
(2004) 04 PAT CK 0061
In the Patna High Court
Case No : C.W.J.C. No. 931 of 2004

Eastern Safety and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-04-2004

Acts Referred:

Citation : (2004) 04 PAT CK 0061

Judgement

1. Petitioner No. 1 is a partnership firm and petitioner No. 2 is one of its partners and they have filed the present writ application for quashing Condition No. 1 in Tender Notice No. 10/2003-2004, issued by respondent No. 3 Deputy Inspector General of Police (Provision). Old Secretariat, Patna, published on 31.7.2003 in the English daily Newspaper, namely, "Hindustan Times", prescribing obtaining of Sales Tax Registration in Bihar as a condition precedent for submitting tender.

2. Petitioner No. 1 is a Small Scale Industrial Unit, having its Unit at Dhanbad in the State of Jharkhand and is engaged in manufacturing various types of shoes and making supply of shoes to various Government departments, including the Police Department. Para Military Forces and Mines etc. It has been supplying I.S.I. Mark Shoes to the Bihar Police regularly since so many years.

3. On 31.7.2003, an advertisement was issued by respondent No. 3 for supply of various articles, including Hunter Shoe, P.T. Shoe and Gum Boot being item Nos. 1.2 and 3. respectively, of the said advertisement. A copy of the advertisement has been appended as Annexure 1 to the writ application.

4. In pursuance of the said tender, the petitioners submitted their tender papers on 22.8.2003. They have appointed one Agent M/s. Amit Traders, A/32. Ganga Apartment, Mainpura, Patna, having its business in the State of Bihar for effectuating supplies in terms of the tender notice. Said M/s. Amit Traders is registered under the provisions of the Bihar Finance Act, 1981, bearing registration No. PTW-4387 (R). A copy of the registration certificate of M/s. Amit Traders has been appended as Annexure 2 to the writ application.

5. On 10.1.2004, the Deputy Inspector General of Police (Provision), Bihar (respondent No. 3) informed petitioner No. 1 and other tenderers to be present on 16.1.2004 before the Central Purchase Committee. However, on that day the meeting of the said Committee could not be held and the tenderers were asked to come on 17.1.2004. On 17.1.2004, price bids of other tenders, whose technical bids were approved by the Central Purchase Committee, were opened. However, as the petitioner's tender did not confirm to Condition No. 1 of the Tender Notice, which was incorporated in terms of the Stores Purchase Preference Policy, 2002, their tender was rejected by the Central Purchase Committee on 17.1.2004. According to Condition No. 1 of the Tender Notice, the manufacturers or their authorised agents, registered with the Commercial Taxes Department, can only submit tenders with regard to the articles mentioned in the advertisement, about which specification has been fixed by the I.S./Defence. The authorised seller/Agent has to submit the authorisation slip/letter from the manufacturer.

6. The case of the petitioners is that the aforesaid condition is arbitrary and violative of Article 19(1)(g) as well as Articles 301 and 304 of the Constitution of India. Their unit is situated outside the State and supplies made by them were in course of inter-State Trade from Jharkhand to Bihar and as such they have no liability under the provisions of the Bihar Finance Act and, accordingly, the said condition is hit by the aforesaid Articles. In the alternative, the petitioner's case is that they have submitted the documents giving names of their authorised Agent, namely, M/s. Amit Traders for the purpose of effectuating the supply in terms of the Tender Notice and as such rejection of his tender was invalid on the aforesaid grounds.

7. Two counter-affidavits have been filed on behalf of the State; one on behalf of respondent No. 2 Commissioner of Commercial Taxes, Bihar, Patna and the other on behalf of respondent No. 3 the Deputy Inspector General of Police (Provision), Patna. However, the stand taken in both the counter-affidavits is the same.

8. The Industries Department, Government of Bihar, issued a Stores Purchase Preference Policy, 2002, according to which in order to obviate any loss to local industries arising out of tax differences prevailing in other States as well as to ensure uniform tax compliance, in all the tenders called by each Government Department, there will be a mandatory compliance that units located in Bihar or Corporate Offices' local agent/authorised dealer of the manufacturing units located outside the State and registered with the Commercial Taxes Department, Bihar, only can participate. A copy of the said Stores Purchase Preference Policy, 2002, has been annexed as Annexure "A" to the counter affidavit filed by respondent No. 3. In terms of the aforesaid Policy, an amendment was made in the Bihar Finance Rules by the Bihar Finance (Amendment) Rules, 2002. Rule 2 of Appendix 8 of the Bihar Finance Rules was amended and the aforesaid policy has been incorporated. The aforesaid provision does not restrict or put prohibition on the manufacturers located outside the State of Bihar from

