(2012) 02 P&H CK 0296

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 16868 of 1994

M/s Balaji Bricks Industries and another APPELLANT

Vs

State of Punjab and another RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Constitution of India, 1950 — Article 246
Punjab General Sales Tax Act, 1948 — Section 5, 5(4)

Citation : (2012) 166 PLR 657

Hon'ble Judges : M.M. Kumar, J;Alok Singh, J

Bench : Division Bench

Advocate : Sandeep Goyal and Mr. Rishab Singla, for the Appellant; Piyush Kant Jain, Addl. A.G., Punjab, for the Respondent

Judgement

M.M. Kumar. J

1. The petitioners are brick kiln owners and are registered under the Punjab General Sales Tax Act, 1948 (for brevity ''the Act''). Their grievance is that they cannot be subjected to a lump sum tax which is determined on the basis of the capacity of brick kiln rather than actual sales. They have, therefore, challenged the notification dated 30.06.1993 (P-1) envisaging realisation of lump sum amount based on actual capacity. They have claimed that their return of sales have been filed regularly and they are paying tax according to assessment framed on that basis. When the matter came up for consideration on 24.11.1994, a Division Bench of this Court while admitting the petition stayed the recovery of lump sum tax subject to condition that payment of tax otherwise under the provisions of the Punjab General Sales Tax Act, 1948 shall be paid. Accordingly, the petitioners have claimed that they have paid the tax on the actual sale and purchase not on the basis of the impugned notification in lump sum.

2. The prayer made by them in the instant petition is for declaring the Section 5(4) of the Act as unconstitutional and for quashing the notification dated

30.06.1993 (P-1). which incorporated Section 5(4) of the Act confers power on the State Government to direct that an owner of a brick kiln in respect of the sale of bricks produced in his brick kiln on or after 01.07.1993 is to pay a lump sum tax at the rate specified in the notification. On the basis of the aforesaid power, a demand has been raised against petitioner No. 1 to pay the lump sum amount which would mean that the tax was not to be paid on the actual sale.

3. It is significant to notice that on 25.04.1995, sub Section (4) of Section 5 of the Act has been deleted and a notification as published in the Punjab Government Gazette of that date is taken on record as Mark ''A''. Therefore, the amendment made on 30.06.1993 remained in operation only from 01.07.1993 to 25.04.1995. Therefore, the challenge to the aforesaid provision in respect of the period of its operation has been made by the petitioners.

4. Mr. Sandeep Goyal, learned counsel for the petitioner has argued that the State Legislature completely lacks competence to levy tax other than the one authorized by various entries of List-II-State List, Schedule 7th of the Constitution. According to Mr. Goyal, Entry 54 of List-II-State List of the 7th Schedule deals with the subject concerning the sale or purchase of goods. Learned counsel has maintained that a perusal of sub Section (4) of Section 5 of the Act would show that is authorities the State Government to issue notification in the official gazette and direct that a dealer may be required in respect of any goods or class of goods to pay lump sum tax subject to such condition as Government may specify in the notification. According to learned counsel, the payment of lump sum tax would be divested of element of sale or purchase of goods, which is the basic requirement of Entry 54, List-II-State List of the 7th Schedule. Therefore, it has been argued that imposition of lump sum tax without the element of sale is wholly without the competence of the State Legislature and could not have been imposed. Learned counsel has maintained that categorization of brick kilns in ''A'', ''B'' and ''C'' on the basis of their production capacity is a concept, which is alien to the sales tax. As a consequence of the aforesaid notification, a demand has been raised by asking petitioner Nos. 1 and 2 to pay lump sum tax. It has, thus, been submitted that the notification adding sub Section (4) of Section 5 of the Act would exceed the power of the State Legislature to frame law.

5. Mr. Piyush Kant Jain, learned Add). A.G., Punjab has however, argued that the business of brick kiln is seasonal business and at the instance of the brick kiln association, the provision was made to pay tax in lump sum amount. He has drawn our attention to the statement of objects and reasons appended with the ordinance issued on 28.06.1993 which shows that the system of lump sum levy in respect of brick kiln owners of the Punjab was introduced to minimize the evasion of tax and to simplify the taxation procedure.

6. Having heard learned counsel for the parties, we find that it would first be necessary to examine Entry 54, List-II-State List of Seventh Schedule of the Constitution, which reads as under:

54. Taxes on the sale or purchase of goods other than newspaper, subject to the provisions of entry 92A of List I.

7. A perusal of the aforesaid entry would show that the Legislature of the State has exclusive power to make laws for that State or any part thereof with respect to any of the matters enumerated in List-II of 7th Schedule. Thus, Entry 54 confers competence on the State Legislature to frame laws concerning tax on sale or purchase of goods other than newspaper. The question before us is whether sub Section (4) of Section 5 of the Act could be brought within the sweep of Entry 54. It would, thus, be necessary to examine sub Section (4) of Section 5 of the Act, which reads as under:

(4) Notwithstanding anything contained in any provision of this Act, the Government, if satisfied that it is necessary or expedient so to do in the public interest, may, by notification in the Official Gazette, direct that in respect of any goods or class of goods a dealer shall pay such lump sum tax and subject to such conditions, as the Government may specify in the notification.

8. The aforesaid provision commences with, a non obstante clause and empowers the State Government to direct that in respect of goods or class of goods a dealer may pay lump sum tax as the Government may specify in the notification. It is obvious that the element of sale is completely missing and virtually it is lump sum amount of tax being collected on the basis of capacity to produce brick kiln by brick kiln owners. We say so for the reason that brick kilns have been divided in three categories as is evident from notification dated 30.06.1993 (P-1) and the same reads as under:

Sr. No.

Capacity of Brick Kiln

Annual Rate of lumpsum tax payable by the owner

1

Brick kiln having capacity of twenty eight ghoris or more of kachi bricks

A Rupees on Lakh and ten thousand only.

2

Brick kiln having capacity of not less than twenty-two and more than twenty seven

B Rupees eighty five thousand only.

3

Brick kiln having capacity of not more than twenty one Ghoris of kachi Bricks

C Rupees seventy thousand only.

Provided that no lumpsum tax shall be payable by the owner of a brick kiln, if he has not sold any bricks during the financial year.

Explanation: The expression ''Ghoris'' used this explanation means a vertical column of bricks of width equal in get length of a brick separate from the next similar vertical column by a distance of 4" to 5" and the number of ghoris is the number of vertical columns of Bricks capable of being accommodate between the inner and outer wall of the vessel of a brick kiln along its width."

9. A perusal of the aforesaid extracts from the notification would show that lump sum tax is sought to be collected from the brick kiln owners whether there was sale of brick kiln or not. It is trite to notice that the tax can be imposed as per entry 54, List-II State List of Seventh Schedule, on the sale or purchase of goods. In the absence of an element of sale or purchase, it is not possible to accept that the State Legislature would be competent to impose tax on the capacity to produce brick kilns by brick kiln owners. The incidence of tax is the sale not the production. Therefore, the provisions of sub Section 4 of Section 5 are beyond the competence of the State Legislature. As a sequel to the above discussion, this petition succeeds. Sub Section (4) of Section 5 of the Act is declared as ultra vires of the Article 246 read with Entry 54, List-II-State List of Seventh Schedule. Accordingly, direction is issued to the respondents restraining them from using the aforesaid provision for any purpose whatsoever. As a consequence, the demand raised from the petitioners by orders (P-2 and P-3) is also set aside. The petition stands disposed of in the above terms.