elaboration of the arguments advanced, has contended that Section 46(1) of the Assam General Sales Tax Act, 1993 (hereinafter referred to as ''the Assam Act'') imposes an embargo on transport from any railway station, steamer station, airport, port office or any other place, any consignment of such goods exceeding such quantities as may be specified by the State Government from time to time by notification in the Official Gazette except in accordance with such conditions as may be specified in such notification. The aforesaid embargo has been imposed by Section 46(1) of the Act in order to ensure that there is no evasion of any tax payable under the Act. Dr. Saraf has also placed before the Court, the provisions of Sub-sections (3), (4), (5) and (7) of Section 46 of the Act which authorises the State Government to erect checkposts and barriers at such places as may be notified and empowers the authority to detain goods in transit at such checkposts to verify the same and to inspect all documents pertaining to such goods. Such verification of the goods in transit and inspection of documents has been empowered and authorised in order to determine as to whether tax payable under the Act in respect of such goods has been paid and that the goods have been properly accounted for in the documents. Sub-section (7) of Section 46 of the Act recites that the documents referred to in Sub-sections (4) and (5) shall be prescribed. The Rules making power is contained in Section 72 of the Act and the relevant provision relied upon by the learned counsel for the petitioners is Clause (iii) of Sub-section (2) of Section 72 of the Act which provides that Rules may be framed to provide for such other matters, which in the opinion of the State Government, is required to be regulated by Rules amongsts others, for the prevention of any avoidance or evasion of tax or for facilitating the efficient levy and collection of tax, interest, penalty etc. payable under the Act.

Learned counsel for the petitioners has also placed before the Court the provisions of the Rules prior to the amendment effected by the notification dated 11th September, 2000 as well as the amended Rules. Rule 43(3), (6)(c) and 7(j)(iii) brought in by the amendment and which is under challenge in the present writ application, may be usefully set out hereinunder :-

"43(3) No person shall transport goods across or beyond a checkpost or barrier except after filing before the officer-in-charge of the checkpost, if so directed by him, the documents referred to in Sub-sections (4), (5) and (7) of Section 46."

"43(6)(c) in case of the Despatch Note (Form-35 as referred to in Clause (j) of

Sub-rule (7), the ''Original'' foil only shall be produced before the officer-in-charge of the checkpost and the ''Counterfoil'' of the form shall be retained by the dealer. The officer-in-charge shall retain the ''Original'' foil of the Despatch Note and after entering the date of crossing of the goods vehicle in the space provided therein and making it with his seal and signature in token of having verified it, shall sent it to the Senior Superintendent of Taxes or the Superintendent of Taxes having jurisdiction over the concerned dealer."

"43 (7)(j)(iii) in case of despatch of taxable goods outside the State from a place within Assam, Despatch Note (in Form 35), Invoice, Consignment Note, Manifest of the transporter, carrier or transporting agent."

5. Rule 43(7)(j)(iii) of the Rules as brought in by the amendment is in substitution of Rule 42(6)(j) as originally enacted which is as under :-

"(j) for the purposes of Section 46, the following shall be the documents so far as they are applicable to the case :

(i) Bill of Sale (Form XXIII);

(ii) Delivery Note (Form XXIV);

(iii) Consignment Notes and invoices ;

(iv) Tax clearance certificate from the concerning Assessing Officer (Form XIII);

(v) Transit pass (Form XXV) whenever applicable ;

(vi) Any other document as may be notified by the Commissioner;

(vii) Declaration to be submitted by the carrier or bailee on inspection by the officer (Form XXVI)."

6. The short and precise ground of challenge as advanced by the learned counsel for the petitioners is that Section 46(1) of the Act which imposes an embargo on movement of specified goods subject to fulfilment of the specified conditions vests in the State authority the power to make provisions for levy and collection of tax and for purposes ancillary thereto insofar as tax payable under the Assam Act is concerned. This is made abundantly clear by the provisions of Section 72(2)(iii) of the Act which is in consonance with Entry-54 of List-II of the 7th Schedule of the Constitution. It is the contention of the learned counsel for the petitioners that the power under the Act to make provisions for levy and collection of tax and purposes ancillary thereto must be understood to be in respect of intra-State transactions and the provisions of the impugned Rules having required the dealers engaged in the inter-State transactions to obtain a Despatch Note in Form-35 prior to movement of such goods, the aforesaid requirement imposed by the impugned Rules is clearly beyond the powers vested in the rule making authority and is also contrary to the constitutional scheme under Article 246 of the Constitution read with the provisions of the 7th Schedule to the Constitution. Dr. Saraf, in this regard has pressed into service a decision of the Apex Court in

the case of Hans Raj Bagrecha Vs. State of Bihar and Others, wherein, according to the learned counsel, the Apex Court while considering the parametrial provisions under the Bihar Sales Tax Act, had held that the provisions of Section 42 of the Bihar Act (which corresponds to Section 46 of the Assam Act) empowered the State authority to make provisions for levy, collection and recovery of intra-State sales and purchase tax and that the said power would not authorise the rule making authority to frame any Rule or prescribe any requirement to ensure the effective levy and collection of inter-State sale or purchase tax. It is the contention of Dr. Saraf, learned counsel for the petitioners, that the impugned provisions of the Rules are liable to be declared ultra vires on the ratio of the decision of the Apex Court in the case of Hans Raj Bagrecha (supra).

