
(1992) 08 AHC CK 0103
In the Allahabad High Court
Case No : Civil Misc. Writ No. 136 of 1986

Jagdish Prasad

APPELLANT

Vs

Passenger Tax Officer and Another

RESPONDENT

Date of Decision : 27-08-1992

Acts Referred:

Citation : (1992) 4 AWC 507 Supp

Hon'ble Judges : M. Katju, J

Bench : Single Bench

Advocate : Ravi Kant, for the Appellant;

Final Decision : Allowed

Judgement

M. Katjo, J.—The Petitioner is an owner of four buses registered as contract carriages with the Regional Transport Authority, Mathura. The Petitioner entered into a contract with Indian Oil Corporation Ltd. A true copy of the agreement is Annexure 1 to the writ petition. Under this contract the Petitioner has placed its vehicles at the disposal of the Corporation for carrying the employees of the Corporation from their residences to the office of the Corporation. The Petitioner is paid charges not according to the number of passengers but according to the kilometers covered by the vehicle. In lieu of rendering such services the Petitioner is paid an amount as provided in Article 3.1 of the Contract (page of the writ petition).

2. By means of this petition, the Petitioner is challenging the levy of passenger tax under the U.P. Motor Gadi (Yatri-Kar) Adhiniyam, 1962 (hereinafter referred to as the Adhiniyam). In para 11 of the writ petition it is alleged that if a vehicle is run by a person exclusively in connection with his trade or business without any hire or reward from the passengers, the incidence of taxation under the Adhiniyam would not be attracted. In para 13 of the writ petition it is alleged that the Petitioner does not ply vehicles for hire or reward and the Petitioner does not collect passenger tax from the passengers. In para 14 it is alleged that since the

Petitioner was not covered by the provisions of the Adhiniyam he did not submit the monthly returns as required by Section 6 but the Passenger Tax Officer issued notice u/s 8 to the Petitioner. In response to this notice the Petitioner appeared before the Passenger Tax Officer and submitted that he does not carry passengers for hire or reward and that he had placed his vehicles at the disposal of the Corporation for providing transport service to its employees. However, the Passenger Tax Officer did not consider the Petitioner's submission and passed assessment orders true copies of which are Annexures 2 to 5 of this petition. Against these orders the Petitioner filed appeals which have been dismissed by the Deputy Transport Commissioner by the order dated 8-11-85, Annexure 6 to the petition. Aggrieved the present writ petition has been filed.

3 A counter affidavit has been filed in which it is not denied that the Petitioner had entered into an agreement with the Corporation for providing transport facility to the employees of the Corporation for which the Petitioner was paid charges on monthly basis. In para 9 of the counter affidavit, it is admitted that the Petitioner was not paid according to the number of passengers but he was paid in lump-sum on monthly basis by the Corporation in accordance with the contract. In para 13 of the counter affidavit it is asserted that the Petitioner was liable to pay Passenger tax, and the orders of the authorities are correct.

4. I have heard learned Counsel for the Petitioner Km. Sunita Agarwal and also learned standing counsel for the Respondents. learned Counsel for Petitioner invited my attention to Entry 56 of List II of the Seventh Schedule to the Constitution which reads "taxes on goods and passengers carried by road or on inland water ways." learned Counsel argued that the provisions of the Adhiniyam must be construed in a manner so as to be inconsonance with Entry 56, and if any provision in the Adhiniyam, has two interpretations the one which will make it inconsonance with Entry 56 should be preferred. Entry 56 of List II provides for a tax on goods or passengers carried by road. It is evident this tax must be imposed on the goods or Passengers that is to say, it should be directly on the goods or passengers. In this connection learned Counsel for the Petitioner referred to the decision of the Supreme Court in M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, . In that case it was held that the cess based on royalty derived from mining land cannot be treated as a tax on land within the meaning of Entry 49 of List II, paragraphs 28 to 36 of this decision, which deal with the meaning of a "tax on land," are instructive. In para 31 the Court referred to the earlier decision of the Supreme Court in the case of India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, , where a distinction was drawn between a tax on land and a tax on income arising from land. The former was a tax directly imposed on land, while the latter was not. A tax on royalty could not be said to be a tax directly imposed on land and hence it would not come under Entry 49. Thus, the test (as stated in para 34) was whether the impact of the tax was on the land or on royalty. Similarly in Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others, it was held that a tax on the capital value of the assets of an individual is not a tax directly on land

under Entry 49."

