(1986) 09 OHC CK 0045

In the Orissa High Court

Case No : O.J.C. No. 1143 of 1985

Bharat Process and Mechanical Engineers Limited and Another APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 24-09-1986

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1987) 65 STC 273

Hon'ble Judges : H.L. Agrawal, C.J;S.C. Mohapatra, J

Bench : Division Bench

Advocate : B.K. Mohanti and Bibek Mohanty, for the Appellant; Additional Standing Counsel and Standing Counsel, Commercial Tax Department, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—A Government company is the petitioner in this writ application under Articles 226 and 227 of the Constitution of India.

2. Having registered office in Calcutta, the petitioner entered into a contract with the National Aluminium Company to erect a water treatment plant in the latter''s factory site and for that purpose had a site office in NALCO Nagar at Angul. The petitioner was transporting various goods for executing the said contract which were to pass through the various check gates established by the State Government in exercise of the power u/s 16-A of the Orissa Sales Tax Act, 1947 (in short "the Act").

3. While the goods of the petitioner were being transported through Jamshola-ghat combined check gate, the officer-in-charge of the check gate who is also a Sales Tax Officer under the Act served a notice on 6th May, 1984, on the driver of the vehicle carrying the goods that the petitioner being a casual dealer under the Act is liable to be taxed in respect of the goods transported. On 4th August, 1984, a similar notice was served in respect of some other goods in another

truck in similar manner. On 25th May, 1985 and on 26th May, 1985, some more goods were being carried through the same check gate where the Sales Tax Officer inspected the vehicles and issued notices to the drivers of the vehicles that the way bills for the goods carried are defective and demanded amounts of Rs. 4,000 and Rs. 5,400 to be paid as provided in Rule 94 of the Rules made under the Act. Petitioner has prayed to quash the aforesaid two notices in form VI-A and the two notices in form-VI-B which have been filed as annexure 1 series to this writ application.

4. Mr. B.K. Mohanti, the learned counsel for the petitioner, took us through the various provisions of the Act and the rules made thereunder. He also placed before us the impugned notices to submit that the actions of the authorities are not in accordance with the provisions of the statute and are liable to be quashed.

5. The relevant provisions of the statute placed before us read as follows :

Section 16-A. Establishment of check post or barrier and inspection of goods while in transit.-(1) If the State Government consider it necessary that with a view to prevent or check evasion of tax under this Act, in any place or places in the State, it is necessary so to do, they may by notification direct the setting up of a check post or the creation of a barrier or both, at such place or places as may be notified.

(2) At every check post or barrier mentioned in Sub-section (1), or at any other place when so required by any officer empowered by the Commissioner in this behalf the driver or any other person in-charge of a goods vehicle or boat shall stop the vehicle or boat, as the case may be and keep it stationary as long as may reasonably be necessary and allow the officer-in-charge of the check post or barrier, or the officer empowered as aforesaid, to examine the contents in the vehicle or boat and inspect all records relating to the goods carried, which are in the possession of such driver or other person in-charge, who shall, if so required, give his name and address and the name and address of the owner of the vehicle or boat.

(3) The officer-in-charge of the check post or barrier, or the officer empowered as aforesaid shall have power to seize and confiscate any goods which are under transport by a goods vehicle or a boat and are not covered by a way bill issued by the person who consigns the goods, in such form and containing such particulars as may be prescribed :

Provided that before taking action for the confiscation of goods under this Sub-section, the officer shall give the person affected an opportunity of being heard and make an enquiry in the manner prescribed :

Provided further that where the person affected makes payment to such officer of the amount of tax payable in respect of such goods to be assessed in the prescribed manner, the goods seized as aforesaid shall be released:

Provided also that no order of confiscation shall be made in respect of goods which are not liable to payment of tax.

(4) If the goods which are seized or confiscated under Sub-section (3) are of a perishable nature, they shall be sold in the prescribed manner.

Rule 94. Check posts.-(1) The State Government may, by notification, direct the setting up of a check post or erection of barrier or both at such place or places in the State as may be specified in the notification. When the check post is set up upon a thoroughfare or road, barriers may be erected across the road or thoroughfare in the form of a contrivance to enable traffic being intercepted, detained and searched.

(2) The State Government may empower any officer not below the rank of an Assistant Sales Tax Officer to be in-charge of a check post or/and a barrier.

(3) (a) The driver or any other person in-charge of a goods vehicle or boat shall stop the vehicle or boat, as the case may be, at a check post or barrier and keep it stationary as long as it is reasonably required by the officer-in-charge of the check post or barrier and allow examination of the goods in the vehicle or the boat and inspection of all the records connected with the goods in the vehicle or boat including way bill in form XXXII.

(b) The way bill in form XXXII shall be supplied.

