

(2020) 11 PAT CK 0043

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9995, 10120, 10121 Of 2015

M/S K C Indane Seva And Ors

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 09-11-2020

Acts Referred:

Bihar Tax On Entry Of Goods Into Local Areas For Consumption, Use Or Sale Therein Act, 1993 — Section 2(3), 3(2)
Constitution Of India, 1950 — Article 301, 304, 304(a)

Citation : (2020) 11 PAT CK 0043

Hon'ble Judges : Sanjay Karol, CJ;S. Kumar, J

Bench : Division Bench

Advocate : Satyabir Bharti, Pawan Kumar

Final Decision : Disposed Of

Judgement

Petitioner has prayed for the following relief(s):

(i) For a declaration that the Rate of Entry tax on any of the Scheduled Commodities to the extent exceeding the rate of Bihar Value Added Tax is illegal, ultra vires and violative of 2nd proviso of Section 3 (2) to the Bihar Tax on Entry of Goods Into The local Areas for Consumption, Use or Sale Therein Act, 1993 (hereinafter referred to as "Entry Tax Act");

(ii) for holding and declaring that the Entry No.26 of the notification bearing SO No.95 dated 31 July, 2008 (Annexure-2, Page-25) in so far as it seeks to prescribe and levy entry tax at the rate of 4% on imports of Domestic cooking gas in the State of Bihar defeats the very scheme of set off against tax liability under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as the "VAT Act") and as such results in additional tax burden to be borne directly by the dealers contrary to the nature and object of indirect taxation;

(iii) To hold and declare that the notification bearing SO no. 31 July, 2008 in so far as it seeks to prescribe levy of 4% Entry Tax against import of Domestic

cooking gas in the State of Bihar is ultra-virus and is violative of Article 301 and 304 of the Constitution of India;

(iv) To hold and declare that the notification bearing SO And no. 95 dated 31 July 2008 in so far as it seeks to prescribe entry tax at the rate of 4% of imports of domestic cooking gas into the State of Bihar as a in the prescribed rate of 1% to be levied and recovered from the dealers under the Bihar VAT Act falsifies the statutory assurance given under second proviso to section 2 (3) of the Bihar Entry Tax Act;

(v) For issuance of a writ of certiorari, quashing the assessment order dated 25 April, 2015 (Annexure-5, Page-36) passed by the respondent, Commercial Tax Officer, Bhagalpur Circle, Bhagalpur by which the petitioner has been assessed for the financial year 2008-09 for payment of entry tax at the rate of 4% on imports of domestic cooking gas as also the consequential demand notice dated 25th April, 2015 by which the petitioner has been directed to deposit a total sum of Rs. 4,79,133.00 (Rupees Four Lacs Seventy Nine thousand one hundred thirty three only) which includes penalty of Rs. 2,39,566.56.

(vi) For issuance of a writ of certiorari, quashing the assessment order dated 25th April, 2015 (Annexure-6, Page-40) passed by the respondent, Commercial Tax Officer, Bhagalpur Circle, Bhagalpur by which the petitioner has been assessed for the financial year 2009-10 for payment of entry tax at the rate of 4% on imports of domestic cooking gas as also the consequential demand notice dated 9th May, 2015 by which the petitioner has been directed to deposit a total sum of Rs. 8,78,963.00 (Rupees Eight Lacs Seventy Eight Thousand Nine hundred Sixty Three Only) which includes interest of Rs. 2,96,868.00.

(vii) to hold and declare that the demand of payment of interest on delayed payment of entry tax in terms of the judgment of the Hon'ble Patna High Court in C.W.J.C. No. 19512 of 2010 (M/s Shree Shankar Ice & Cold Storage vs. The State of Bihar & Ors.) wherein it was held that there is no provision for levy of interest on amount of Entry Tax levied under Section 6 of the Act is illegal, un authorized in law and fit to be set aside;

(viii) To pass such other order(s) as your Lordships may deem fit and proper in the facts and circumstances of the case."

