
(2007) 03 MP CK 0048
In the Madhya Pradesh High Court

Indian Infrastructure Equipment Ltd. and Another	APPELLANT
Vs	
Check-Post Officer and Others	RESPONDENT

Date of Decision : 19-03-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2007) 3 MPLJ 614 : (2006) 2 MPLJ 527 : (2007) 9 VST 457

Hon'ble Judges : S.K. Kulshrestha, J;J.K. Maheshwari, J

Bench : Division Bench

Judgement

S.K. Kulshrestha, J.

This writ appeal shall also govern disposal of Writ Appeal Nos. 10,11,12,13 and 14 of 2006. All these appeals have been filed against the common order passed on April 12, 2006 by the learned single judge in Writ Petition Nos. 929, 930, 931, 932, 933 and 934 of 2006 between the same parties.

According to the petitioner, the petitioner is a registered company, dealing in leasing out equipment and machinery on rental basis. The petitioner contended before the authorities that it purchased earth moving equipments, namely, JCB backhoe loaders, in Jaipur and after obtaining temporary registration certificate from the R. T. O., Jaipur, despatched the JCBs from Rajasthan to Harda, in the State of Madhya Pradesh, through transporter, respondent No. 3, Truck Operators' Union. On September 23, 2005 the trucks carrying JCBs were checked at the border check-post, Dhabla-Jodi, Khilchipur, in District Rajgarh (M. P.). The Check-post Officer found that the documents in relation to the JCBs were not in order and, therefore, issued the prescribed show cause notice for payment of tax together with penalty under the provisions of the M. P. Commercial Tax Act, 1994 (hereinafter referred to as, "the Act"). The petitioner appeared before the Check-post Officer and represented to him that the machines were being sent to Harda in Madhya Pradesh, on rental basis and not for sale and, therefore, there was no case of evasion of tax. The Check-post Officer, however, did not accept the petitioner's contention and vide order dated October 22, 2005, he

imposed the penalty in respect of each JCB detained at the check-post. The petitioner challenged these orders before the Commissioner, u/s 62 of the Act, but the revision was dismissed. It was in this context that the petitioner challenged the orders dated January 23, 2006 and October 22, 2005 and the demand made vide notice dated October 23, 2005. The learned single judge observed that in the absence of the documents, the Check-post Officer rightly initiated action provided under the law and passed the orders impugned and raised the demand. The transporters were given adequate opportunity to dislodge the presumption that no attempt was made to facilitate evasion of the tax and the petitioner had not only a chance before the revenue authority but also before the revisional authority, by virtue of the order of the court in the earlier round of litigation and dismissed the petition. It is against this dismissal that the above appeals have been filed by the petitioner.

In relation to the objection of the learned Government Advocate that the matter has apparently been decided under article 227 of the Constitution of India by the learned single judge against which appeal is not provided, Mr. Choudhari has invited attention to the decision in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, and stated that when a writ of certiorari was being claimed, it was not a case where the supervisory power of this Court was invoked under article 227 to keep the lower Tribunal within the bounds of its authority. Reference has also been made to the decision in *Surya Dev Rai Vs. Ram Chander Rai and Others*, , particularly to paragraph 24, where their Lordships have described the distinction between the exercise of power under article 226 of the Constitution of India and under article 227 thereof. While from the order passed by the learned single judge it is not clear whether the power has been exercised under article 226 or 227 of the Constitution of India, we proceed on the assumption that the learned single judge has also acted under article 226 of the Constitution of India and considered the merits of these appeals.

Learned Counsel for the appellant has invited our attention to Section 45A of the Act, especially to Sub-section (4) thereof in support of his contention that it is only in relation to the notified goods that the provision is attracted. His contention is that since admittedly JCBs have not been notified as the goods to which Section 45A of the Act applies, the action of the respondents in seizing the goods and subjecting the goods to penalty is illegal and highhanded. For convenience Section 45A(1), (4) and (7) are reproduced hereunder:

45A. Establishment of check-posts.-(1) The State Government or the Commissioner may, with a view to prevent or check evasion of tax under this Act, set up or erect in such manner as may be prescribed, check-posts or barriers at such places in the State, excluding railway premises, as may be notified:

Provided that the Commissioner shall not set up a check-post or erect a barrier for a period exceeding six months at time.