(4) (a) If on such inspection the officer-in-charge of the check post or barrier finds ?hat the goods are not fully covered by a way bill in form XXXII or that the way bill is defective or incomplete or that there is evasion of tax in respect of goods carried in such vehicle or boat, as the case may be, he shall serve on the owner of the goods or any person on his behalf a notice in form VI-B giving him an opportunity to rectify the defect or omission if any or an option to pay such amount indicated by the officer-in-charge of the check post or barrier.

(b) If the owner of the goods or any person on behalf of such owner fails to pay. the tax as required in Sub-rule (a) above, the officer-in-charge of a check post or barrier shall order the unloading of the goods and seize and confiscate them after following the procedure in Sub-rule (5).

(c) Where the officer-in-charge of the check post or barrier seizes the goods, he shall issue a receipt giving the description, quantity and approximate valuation of the goods unloaded and seized to the driver or other person in-charge of the vehicle or boat and obtain his acknowledgement.

(5) The officer-in-charge of the check post or barrier shall before ordering confiscation of the goods give the owner of the goods, if present in the vehicle or boat, as the case may be, an opportunity of being heard. If such person is not present the officer shall make such enquiries as he deems fit, ascertain the name and address of such person and if the name and address of such person are ascertainable give him an opportunity of being heard before ordering confiscation. In the case of non-perishable goods, at least 7 days time shall be

given for the owner of the goods to state his case before the officer-in-charge of the check gate.

(6) The goods confiscated shall be sold in public auction. A copy of the order of confiscation shall be served on the owner of the goods where the name and address of such owner is ascertainable.

(7) If the goods confiscated are of a perishable nature, the confiscation thereof shall not be postponed on account of a revision having been preferred against the orders of confiscation.

(8) If any order directing confiscation is reversed on revision, the goods confiscated, if they have not been sold before such reversal comes to the knowledge of the officer conducting the sale or if they have been sold, the proceeds thereof shall be dealt with as prescribed in Sub-rule (10) of this rule.

(9) Where a confiscation was ordered for the reason that the owner was not ascertainable, such person or any person on his behalf may appear before the officer ordering confiscation and satisfy him with relevant record regarding the bona fides of the transport of the goods, in question. If the officer is satisfied that there has been no evasion of tax, he may, for reasons to be recorded in writing, order the release of the confiscated goods. The officer shall also specify in his order the amount to be paid towards the charges, if any, incurred by the State for the safe custody of the goods and other incidental charges. If the officer is not satisfied, he may, after recording the reasons therefor; order that the sale under Sub-rule (6) may be proceeded with.

(10) Goods ordered to be released or the proceeds thereof referred to in Sub-rule (8) if they have been sold, shall be handed over or refunded, as the case may be, by the officer-in-charge thereof to the owner of the goods or to his agent on payment of or after deducting the charges incurred by the State.

FORM XXXII Form of way bill [See Rule 94-A(3)]

1. (a) Name and address of the person consigning the goods.

(b) If he is a dealer, Registration Certificate No. under the Grissa Sales Tax Act and the name of the concerned sales tax circle.... 2. Full address of the place....

(1) From which they are consigned....

(2) To which they are consigned....

3. (a) Description of the goods....

(b) Quantity or weight....

(c) Value of goods....

4. (a) Name and address of the owner of the goods vehicle or boat by which the goods are consigned....

(b) Number of the goods vehicle or boat....

5. If the consignor is transporting goods in pursuance of a sale, for the purpose of delivery to the buyer the name and address of the person to whom the goods are sold, his registration certificate number under the Orissa Sales Tax Act, if he is a dealer and bill number and date relating to the sale.

6. If the consignor is transporting goods after purchasing them, the name and address of the person from whom the goods were purchased, his registration certificate number and the bill number and date relating to the purchase.

7. If the consignor is transporting the goods from one of his shops or go downs to an agent for sale, or from one of his shops or go downs to another for the purpose of storage or sale, the address of the agent or of the shop or go down to which the transport is made.

I/We...certify that to the best of my/our knowledge the particulars furnished above are true and correct.

Signature of consignor.

FORM VI-B [See Rule 94]

To

Shri...

Address...

Whereas it appears to me that the way bill in form XXXII supplied by you under Sub-rule (3) of Rule 94 of the Orissa Sales Tax Rules, 1947, is found to be defective/incomplete for the following reasons :

1.

2.

3.

4.

Whereas I find that there is evasion of tax in respect of the goods carried. You are hereby given an opportunity to rectify the defect or omission stated above or option to pay Rs. ...immediately on receipt of this notice failing which action will be taken under Clause (b) of Sub-rule (4) of Rule 94 of the Orissa Sales Tax Rules, 1947.

Place... Sales Tax Officer/Officer-in-charge of Date... check post or barrier. (Seal)

Section 12-B. Assessment of tax on casual dealers.-Notwithstanding anything in Sections 12 and 12-A, it shall be open to an assessing authority, including the officer-in-charge of the check post or barrier referred to in Section 16-A to make a provisional or final assessment on a casual dealer on the turnover of the purchase, or the sale of the goods, effected by him, in accordance with such Rules as may be made in this behalf.