participating in the tender, on the other hand, the units located outside the State of Bihar can also participate in the tender through the Corporate Office, local Agent and authorised dealer, provided it is registered with the Commercial Taxes Department. The aforesaid Purchase Policy extends preferential policy to large and medium scale industries situated in the State of Bihar and also to ensure uniform tax compliance by the suppliers. Petitioner No. 1's Unit is located outside the State. No doubt, it has appointed one M/s. Amit Traders, Patna, as its Agent, which is a registered dealer under the Bihar Finance Act, but the petitioners have not submitted their tender through the aforesaid authorised Agent. They have directly submitted their tender and have, thus violated Condition No. 1 of the Tender Notice. The petitioners are not registered under the Bihar Finance Act and as such their tender has rightly been rejected, Further case of the State is that no doubt the registration under the Sales Tax depends upon the liability to pay tax under the charging section of the Bihar Finance Act after the specified quantum of turn over exceeds. The taxable event of an importing agent/authorised dealer starts from first sale in Bihar and in that case the manufacturers from outside the State as well as the manufacturers inside the State will pay the same rate of sales tax and there would be no discrimination, on the other hand, the unit located, outside the State without the aforesaid condition, will pay the lesser amount of sales tax on the inter State transaction and, thus, the manufacturing unit located inside the backward State of Bihar will be discriminated and the same will also stop the further growth of industries in this State.

9. Learned counsel for the petitioner raised two points; firstly that the mandatory condition of registration of the manufacturing units located outside the State of Bihar under the provisions of the Bihar Finance Act puts unreasonable restrictions/prohibition on their right to carry trade and commerce and, thus, is violative of Article 19(1)(g) of the Constitution of India and; secondly that the said condition is violative of Article 301 and is not saved by Article 304(a) of the Constitution, which authorises the Legislature of the State to impose on goods imported from other States and tax to which similar goods manufactured or produced in that State are subject, without making any discrimination between the goods imported and goods manufactured and produced in the State. The aforesaid action of the respondent-authorities put impediment in the free flow of inter State trade and commerce throughout the country. In support of his submission, he relied upon two judgments of the Apex Court; one in the case of M.K. Salpekar Vs. Sunil Kumar Shamsunder Chaudhari and Others, ; and the other in the case of Weston Electronics v. State of Gujarat, reported in the same volume at page 2038. He also placed reliance on the two unreported orders of the Jharkhand High Court; one of the Division Bench in the case of Rama Expoinvest Pvt. Ltd. v. State of Jharkhand and Ors., C.W.J.C. No. 1800 of 2001, and the other of a Single Bench in the case of Shakti Steel Pipes, a unit of Shakti Tubes Limited v. The State of Jharkhand and Ors., WP (C) No. 696/2002.

10. Learned counsel appearing for the State combated both the submissions and

submitted that the said condition is not violative of any of the Articles of the Constitution. Tax on sale of goods is not an impediment in the free flow of trade and business and is not violative of Article 301 of the Constitution, on the other hand, the said Policy decision clearly shows that with a view to have a uniform tax structure with regard to the goods imported from outside the State as well as the goods manufactured or produced inside the State and with a view to protecting industries in the backward State the said terms and conditions have been incorporated. There is no question of discrimination with regard to rate of tax between the goods manufactured and brought from outside the State and the goods manufactured or produced inside the State. If the manufacturing unit's located outside the State and is registered or if not registered but its corporate offices' local agent/authorised dealer is registered under the Bihar Finance Act, in that case it will pay the same amount of tax with regard to the goods, which have been manufactured or produced out of the State like the goods manufactured or produced inside the State and as such there is no question of discrimination, on the other hand, uniform tax is being levied and as seen the said policy decision, in no way, discriminates between the manufacturer of goods outside the State and manufacturer of goods inside the State. There is no total prohibition from participating in the tender, on the other hand, the restriction is reasonable in public interest as stated above and as such the same is not violative of Article 19(1)(g) of the Constitution of India. In support of his submission, he relied upon the two judgments of the Supreme Court; one in the case of Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, and the other in the case of Shree Digvijay Cement Co. Ltd. and Others Vs. State of Rajasthan and Others, .

11. In view of the arguments advanced at the Bar, two questions arise for consideration in this case; firstly as to whether Condition No. 1 incorporated in the Tender Notice is violative of Article 19(1)(g) of the Constitution and secondly as to whether the same is hit by Article 301 and 304 of the Constitution? Both the questions are interlined and as such the same will be disposed of together.

