

(2006) 01 CAL CK 0001
In the Calcutta High Court
Case No : W.P.T.T. No. 8 of 2004

Ferring Pharmaceuticals Private Ltd. and Another	APPELLANT
Vs	
Assistant Commissioner of Commercial Tax Officer and Others	RESPONDENT

Date of Decision : 05-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 464
Essential Commodities Act, 1955 — Section 6
Income Tax Act, 1961 — Section 132
Penal Code, 1860 (IPC) — Section 26
West Bengal Sales Tax Act, 1994 — Section 68, 69, 70, 71
West Bengal Sales Tax Rules, 1995 — Rule 210, 211, 211A, 212, 212(2)

Citation : (2006) 1 CALLT 577 : (2006) 1 CHN 557 : (2006) 147 STC 252

Hon'ble Judges : Maharaj Sinha, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Moinak Bose and Kumarjit Das, for the Appellant; Seba Ray, for the Respondent

Final Decision : Allowed

Judgement

Asok Kumar Ganguly, J.—This writ petition by M/s. Ferring Pharmaceuticals Private Limited was filed challenging an order dated 26.9.2003 passed by the West Bengal Taxation Tribunal which was an order of remand as also the order dated 21.1.2004 passed by the respondent No. 3 the Commercial Tax Officer imposing therein a penalty.

2. Relevant facts of the case are that a consignment of goods being consignment No. 18772795 dated 2nd January, 2002 was imported into West Bengal and the said consignment contained two packages including 20 boxes each containing 5 ampoules of Remestyp Injection amounting to Rs. 1,39,104/- and another package containing 90 boxes of one ampoule of Decapeptyl Injection amounting to Rs. 5,04,252/-. It is further pleaded that the said consignment was accompanied with one Air consignment note covering the entire stock of goods

transferred from Mumbai to Kolkata and the two different stock transfer notes being Nos. 18 and 22 both dated 25.1.2002 pertaining to the consignment of 20 and 90 boxes were issued respectively. Both the two stock transfer notes accompanied the consignment which was transported from Mumbai to Kolkata through Air.

3. One of the employees of the petitioner, Sri Ashoke Das, a peon, was sent to the Airport Check Post for releasing 20 boxes and accordingly a waybill was filled up in a statutory form in compliance with West Bengal Sales Tax Rules for releasing the goods from Airport Checkpost authority. At that time the respondent No. 1 asked the waybill in respect of the second stock transfer note for 90 boxes. But Sri Ashoke Das, the petitioner's representative, could not produce the waybill about the second stock transfer note. As such those goods were not released and were kept in the custody of the Airport authority and no claim was made for releasing the goods covered by the second stock transfer note as waybill was not produced by the representative of the petitioner.

4. The respondent, on the other hand, immediately seized the goods and handed over a seizure receipt along with the grounds of seizure to Sri Ashoke Das, the representative of the petitioner. In view of those facts, a show-cause notice was issued against the petitioner asking the petitioner to show-cause against imposition of penalty u/s 71 of the West Bengal Sales Tax Act, 1994 (hereinafter referred to as the "said Act").

5. As the petitioners were dissatisfied with the alleged seizure they moved an application before the West Bengal Taxation Tribunal (hereinafter referred to as "said Tribunal") challenging the purported seizure. The said proceeding was numbered as Case No. R.N. 40 of 2002. The Tribunal, however, was not pleased to interfere with the petitioner's application and dismissed the same. Thereafter, the petitioner moved another petition before the Assistant Commissioner, Commercial Tax praying for release of the seized goods since the goods were life saving drugs. The petitioner undertook to pay security charges under protest and also made a prayer for early hearing of the penalty proceeding.

