
(1989) 12 GAU CK 0014
In the Gauhati High Court
Case No : Civil Rule No. 780 of 1981

Electric and Furnishing Mart

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 01-12-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1990) 1 GLJ 117

Hon'ble Judges : A.Raghuvir, C.J. and M.Sharma, J

Bench : Division Bench

Advocate : T.C.Khetri, K.K.Bhatra, P.K.Barua, Advocates appearing for Parties

Judgement

A. Raghuvir, C.J.

This firm of M/s. Electric and Furnishing Mart is a registered dealer under the Assam Finance Sales Tax Act XI of 1956. The firm inter alia imports goods from out side Assam and is the writ petitioner in the instant case. The firm seeks a declaration to hold section 33A is ultra vires of the Constitution. The firm further seeks to declare Rules 71 to 74 ultra vires of the Act XI of 1956. The third relief sought for by the firm is to declare a document, called circular dated February 20, 1981 and another letter dated July 16, 1981 both the documents of the Assam Sales Tax department are illegal and void in law. These are the three reliefs that are sought in the writ petition. Originally when the writ petition was filed the firm did not cover relief as to section 33A. At a later point of time the writ petition was amended to cover that relief there upon the learned Advocate Generals of Assam and Meghalaya both were asked to take notice of the writ petition. All the respondents impleaded in the case resist the writ petition.

The instant firm earlier filed a writ application to quash a circular dated March 1, 1981 in that the Superintendent of Taxes at Tezpur instructed the importers of goods imported by road to obtain permits from Superintendent of Taxes before goods are imported and produce at the Check Post along with the way bills of the

goods. The letter of the Superintendent of Taxes, Tezpur and the form appended to the letter both were assailed in this Court. The writ petition was allowed. The case is reported in 52 STC 354, Electric & Furnishing Mart vs. State of Assam and Ors. The learned Advocate General of Assam represented the circular of March 1, 1981 was withdrawn either before the writ petition was decided or after the decision of this Court was rendered.

In another decision of this Court a circular dated February 7, 1981 of the Sales Tax Department was assailed. The writ petition was dismissed and the decision is reported in 52 STC 368, Bhagwat Swamp Gupta vs. C.I.T., Assam. We call this decision in the second case. The forms prescribed in the second case were different and thus the first case was distinguished. The forms assailed in the second case this Court held did not impose any unreasonable restriction. The free movement of goods or trade in the country was not thwarted.

The instant case is the third in the series of circulars. The instant writ petitioner was not a party in the second case. The firm in the instant case contends the instructions issued on February 20, 1981 by the Deputy Commissioner of Taxes to the Chambers of Commerce in the State of Assam are not legal. Further the letter dated July 16, 1981 imposes unreasonable restrictions when importers are asked to produce at Check Post forms which were the subject matter of consideration in the second case,

The Deputy Commissioner of Taxes, informed the Chambers of Commerce that the contents of the forms are no more res integra and along with the letter a copy of the judgment in the second case was provided to the Chambers of Commerce. Earlier in the letter on February 20, 1981 officials of the Tax Department were communicated the following : "In continuation of this office No. quoted above, it is hereby clarified that for facilitating uninterrupted flow of traffic, you may besides using a permit on application in respect of each consignment, issue to the dealers of your area in suitable cases permits in advance in the enclosed form on individual application. Such permits may be issued in books of 25 (twenty five) or more forms after affixing your signatures at the appropriate place. A proper record should be kept by you for issue of such forms to each individual dealer as in the cases of "C" forms. The advance permit should be in triplicates "counterfoil", "original" and "duplicate". The counterfoil part shall be retained by the consignees dealer. The original and duplicate portions should accompany the goods and be produced at the checkpost. The checkpost officer will return the duplicate portion after necessary verification to the consignee/carrier with his checked seal etc. and retain the portion marked original on the body of which the consignee/carrier will acknowledge receipt of the portion marked duplicate. The portion retained by the checkpost will be forwarded by the checkpost to the Superintendent of Taxes who had issued the form. The checkpost shall keep a brief record of such forms received in its usual register and the assessing officers shall at the time of assessment check the records of advance permits issued with dealers" accounts. Pending issue of

necessary forms from this office, you may issue such advance permits in forms produced by the dealers and keep proper records as stated above."

We see in the second case this Court held the circular of February 20, 1981 did not impede the free trade or impose unreasonable restriction on trade. Against that decision there was no appeal filed in the Supreme Court therefore the learned counsel for the writ petitioner at the inception it was pointed out to him that the Hs raised now in the instant case is hit by decision in the second case. The principle of res judicata operates on the issue as held in the case of AIR 1962 SC 1621, Ujjam Bai vs. State of U. P. and AIR 1961 SC 1457, Daryao vs. State of U. P. In the latter case the Supreme Court held "an error of law or fact cannot in general be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends."

The learned counsel for the writ petitioner cited AIR 1964 SC 1013 and the case (1988) 2 SCC 602, A. R. Antulay vs. R. S. Nayak and relied on paras 4 Mo 48 and argued when fundamental rights of the citizens are violated the principles of res judicata do not bar the Courts from giving reliefs to the affected person. The plea advanced in such a wide manner obviously cannot be accepted. In paras 42 to 48 referred to by the counsel the principles of per incuriam and principles of precedents were discussed. Whether a Division Bench of three Judges can overrule a Division Bench of two Judges, was considered. In that connection it was held rules of practice were recounted that a Constitution Bench decision of the Supreme Court was binding on another Constitution Bench. It is in that context the observations in paras 47 and 48 were made. The Supreme Court did not hold that the principle of resjudicata is inapplicable in 226 proceedings nor Daryao's case or Ujjam Bai's case were overruled. Therefore we hold the relief sought for as respects the circular dated February 20, 1981 and letter of July 16 1981, no relief can be granted to the petitioner in the instant case.

