

(1998) 04 PAT CK 0023
In the Patna High Court
Case No : C.W.J.C. No. 565 of 1998 (R)

D.V.C. Bukaru Co-operative Stores Ltd. APPELLANT
Vs
State of Bihar and Others RESPONDENT

Date of Decision : 15-04-1998

Acts Referred:

Bihar Finance Act, 1981 — Section 45(3)
Constitution of India, 1950 — Article 226

Citation : (1999) 47 BLJR 2058 : (1998) 2 PLJR 499 : (2000) 119 STC 138

Hon'ble Judges : R.A. Sharma, J;A.K. Prasad, J

Bench : Division Bench

Advocate : Binod Poddar, Biren Poddar and Anubha Raut, for the Appellant; I. Senchoudhary, S.C.I., Anil Kumar, J.C. to S.C. I. and Rajesh Kumar Sinha, J.C. to S.C. I., for the Respondent

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—The petitioner has filed this writ application challenging the assessment orders for the financial year 1995-96 passed by the Deputy Commissioner of Commercial Taxes, Tenughat Circle, Phusro, under the Bihar Finance Act, 1981 (hereinafter referred to as "the Act") and the Central Sales Tax Act, 1956. Prayer for quashing the demand notices issued pursuant to the said assessment orders, has also been made. It has also challenged the validity of Sub-section (3) of Section 45 of the Act whereby admission of appeal filed against an assessment order has been barred, unless 20 per cent of the tax assessed or the admitted tax whichever is greater is paid.

2. The learned S.C. I., at the threshold, has raised preliminary objection about the maintainability of this application on the ground of alternative remedy of appeal. In reply, the learned counsel for the petitioner has made two submissions, namely, (i) the impugned assessment orders are arbitrary having shown inflated sales without any ground reality and without giving a reasonable opportunity of being heard to the petitioner and (ii) in view of Section 45(3) of

the Act, the petitioner cannot file an appeal because it cannot be admitted, unless 20 per cent of the tax assessed is deposited by it.

3. Against assessment order, an appeal lies u/s 45 of the Act. The appeal being efficacious and adequate remedy, we cannot entertain this application merely because 20 per cent of the tax assessed is to be deposited by the petitioner. The question as to whether the impugned assessment orders contain inflated sales is a question which can more appropriately be decided in appeal on the basis of the materials produced by the parties. If the petitioner is dissatisfied with the assessment orders, it has to challenge the same before the appellate authority. It is not open to it to by-pass the statutory remedy. In *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, the Supreme Court has laid down as under :

".....Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance, where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it, that recourse may be had to Article 226 of the Constitution. But then the court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters....."

4. In *State of Goa and others Vs. Leukoplast (India) Ltd. etc.*, , the apex Court reiterated the same rule holding that it is not open to an assessee to by-pass the statutory remedy provided under the Sales Tax Act and to approach the High Court with the writ application against the assessment order.

5. As we were not inclined to entertain this writ application on the ground of alternative remedy, the learned counsel for the petitioner, in order to obviate the necessity of depositing 20 per cent of the tax assessed before admission of the appeal, has challenged the validity of Section 45(3) of the Act. We, therefore, heard the learned counsel for the parties on the said question and thereafter reserved the judgment.

6. The learned counsel for the petitioner has challenged the validity of Sub-section (3) of Section 45 of the Act on two grounds, namely, (i) the requirement of deposit of 20 per cent of the tax assessed before admission of the appeal is an onerous condition on the right of appeal which has virtually nullified the said right for all practical purposes and is, therefore, violative of Article 14 of the Constitution. In support of this submission, reliance has been placed on [1991] 81 STC 291 (*Monoranjan Chakraborty v. State of Tripura*) and *Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava*, and (ii) in all States except the State of Bihar, although the provision requiring the deposit of part of the tax assessed as a condition precedent for filing appeal has been enacted in their respective Sales Tax Act but power has been given to the appellate

authority to dispense with or modify the said requirement of deposit in suitable cases, but in this State the appellate authority has not been given any such power and the dealer has to deposit 20 per cent of the tax assessed. The impugned provision is, therefore, discriminatory in nature and violates Article 14 of the Constitution. The learned SC I has disputed the above submissions.