6. In connection with the said seizure, the respondent authorities heard the matter and imposed a penalty of Rs. 1,41,594/- and a notice in form No. 45 demanding penalty u/s 71 of the said Act was handed over to the petitioner. The petitioner under protest paid the said penalty of Rs. 1,41,594/- and got the goods released on 20th February, 2002, and the release order was issued vide Memo. No. 22432. The order of the Tribunal dated 8.8.2002 was challenged by the petitioner by filing a writ petition being W.P.T.T. No. 14 of 2002. The said writ petition came up for hearing before a Division Bench of this Court and the Division Bench by an order dated 21st August, 2003 was pleased to set aside the order dated 8th February, 2002 passed by the Tribunal as it was not a reasoned order. The Division Bench remanded the matter to the said Tribunal for hearing afresh and for passing a fresh judgment. The matter was heard by the said Tribunal on 26th of September, 2003 and an order was passed. In the said order

the Tribunal found that stock transfer of two different types of consignments of goods and of different quantity were brought to the Airport under one consignment note but waybill in respect of 90 boxes of medicine was not produced. The Tribunal found that it was a case of stock transfer. As such the right to property over the goods was not questioned. The Tribunal held that even though the goods were not seized from the physical possession of the petitioner but constructive possession of the petitioner was there over the goods when seizure was made as such there was violation of Rule 211 of West Bengal Sales Tax Rules, 1995 and accordingly the Tribunal held that seizure was made in accordance with law.

7. On the question of penalty the Tribunal found that there was no evidence on record to show that there was any attempt made by the petitioners to take delivery of the goods or get the goods released by any unfair means or under any false pretext. As such, the Tribunal found that there might have been a bona fide mistake or a communication gap on the part of the petitioners but since there was no mens rea the penalty could not have been imposed. As such the Tribunal upheld the seizure but set aside the order of penalty and remanded the matter to the Commercial Tax Officer to hear the matter on the question of penalty and directed the disposal of the penalty proceeding within a certain time frame.

8. Thereafter a notice was issued by the Commercial Tax Officer on 05.01.2004. Pursuant to such notice the petitioners appeared before the Commercial Tax Officer and filed its representation. In the said representation it was made clear that the petitioners had been advised to challenge the order of the Taxation Tribunal dated 26.9.2003 before the High Court.

9. It is the case of the petitioners that despite such representation, the Commercial Tax Officer heard the matter and ultimately passed an order of penalty of Rs. 70,792/- by reducing it from Rs. 1,41,594/- which was imposed previously.

10. Both these orders namely order dated 26.9.2003 and the order dated 21.1.2004, as noted above, have been challenged in this writ petition before the High Court.

11. Certain facts in this case are not in dispute. It is not in dispute that it is a case of stock transfer from the registered office of the petitioner at Koko Udyog, Unit Bhawan, Unit No. 86, Mumbai to its Kolkata office and the goods were sent by Air. It is also not in dispute that on 25th January, 2002 one stock transfer note being No. 18 dated 25.1.2002 containing 20 boxes of Remestyp 1.0 injection being batch No. 252401 reached the Kolkata office for taking delivery from the Airport. It is also not disputed that Sri Ashoke Das, a peon of the petitioner, had no clue regarding the second stock transfer note being Note number 21 and its contents. The second stock transfer note had not reached the Kolkata office on 25.1.2002.

12. Even though these aforesaid facts are not disputed, petitioner received a notice of show-cause why penalty shall not be imposed u/s 71 of the Act as the petitioner failed to comply with the requirement of Rules 210/ 211/211A/212 and 213 of the West Bengal Sales Tax Rules, 1995 (hereinafter referred to as the said rules).

13. It is common ground that seized goods are life-saving drugs and perishable in nature and as such under compelling circumstances the petitioner got the goods released by paying the penalty under protest.

14. The grounds of seizure after reiterating the aforesaid facts stated that the consignment was intercepted and put under physical verification by way of routine test and on search it was found that in addition to 20 boxes of Remestyp injection, the consignment contained 90 boxes of Decapeptyl injection and it was alleged that same was not reflected in the waybill and according to the respondent authorities the same was a false declaration furnished by the petitioner. In fact the case of the petitioner is that there was only one waybill for 20 boxes and the other waybill had not reached the Kolkata office. The stock transfer note specifically mentioned two consignments separately. Therefore, the authority should not have proceeded on the basis that there was any false declaration by the petitioner. On these facts one consignment of 20 boxes was released and the other consignment was seized in exercise of the power u/s 70 of the West Bengal Sales Tax Act from the alleged possession and custody of Sri Ashoke Das.

15. It cannot be disputed that Sri Ashoke Das had no custody over the goods. Therefore, this factual assumption is obviously wrong. It is the consistent case of the petitioner that no attempt was made by Sri Ashoke Das to get the consignment of 90 boxes released and that stand of the petitioner could not be disputed. Sri Ashoke Das only wanted to have the consignment of 20 boxes released and for which there was a waybill.

