
(2016) 03 PAT CK 0142

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 7606, 7671, 7703, 7712, 7779, 7782, 7854, 7859, 7884, 7941, 7992, 7999, 8018, 8041 and 8670 of 2007

Customs Department

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Constitution of India, 1950 — Article 285, Article 289, Article 289 (1)

Citation : (2016) 336 ELT 220 : (2016) 2 PLJR 567

Hon'ble Judges : Hemant Gupta and Ramesh Kumar Datta, JJ.

Bench : Division Bench

Advocate : Archana Meenakshee and Kumar Pankaj, Advocates, for the Appellant; Vikash Kumar, AC to PAAG, for the Respondent

Final Decision : Disposed off

Judgement

Hemant Gupta, J.—1. This judgment shall dispose of all these 15 writ petitions filed by the Customs Department arising out of assessment year 1986-1987 to 2000-2001 as common issue is involved in all these matters.

2. The facts are not in dispute. The petitioner in discharge of its functions, sells confiscated goods which have been imported in contravention of the Custom laws. Such goods are disposed of by the Customs Department by public auction or through the N.C.C.F/or other co-operative agencies. Usually, the confiscated goods are sold by public auction, giving advertisement in newspapers. Thereafter, the interested persons participate in tender process and highest bidder of confiscated goods are required to deposit the bid money along with sales tax in concerned treasury and on production of treasury receipt, the goods are released by the Assistant Commissioner Customs (P), Muzaffarpur.

3. The grievance of the petitioner is that by virtue of an ex-parte order the petitioner was saddled with the tax liability. The stand of the petitioner is that it is not liable for payment of sales tax. It is asserted that petitioner is not a dealer

in terms of Section 2(e) of the Bihar Finance Act, 1981 and action of the respondents to saddle the petitioner with liability of tax is illegal.

4. In the counter affidavit, the stand of the State is that petitioner is a dealer registered under Section 14 of the Bihar Finance Act, 1981 as also under the Central Sales Tax Act, 1956 as it carries out the business of sale of confiscated goods through auction and that as dealer the petitioner is required to furnish return and deposit tax as per Section 16 of the Bihar Finance Act, 1981. The petitioner is also required to produce books of accounts relating to its transactions and get assessed under section 17 of the Act. The petitioner neither filed return nor produced books of accounts as required under section 16(1) and 17(2) of the Bihar Finance Act, 1981 in spite of notice. Thereafter an ex parte order was passed. Thus, it was asserted that action against the petitioner is in accordance with law and there is no infirmity in raising demand of levied tax, interest and penalty.

5. Learned counsel for the petitioner has vehemently argued that the sold goods are property of the Union of India and, therefore, exempted from State taxes in terms of Article 285 of the Constitution of India.

6. Article 285 of the Constitution of India read as under:-

"Exemption of property of the Union from State taxation-(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

7. The Article 285 of the Constitution of India bars the State to levy tax on the property of Union of India, whereas Article 289 of the Constitution of India bars the Union of India to levy tax on the property and income of the State.

8. The provisions of Article 289 of the Constitution of India came up for consideration before the Hon"ble Supreme Court in a Presidential reference in Re. The Bill to amend S. 20 of the Sea Customs Act, 1878, and S. 3 of the Central Excises and Salt Act, 1944, , AIR 1963 SC 1760. The provisions of Article 289 of the Constitution of India again were examined by the Hon"ble Supreme Court in the case of New Delhi Municipal Council Vs. State of Punjab, (1997) 7 SCC 399.

9. The majority opinion in the Supreme Court in Sea Customs case (supra) held that the bar of Article 289 of the Constitution of India does not apply to indirect tax like customs duty, Central excise duty, sales tax etc.