7. Section 45 provides for an appeal against an order of assessment or penalty or both passed by the prescribed authority. Sub-section (3) of the said section, which is reproduced below, has laid down that no appeal shall be admitted unless the dealer objecting to the order of assessment has paid 20 per cent of the tax assessed or full amount of admitted tax whichever is greater :

"45(3). No appeal under Sub-section (1) or (2) shall be admitted unless the dealer objecting to an order of assessment has paid twenty per centum of the tax assessed or full amount of admitted tax whichever is greater."

8. Recently, a division Bench of this Court in Tin Plate Co. of India Ltd. Vs. State of Bihar and Others, , while dealing with the contention as regards Sub-section (3) of Section 45 of the Act, has laid down as follows :

".....In my view, the object of the provisions is to ensure the deposit of the amount claimed from the assessee in case he seeks to file an appeal against a tax after tax being assessed and demand notice is sent to him. It cannot be said that the requirement of depositing the amount claimed as condition precedent to the admission of an appeal, which seeks to challenge imposition of tax, has the effect of nullifying the right of appeal. It is well-settled that the right of appeal is neither a fundamental nor constitutional right but is only a creation of statute, that is, without statutory provisions creating such right, no person is entitled to it. It follows, in my considered opinion, that the statute which gives this right can also regulate it by imposing conditions or restrictions for its exercise.

16. While interpreting Section 170(b) of the Delhi Municipal Corporation Act, 1957, in the case of Shyam Kishore and others Vs. Municipal Corporation of Delhi and another, , their lordships of the Supreme Court, after considering various decisions, inter alia, has observed as follows :

"Right of appeal is the creature of statute. Without statutory provisions creating such right, the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal, cannot impose conditions for the exercise of such right. In the absence of any special reason, there appears to be no legal or constitutional impediment to the imposition of such condition."

..... 17. On the backdrops of these settled principles of law, I am of the view that only because the petitioner was to deposit 20 per cent of the tax assessed as condition precedent of admission of the appeal, cannot be a ground for entertaining the writ application under Article 226 or 227 of the Constitution."

9. The Gauhati High Court in Monoranjan Chakraborty v. State of Tripura [1991]

81 STC 291(gau) has declared certain provisions of the Tripura Sales Tax Act requiring a dealer to deposit 50 per cent of the tax assessed before filing of the appeal as ultra vires on the ground that the said Act has conferred on the assessing officer vast discretion in the matter of levy of tax and imposition of penalty and if such officer makes illegal assessment and raises exorbitantly high demand, on the basis of such assessment, it will cause serious prejudice to the dealer and in many cases even ruin him because he has to deposit 50 per cent of the tax assessed. It was, therefore, held that the power to levy tax or impose penalty conferred on the assessing officer without effective corrective machinery by way of appeal or revision is unreasonable, oppressive and uncontrolled. The relevant provision of the Tripura Sales Tax Act requiring payment of 50 per cent of tax assessed before admission of the appeal was accordingly declared as ultra vires being violative of Article 14 of the Constitution.

10. The M.P. High Court in *Lachhmandas v. State of M.P.* [1995] 98 STC 274 has dissented from the aforesaid decision of the Gauhati High Court and has upheld the Madhya Pradesh General Sales Tax Act under which a part of assessed tax was required to be deposited as a condition precedent for filing an appeal. The relevant extract from the said decision is reproduced below :

"14. The right of appeal is a statutory right. It is open to the Legislature to provide for a remedy of appeal and also impose conditions in the matter of exercise of that right. The possibility of the lower authority passing a perverse order imposing a disproportionately heavy penalty is only a possibility of abusing of power. Such a possibility cannot be taken into consideration in testing whether right of appeal provided is effective or illusory. The requirement is not to deposit the entire amount due, but only a part of the balance due. It cannot be said that huge or disproportionate amounts are required to be deposited as condition precedent. It is true that there is no discretion granted to the appellate authority to relax the condition, But this is of no moment in view of several factors, namely, the satisfaction of the taxing officer is required to be objective, opportunity to show cause is required to be granted, the officer has to pass a reasoned order, and the deposit required is not of the entire balance but only a part of it. The provision is regulatory in nature and is not oppressive or arbitrary,"

11. The Supreme Court in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, , has, in this regard, laid down as under :

".....The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law

that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income Tax Act, 1922. The proviso to that section provided that ".....no appeal shall lie against an order Under Sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it.....".