5. The above decision of the Supreme Court are helpful in interpreting Entry 56 of List II. A tax on Passengers must be a tax directly imposed on Passengers, though it need not be directly collected by the State from the Passengers. In other words, the impact of the tax must be on the passengers.

6. The interpretation sought to be given by learned standing counsel to Section 3(1) and its Explanation II would place these provisions outside the scope of Entry 56 to List II of the Seventh Schedule because such an interpretation would put the impact of the tax not on the Passengers but on the; operator of the vehicle. Such an interpretation would make these provisions unconstitutional, and hence it should be avoided.

7. In *A.S. Karthikeyan and Others Vs. State of Kerala and Another*, the validity "of the Kerala Motor Vehicles (Taxation of Passengers and Goods Amendment) Act, 1971 was upheld by the Supreme Court. However, in para 45 of the said judgment it has been noticed by the Supreme Court that (he Passenger tax under that Act was always paid by the passengers although it was paid to the State by the operators who collected the tax as well as the fare from the Passengers.

8. In the present case, however, no tax is paid by the passengers but it is paid by the Petitioner who is only an operator of the vehicle. A facility is provided by the Corporation to its employees for carrying them from their residence to the office. The Petitioner does not realize any Passenger tax from the passengers carried in his vehicle, as alleged in para 13 of the writ petition.

9. A perusal of the Adhinyam shows that u/s 3(1) a tax is levied by the State Government on every Passenger carried by a stage carriage at a rate equivalent to five per cent of the fare payable by such Passenger to the operator of the stage carriage. Learned Standing Counsel laid emphasis on Explanation II of Section 3(1) of the Adhinyam which states "In the case of a contract carriage the fare payable for the carriage divided by the number of Passengers there in shall be deemed to be the fare payable by each such Passenger....." Learned Standing Counsel argued that in view of Explanation II Passenger tax was payable by the Petitioner even if the passengers did not pay any tax.

10. Explanation II to Section 3(1) is a deeming provision, and It provides a convenient method of assessing the tax. If Explanation II is construed to mean that something which is not a tax on passengers should nevertheless be treated to be a tax on Passengers such an interpretation would make the tax beyond the scope of Entry 56 as per the ratio of the decision of the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.,* . In that case it was held that something which is not a sole cannot be deemed to be a sole and then taxed. Hence Explanation II must be held to apply only to taxes imposed directly on Passengers, and it is a provision for convenient assessment of such a tax. It will not apply to a case (like the present one) where an operator has

contracted with a company to transport its employees on payment of a sum uncorelated with the passengers. In the present case the tax is really being levied not on the Passengers but on the operator, and hence it does not fall under Explanation II to Section 3(1) as interpreted in the light of Entry 56 to List II of the Seventh Schedule.

11. The tax being levied will also not fall under Entry 57 to List II because it is not a tax on vehicles but a tax on the operator or the income accruing to the operator under the contract. In fact there is a separate tax on vehicles in the Stats known as the U.P. Motor Vehicles Taxation Act, 1935.

12. The tax being levied on the Petitioner would not also fall under Entry 35 to List III. This Entry is not a taxing entry. As is well settled, power to tax must be derived from a specific taxing entry, vide *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, . Moreover, the expression "principles on which taxes on such vehicles are to be levied" in Entry 35 of List III does not confer power to tax but only connotes rules of guidance in the matter of taxation vide *State of Assam v. Labanya* AIR 1967 SC 1575.

13. Learned Standing Counsel invited my attention to the decision of a Division Bench of this Court in *Mahboob Hasan v. Passenger Tax Officer* 1988 ALJ 1026. In that case the Petitioner had been granted a contract carriage permit for plying its vehicle from Allahabad to Phoolpur for carryiag the employees of IFFCO The payment of hiring of the bus was made on monthly basis within 15 days of presentation of the bill to IFFCO by the Petitioner. The Division Bench held that the provisions of the Adhiniyam were applicable to the Petitioner and hence he had to pay passenger tax.