16. In the order of the Tribunal dated 26.9.2003 the Tribunal has nowhere stated that there was any attempt made by Sri Ashoke Das or any one on behalf of the petitioner company to secure the release of the other consignment of 90 boxes.

17. Now the question is whether in the facts of the case any time should have been granted to the petitioner to produce the other waybill. Reference in this connection be made to the relevant rules on the subject. In the Tribunal's order referred to above, it has been alleged that the petitioner violated Rule 211 of the rules and the Tribunal held that question of allowing time to the dealer for production of the relevant waybill is not permitted under Rule 211 and the same is permitted only under sub-rule (2) of Rule 212. The Tribunal also admitted that Sri Ashoke Das did not have the actual physical possession of the goods and he had constructive possession.

18. This Court does not understand what is meant by constructive possession in

the facts and circumstances of this case. The concept of constructive possession cannot be pressed into service when one is dealing with the question of seizure of goods from the possession of a party. Seizure is an overt act and as a result of which property which is in the physical possession of a private party can be seized and taken control of by the seizing authority. If the property is not in the physical possession of any private party but is in physical possession of the authority as in the instant case, there is no question of seizure.

19. There may be cases of constructive or deemed seizure in a situation where it is not possible to take physical possession of any article or thing and remove it to any safe place because of its volume, weight or other physical characteristics or may be where the thing seized is itself of a dangerous nature. In such cases the authorized officer may serve on the owner or on the person who is in immediate possession or control of the goods that he shall not part with, remove or deal with the seized articles except with the previous permission of the authorized officer. This may be called deemed or constructive seizure as provided in Section 132 of Income Tax Act, 1961. But in order to constitute seizure the person from whose possession the goods are seized must have prior actual and physical possession of the goods.

20. Whenever the authorities are talking of constructive possession, the authorities are talking on the basis of inference. In matters relating to seizure which may lead to imposition of penalty, there is no warrant for proceeding on the basis of inference unless it is authorized by law. Here there is no legal basis for drawing such inference. As such the very basis of seizure is unsustainable. Under Rule 211 it is made clear that when any consignment of goods is imported or brought into West Bengal by a dealer from any place outside West Bengal and such consignment of goods reaches a particular station either by a railway station, steamer station or a port or airport or post office in West Bengal in that case such dealer shall, before taking delivery of such consignment of goods, present before the Commercial Officer or Inspector at the checkpost a waybill in Form No. 42. In the instant case there is no violation of Rule 211 inasmuch as the consignment of 90 boxes has not been taken delivery of by the petitioner on 29.1.2002.

21. It may be noted in this connection that the goods arrived at the check- post at 2.30 p.m on 29.1.2002. From the seizure receipt it appears that the authorities allegedly intercepted the goods at the checkpost at 2.30 p.m. and the alleged seizure was made as per the seizure receipt at 3.40 p.m. Therefore, within a span of 1 hour 10 minutes from the arrival of the goods the seizure had taken place and such seizure is sought to be justified under Rule 211. But Rule 211 would apply only when there was an attempt to take delivery of the consignment. Here there is no finding by the Tribunal that there was any attempt by the petitioner to take delivery of the consignment without presentation of the waybill.

22. The requirement of giving time under Rule 211(2) is attracted in the facts of

the case as the second consignment of goods arrived without the waybill and in such a situation time of 48 hours for presentation of the waybill should have been granted. In any event before purporting to seize the goods within 1 hour and 10 minutes from the time of their arrival some reason should have been recorded in the seizure memo, inter alia, to the effect that despite an opportunity being given to the dealer to produce the waybill for the second consignment it has failed to do so. Here nothing of that kind has taken place. As such this seizure cannot be justified. In fact it has been admitted in the order of the Tribunal dated 29.9.2003 that dealer never intended to evade payment of taxes. It has been categorically held by the Tribunal that there is no evidence on record to show that there was any attempt made by the dealer to take delivery of or get the goods released by any unfair means. There is also a finding by the Tribunal that there might have been a bona fide mistake or communication gap after arrival of the goods in question. Having arrived at such a finding this Court does not understand how can the authorities justify seizure. From a proper reading of Rules 211 and 212 of the said rules it appears that seizure can take place where there is an attempt made by the dealer to get the goods released in order to evade payment of taxes.