Rule 28-B. Provisional assessment of casual dealers.-(1) A casual dealer shall furnish to the assessing authority including the officer-in-charge of check post or barrier referred to in Section 16-A, when called upon to do so, by a notice in form VI-A, a return of estimated turnover in form IV-B within 24 hours or such period as may be specified in the notice.

(2) The assessing authority or the officer-in-charge of check post or barrier referred to in Section 16-A, shall if he is satisfied after making such scrutiny of the accounts of the casual dealer and such enquiry as he may consider necessary that the return furnished under Sub-Rule (1) is correct and complete provisionally assess the amount of tax due from him on the basis of such return.

(3) If a casual dealer does not furnish the return as required by the notice referred to in Sub-Rule (1) or if the return furnished by him appears to the assessing authority or the officer-in-charge of check post or barrier to be incorrect or incomplete, such authority or officer shall, after giving the casual dealer a reasonable opportunity of being heard, assess him to the best of hjs judgment.

FORM VI-A Notice to a casual dealer [See Rule 28-B]

To

Shri... (casual dealer) Address...

Whereas it appears to me that you being a casual dealer are liable to pay tax under the Orissa Sales Tax Act, 1947, you are hereby required to furnish a return in form IV-C, enclosed for the period from...to...immediately on receipt of this notice.

In the event of your failure to comply with the terms of this notice I shall proceed to assess you provisionally u/s 12-B of the Act to the best of my judgment without further reference to you.

Assistant Sales Tax Officer, Place.... Sales Tax Officer, Date.... Officer-in-charge of check post. (Seal)

6. For the purpose of this writ application, it is not in dispute that the assessment proceeding under the Act is pending before the Sales Tax Officer, Angul, under whose jurisdiction the petitioner is carrying on business in NALCO Nagar where the transaction in respect of the goods covered under the notices shall be considered. The goods were transported to NALCO Nagar for the purpose, of business. In the premises it is to be examined whether the notices in form VI-A issued to the petitioner on 6th May, 1984 and 4th August, 1984 are valid in law. Those notices have been issued for assessment of the petitioner as a casual dealer. Rule 28-B extracted earlier is the basis on which the notice in form VI-A is to be issued. A perusal of the pro forma statutory notice shows that in case the

return called for is not filed within 24 hours the provisional assessment would be completed to the best of judgment of the Sales Tax Officer without any further notice to the petitioner. Rule 28-B requires that the person receiving the notice in form VI-A is to file the return within 24 hours. In case he fails to file the return, the assessment would be completed to the best of judgment of the Sales Tax Officer after giving adequate opportunity to the person of being heard. The procedural law in Rule 28-B having required adequate opportunity to be given to the person to whom the notice in form VI-A is issued, the notice is directly inconsistent inasmuch as the same has provided that no further opportunity shall be given to the person. Taxing statutes are to be rigidly construed. The notice, thus, cannot be sustained as being inconsistent with the rules. In the aforesaid view of the matter, annexures 1-B and 1-C are liable to be quashed.

7. It is now to be examined if the notices vide annexures 1 and 1-A in form VI-B can be sustained. The notices indicate that they have been issued on account of defective way bills. It is not in dispute by both the parties that the defect is that the undertaking required by the Commissioner to be given by the person whose goods are transported has not been given on both the occasions. Perusal of Section 16-A, Rule 94 and the pro forma statutory way bill do not disclose that an undertaking is to be given. It is not the case of the department that there is omission in the way bill or the same is incomplete in any other manner or that the facts stated therein are not correct. When the way bill is complete and correct in all respects, a further requirement of undertaking which is not envisaged under the statute, cannot authorise the officer-in-charge of the check post to issue the notice in form VI-B. No person normally has right to detain or inspect the vehicle of another or seize the goods transported therein unless authorised for the purpose. Where being authorised by the statute a person inspects the vehicle and seizes the same, he is required to comply with the requirements of the law. Any action in excess of the requirement of law would be affecting the right of the other person and would amount to excessive exercise of a statutory power. No provision has been brought to our notice under the Act or the Rules by which a Commissioner can require a person to give an undertaking. Even if the Commissioner requires such an undertaking for the benefit of the persons whose goods are transported, the drastic law of seizure cannot be exercised where those persons do not intend to take the benefit offered to them. In that view of the matter, the notices in form VI-B issued by the officer-in-charge, Jamshola-ghat combined check gate, cannot be sustained.

8. In conclusion, the notices vide annexures 1-B and 1-C in form VI-A being inconsistent with Rule 28-B are quashed and the notices vide annexures 1 and 1-A in form VI-B having been issued in excess of the power vested under the statute are quashed.

9. In the result, the writ application is allowed. No costs.

H.L. Agrawal, C.J.

10. I agree.