14. In my opinion the Division Bench decision in *Mahboob Hasan's* case (Supra) is a judgment per incuriam as it has completely over looked Entry 56 of List II of the Seventh Schedule of the Constitution. As held by the Supreme Court in *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, if a judgment is passed without noticing some statutory provision it become a judgment per incuriam. In my opinion the decision in *Mahboob Hasan's* case (supra) was passed without noticing Entry 56 of List II of the Seventh Schedule to the Constitution and hence it is a judgment per incuriam. As already mentioned above. Entry 56 of List II permits imposition of tax on passengers carried by road. The tax must be directly imposed on the passengers. No doubt the machinery for collection of the tax can be of different types and it is not necessary that the tax should be directly collected by the State Government from the passengers as held in *A.S. Karthikeyan's* case (supra), but never-the-less it must be a tax on passengers, otherwise it will be outside the scope of Entry 56, List II of the Seventh Schedule to the Constitution. This aspect, as well as Entry 56 of List II, have been totally over looked by the Division Bench in *Mahboob Hasan's* case (supra). The facts of the present case disclose that there is no tax on passengers at all, and the tax is infact levied on the Contractor (the petttioner). Hence it is outside the scope of Entry 56 and is consequently illegal.

15. In the Synthetics & Chemicals case (supra) the Supreme Court observed (in para 40) "Incuria literally means carelessness. In practice per incuriam appears to mean per ignoratum. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered in ignoratum of a statute or other binding authority vide Young v. Bristol Aeroplane Co. Ltd. 1944 (2) All. ER 293.

16. The decision in Mahboob Hasan's case was rendered in ignorance of not merely a statutory provision but a constitutional provision viz. Entry 56. Hence it is clearly per incuriam.

17. A question may arise whether a single Judge of this Court can hold a division bench judgment to be per incuriam. In Synthetics & Chemicals case (supra) a 2 Judge Bench of the Supreme Court held an observation of a 7 Judge Bench to be per incuriam. Hence the answer must be in the affirmative.

18. In my opinion the decision in Mahboob Hasan's case (supra) is not only per incuriam but is also sub-silento.

19. In "Salmond on Jurisprudence". 12th Edn. the meaning of a decision sub-silento has been explained as follows :

A decision passes sub-silento when the particular point of law involved in the decision is not perceived by the Court or is present to its mind. The Court may consciously decide in favour of one party because of point A. which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved on the facts, and although the case had a specific outcome, the decision is not an authority on point. B. Point B is said to pass sub-silento.

20. An illustration of a decision sub-silento is Gerard v. Worth of Paris Ltd. (1936) 2 All ER 906, where a dismissed employee who had obtained damages against a company for wrongful dismissal applied for a garnishee order on a bank account standing in the name of the liquidator of the company. In this case the question whether a garnishee order could legally be made on an account standing in the name of the liquidator was not considered at all. Hence when this question was raised in the subsequent case Lancaster Motor Co. v. Bremith Ltd (1941) 1 KB 675, it was held that the previous-decision was not binding.

21. In the Synthetics & Chemicals case (supra) it was held (per R M. Sahai, J.) "A decision passes sub-silento.....involved in the decision is not perceived by the Court or when the particular point of law, present in its mind (Salmond on Jurisprudence 12th Edn. p. 153)."

22. The decision in Mahboob Hasan's case (supra) is to my mind a judgment sub-silento because a consideration of Entry 56 List II was logically involved in the interpretation of Section 3(1) and Explanation II of" the Adhiniyam, but Entry 56

was not noticed by the bench.

23. For the above reasons, the petition succeeds. A writ of certiorari is issued quashing the orders dated 10-9-81 (Annexures 2 to 5) and the order dated 8-11-85 of the Deputy Transport Commissioner (Annexure 6) and a mandamus is issued restraining the Respondents from assessing the Petitioner under the U.P. Motor Gadi (yatri-Kar) Adhiniyam, 1962 or from demanding or realising any amount under the said Adhiniyam from the Petitioner. There is no order as to costs.