The learned counsel for the petitioner next attacked section 33A was incorporated in the Act XI of 1956 by the Amending Act XIV of 1966 a decade after the original Act was passed. The counsel argued section 33A was unnecessarily incorporated in the Act. In support of the assertion the learned counsel relied on section 11, which relates to assessment cases of escape and evasion. Section 13 which imposes penalty for concealment of turnover. The powers of authorities to offences and penalties in section 25 was referred. Powers to order production of accounts contained in section 31 was referred. Finally section 32 was cited which related to the power to call for statements. In view of all these sections the learned counsel for the petitioner argued section 33A is ""surplus and unnecessary?. We are afraid we cannot countenance such a contention as it is for the legislature to decide (not for the Courts to decide) whether any amendments are necessary or otherwise to any particular enactment. This Court cannot strike down a provision because the provision is unnecessarily incorporated or hold the provision is a surplusage.

Section 33A reads as under;

"33A. Erection of check posts(1) The State Government may, by notification, set up and erect, in such manner as may be prescribed checkpoints and barriers at any place in the State with a view to prevent the evasion of tax payable under this Act. (2) Every person transporting goods shall, at any checkpoint or barrier referred to in subsection (1) and before crossing such checkpoint or barrier, file before the Officer incharge of the checkpoint or barrier, a correct and complete declaration of the goods in such form and in such manner as may be prescribed. (3) The Officer incharge of the checkpoint or barrier for the purpose of satisfying himself that the provisions of subsection(2) are not being contravened, and subject to such restrictions as may be prescribed ; intercept, detain and search any vehicle or boat which may be suspected of being used for contravening such provisions."

The learned Advocate General submitted vires of similar provision is covered by the decision in 27 STC 1, Check Post Officer, Coimbatore vs. K. P. Abdulla & Br\$ In that case clause (3> of section 42 of Madras General Sales Tax Act of 1959 was struck down by the High. Court. On appeal the Supreme Court held clause 3 of section 42 was not incidental to the legislation of Entry 54 of List II of the Seventh Schedule of the Constitution therefore principally on that ground appeal against the decision of the State High Court was dismissed. We see there are more direct cases covering the subject at issue. The decision in (1486) 2 SCC 486, Sodhi Transport Co & Others vs. State of U. P. & Ors. was a case where check posts were established under section 28 and transit passes were required to be produced at the check post under Rule 87 and a form was to be delivered. All these were prescribed under Uttar Pradesh Sales Tax Act 15 of 1948. The Supreme Court held checkpoints were established to prevent evasion of tax. Persons who intended to transport goods by road were facilitated if they complied the requirement in section 28B of the Act. A vehicle entering Uttar Pradesh and bound for any other place outside that State, the driver or other person incharge of such vehicle was to obtain transit pass and deliver forms of thirty four to the Officer incharge of the checkpoint. The validity of sections 28, 28B, Rule 87 and the form thirty four were assailed on three grounds that (i) the provisions were outside the scope of Entry 54 of List IF of the Seventh Schedule to the Constitution; (ii) they infringed freedom of trade, commerce and intercourse guaranteed under Article 301 of the Constitution ; and (iii) they imposed unreasonable restrictions on the freedom of trade guaranteed under Article 19(1) (g) of the Constitution. The three contentions were rejected. These provisions were compendiously referred to "just machinery provisions" and were held enacted to ensure that there is no evasion of tax and did not impose unreasonable restriction. They were held incorporate in public interest and do not hamper trade. The contentions based on Article 301 and Article 19(1)(g) of the Constitution were rejected. The ratio in the case was reiterated in AIR 1989 SC 1119, State of Bihar vs. Harihar Prasad, where Part XIII of the Constitution was again considered. In that case notification and two forms, Forms XXVHIA and XXV1KB prescribed under Bihar Finance Act, 1984 were assailed. The Supreme

Court held that the case was covered by the ratio in *Sodhi Transport Co. vs. State of U.P.*, (1986) 2 SCC 486.

The learned counsel for the petitioner next contended Act 11 of 1956 was assented to by the President of India. Therefore, protection of Article 304 clause (B) is not available to section 33A. This question need not be considered at length as the installation of a check post or check gate or erection of a check post were held to be reasonable restriction. During the debate the case in AIR 1989 SC 2015, *Buxa Dooara Tea Co. Ltd vs. State of West Bengal* was cited wherein the. Supreme Court reviewed the cases relevant to reasonable restriction under Article 304 (b) was considered. In that case vires of West Bengal Rural Employment and Production Act, 1976 was at issue. The precise question was related to cess levied on tea estates under the Act. The Supreme Court held the legislative head was occupied under the Tea Act, 1953. It was further held there was no legislative competence to sustain the Act and the Statute of State Act of 1976 was struck down.

In view of the above discussion we hold the contention raised to assail section 33A fails. We may mention no argument is advanced as respect the vires of Rules 71 to 74 in this case.

This writ petition therefore for the aforesaid reasons is dismissed. There will be no order as to costs.