(1974) 01 OHC CK 0009

In the Orissa High Court

Case No : Original Jurisdiction Case No. 212 of 1971

Kamal Kumar Goyal APPELLANT

Vs

State of Orissa and Another RESPONDENT

Date of Decision : 22-01-1974

Acts Referred:
Orissa Sales Tax Act, 1947 — Section 16A

Citation : (1975) 35 STC 343

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : S.C. Ray, B. Agarwalla and R.S. Agarwalla, for the Appellant; The Advocate-General and the Standing Counsel (S.T.), for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—The petitioner before us is a partner of the Central Goods Transport Corporation which carries on transport business by road, has offices located at various important cities of India and engages in transport of goods for payment. On 21st December, 1970, two vehicles of this organisation, bearing Registration Numbers ORU 1036 and BRV 5388, were carrying various goods of different consignees from Calcutta by road. Some were meant to be delivered at Cuttack within this State and others were meant for Srikakulam within the State of Andhra Pradesh. When the two trucks arrived at the sales tax check-gate located at Gandarpur-Sikharpur on the National High Way No. 5, at the outskirts of Cuttack town, on 23rd December, 1970, the check-gate authorities inspected the goods carried by the two vehicles. They found that certain goods were not covered by way-bills as prescribed under the Orissa Sales Tax Act (hereinafter referred to as the "Act") and the Rules made thereunder. Accordingly, the said goods were seized by the authorities at the check-gate as per seizure lists bearing numbers 6 and 7 dated 23rd December, 1970 (annexures I and I/a). The Assistant Sales Tax Officer attached to the check-gate issued a notice to the firm to show cause by 30th December, 1970, as to why the goods so seized may not be confiscated (annexure 2 series). On the appointed day, a representative of the firm appeared, showed cause and prayed for release of the goods. By notice dated 3rd February, 1971, the Assistant Sales Tax Officer directed the firm to furnish the names and addresses of the persons on whose behalf the seized goods were being carried and to furnish documents in support of such statement as may be made. On 7th February, 1971, compliance was effected. But, that day, the check-gate authority issued notice to the firm to show cause as to why penalty amounting to twice the tax chargeable in respect of the sale of the goods seized may not be imposed. On 10th February, 1971, cause was shown and jurisdiction of the Assistant Sales Tax Officer was disputed. On 16th February, 1971, the said authority passed an order for confiscation of the goods seized excepting a part thereof relating to a dealer at Cuttack said to be the consignee thereof. The petitioner filed this application on 24th February, 1971, challenging the vires of Section 16-A of the Act as also Rule 94 of the Orissa Sales Tax Rules (hereinafter referred to as the "Rules") and has asked this court to quash the various orders of the check-gate authority and to direct return of the goods.

2. In the counter-affidavit given by the check-gate authority on behalf of the opposite parties, the statutory provisions in the Act have been contended to be intra vires and the action has been sought to be justified.

3. Section 16-A of the Act provides for establishment of check post or barrier and inspection of goods while in transit. That section provides :

(1) If the State Government consider it necessary that with a view to prevent or check evasion of tax under this Act in any place or places in the State, it is necessary so to do, they may by notification direct the setting up of a check post or the creation of a barrier or both, at such place or places as may be notified.

(2) At every check post or barrier mentioned in Sub-section (1), or at any other place when so required by any officer empowered by the Commissioner in this behalf the driver or any other person in-charge of a goods vehicle or boat shall stop the vehicle or boat, as the case may be, and keep it stationary as long as may reasonably be necessary, and allow the officer-in-charge of the check post or barrier, or the officer empowered as aforesaid, to examine the contents in the vehicle or boat and inspect all records relating to the goods carried, which are in the possession of such driver or other person in-charge, who shall, if so required, give his name and address and the name and address of the owner of the vehicle or boat.