(2) to (3) ...

(4) Every person transporting such goods as may be notified by the State Government in this behalf (hereinafter referred to in this section as the transporter) shall carry with him an invoice, bill or challan or any other document, by whatever name called, issued by the consignor of the goods giving such particulars as may be prescribed.

(5) to (5-A) ...

(6) ...

(7) If the Check-post Officer finds after searching the vehicle and verifying the declaration or other documents relating to the goods, that-

(a) goods notified under Sub-section (4) are being transported in respect of which the transporter has not filed any declaration, or

(b) the declaration filed in respect of any goods is false or incorrect, either in respect of the kind of goods, or the quantity of goods transported, or the value thereof, or

(c) consignor or the consignee of the goods is shown to be a dealer registered under this Act, while the records available in his office do not show the existence of such a dealer,

such officer may presume, until the contrary is proved, that an attempt was being made to facilitate the evasion of tax in respect of such goods and he may, after recording his reason therefore in writing, a copy of which shall be forthwith supplied to the transporter, seize such goods or the vehicle along with the goods in such manner as may be prescribed.

Learned Government Advocate for the respondents-State has, however, placed reliance on Section 45D of the Act, which grants power to the authorities to check goods in transit. Referring to Sub-section (2) of Section 45D, learned Government Advocate has pointed out that the transporter is enjoined with a duty to carry with him an invoice, bill or challan or any other document, by whatever name called, issued by the consignor of the goods giving such particulars as may be prescribed. Sub-section (2) of Section 45D reads as under:

45D. Power to check goods in transit.-(1) ...

(1-A) ...

(2) Every transporter transporting by road any goods in the State of

Madhya Pradesh shall carry with him an invoice, bill or challan or any other document, by whatever name called, issued by the consignor of the goods giving such particulars as may be prescribed.

Learned Counsel for the appellant submits that there is patent ambiguity in the

provisions contained in Sub-section (2) of Section 45D inasmuch as the invoice, bill or challan or any other document issued by the consignor should be in the manner as may be prescribed. At a glance, the provision does give indication that it is only the documents which are prescribed to be produced before the authority, but on closer scrutiny it appears that insofar as invoice, bill or challan are concerned, they are required to be produced and it is not necessary that in case of these documents particulars should be prescribed. It is only in relation to "any other document" that the qualifying clause "may be prescribed", is attracted. Sub-section (4) of Section 45D provides for action to be taken for contravention of Sub-section (2) of Section 45. Sub-section (4) of Section 45D reads as follows:

45D. Power to check goods in transit.-(1) to (3) ...

(4) If the officer referred to in Sub-section (3) finds on the inspection of the vehicle that the transporter is not carrying the documents or the documents being carried are not in order or the transporter is not carrying a copy of the declaration, he may direct the transporter to take the vehicle along with the goods and the documents to the nearest check-post or any Commercial Tax Officer to be named by him and stop it and keep it stationary there till such time as may be required for action in accordance with the provisions of Section 45A.

From the above provision it is manifest that if the officer taking action finds on inspection of the bill that the transporter is not carrying the documents or the documents being carried are not in order, he may direct the transporter to take the vehicle along with the goods and the documents to the nearest check-post or any Commercial Tax Officer to be named by him and stop it and keep it stationary there till such time as may be required for action in accordance with the provisions of Section 45A. Learned Counsel for the appellant submits that once it is clear that the provisions of Section 45A have been incorporated for taking further action, Sub-section (7) of Section 45A of the Act becomes operative and, therefore, unless any of the ingredients attracting penalty contained in the said sub-section is attracted, the goods cannot be subjected to any penalty. We have already reproduced Sub-section (7) hereinabove. Sub-section (7) has three Clauses : (a), (b) and (c). Clause (a) relates to goods notified under Sub-section (4) of Section 45A, being transported in respect of which the transporter has not filed any declaration. This clause is not attracted as it is an admitted position that the goods which are being transported were not notified. Clause (b) is attracted if the declaration filed in respect of any goods is false or incorrect either in respect of the kind of goods or quantity of goods to be transported or the value thereof. Contention of the learned Counsel is that there was no suppression, indeed, there could not have been in respect of the JCB machines with regard to the kind of goods or the quantity of goods transported and since according to the appellant, it was a case of stock transfer 95 VAT and Service Tax Cases 5-10-2007 the provision was not attracted. Clause (c) contemplates a contingency where consignor or consignee of the goods is shown

to be a dealer registered under the Act, while the records available in the office do not show the existence of such dealer.

