(2012) 02 MP CK 0030

In the Madhya Pradesh High Court

Case No : Writ Petition No. 14799 of 2008

NTPC Ltd., Sidhi APPELLANT

Vs

The Commissioner, Municipal Corporation and Another RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Central Sales Tax Act, 1956 — Section 3
Constitution of India, 1950 — Article 245, 246, 269, 269(1), 286
Madhya Pradesh Municipal Corporation Act, 1956 — Section 127, 129, 132, 132(6)(n), 132(6)(n)(o)
Madhya Pradesh Municipalities Act, 1961 — Section 127, 129

Citation : AIR 2012 MP 172 : (2012) ILR (MP) 1567

Hon'ble Judges : Sanjay Yadav, J;Ajit Singh, J

Bench : Division Bench

Advocate : H.S. Shrivastava with Abhijeet Shrivastava and Sandesh Jain, for the Appellant; Shobha Menon with Rahul Choubey for the Respondent No. 1 and Rahul Jain, Dy. A.G. for the Respondent No. 2/State, for the Respondent

Final Decision : Allowed

Judgement

Ajit Singh, J.—This order shall also decide Writ Petition No. 12767/2008 because it was heard analogously along with the present petition and involves a common issue. By this petition, the petitioner has mainly prayed that levy of terminal tax on electricity transmitted through wire outside the corporation limits of Singrauli be declared as illegal being violative of the provisions of Article 246 and Entry 56 of List II, Schedule VII, of the Constitution. The petitioner has also prayed for quashing of demand notices for payment of terminal tax issued by respondent no. 1, Commissioner, Municipal Corporation, Singrauli.

2. Petitioner, National Thermal Power Corporation Limited (in short, "the NTPCL") has a thermal power station situated at Vindhya Nagar, District Singrauli. The electricity generated by the petitioner is fed into Power Grid Corporation of India Limited (PGCL) from where the transmission lines transmit the electricity to several States. The electricity so transmitted is also consumed in the State of

Madhya Pradesh. Respondent no. 1 is Commissioner of the Municipal Corporation, Singrauli. He has issued the impugned demand notices to the petitioner levying terminal tax on the electricity exported from the municipal limits of Singrauli at the rate of 0.10% on the basis of price. Aggrieved, the petitioner has filed the present petitions on the ground that neither respondent no. 1 nor respondent no. 2, the State of Madhya Pradesh, is competent to levy such a tax on the transmission of electricity.

3. It is argued by the learned senior counsel for the petitioner that from the reading of Entry 56 of List II, Schedule VII, read with Article 246 of the Constitution it is clear that the State Legislature has power to levy taxes only on goods and passengers carried by road or on inland water-ways. According to the learned senior counsel although the electricity is goods, it is not carried by road or on inland water-ways and, therefore, does not come within the purview of Entry 56 of List II. The learned senior counsel further submitted that the terminal tax on electricity can be levied by the Parliament alone in exercise of its powers under Entry 97 of List I read with Article 246 of the Constitution which covers any other matter not enumerated in List II or List III.

4. The learned senior counsel appearing for respondent no. 1, on the other hand, defended the levy of terminal tax on the ground that Entry 56 of List II, Schedule VII, of the Constitution covers levy of such tax and the State Legislature has power to impose tax on the consumption or sale of electricity. The learned senior counsel also submitted that under sub-section (6) of section 132 clause (0) of the Madhya Pradesh Municipal Corporation Act, 1956 (in short, "the Act") the Corporation for the purposes of the Act, subject to general or special order, which the State Government may make in this behalf, impose any other tax which the State Government has power to impose under the Constitution of India with the prior approval of the latter. The learned senior counsel further submitted that the State Government has made The Terminal Tax (Assessment and Collection) On The Goods Exported From The Madhya Pradesh Municipal Limits Rules, 1996 (in short, "the Rules") and sub-rule (3) of Rule 2 of the Rules defines "terminal tax" to mean terminal tax on goods exported from the Municipal limit in accordance with the sanction of the State Government under clause (o) of sub-section (2) of the Act. According to the learned senior counsel, sub-rule (3) of the Rules provides that every person, businessman, establishment and the licence holder shall be responsible to collect the terminal tax or the goods at the rate specified in the Schedule, if he himself exports any goods as shown in the Schedule or sale for the purpose of export. The learned senior counsel also referred to the definition of "goods" defined in clause (28) of section 5 of the Act.