Learned counsel for the petitioner states that petitioner's case be disposed of in terms of the judgment dated 09.09.2020 passed in C.W.J.C. No.5229 of 2015, titled as M/s. Global India Marketing Company Vs. the State of Bihar & Ors. The said judgment is reproduced hereinunder:

"The petitioner has prayed for the following relief(s):-

"(i) For holding and a declaration that the notification bearing S.O. No. 95 dated 31.07.08 to the extent it prescribes chargeability of 8% of Entry Tax against import of electrical goods and other such items vide its Entry 17 is illegal, ultra vires and violative of section 3 (2) 2nd proviso to the Bihar Tax Entry of Goods

Into Local Areas For Consumption, Use or Sale Therein Act 1993 (hereinafter referred to as "the Bihar Entry Tax Act" for short).

(ii) For holding and a declaration that the notification bearing S.O. No.95 dated 31.07.08 in so far as it seeks to prescribe levy of 8% Entry Tax against import of Electrical goods into the State of Bihar defeats the very scheme of set off against tax liability under the Bihar Valued Added Tax Act 2005 (hereinafter referred to as "the Bihar VAT Act" for short) and as such results in additional tax burden to be borne directly by the dealers contrary to the nature and characteristic of indirect taxation;

(iii) For holding and a declaration that the notification bearing S.O. No. 95 dated 31.07.08 in so far as it seeks to prescribe levy of 8% Entry Tax against import of Electrical goods into the State of Bihar is ultra vires the Constitution of India being violative of article 301 and 304;

(iv) For holding and a declaration that the notification bearing S.O. No.95 dated 31.07.08 in so far as it seeks to prescribe levy of 8% Entry Tax against import of Electrical goods into the State of Bihar as against the prescribed rate 4% of tax to be levied and recovered by the dealers under Bihar VAT Act falsifies the statutory assurance made in 2nd proviso to section 2(3) of Bihar Entry Tax Act;

(v) For holding and a declaration that the notification bearing S.O.No. 95 dated 31.07.08 in so far as it seeks to prescribe levy of 8% Entry Tax against import of Electrical goods into the State of Bihar as against Bihar VAT leviable @ 4% on point of sale deserves to be struck down in light of the law settled by this Hon'ble Court in Food Corporation of India Vrs. The State of Bihar & Others reported in 2008 (2) PLJR page 698 and United Breweries Ltd. Vs. The State of Bihar and Others reported in 2004 (2) PLJR page 305;

(vi) For quashing of the ex-parte order dated 22.10.13 passed by the respondent Commercial Taxes Officer, Hazipur Circle, Hazipur whereby the petitioner has been assessed for the financial year 2009-10 on the basis of audit objection raised by the Accountant General Bihar on grounds of short payment of Entry tax by the petitioner @ 4% against scheduled rate of 8% and for quashing of the consequent demand notice dated 03.11.14 issued by the said respondent calling upon the petitioner to deposit a sum of Rs.24,75,020/- on account of entry tax liability under the Bihar Entry Tax Act;

(vii) For any other relief or reliefs to which the petitioner is found and title in the facts and circumstances in this case;"

The present petition was tagged along with the other cases of similar nature and listed for hearing before different Benches from time to time.

In effect, the petitioner challenged the Constitutional validity of different provisions of the Bihar Tax on Entry of Goods into Local Area for Consumption, Use or Sale Therein Act, 1993, as amended from time to time.

It is a matter of record that Hon'ble the Apex Court vide judgment dated 14th of July, 2006 passed in Civil Appeal No. 3453 of 2002, titled as M/s. JINDAL STAINLESS Ltd. & ANR. Vs. STATE OF HARYANA AND ORS. had permitted the parties, before the Supreme Court, to place within two months additional material in the concerned writ petitions.

