

(2007) 04 PAT CK 0135
In the Patna High Court
Case No : CWJC No"s. 1211, 1212 of 2007

McDowell and Co. Ltd.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 06-04-2007

Acts Referred:

Constitution of India, 1950 — Article 304(a)

Citation : (2007) 3 PLJR 36

Hon'ble Judges : Rekha Kumari, J;Aftab Alam, J

Bench : Division Bench

Advocate : Satyabir Bharti, for the Appellant; P.K. Shahi and Purnendu Singh, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Mr. Satyabir Bharti, counsel for the petitioner and Mr. Advocate General representing the State. The petitioner is aggrieved by and seeks to challenge the assessment orders, dated 19.7.2006 passed by the Assistant Commissioner, Commercial Taxes, Barh Circle, Barh and the consequential demands issued on 20.2.2007 (Annexures 8 and 8A respectively in both the writ petitions). By the impugned assessment orders coming under challenge in CWJC No. 1211 of 2007, entry tax is levied on furnace oil for the period 22.8.2003 to 31.3.2004; in CWJC No. 1212 of 2007 the assessment order coming under challenge levied entry tax on the same article for the period 1.4.2004 to 31.3.2005.

2. On behalf of the petitioner, it is contended that the assessment orders and the demands were illegal because during the periods in question the Bihar Tax on Entry of Goods into Local Area for Consumption, Use or Sale Therein Act, 1993 is held to be bad, invalid and unconstitutional by this Court.

3. It is an admitted position that furnace oil, on which tax is sought to be levied, was not included in the schedule to the Act as it was originally framed in 1993. It came to be included (at serial No. 23) in the Schedule by the amending Act No. 9

of 2003 with effect from 22.8.2003. In a recent decision by the court in Indian Oil Corporation Limited and Another and Harinagar Sugar Mills Limited Vs. State of Bihar and Others , the provisions of the Act and the legislative changes introduced into it from time to time were considered in detail. The court found and held that though the parent Act of 1993 was constitutionally valid, the amendments introduced into it without the assent/sanction of the President rendered it invalid and ultra vires Article 304(a) of the Constitution. According to the decision, the Act was bad, invalid and unenforceable from 5.11.2001 (the date of its first amendment) till its validity was restored on 29.8.2006 by virtue of further amendments introduced with effect from that date.

4. Following the decision in M/s Indian Oil Corporation Limited and M/s Harinagar Sugar Mills Limited the court also allowed the case of Food Corporation of India (CWJC No. 11787 of 2006) by its decision, dated 24.1.2007.

5. From the above it is evident that the assessment orders and the demands appertain to a period during which the Act is held to be bad, invalid and inoperative. In light of the aforesaid decisions, these writ petitions are bound to succeed.

6. Mr. Advocate General, however, strongly opposed the prayer made on behalf of the petitioner. He first submitted that the decision in M/s Indian Oil Corporation Limited was more in the nature of, what he called, "an opinion" by the court than a judgment, forming a binding precedent. He pointed out that in the Indian Oil Corporation decision it was observed that though the two cases were fit to be allowed, the court refrained from making any order or direction in that regard since the matter was already pending before the Supreme Court. He submitted that the decision of this Court was filed in the appeals pending before the Supreme Court but the decision was yet to receive the seal of approval by the Apex Court and hence, it could not be used as a precedent for other cases before this Court.

7. We are unable to accept the submission. In M/s Indian Oil Corporation Limited this Court arrived at clear and definite findings but it refrained from making any operative directions in deference to the pendency of the appeals before the Supreme Court and having regard to the terms in which the remand was made by the Supreme Court.

8. We find the submission quite unacceptable that even though clear findings are recorded in the decision, those are not to be used as precedent in the other cases before the same court. Moreover, the decision in M/s Indian Oil Corporation Limited has already been relied upon in the case of Food Corporation of India and that case was allowed wholly on the basis of the decision in M/s Indian Oil Corporation Limited. It, therefore, cannot be argued any longer that the decision in M/s Indian Oil Corporation Limited cannot be taken as precedent for other cases before the same court.

9. Mr. Advocate General next submitted that the Act was first challenged before

this Court in Bihar Chamber of Commerce and etc. Vs. State of Bihar and Others had held it to be invalid and ultra vires the Constitution and had consequently struck it down. In appeal, the decision of this Court was reversed and the Act was held to be good and constitutionally valid by the Supreme Court in State of Bihar etc. Vs. Bihar Chamber of Commerce etc., .The Advocate General submitted that even assuming that the decision in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , the Act must be deemed to be good and valid in light of the earlier decision in the State of Bihar vs. Bihar Chamber of Commerce till 13.4.2006 when the decision in Jindal II was pronounced. According to him, therefore, the State was authorised and competent to levy and realise entry tax until April 13, 2006, in view of the earlier decision of the Supreme Court in State of Bihar vs. The Bihar Chamber of Commerce.

10. We are unable to accept the submission. It is well settled that an Act when declared illegal by the Supreme Court does not become illegal from the date of such declaration but it has to be viewed as illegal from its very inception.

11. As noted earlier, on a detailed consideration of the decision in State of Bihar vs. The Bihar Chamber of Commerce the decision in Jindal II and a number of other decisions this Court has already come to the conclusion in M/s Indian Oil Corporation Limited that the Act was rendered bad and invalid as a result of the first amendment introduced from 5.11.2001 and, therefore, it was not open to the State to levy any entry tax under the provisions of the Act as it stood after the amendments until its validity was restored w.e.f. 29.8.2006.

12. Mr. Advocate General lastly submitted that entry tax, in its nature, was to be passed on to the consumers and the tax leviable on furnace oil would, therefore, must have been factored into the price of the final produce by the petitioner, that is, India Made Foreign Liquor. The petitioner had, thus, in any event, collected the tax from the ultimate consumers of its produce. Any restraint on the state to realise the entry tax would, therefore, allow the petitioner to retain the money collected from the consumers as entry tax on one of the articles used in the manufacturing process.

13. We are aware of the decisions v. here the Supreme Court disallowed refund of the taxes already collected by the State under an Act declared illegal on the principle of "unjust enrichment" but we are not aware of a single case in which the principle was extended so far as to allow the State to collect and realise the amount of tax under an Act declared illegal by the Court.

14. In reply to the last submission made by the Advocate General, Mr. Bharti submitted that it was unfounded on facts and incorrect in law. He submitted that the petitioner had made specific averment in the writ petition that it had not collected any entry tax from anyone, including the consumers of its end produce. He pointed out that the averment remained undenied by the State. As regards the legal position he submitted that the issue was concluded by an earlier decision of the Supreme Court in M/s. Somaiya Organics (India) Ltd. Vs. State of

Uttar Pradesh and Another, .

15. In our view the submission by Mr. Bharti is well founded.

16. Thus, viewed from any angle we are unable to sustain the orders of assessment and the demands for entry tax on furnace oil during the periods in question. We accordingly quash the assessment orders and the demands, Annexures-8 and 8A respectively in both the cases and restrain the respondent authorities from realising the demands of entry tax from the petitioner for the aforesaid periods. In the result, these two writ petitions are allowed but with no order as to costs.