5. The learned Deputy Advocate General appearing for the State Government has adopted the submissions made by the learned senior counsel for respondent no. 1.

6. "Goods", as defined in Clause (28) of section 5 of the Act, reads as under:

"goods" means any material, commodity or article, and include animals, electricity and electro-magnetic waves or signals transmitted through wires or wireless devices.

7. Section 132 of the Act deals with taxes to be imposed by the Corporation under the Act. Under sub-section (6) of section 132 the Corporation, in addition to the taxes specified in sub-section (1), is empowered to impose taxes enumerated therein. Clauses (n) and (o) of this sub-section read as under:

132. Taxes to be imposed under this Act.

(6) In addition to the taxes specified in sub-section (1), the Corporation may for the purpose of this Act, subject to any general or special order which the State Government may make in this behalf, impose any of the following taxes, namely:-

(a) xxxxxx

(b) xxxxxx

(c) xxxxxx

(d) xxxxxx

(e) xxxxxx

(f) xxxxxx

(g) xxxxxx

(h) xxxxxx

(i) xxxxxx

(j) xxxxxx

(k) xxxxxx

(l) xxxxxx

(m) xxxxxx

(n) a terminal tax on goods or animals exported from the limits of the Corporation; and

(o) any other tax which the State Government has power to impose under the Constitution of India, with the prior approval of the State Government.

8. In exercise of the powers conferred u/s 433 read with clause (o) of sub-section (2) of sections 132 and 133 of the Act, the State Government has made the rules to regulate the assessment and collection of the terminal tax on the goods which are exported from the limits of Municipal Corporations, Municipal Councils and Nagar Panchayats. These rules come into force in a Municipal Corporation on such date on which such Municipal Corporation, under clause (o) of sub-section (6) of section 132 of the Act, imposes the terminal tax on goods

exported from the Municipal limits, clause (c) of sub-rule (2) of the Rules defines the terminal tax. It reads as under:

(c) "Terminal tax" means the terminal tax on goods exported from the Municipal limit in accordance with the sanction of State Government under clause (o) of sub-section (2) of Section 132 of the Madhya Pradesh Municipal Corporation Act, 1956 and the tax described in clause (xvi) of sub-section (1) of Section 127 of the Madhya Pradesh Municipalities Act, 1961.

9. Sub-rule (3) of the Rules reads as under:

3. Every person, businessman, establishment and the licence holder under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1971 (No. 24 of 1973), shall be responsible to collect the terminal tax or the goods at the rate specified in the Schedule, if he himself exports any goods as shown in the Schedule or sale for the purpose of export

10. There are two relevant entries in List II of Schedule VII of the Constitution. They are Entry Nos. 53 and 56 and read as under:

53. Taxes on the consumption or sale of electricity.

56. Taxes on goods and passengers carried by road or on inland water-ways.

11. In the present case, respondent no. 1 has not levied tax on the consumption or sale of electricity which falls under Entry 53. Respondent no. 1 has levied terminal tax on the transmission of electricity outside the Corporation limits. For such levy of terminal tax, respondent no. 1 has relied upon Entry 56 of List II as well as section 5(28) and section 132(6)(n)(o) of the Act.

12. The power of the State Government in the present context is derived only from Entry 56 of List II which has been quoted above. It makes no reference to transmission of electricity. It is true that the goods include electricity but it cannot be said to be carried by road or inland water-ways. The learned Counsel for respondent no. 1 argued that the electric poles of electric lines, by which the electricity is transmitted, can be read as road within the meaning of Entry 56 but it is very difficult to agree with this submission. Electricity cannot be said to be goods carried by a road nor can electric lines be equated to roads. They are two different and distinct mode of carriage. In this background, the terminal tax on goods mentioned in section 132(6) (n) and (o) cannot be construed to mean terminal tax on electricity. It may be made clear that the Corporation, in this case, is not charging sales tax on electricity generated and transmitted by the petitioner.

13. It was also pointed out by the learned Deputy Advocate General that "electricity" has been included in concurrent List III as Entry 38, Schedule VII, of the Constitution. But the State Legislature has not enacted any law under this entry and, therefore, the entry has no bearing in the present petitions. Also a power to tax cannot be inferred from a general entry for taxes are specifically

named and distributed between the Union and States by various entries in List I and List II of the Constitution (See Principles of Statutory Interpretation 13th edition by Justice G. P. Singh, pp. 820, 821).

14. For these reasons, I quash the demand notices for payment of terminal tax issued to the petitioner by respondent no. 1. The amount of terminal tax, if any, deposited by the petitioner be immediately refunded at the rate of six percent per annum.