12. The Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, , on which reliance has been placed by the learned counsel for the petitioner, is not a case dealing with the question in issue in the present case. In that case, Section 35 of the Central Excises and Salt Act, 1944 conferred unfettered right of appeal on a dealer without precondition of deposit of the assessed duty but by virtue of a notification issued by the Government applying the provision of the Customs Act, such a condition was imposed. The court struck down the notification holding that by notification the right of appeal u/s 35 of the Central Excises and Salt Act, 1944 has been whittled down.

13. So far as Section 45(3) of the Act is concerned, it does not require deposit of the total tax assessed. It requires merely 20 per cent of the tax assessed to be paid before admission of the appeal. Such an amount is not exorbitant and does not impose any onerous or unreasonable condition on the right of appeal. The assessing officers are required to pass assessment orders on the basis of objective criteria after giving opportunity to show cause to the dealer. The officer has to pass a reasoned order which is liable to be subjected to scrutiny before the appellate authority. It, therefore, cannot be presumed that the assessing officer will pass an arbitrary order raising exorbitantly high demands. The Gauhati High Court has declared the relevant provision of the Tripura Sales Tax Act as ultra vires, on the possibility of abuse of power by the assessing officers. A statutory provision cannot be declared ultra vires on a mere possibility of the abuse of power in a given case. It is, therefore, not possible to agree with the views expressed in *Monoranjan Chakraborty v. State of Tripura* [1991] 81 STC 291 by the Gauhati High Court. We are, however, in agreement with the views expressed by the M.P. High Court in *Lachhmandas v. State of M.P.* [1995] 98 STC 274. As mentioned hereinbefore, the division Bench of this Court in **Tinplate Company of India Ltd. v. State of Bihar* 1997 (1) 521 LR 521 has given good reasons in support of Section 45(3) of the Act with which we respectfully agree. There is no justification for reconsideration of the views expressed in the said decision. The first submission of the learned counsel for the petitioner is accordingly rejected.

14. The second submission also deserves the same fate. Merely because in some other States the appellate authority has been given power to relax or waive the condition requiring deposit of part of the tax assessed it cannot be held that absence of such a provision in the Act in this State will render it ultra vires. Each State has its own problems. The various relevant matters differ from State to State. The Supreme Court in *Khazan Chand v. State of Jammu and Kashmir* [1984] 56 STC 214 has, in this connection, observed as follows :

".....Sales tax is the biggest source of revenue for a State and it is for the State to decide how and in what manner it will raise this revenue and to determine which particular transactions of sale or purchase of goods taking place within the State should be taxed and at what rates, and which particular transactions of sale or purchase of goods should be exempted from tax or taxed at a lower rate having regard to the subject-matter of sale, as for instance, where particular goods constitute necessities for the poorer classes of people or where the goods in question are of such a nature as are required to be exempted from tax or taxed at a lower rate in order to encourage a local industry. Consideration of these matters must, from the nature of things, differ from State to State. Similarly, it is for each State to determine the methods it will adopt to collect its revenue from this source and to decide which methods would be most efficacious for this purpose. The provisions of the sales tax law of each State must, therefore, necessarily differ in various respects from the provisions of sales tax laws of other States. If the provisions of the legislation of every State on a particular topic are to be identical in every respect, there is no purpose in including that topic in the State List and it may as well be included in the Union List. Merely because the provisions of a State law differ from the provisions of other State laws on the same subject cannot make such provisions discriminatory."

15. For the reasons given above, we hold the provisions of Sub-section (3) of Section 45 of the Act as valid and the same are not ultra vires.

16. As the petitioner has remedy of appeal against the impugned assessment orders, this writ application is dismissed on the ground of alternative remedy. No costs.

A.K. Prasad, J.

17. I agree.