7. The next ground of challenge, as advanced on behalf of the petitioners is that the requirement of obtaining a Despatch Note as a pre-condition for movement of goods outside the State of Assam from any place within the State has the effect of impeding the free flow of trade and commerce as enshrined under Article 301 of the Constitution and such impediment in the free flow of trade and commerce not being saved by Article 304 of the Constitution, the impugned Rules violate Part-XIII of the Constitution. In support of the aforesaid ground of challenge, Dr. Saraf has placed before the Court the pleadings contained in the writ petitions which are to the effect that unless and until a Despatch Note in Form 35 is obtained by the dealer from the office of the jurisdictional Sales Tax Officer, there cannot be any movement of goods to any destination outside the State.

The practice and procedure for obtaining the said forms is alleged to be cumbersome. The issue of forms is dependant on the availability of the same in the office as well as upon the concerned officer. All these, according to the learned counsel, has the effect of causing an immediate inference in the movement of goods outside the State resultantly violating Article 301 read with Article 304 of the Constitution. Reliance in this regard has been placed by the learned counsel for the petitioners on a judgment of the Apex Court in the case of the State of Bihar and Others Vs. Harihar Prasad Debuka and Others,

8. Mr. K.N. Choudhury, learned Sr. counsel appearing on behalf of the revenue, in the course of his very elaborate arguments, has tried to controvert the contentions advanced on behalf of the writ petitioners by contending that the power to enact the impugned provisions of the Rules is traceable to Section 9(2) of the Central Sales Tax Act, 1956 and, therefore, the contention advanced on behalf of the petitioners that the impugned provisions of the Rules are ultra vires, is not correct. Mr. Choudhury by placing reliance on the aforesaid provisions of Section 9(2) of the Central Sales Tax Act, has contended that the entire machinery provisions for collection of tax under the Assam Act stands engrafted in the Central Sales Tax Act, 1956 by virtue of operation of Section 9(2) of the said Act. Mr. Choudhury has alternatively submitted that the

impugned provisions of the Rules having been designed to ensure proper levy and collection of tax under the provisions of the Assam Act and for the said purpose, some monitoring the inter-State transactions for which the impugned provisions have been made would not render the same ultra vires. The provisions of the impugned Rules have been enacted to facilitate levy and collection of tax under the Assam Act and the encroachment, if any, on inter-State transactions are merely incidental. Learned counsel has further contended that the requirement of obtaining Form-35 is a purely regulatory measure which is calculated and designed to facilitate inter-Sate movement of goods rather than to impede such movement. According to the learned counsel, such forms are freely available in all offices of the department and there is no conceivable reason as to why a genuine dealer engaged in honest inter-State transactions should resist any compliance with such regulatory measures. Lastly, it has been submitted by Mr. Choudhury that the impugned provisions of the Rules having been introduced to facilitate levy and collection of tax and check evasion thereof is in public interest and, therefore, the validity thereof should be upheld by the Court.

9. The power to make provisions to ensure and facilitate due and proper levy and collection of tax under the Assam Act and to check evasion of tax payable under the said Act is traceable to Sections 46 and 72 of the Act. By virtue of the provisions of Entry-92A of the List-I and Entry-54 of the List-II of the 7th Schedule of the Constitution, the power of the State Government to frame measures for levy and collection of tax and for purposes ancillary thereto, must be understood to be confined to intra-State transaction. Such power of the State authority would not extend to inter-State movement of goods. What is noticeable is that by the amendment to the Rules under challenge brought in by the notification dated 11.9.2000, preconditions have been imposed requiring the dealers to obtain a Despatch Note in Form 35 in respect of movement of goods outside the State of Assam from any place within the State. The Rules in force prior to the amendment did not impose any such requirement. Under Entry-54 of List-II, the power of the Sate Legislature to levy tax on sales and purchase of goods is subject to the provisions of Entry-92A of the List-I which pertains to the inter-State transactions. The State Legislature would not have any power to enact any law or make any provision relating to levy and collection of tax and for purpose ancillary thereto in respect of the inter-State transactions. The aforesaid field is exclusively covered by the provisions of the Central Sales Tax Act, 1956. Rule 43(7)(j)(iii) of the Act requires a dealer to obtain a Despatch Note in Form-35 for despatching/ transporting goods outside the State whereas Rule 43(3) expressly states that no person shall transport goods across or beyond the checkpost or barrier without filing before the officer-in-charge of the checkpost the documents mentioned in Section 46(7) of the Act. Rule 43(6)(c) imposes on the dealer the requirement of production of the Despatch Note in Form 35 referred to in Sub-rule (7)(j)(iii) of Rule 46 before the officer-in-charge of the checkposts who is required to retain the original of the Despatch Note. The aforesaid provisions of the Rules which are ancillary to the provisions for levy