15. The petitions succeed and are allowed. However, no order as to costs.

Per Sanjay Yadav, J.

16. While entirely agreeing with the view by my learned brother that, the levy of export tax on the transmission of electricity, generated at Singrauli, within the territorial limits of Municipal Corporation Singrauli and the demand raised therefor from the petitioner, is beyond the competence of the Municipal Corporation Singrauli, I have following reasons to add.

17. Indisputably, as borne out from the pleadings the Electric Power (Electricity) generated at Super Thermal Power Plant at Vindya Nagar, Singrauli; owned by the petitioner, a government company, registered under the Companies Act, 1956, is transmitted, through transmission lines (overhead power lines) to the purchaser, the Western Power Grid, comprising of Madhya Pradesh, Gujarat and Maharashtra. As per the petitioner the portion is also utilised within the limits of Singrauli Municipal Corporation. It is also not in dispute that the petitioner company pays Electricity Duty under the M.P. Electricity Duty Act, 1949 and the Entry Tax under the Entry Tax Act, 1976 to the State of Madhya Pradesh.

18. Admittedly, Municipal Corporation Singrauli, owes its incorporation to the Madhya Pradesh Municipal Corporation Act, 1956 (referred as Act of 1956 hereforth). An Act, enacted by the State Legislature, to provide for the establishment of Municipal Corporation for certain cities in Madhya Pradesh. Part IV of the Act 1956 comprise of Chapter XI which deals with Taxation which vests the Municipal Corporation to impose tax under the Act of 1956. Sub-section (6) of Section 132 provides for that in addition to the taxes specified in sub-Section (1), the Corporation may, for the purpose of the Act of 1956 and subject to any general or special order which the State Government may make in this behalf, impose any of the taxes enumerated therein.

19. Clauses (n) and (o) of this sub-section respectively stipulates "(n) a terminal tax on goods on animals exported from the limit of the Corporation", and "(o) any other tax which the State Government has power to impose under the Constitution of India, with prior approval of the State Government". The power to impose terminal tax on goods or animals exported from the limits of the Corporation and in respect of" any other tax" thus can be levied to the extent of the powers State Government has under the Constitution of India.

20. The expression "goods" which appear in Section 132 find its meaning in

clause (28) of Section 5 of 1956 Act. Prior to 31.8.2005, the "goods" was defined as "(28)" "goods" includes animals". However, with Madhya Pradesh Nagar Palik Vidhi (Sansodhan) Adhiniyam, 2005, Clause (28) in Section 5 of 1956 Act was substituted by new a clause namely:-"(28) "goods" means any material, commodity or article and include animals, electricity and electro-magnetic waves or signals transmitted through wires or wireless devices." The amendment came into effect from 31.8.2005.

21. Said amendment led the Municipal Corporation Singrauli to issue notification on 1.12.2006 imposing export tax (terminal tax) on electricity and electro-magnetic waves or signals transmitted through wires or wireless devices @0.10 percent w.e.f 1.12.2006, i.e. the date of notification. The notification is in the following terms:

22. The notification and the levy of tax thereby is in exercise of powers under the Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limits, Rules 1996. These Rules are framed by the State Government in exercise of the powers conferred u/s 433 read with clause (o) of sub-section (2) of Section 132 and Section 133 of the Madhya Pradesh Municipal Corporation Act, 1956 and Section 355 read with clause (xvi) of sub-section (1) of Section 127 and Section 129 of the Madhya Pradesh Municipalities Act, 1961, to regulate the assessment and collection of the terminal tax on the goods which are exported from the limits of Municipal Corporation, Municipal Councils and Nagar Panchayats.

23. At this juncture pertinent it would be to note that competence of State legislature to enact Sections 132 and 133 of 1956 Act and Sections 127 and 129 of the M.P. Municipalities Act, 1961 which provides for and enable the Municipal Corporations, Municipalities and Nagar Panchayats to levy export tax has been affirmed in various cases. To note few

24. In Eternit Everest Ltd. v. State of M.P. and others: Misc. Petition No. 2610/1991 decided on 10.5.1995, the Division Bench upheld the validity of Section 129 of 1961 Act. The Division Bench referred to Entry No. 52 of List II and also referred to the decisions rendered in the case of Monji Kalyanji and Others Vs. State of Madhya Pradesh, and Amrit Banaspati Co. Ltd. Vs. Union of India and others,

25. Similarly in Smt. Meera Khandelwal Vs. State of Madhya Pradesh and Others, wherein validity of amended provision of Sections 129 of 1961 Act was called in question. The Division Bench taking note of relevant entries in Schedule VII and Articles 301 and 304B of the Constitution of India upheld the provisions.