12. Article 19 of the Constitution protects certain rights, including right to practise any profession, or to carry on any occupation, trade or business as provided under Sub-clause (g) of Clause (1) of Article 19 of the Constitution, That right is not absolute and that is controlled by Clause (6) thereof, which provides, inter alia, for imposing reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the general public. However, in the interest of general public does not mean in the interest of the public of the whole of India. It can be in the interest of even a smaller group of general public. However, Article 19(1)(g) of the Constitution restricts total prohibition. If the restriction is such as it totally prohibits the exercise of right to carry on business and trade then such restriction will be unreasonable and will not be treated in public interest. However, while deciding the said question, the Court has to strike a balance between the individual freedom and social control. Article 301 of the Constitution of India provides that subject to other provisions

of this Part (Part XIII), under which part this Article falls, trade, commerce and intercourse throughout the territory of India shall be free. Article 303 of the Constitution contains a provision with regard to restrictions on the legislative powers of the Union and of the States with regard to trade and commerce. The said Article provides that if the tax imposed by the State is discriminatory, it will be hit by Article 303(1). Article 304 is an exemption to the aforesaid Article 301 and it provides, inter alia that notwithstanding anything contained in Article 303, the Legislature of a State may impose a non-discriminatory tax on goods so imported from outside the State as provided under Article 304(a) or impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within the State as may be required in the public interest provided that a legislation for the said purposes shall not be introduced or moved in the Legislature of a State without the previous sanction of the President.

13. Thus, any State legislation, which impedes free flow of trade and commerce throughout the territory of India, is violative of Article 301 of the Constitution unless it falls within the exemption as provided under Article 304. However, compensatory and regulatory laws are not covered by Article 301 of the Constitution.

14. The Constitution of India is not a static document, but it is an organic document and the meaning of the expressions used therein cannot be read in isolation and it is to be read with a view to achieving the object as provided in the Constitution. The meaning of the expressions has to be given in the context of the requirement of the changing situation. The Constitution provides for growth of society economically politically and socially and in the context interpretation not only meets the present situation but also takes into account the future contingencies, that might arise in a developing organism, the Apex Court in the case of *M/s. V.D.O. Electronics (supra)*, in paragraph 20 observed as follows :--

"In our opinion, Part XIII of the Constitution cannot be read in isolation. It is part and parcel of a single constitutional instrument envisaging a federal scheme and containing general scheme conferring legislative powers in respect of the matters relating to List II of the 7th Schedule on the States. It also confers plenary powers on States to raise revenue for its purposes and does not require that every legislation of the State must obtain assent of the President. Constitution of India is an organic document. It must be so construed that it lives and adapts itself to the exigencies of the situation, in a growing and evolving society, economically, politically and socially. The meaning of the expressions used there must, therefore, be so interpreted that if attempts to solve the present problem of distribution of power and rights of the different States in the Union of India and anticipate the future contingencies that might arise in a developing organism. Constitution must be able to comprehend the present at the relevant time and anticipate the future which is natural and necessary corollary for a growing and living organism. That must be part of the constitutional

adjudication. Hence, the economic development of States to bring these into equality with all other States and thereby develop the economic unity of India is one of the major commitments or goals of the constitutional aspirations of this land. For working of an orderly society economic equality of all the states is as much vital as economic unit."

15. The tax on sale of goods would not normally offend Article 301 of the Constitution. However, if it impedes directly or immediately the free flow of trade and commerce and intercourse within the Union of India then it will be violative of Article 301 of the Constitution of India and the Apex Court in the aforesaid case in paragraph 21 held that the tax which does not directly or immediately restrict or interfere with the trade, commerce and intercourse throughout the territory of India would, therefore, be excluded from the ambit of Article 301 of the Constitution. The sales tax has only an indirect effect on trade and commerce. Normally a tax on sale of goods does not directly impede the movement of goods. The tax is on sale and movement is occasioned by sale. In this connection, it is relevant to quote paragraph 21 of the said judgment, which runs as follows :--

"The taxes which do not directly or Immediately restrict or interfere with trade, commerce and intercourse through the territory of India, would therefore be excluded from the ambit of Article 301 of the Constitution. It has to be borne in mind that sales tax has only an indirect effect on trade and commerce. Reference may be made to the Constitution Bench judgment of this Court in *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, , where this Court observed that normally a tax on sale of goods does not directly impede the free movement of transport. See also the observations in *Mudaliar case* AIR 1969 SC 147, where at p. 851, it was observed that a tax on sale would not normally offend Article 301. That article made no distinction between movement from one part of State to another part of the same State and movement from one State to another, In this connection reference may also be made to observations in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, .