23. On a conjoint reading of the provision of Sections 68, 69 and 70 of the West Bengal Sales Tax Act, 1994 it appears that the sine qua non of a valid search is the reason to believe of the appropriate authority that any goods are being transported in contravention of the provisions of Section 68. If there is a bona fide reason to believe on that aspect of the matter then the authority shall first detain the vehicle carrying such goods for a period not exceeding 48 hours and if the person bringing, importing or receiving such goods fails to furnish such particulars as have been prescribed u/s 68, the authority shall seize such goods together with any container or materials for the packaging of such goods. The proviso of Section 70 makes it clear that in granting the period of 48 hours, Sunday or a public holiday declared under the Negotiable Instruments Act shall be excluded. Therefore, the provision of giving 48 hours time to produce necessary document is a condition precedent to a valid seizure of such goods. The fact that such a condition is a mandatory one is made clear from the proviso which says that the period of 48 hours must be very strictly construed and from such period shall be excluded Sunday or any other holiday declared under the Negotiable Instruments Act. In the instant case, the seizure has taken place within virtually one hour and ten minutes of the arrival of the goods and the requirement of giving 48 hours to produce the document, which is also a statutory requirement, has been totally ignored. Apart from that, Section 68 is linked up with Section 70 and the provision of Section 70 can only be resorted to provided there is a contravention of Section 68. The opening words of the Section 68 are that the said Section has been enacted in order to ensure that there is no evasion of taxes.

24. In the instant case there is a finding of the Tribunal that there was no attempt on the part of the petitioner to evade payment of taxes nor was there

any attempt to take delivery of the goods in any unfair manner. The Tribunal has come to the conclusion that there may be a bona fide mistake or a communication gap. After having come to the said finding the Tribunal should not have sustained the seizure of the goods.

25. The words "reasons to believe" frequently occur in various fiscal statutes. These words operate as a safeguard against an arbitrary exercise of power by the authorities under fiscal statutes which empower such authorities to exercise sweeping and drastic powers. The power of search and seizure is in the nature of a sweeping power. In the context of such power the protection given by the words "reasons to believe" does not mean that the entertainment of belief by the authorities is based on a mere subjective process. The Courts have held that this entertainment of belief must be on relevant facts and within the limits prescribed by the statute. In *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta*, , the Supreme Court held that the belief as suggested by the words "reasons to believe" must be the belief of an honest and reasonable person. Such belief must be based on reasonable ground and such belief cannot be based on mere suspicion gossip and rumour. Almost in the same vein is the judgment of the Supreme Court in the case of *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, . In that case the Supreme Court held that the belief must be held in good faith and it cannot be a mere pretence. In the other words, it has been judicially accepted that it is open to the Court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of opinion or whether such reasons are extraneous or irrelevant to the purposes of the Section.

26. Similarly, in *Dr. Jai Shanker (Lunatic) through Vijay Shanker Brother Guardian Vs. State of Himachal Pradesh*, , the expression "reasons to believe" occurring in Section 464 of Code of Criminal Procedure, 1898 came up for consideration and the learned Judges held that the words reasons to believe mean a belief which a reasonable person would entertain on the facts before him.

27. Similar opinion has been expressed in *Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, , in the context of the provisions of search and seizure under the Foreign Exchange Regulation Act. The expression "reasons to believe" came up for interpretation. The Supreme Court held the expression "reasons to believe" is not synonymous with the subjective satisfaction of the officer and it was held that the belief must be held in good faith and should not be a mere pretence. In *Joti Parshad Vs. State of Haryana*, , the words "reasons to believe" came up for consideration in the context of Section 26 of Indian Penal Code. Referring to Section 26 of the Indian Penal Code, the learned Judges held that formation of reasons to believe is not the same thing as suspicion or doubt and mere seeing cannot be equated to belief. The "reasons to believe" according to the learned Judges is a slightly higher level in the state of mind. In fact, a distinction was made between the reasons to believe and reasons to suspect by the Supreme Court in the case of

Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, . By construing the words "reasons to believe" the learned Judges of the Supreme Court in Lakhmani held that the words are wide but not plenary. The learned Judges explained the position by saying there must be a live link or a close nexus between the materials before the officer in the case in question and the reasons to believe which the officer has to entertain before acting under the relevant section (See para 12). This expression again came up for consideration by the Supreme Court in the case of N. Nagendra Rao and Co. Vs. State of Andhra Pradesh, . Construing the words "reasons to believe", the learned Judges opined that the words may suggest the formation of opinion in a subjective way but in reality such formation of opinion must be based on materials on record which cannot be arbitrary, capricious and whimsical. The Supreme Court held that the words "reasons to believe" are a check on the exercise of power of seizure of the goods which is provided by the Section 6(a) of the Essential Commodities Act.

28. Going by the aforesaid tests and the well-settled principles, this Court is of the opinion that in the facts of this case discussed above the appropriate officer cannot entertain reasons to believe that the consignments in question are transported in contravention of the provisions of Section 68. Therefore, the formation of opinion u/s 70 is not based on valid grounds and the seizure cannot be sustained.

29. Since the seizure is not valid the subsequent imposition of penalty also cannot be sustained.

30. Attention of this Court was drawn to the Division Bench judgment in the case of Pannalal Mahabir Prasad and Anr. v. State of West Bengal and Ors. reported in 2000(35) STA 41. In that case a Division Bench of Calcutta High Court held that where the bona fides of the assessee have been fully established by the fact that it had obtained permit from the Assistant Collector of Commercial Taxes on 21st and produced it on 25th and the goods arrived at the checkpoint on 24th there should not be any seizure or payment of penalty. The facts here are almost identical and as such the penalty proceeding in this case cannot be sustained. Attention of this Court was also drawn to another decision of the Division Bench of this Court in the case of Shree Azad Transport Co. Put. Ltd. v. Commercial Tax Officer, Duburdi Check-Post, Burdwan and Ors. reported in Vol. 123 Sales Tax Cases 13. The learned Judges held that the provisions of the said Act and rules must be harmoniously construed and after reading them harmoniously the Court came to the conclusion that upon interception of the goods which enter the West Bengal zone in contravention of the provisions of Section 68, a detention of the goods is required to be made for a period not exceeding of 48 hours. Within that period an opportunity is to be granted to the person bringing, importing or receiving such goods for producing the necessary documents and in case of his failure to do so the goods may be seized together with any container or other materials or the packing thereof. In the instant case, the aforesaid procedure was not followed in respect of the second consignment of 90 boxes. Therefore,

the statutory mandate not having been followed, both the seizure and the imposition of penalty are liable to be quashed.

31. In another decision of the Division Bench of the Calcutta High Court in the case of Zarghamuddin Ansari (Anwar) v. Commercial Tax Officer and Ors. reported in Vol. 38 STA 129 this Court held that in a case where there is no finding that the dealer had any intention to evade payment of taxes and there was subsequent production of documents but such subsequent production was not considered, the order of the Taxation Tribunal for seizure of the goods and the imposition of penalty cannot be sustained.

32. In fact the Tribunal in its order dated 26.9.2003 expressed its doubt about the imposition of penalty and remanded the matter to the Commercial Tax Officer for consideration of the question of penalty. But the Commercial Tax Officer in the facts of the case did not properly exercise his discretion by maintaining a reduced quantum of penalty.

33. This Court holds that since there is no attempt on the part of the petitioner to evade the payment of taxes and in view of the finding of the Tribunal that there may be a bona fide mistake, the imposition of penalty cannot be sustained and is set aside. The amount of penalty which was realised from the petitioner is to be refunded by the respondents to the petitioner within a period of six weeks from today. But, if the amount is not so refunded by the respondents to the petitioner within a period of six weeks from today in that case such refund will have to be made along with an interest of 9 per cent per annum to be levied from the date of expiry of six weeks from today and till the date of actual refund.

34. The writ petition thus succeeds. The impugned order of the Tribunal dated 26.9.2003 and the order of the Commercial Tax Officer dated 21.1.2004 are quashed.

35. There is no order as to costs.

Maharaj Sinha, J.

36. I agree.

Later:

37. Urgent xerox certified copy of this judgment be made available to the parties, if applied for.