26. In Northern Coal Fields Limited Vs. State of Madhya Pradesh and Another, , Division Bench after referring to Entries 5, 23, 50, 56 of List II and Entries 54 and 89 of List I of the Constitution of India, upheld the validity of Section 132(6)(n) and (o) 1956 and Rule 3 of the Rules, 1996.

27. Be that as it may.

28. In the case at hand the competence of State legislature in amending clause (28) of Section 5 of 1956 Act is being questioned on the anvil that, incorporating ''electricity and electro-magnetic waves or signals transmitted through wires or wireless devices'' is beyond its competence as the same is not covered by any entry falling within list II of VIIth Schedule. It is urged that, Entry 89, 92A, 97 of list I of Schedule VII covers the field whereon only Parliament can legislate. Entry 89 and 92 A of List I of Schedule VII of the Constitution of India respectively relates to "Terminal Taxes on goods or passengers, carried by railway, sea or air; taxes on railways fares and freights" and "Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."

Clause (28) of Section 5 which is amended is not a charging section but is a definition clause. The charging provision is Section 132 of 1956 Act and clauses (n) and (o) of sub-section (6) have an inbuilt limitation within which and the extent to which the Municipal Corporations is enabled to levy taxes. Thus the validity of taxation provision, i.e., Section 132, having not been challenged in this petition, question is whether clause (28) of Section 5 is assailable on the assumption that the word finds mention in taxation provision (i.e Section 132(6)(n) and (o)).

29. Trite it is that the power to impose tax ordinarily would not be deduced from a general entry. (Please see Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, paragraph 55].

30. Also that field of operation in respect of entries respectively varies, e.g. field of operation of entry 53 of List II being Taxes on the consumption or sale of electricity and of entry 56 ''Taxes on goods and passengers carried by road or on inland waterways'' and of entry 38 of List III is Electricity.

31. Competence to Legislate flows from Article 245, 246 and the other Articles, following in Part XI of the Constitution of India. And as held in M/s Ujagar Prints and others v. Union of India and others: (1989) 5 SCC 488 that "If a legislation purporting to be under a particular legislative entry is assailed for lack of legislative competence, the State can seek to support it on the basis of any other entry within the legislative competence of the legislature. It is not necessary for the State to show that the legislature, in enacting the law, consciously applied its mind to the source of its own competence". (Paragraph 53 of the report).

32. No prohibition being imposed vide entry 89 and 92A for effecting a legislation of a general nature, it cannot be presumed that the State legislature exceeded in causing amendment in clause (28) of Section 5 of 1956 Act by incorporating "electricity and electro-magnetic waves on signals transmitted through wires or wireless devices."

33. It was suggested during course of argument in support of the proposition

that Entry 89 of List I covers the field, that, electricity is being transmitted through air, the suggestion is not acceptable for the reason that the definition of ''goods'' being clear to include electricity and electromagnetic waves or signals transmitted through wires or wireless devices, meaning thereby that, the electricity gets transmitted through wires and electromagnetic waves or signals are transmitted through wireless devices. In the case at hand the extent of challenge is the inclusion of ''electricity''. The contention of learned senior counsel is not acceptable as the definition is clear and unambiguous. Technically also, the submissions of learned senior counsel that the transmission of electricity be presumed to be through air is not acceptable. The characteristic of electric energy has been noted in following terms in State of A.P. Vs. National Thermal Power Corporation Ltd. and Others,

21. Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from Aiyar''s Law Lexicon (Second Edition, 2000) "Electricity in physics is "the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves." Its true nature is not understood. Imperial Dictionary (quoted in Spensley v. Lancashire Ins. Co., where the court, quoting from the same authority, said, "We are totally ignorant of the nature of this cause whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores or all bodies, and is capable of motion from one body to another."

This characteristic quality of electric energy was judicially noticed in Indian Aluminium Co.etc.etc. Vs. State of Kerala. Vide para 25 this Court has noted, (SCC p. 650)

13. "Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place." "as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place."

These properties of electricity as goods are of immense relevance as we would state'' hereafter.

34. The characteristic as noted above nowhere suggests that the electricity can be transmitted through air (the air is a mixture of oxygen, nitrogen etc. and the

gas is the bad conductor of electricity).