Both the preceding cases clearly establish that if a taxing provision in respect of intra-State sale does not offend Article 301, logically it would not affect the freedom of trade in respect of free flow and movement of goods from one part of the country to the other under Article 301 as well."

16. In paragraph 27, it was further held that even if it is supposed that the sales tax is covered by Article 301 as a tax directly and immediately hampering the free flow of trade, it does not follow that it falls within the exemption of Article 304 and it would be hit by Article 301. If the general rate of tax, which is to be compared under Article 304(a), is at par and the same qua the locally made goods and the imported goods, then the said provision cannot be said to be hit by Article 301 of the Constitution. In the said case, notifications were issued u/s 8(5) of the Central Sales Tax Act exempting new units of manufacturers in the State in respect of various goods for different periods from payment of any sales

tax, whereas, the same goods manufactured outside and sold in the State were liable to pay sales tax. The same was challenged on the ground of it being ultra vires to the Constitution of India as that infringes the rights guaranteed under Part XIII and also under Article 14 and 19(1)(g) of the Constitution. The Apex Court negated the aforesaid challenge. It was held that such exemption is permissible and it does not violate the aforesaid Articles. In this connection it is relevant to quote paragraph 28 as follows :--

"Concept of economic barrier must be adopted in a dynamic sense with changing conditions. What Constitutes an economic barrier at one point of time often cease to be so at another point of time. It will be wrong to denude the people of the State of the right to grant exemptions which flow from the plenary powers of legislative needs in List II of the 7th Schedule of the Constitution. In a federal policy, all the States having powers to grant exemption to specified class for limited period, such granting of exemption cannot be held to be contrary to the concept of economic unity. The contents of economic unity by the people of India would necessarily include the power to grant exemption or to reduce the rate of tax in special cases for achieving the industrial development or to provide tax incentives to attain economic equality in growth and development. When all the States have such provisions to exempt to reduce rates the question of economic war between the States inter se or economic disintegration of the country as such does not arise. It is not open to any party to say that this should be done and this should not be done by either one way or the other. It cannot be disputed that it is open to the States to realise tax and thereafter remit the same or pay back to the local manufacturers in the shape of subsidies and that would neither discriminate nor be hit by Article 304(a) of the Constitution."

17. In the case of Shree Digvijay Cement Co. Ltd., (supra), which was rendered by a Constitution Bench. The State of Rajasthan reduced the tax on inter-State sale of cement from that State to 4%. The manufacturers of Gujarat challenged the same on the ground that the same would amount to discrimination as the cement from Rajasthan would be cheaper in the State of Gujarat, which would adversely affect the local sale of cement manufactured in the State of Gujarat. Such reduction of tax was contrary to the scheme contained in Part XIII of the Constitution and was liable to be struck down. The Apex Court negated their challenge and held in paragraph 24 that the reduction of rate of tax in the State of Rajasthan was not to prevent or hinder the free movement of goods from one State to another, on the other hand, it increased the movement of cement from Rajasthan to other States and the said notification did not create a barrier, which might have had the effect of hindering free movement of goods, but, on the other, the sales tax barrier was lowered resulting in increased volume of inter-State trade.

18. Thus, the settled law is that normally the tax on sale of goods does not violate Article 301 of the Constitution unless it is shown that it directly impedes the free movement of trade, commerce and intercourse. The State has power to

make legislation to tax on goods manufactured from outside the State. However, in such a case, there shall be no discrimination between the goods manufactured outside the State and the goods manufactured inside the State, but that question does not arise in this case because there is no question of discrimination.

19. So far, as the cases relied upon by the petitioner are concerned, in the case of West Bengal Hosiery (supra), there was a levy of tax on the Hosiery goods manufactured outside the State of Bihar and sale in the State of Bihar, whereas the sales of similar Hosiery goods manufactured in the State of Bihar were exempted from sales tax. The State of Bihar did not file any counter affidavit in that case to justify the aforesaid levy as regulatory measure or a compensatory tax and in that context, it was held that the said action of the State is violative of provision of Article 301, read with Article 304(b) of the Constitution. Similarly, in the case of Weston Electronics (supra), the levy of sales tax at different rates on the goods imported into the State and the goods manufactured within the State was held to be illegal as that was discriminatory. The laws were struck, down as they were discriminatory and violative of Article 304(a) of the Constitution.