10. In a later judgment, in the case of New Delhi Municipal Council (supra), the

Hon"ble Supreme Court held that Article 289 (1) provides for exemption of property and income of the States only from taxes imposed directly upon them; it has no application to indirect taxes like duties of excise and customs; duties of excise and customs are not taxes on property or income; they are taxes on manufacture/production of goods and on import/export of goods, hence, outside the purview of clause (1) of Article 289.

11. Considering the aforesaid two judgments, the Hon"ble Supreme Court in the case of Collector of Customs and another v. State of W.B. and another, , (1999) 1 Supreme Court Cases 192 examined the identical issue as raised in the present cases where the Collector of Customs was found to be a "dealer" within the meaning of the Bengal Finance (Sales Tax) Act, 1941 after the customs sold goods confiscated under the provisions of the Customs Act, 1962 because of non-payment of custom duty thereon. The Court held to the following effect:

"4. It would appear that no real arguments were advanced before this Court by the appellant-State and the judgment of this Court in Sea Customs Act (1878), S. 20(2), , AIR 1963 SC 1760 was not pointed out. In the Sea Customs Act case a nine-Judge Bench of this Court opined by a majority, that Article 285 envisaged immunity from direct taxes and not from indirect taxes such as sales tax. With specific reference to sales tax, this Court said:

"We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax."

5. The decision in the Sea Customs Act case was considered by another nine-Judge Bench in the case of New Delhi Municipal Council v. State of Punjab, , (1997) 7 SCC 339 and was affirmed."

12. In view of the said facts, the Special Leave to Petition of the Collector of Customs was dismissed.

13. Such judgments have recently been followed by three-Judge Bench of the Hon"ble Supreme Court in the case of Karya Palak Engineer, CPWD v. Rajasthan Taxation Board, , (2004) 7 SCC 195. The Court held to the following effect:

"12. Having heard the learned counsel for the parties and having perused the judgment of the High Court and the relevant clause in the agreement between the appellant and its contractors concerned we are satisfied that the question involved in these appeals are no more res-integra. This Court as far back as in the year 1963 in a presidential reference case under Sea Clustoms Act held;

"The bar of Article 289 of the Constitution of India does not apply to indirect tax like Customs duty, Central Excise duty, Sales Tax etc."

13. In the said case it was held that exemption of property from tax contemplated in Article 289 was confined to direct tax on property and not to the levy of indirect taxes. The ratio of the said judgment though delivered in context of Article 289, applies to the exemption in favour of the Union of India under Article 285 in all force.

14. Judgment in Sea Customs Case (supra) was followed by this Court in the case of New Delhi Municipal Council Vs. State of Punjab & Ors. , 1997 (7) SCC 339, wherein this Court by majority judgment at para 148 held:-

"It would be appropriate at this stage to notice the ratio of two judgments of this Court dealing with Article 289. In Sea Customs Act, a Special Bench of nine learned Judges, by a majority, laid down the following propositions : (a) clause (1) of Article 289 provides for exemption of property and income of the States only from taxes imposed directly upon them; it has no application to indirect taxes like duties of excise and customs; (b) duties of excise and customs are not taxes on property or income; they are taxes on manufacture/production of goods and on import/export of goods, as the case may be, and hence, outside the purview of clause (1) of Article 289."

14. In view of the aforesaid judgments, we find that the petitioner is a dealer within the meaning of Section 2(e) of the Bihar Finance Act, 1981 read with IInd Explanation and, thus, it is exigible to the sales tax.

15. Having returned such finding, the question to be examined is whether the petitioner is liable to penalty or interest on account of non-filing of return etc. We find that the said question needs to be re-decided by the Assessing Authority keeping in view the fact that the petitioner is Custom Department of the Government of India and there could be ambiguity in understanding the provisions of the Bihar Finance Act, 1981.

16. Thus, we uphold the levy of tax and remit the matter to the Assessing Authority for determining the question of penalty and interest. Such determination shall be made after giving an opportunity of hearing to the petitioner in accordance with law.

17. The writ petitions thus stand disposed of.