35. In State of Andhra Pradesh v. National Thermal Power Corporation Ltd. (supra), reliance whereon is placed by learned senior counsel appearing for the petitioner it was held:

28. It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extra territorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra territorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In Burmah Shell Oil Storage & Distributing Co. India Ltd. (supra), which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer, i.e. the one who consumes. In Entry 53, ''sale for consumption'' (the meaning which we have placed on the word ''sale'') would mean a sale for consumption within the State so as to bring a State Legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extra territorial operation of State legislation.

30. In both the cases before us, contracts have been entered into between parties to the transaction, that is, the sellers and the buyers (in other States) prior to the generation of electricity. The NTPCL generates electricity and pursuant to these contracts supplies the same from its power stations situated in the States of A.P. or M.P. to the buyers in other States where it is received and consumed. There is no hiatus between generation, sale, supply, transmission, delivery and consumption. The inter-State movement of electricity is pursuant to contracts of sale. Such sales can be held only as inter-State sales. Though it may be permissible to fix the situs of sale either by appropriate State legislation or by Judge made law as held by the majority opinion in 20th Century Finance Corporation case, we would like to clarify that none of the two can artificially appoint a situs of sale so as to create territorial nexus attracting applicability of tax legislation enacted by any State Legislature and tax an inter-State sale in breach of Section 3 of the CST Act read with Articles 286(2) and 269(1) and (3) of the Constitution. No State legislation, nor any stipulation in any contract, can fix the situs of sale within the State or artificially define the completion of sale in such a way as to convert an inter-State sale into an intra-State sale or create a territorial nexus to tax an inter-State sale unless permitted by an appropriate central legislation. But this is exactly what the definition of ''consumer'' in Clause (2)(a) of the M.P. Electricity Duty Act, 1949 has done. The definition of consumer

has been artificially extended to include any person who receives electrical energy (without regard to its consumption) and also to include a person who, receiving the electrical energy in bulk, forwards it onwards for distribution, (without regard to the fact whether it transmitted outside the State and whether the electricity or is not consumed within the State). The same definition has been adopted in M.P. Upkar Adhinlyam, 1981. This definition of consumer shall have to be read down as including within it only such persons who receive the electricity for consumption or distribution for consumption within the State. Without such reading down, the definition of ''consumer'' would be rendered ultra vires of Articles 286 and 269 of the Constitution read with Section 3 of the Central Sales Tax Act, 1956.

36. When tested on above proposition the definition of "goods" which as per the petitioner when amended has enabled the Corporation to levy tax on transmission of electricity by wires which is beyond its competency, stands the scrutiny because of the inbuilt limitation in clauses (n) and (o) of sub-section (6) of Section 132 of 1956 Act.

37. For these reasons the petition fails to the extent of challenge that the State Legislature exceeded its legislative competence in amending clause (28) of Section 5 of 1956 Act.

38. Coming to the next issue that, whether it is beyond the competence of Municipal Corporation, Singrauli, to levy export tax on the transmission of electricity through wires, finds its answer in clause (n) of sub-section 6 of Section 132 of 1956 Act, that the Corporation is vested with the power to levy any other tax only to the extent the State Government has power to impose under the Constitution of India. And as observed in State of Andhra Pradesh v. National Thermal Power Corporation Ltd. (supra): ".........In such a case when the generation takes place in one State wherefrom it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by Section 3 of the CST Act." (Paragraph 29). Demand of tax raise by the respondent Corporation does not specify as to how much of the electricity generated at Singrauli transmitted through wires, is consumed within the State of Madhya Pradesh. In absence whereof the Municipal Corporation, Singrauli is not within its right in levying export tax on the entire electricity generated and transmitted through wires from within Singrauli Municipal limits. The definition of "goods" in clause (28) of Section 5 of 1956 Act has to be read within the confines of Section 132(6)(o) of 1956 Act. Thus the Corporation since has no powers to levy tax beyond the powers of the State, the demand raised on the entire transmission of electricity deserves to be and is hereby quashed. Petition is allowed to the extent above. There shall be no costs.

Result :

The petitions are allowed and the demand notices for payment of terminal tax issued by the Municipal Corporation, Singrauli, are hereby quashed. It is ordered that, the amount of terminal tax if any deposited by the petitioner, be immediately refunded @ 6% per annum. The interest to be calculated from the respective dates of deposit.

The petitions succeed and are allowed. There shall be no costs.