20. Thus, the cases relied upon on behalf of the petitioner are not applicable in this case as in this case there is no question of providing two different rate of tax with regard to the goods manufactured or brought here from outside the State and the goods produced or manufactured inside the State. There is no discrimination also in the matter of payment of sales tax between the two classes of goods, on the other hand, by making aforesaid clause, the same rates of tax is payable by the suppliers. Non-incorporation of the aforesaid condition in the Tender Notice would have caused discrimination to the manufacturing units within the State of Bihar as they would pay higher rate of tax in comparison to the manufacturing units located outside the State of Bihar as they would pay tax on inter-State sale, which is lesser than the rate of tax payable under the Bihar Finance Act.

21. Thus, the aforesaid condition has been put to protect the manufacturing units within the State of Bihar with a view to accelerating the industrial growth and to have a uniform rate of sales tax. Thus, the same is not hit either by Article 301 or is in breach of Article 304(1)(a) of the Constitution.

22. The Preference Policy and the amendment in the Bihar Finance Rules have been incorporated for the purposes, which are in public interest. The purposes are incorporated in paragraph No. 2.1 of Annexure "A" to the counter affidavit, which runs as follows :--

"2.1 In order to obviate any loss to local industries arising out of tax differences prevailing in other States as well as to ensure uniform tax compliance, in all the tenders called by each Government, Department, there will be a mandatory provision that units located in Bihar or Corporate offices" local agent/authorised dealer of the manufacturing units located outside the State and registered with the Commercial Taxes Department Bihar only can participate.

Note : "Units situated in the State means such units that are located and registered in the State of Bihar."

23. Same purposes have been reiterated by the Bihar Finance (Amendment) Rules, 2002 by amending Rule 2, relevant part of which runs as follows :--

3. Substitution of Rule 2 of Appendix 8 of the Bihar Finance Rule :--

Rule 2 of Appendix 8 of the Bihar Finance Rules shall be substituted by the following :--

"Where the purchase is proposed for not more than Rs. 20,000/- (twenty thousand), such purchases may be decided on the basis of Price list received from the unit located in India. In all other cases (except the specified exceptions mentioned in the rules below) tenders shall be invited for all purchases. It will be provided in every tender that only the industrial units of Bihar and such corporate offices/local offices, agents, authorised dealers of producing units of outside State, which are registered under commercial taxes of the Bihar State may participate in the tender."

24. Thus, the very object of Condition No. 1 in the Tender Notice has been made in public, interest for the aforesaid purchases. There is no total prohibition so far as the manufacturers from outside the State are concerned in submitting tenders. If they are already having registration in the State of Bihar, then they are eligible to participate in the tenders and in case of having no registration, they can apply through authorised agents or dealers who are registered under the provisions of the Bihar Finance Act with the Commercial Taxes Department, Bihar. Thus, the restriction on the manufacturing units located outside the State is not putting a total prohibition to carry trade, business and commerce, on the other hand, the same is reasonable one for public interest to serve the object as indicated above.

25. The case of M/s. Rama Expoinvest Pvt. Ltd., (supra) which is of a Division Bench, the intending tenderers from outside were required to file sales tax clearance certificate of Jharkhand State and it was held that the same was violative of Article 19(1)(g) of the Constitution on the ground that the petitioner of that case not being a dealer did not get itself registered u/s 14 of the Act and as such there was no question of filing a sales tax clearance certificate.

26. So far as other case of M/s. Shakti Steel Pipes, (supra) is concerned. Condition No. 15 was imposed in the tender notice of Jharkhand, whereby tenderers outside the State were required to raise the bill for the State of Jharkhand and if necessary have to obtain registration under the provisions of the Jharkhand Sales Tax Act. There was no provision to make supply through various Agents. Dealing with the said matter, a learned Single Judge of the Jharkhand High Court struck down the said condition on the ground that there was no provision under the Jharkhand Sales Tax Act to obtain registration, event though not covered by the charging section. However, the learned Single Judge

held that the State without amending law and without prescribing guideline or making rules under the Bihar Finance Act or Jharkhand Sales Tax Act, incorporated the aforesaid condition.

27. In the State of Bihar, as stated above, already a policy decision has been taken with a view to achieve the object of policy. The said condition in the Tender Notice has been incorporated, which as stated above, does not suffer from any of the infirmities as urged on behalf of the petitioner. The said decisions were tendered in different context and hence not relevant in the present context.

28. For the reasons aforementioned, we do not find any merit in this writ application and it is, accordingly, dismissed.