(3) The officer-in-charge of the check post or barrier, or the officer empowered as aforesaid shall have power to seize and confiscate any goods which are under transport by a goods vehicle or a boat and are not covered by a way-bill issued by the person who consigns the goods, in such form and containing such particulars as may be prescribed :

Provided that before taking action for the confiscation of goods under this sub-section, the officer shall give the person affected an opportunity of being heard and make an enquiry in the manner prescribed :

Provided further that where the person affected makes payment to such officer of the amount of tax payable in respect of such goods to be assessed in the prescribed manner, the goods seized as aforesaid shall be released :

Provided also that no order of confiscation shall be made in respect of goods which are not liable to payment of tax.

(4) If the goods which are seized or confiscated under Sub-section (3) are of a perishable nature, they shall be sold in the prescribed manner.

Rule 94 of the Rules makes detailed provisions relating to check posts and prescribes the form of the way-bill as also the detailed procedure of working out the requirements of Section 16-A of the Act.

4. The provisions for establishing check posts are now found almost in each of the States'' Sales Tax Acts [see Section 29 of the Andhra Pradesh General Sales Tax Act of 1957, Section 41 of the Bihar Sales Tax Act of 1959, Section 23-A of the Bengal Finance (Sales Tax) Act of 1941, as extended to the Union Territory of Delhi, Section 29 of the Kerala General Sales Tax Act of 1963, Section 29-A of the Madhya Pradesh General Sales Tax Act, 1958, Section 42 of the Madras General Sales Tax Act of 1959, Section 22-A of the Rajasthan Sales Tax Act of 1954, and Section 28 of the U.P. Sales Tax Act of 1948]. These provisions are, however, not of a uniform type. The powers of seizure and confiscation are only available in some of the Acts while others only confer jurisdiction on the check-gate authorities to detain and inspect the consignment carried by road or water. Some of these statutory provisions have been subjected to attack on the question of their vires, such as Venkatachalapathi v. Commercial Tax Inspector [1965] 16 S.T.C. 894, where Section 28-A of the Mysore Act was challenged ; Papanna v. Deputy Commercial Tax Officer [1967] 19 S.T.C. 506, where the vires of the appropriate provision in the Andhra Pradesh Act was challenged ; Abdulla and Bros. v. Check Post Officer [1968] 22 S.T.C. 260 and K.P. Abdulla and Bros. v. Check Post Officer [1968] 22 S.T.C. 552, where the vires of the appropriate provision in the Madras Act was challenged ; as also A. D. C. M. Society Ltd. v. Special Assistant Commercial Tax Officer [1972] 29 S.T.C. 649, where the provision in the Andhra Pradesh Act was also challenged. No consensus is found in these decisions. On examination of the position, some decisions have upheld the statutory provision while the others have found that it is ultra vires.

5. Mr. Ray for the petitioner has, however, relied upon a decision of the Supreme Court in the case of The Check Post Officer and Others Vs. K.P. Abdulla and Bros., The court was examining the vires of the power to seize, confiscate and levy penalty in respect of goods carried in a vehicle as provided u/s 42 of the Madras General Sales Tax Act of 1959.

6. Before proceeding to deal with the said case, it is necessary that we refer to the appropriate legislative entry. The Orissa Sales Tax Act is a legislation

relatable to entry 54 of List II of the Seventh Schedule of the Constitution. Law is well-settled that a legislative entry does not merely enunciate powers. It specifies a field of legislation and the widest import and significance should be attached to it. Power to legislate on a specified topic would include power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein : see Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others, . An enquiry to the vires of Section 16-A of the Act, therefore, would necessarily require a determination as to whether the section makes provision for something ancillary and incidental to taxation of sales or goes beyond that limit. The Supreme Court in the case of The Check Post Officer and Others Vs. K.P. Abdulla and Bros., stated :