and collection of tax, imposes certain procedural requirements to be adopted by the dealers in case of movement of goods outside the State even in connection with an inter-State transaction. The same is made expressly clear not only by the provisions of the impugned Rules but also by Form 35 as prescribed which require all the dealers to specify as to whether the goods transported outside the State are in the course of inter-State sales, inter-State stock transfer and/or export outside India. Such inter-State transactions are clearly outside the purview of the powers vested by the Constitution and the Act in the State authority. This is precisely what the Supreme Court held in the case of Hans Raj Bagrecha (surpa). In the aforesaid case, the Apex Court was dealing with the provisions of Rule 31B of the Bihar Sales Tax Rules which imposed a prohibition on transport of goods to any place outside the State of Bihar without obtaining a despatch permit in the form prescribed prior to despatch of the goods. The Apex Court considered the validity of the aforesaid Rule 31B of the Bihar Sales Tax Rules in the context of Section 42 of the Bihar Sales Tax which is par-ametria with the provisions of Section 46(1) of the Assam Act. The Apex Court in the aforesaid decision, held that the power u/s 42 of the Bihar Act being in respect of intra-State transaction, Rule 31B of the Bihar Sales Tax Rules having put an embargo on inter-State transaction was clearly unauthorised.

The ratio of the aforesaid decision would squarely apply to the facts of the present case. In the other case, cited at the Bar, i.e., the State of Bihar and Others Vs. Harihar Prasad Debuka and Others, Hans Raj Bagrecha (supra) was distinguished on facts and the challenge made therein was negatived. The Apex Court in the later case, i.e., the State of Bihar and Ors. v. Harihar Prasad Debuka and Ors., had dealt with the validity of the Rules challenged therein from the standpoint of Article 301/304 of the Constitution which relates to the second ground of challenge in the present proceedings, an aspect to which this Court will turn only if necessary.

10. The submissions advanced by Mr. Choudhury, learned counsel for the revenue to the effect that the provisions of the impugned Rules have been primarily designed to ensure and facilitate levy and collection of tax under the Assam Act and the encroachment on inter-State transaction, if any, is purely incidental would hardly merit, any attention in view of the clear stand taken by the Revenue in the aforesaid affidavit filed that the provisions of the impugned Rules have been enacted to ensure levy and collection of central sales tax payable in respect of inter-State transaction a portion of which is remitted to the coffers of the State Government. In fact, acting on the basis of the admissions contained in the affidavit, it would have been possible for this Court to hold that the impugned provisions of the Rules are clearly ultra vires the powers of the State authority, without undertaking the elaborate discussion as above, an exercise that this Court considered inappropriate, without ascertaining the true effect of the Rules from the expressed provisions of the Rules itself. The alternative submission advanced by Mr. Choudhury, i.e., that the power to frame the impugned Rules is tranceable to Section 9(2) of the Central Sales Tax Act,

1956 does not merit any scrutiny at all in view of the fact that Section 9(2) of the said Act which imports the machinery provisions under the Assam Act and Rules for the purpose of levy and collection of tax under the Central Act cannot be understood to have conferred any power on the State authority to frame a Rule in respect of transactions falling under the Central Sales Tax Act. In view of what has been discussed above, there is no escape from the conclusion that the provisions of Rule 43(3), 43(6)(c) and 43(7)(j)(iii) of the Rules insofar as the requirement to obtain a Despatch Note in Form 35 and for production thereof at the checkposts are concerned, are clearly beyond the powers of the State authority and are hereby declared as ultra vires.

11. As the provisions of Rule 43(3)(c) and 43(7)(j)(iii) of the Rules have been found to be beyond the powers of the rule making authority and have been adjudged and declared as ultra vires, it will not be necessary to go into the second question raised on behalf of the writ petitioner namely, the provisions of the aforesaid Rules are ultra vires the provisions of Articles 301 and 304 of the Constitution.

12. For the aforesaid reasons, this batch of writ petitions will have to be allowed which I do accordingly.