In most of the cases, such an additional material was not placed by the parties, perhaps for the reason that the issue decided in terms of the said judgment was pending consideration before a Larger Bench of Hon'ble the Apex Court.

Subsequently, a Constitution Bench (Nine Judges) of the Hon'ble Apex Court in the case of JINDAL STAINLESS LIMITED & ANOTHER VS. STATE OF HARYANA & OTHERS, reported in (2017) 12 SCC 1, after examining the correctness of the decision rendered in the case of Jindal Stainless Ltd. (2) and another Vs. State of Haryana and others, reported in (2006) 7 SCC 241 has observed as under:

"1159. By majority the Court answers the reference in the following terms:

1159.1. Taxes simpliciter are not within the contemplation of Part XIII of the Constitution of India. The word "free" used in Article 301 does not mean "free from taxation".

1159.2. Only such taxes as are discriminatory in nature are prohibited by Article 304(a). It follows that levy of a non-discriminatory tax would not constitute an infraction of Article 301.

1159.3. Clauses (a) and (b) of Article 304 have to be read disjunctively.

1159.4. A levy that violates Article 304(a) cannot be saved even if the procedure under Article 304(b) or the proviso thereunder is satisfied.

1159.5. The Compensatory Tax Theory evolved in Automobile Transport case and subsequently modified in Jindal's case has no juristic basis and is therefore rejected.

1159.6. The decisions of this Court in Atiabari, Automobile Transport and Jindal cases and all other judgments that follow these pronouncements are to the extent of such reliance overruled.

1159.7. A tax on entry of goods into a local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing State.

1159.8. Article 304 (a) frowns upon discrimination (of a hostile nature in the protectionist sense) and not on mere differentiation. Therefore, incentives, set-offs etc. granted to a specified class of dealers for a limited period of time in a non-hostile fashion with a view to developing economically backward areas would not violate Article 304(a). The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular Benches hearing the matters.

1160. States are well within their right to design their fiscal legislations to ensure that the tax burden on goods imported from other States and goods produced within the State fall equally. Such measures if taken would not contravene Article 304(a) of the Constitution. The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular Benches hearing the matters.

1161. The questions whether the entire State can be notified as a local area and whether entry tax can be levied on goods entering the landmass of India from another country are left open to be determined in appropriate proceedings."

Perhaps, the only surviving issue requiring consideration by this Court is the one pointed out in Paragraph 1161, reproduced supra.

However, after the matter was heard for some time, we find the record to be totally silent on facts or grounds with regard thereto. No doubt, the issue is purely legal. But even the relevant provisions of the Statute claimed to be ultra vires are not on record and the reason is not far to seek for the petition was filed way back in the year, 2015 and the Legislation was amended/enforced subsequently. That apart, even during the course of hearing we found absolute incoherence with regard thereto.

As such, we are of the considered view that each one of the petitioners file a fresh petition placing on record not only the specific legislation or part thereof, Constitutional validity whereof they wish to challenge, as also specify the grounds, in addition to the one reproduced supra.

This they are permitted to do so within a period of eight weeks on the same and subsequent cause of action. As and when such petition is filed, the same shall be considered for hearing on priority basis.

Learned counsel for the petitioner invites our attention to the interim order dated 06.05.2015 and prays that the same to be made absolute, infinality.

We are not inclined to allow such a prayer. However, since we permit the petitioner to file an exhaustive petition on the same and subsequent cause of action, the such interim order(s) would continue for a further period of eight weeks, within which, a fresh petition be filed. We clarify that if such a petition is not filed within eight weeks and mentioned for early listing, the interim order(s) shall automatically stand vacated, without any further reference to this Court.

Petition stands disposed of in the aforesaid terms.

Interlocutory Application, if any, shall stand disposed of."

The direction issued supra shall apply mutatis mutandi also in the instant case and the present case is also disposed of in the aforesaid terms.

Interlocutory application, if any, shall also stand disposed of.