...A taxing entry therefore confers power upon the legislature to legislate for matters ancillary or incidental including provisions for preventing evasion of tax. Sub-sections (1) and (2) of Section 42 are intended to set up machinery for preventing evasion of sales tax. But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale or purchase of goods. By Sub-section (3) the officer-in-charge of the check post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check post are goods which have been sold within the State of Madras and in respect of which liability to pay sales tax has arisen, and authorises the Check Post Officer, unless the specified documents are produced at the check post or the barrier, to seize and confiscate the goods and to give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by Sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even as personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in Clauses (i), (ii) and (iii) of Sub-section (3) of Section 42, stands in danger of having his goods forfeited. Power under Sub-section (3) of Section 42 cannot be said to be ancillary or incidental to the power to legislate for levy of sales tax.

A comparison of the provisions of Section 42 of the Madras Act and Section 16-A of the Orissa Act would show that there is difference in the scheme and, in fact, the reasons which have been utilised by the Supreme Court to come to its conclusion in this case are not available under the Orissa Act. For convenience, we quote Section 42 of the Madras Act :

42. (1) If the Government consider that with a view to prevent or check evasion of tax under this Act in any place or places in the State, it is necessary so to do,

they may, by notification, direct the setting up of a check post or the erection of a barrier or both, at such place or places as may be notified.

(2) At every check post or barrier mentioned in Sub-section (1), or at any other place when so required by any officer empowered by the Government in this behalf, the driver or any other person in-charge of any vehicle or boat shall stop the vehicle or boat, as the case may be, and keep it stationary as long as may reasonably be necessary, and allow the officer-in-charge of the check post or barrier, or the officer empowered as aforesaid, to examine the contents in the vehicle or boat and inspect all records relating to the goods carried, which are in the possession of such driver or other person in-charge, who shall, if so required, give his name and address and the name and address of the owner of the vehicle or boat as well as those of the consignor and the consignee of the goods.

(3) The officer-in-charge of the check post or barrier, or the officer empowered as aforesaid shall have power to seize and confiscate any goods which are under transport by any vehicle or boat and are not covered by, (i) a bill of sale or delivery note,

(ii) a goods vehicle record, a trip sheet or a log book, as the case may be, and

(iii) such other documents as may be prescribed under Sections 43 and 44 :

Provided that before ordering confiscation the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner :

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation-

(a) in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater ; and

(b) in other cases, a sum of money not exceeding one thousand rupees." The Supreme Court found that there was an unwarranted assumption in the provisions under the Madras Act that all goods transported were following a sale and no distinction was being made between "goods sold" and "goods not sold".

The learned standing counsel emphasised on this feature and contended that if these grounds were not available the power of confiscation must, on the accepted principles of interpretation of the scope of legislative entries, could have been upheld, because, confiscation is actually a powerful control over evasion of taxes and, therefore, it is incidental and ancillary to taxation. We find force in the contention of the learned standing counsel. In the Orissa Act, it has been clearly provided that there would be no confiscation in respect of goods which are not liable to payment of tax. Unless there has been a sale the incidence of taxation under the Act would not arise. Confiscation under the scheme of the Orissa Act is, therefore, confined to cases of sale only. The mischief which impressed the Supreme Court to arrive at its conclusion in The Check Post Officer and Others Vs. K.P. Abdulla and Bros., has been done away with in the statutory provision and since confiscation is co-related to an instance of sale only, it must follow that confiscation is a matter incidental and ancillary to taxation and is, therefore, within the legislative competence of the State in terms of entry 54 of List II of the Seventh Schedule of the Constitution.

7. On the aforesaid analysis, the irresistible conclusion which one can only reach is that the provision is intra vires. The petitioner''s entire attack in this case was to the vires and to no other. In fact Mr. Ray had conceded during argument that if the statutory provision turned out to be intra vires, he had no further grievance against the impugned order.

8. We would accordingly dismiss this petition. We, however, do not make any order as to costs because the petitioner appears to have rushed to court on the basis of the aforesaid decision of the Supreme Court without realising the distinction.

B.K. Ray, J.

9. I agree.