Coming to the first part of the contention that Sub-section (7) of Section 45A would be attracted only in relation to the notified goods, then notwithstanding that goods have been seized in violation of the provisions contained in Section 45D of the Act, the other conditions present in Section 45A are first required to be satisfied before proceeding to take any action thereunder.

Though the argument has been advanced on the basis of the provision of Sub-section (7) of Section 45A, the fallacy of the argument becomes apparent when the provisions of Sub-section (2) and Sub-section (4) of Section 45D are examined. Under Sub-section (4) of Section 45D, if the officer finds on the inspection of the vehicle that the transporter is not carrying the documents or the documents being carried are not in order or the transporter is not carrying a copy of the declaration, he may direct the transporter to take the vehicle along with the goods and the documents to the nearest check-post or any Commercial Tax Officer to be named by him and stop it and keep it stationary till such time as may be required for action in accordance with the provision of Section 45A. From Sub-section (4) of Section 45D it is luculent that the satisfaction that is derived is on the basis of Sub-section (4) of Section 45D and not in accordance with either Sub-section (1) or Sub-section (4) of Section 45A of the Act. The reference to Section 45A is a reference only to its machinery provision and not the substantive requirement contained therein which is attracted in altogether a different sphere. We are, therefore, of the considered view that once the satisfaction is derived under Sub-section (4) of Section 45D of the Act, then for the purpose of taking action, reference can be made to Sub-section (7) of Section 45A. Clause (b) of Sub-section (7) relates to the declaration filed in respect of any goods which is incorrect either in respect of the kind of goods or the quality of goods transported or the value thereof and provides for a presumption, until contrary is proved, that an attempt was being made to facilitate the evasion of tax in respect of such goods. It proceeds to grant further power of seizure of the goods or the vehicle along with the goods in such manner as may be prescribed. The provisions following Sub-section (7) also refer to the manner in which further action is to be taken.

We may also refer to the declaration filed by the transporter of which a copy is appended as annexure P-5. In this declaration it was stated that it was a case of stock transfer and no sale was involved in the transaction. However, though it is admitted that goods moving from Rajasthan were destined for Harda, nothing was brought on record to show that the appellant had any branch at Harda to which the goods were being transported. The stand was later shifted and it was stated that though it was mentioned that it was a case of stock transfer, the goods were being sent to Harda on lease, as the business of the appellant was to give machinery on hire. Learned Government Advocate has pointed out that what was stated was that the goods were being sent to M/s. Y. B. Earth Movers and

later name of Mr. Yahya Khan was disclosed as proprietor of M/s. Y. B. Earth Movers. On enquiry, no person by the said name could be traced out and Mr. Rahawar Khan had participated in the proceedings. Apparently the goods were destined for sale and, therefore, the information which was given vide annexure P-5 was false and misleading. We are, therefore, of the view that insofar as the writ petitions have been dismissed by the learned single judge, no interference is called for.

However, learned Counsel for the appellant submits that without giving proper opportunity to the parties with regard to the quantum of penalty, the authorities have imposed the maximum penalty provided by law. The counsel for the appellant contends that it is not that in all the cases the maximum penalty is attracted and the authority is required to give cogent and convincing reasons as to why the maximum penalty is being imposed in a particular case. We have gone through the order dated January 23, 2006 (annexure P-8) of the Commissioner of Commercial Tax, Ujjain. Though he has given detailed reason why the penalty is attracted, he has not given any reason why the maximum penalty is imposable. Under these circumstances, while dismissing the appeals on all other grounds, we direct the revisional authority to give an opportunity to the appellant and thereafter to decide the quantum of penalty. Meanwhile, status quo will be maintained and coercive steps to recover the amount shall remain in abeyance.

With the above direction, the appeals are disposed of.