

(1996) 02 PAT CK 0008

In the Patna High Court

Case No : C.M.W.J. No's. 360, 3018, 3178 and 3559/93, 108, 150, 550, 628, 647, 664, 1654, 1662, 1666, 1886, 1959, 2152, 2183, 2343, 2504, 2533, 2568, 3138, 2245, 3227, 3398 and 3399/94 and 9, 42, 99, 121, 122, 125, 172, 244, 254, 256, 258, 317, 337, 338, 400, 1253

O.C. Corporation and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 02-02-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 301, 304

Citation : (1996) 1 BLJR 672 : (1996) 1 PLJR 547

Hon'ble Judges : S.K. Homchaudhuri, J; Gurusharan Sharma, J

Bench : Division Bench

Judgement

S.K. Homchaudhuri, J.—In the batch of these petitions, the petitioners have challenged the validity of the provisions of Sub-section (2a) and Sub-section (2b) of Section 31 of the Bihar Finance Act (hereinafter mentioned as the "Act") and the rules framed there under on the following grounds:

(i) "The provisions of Sub-section (2a) and Sub-section (2b) of Section 31 of the Act are unconstitutional in as much as the provisions are beyond the ambit of the legislative jurisdiction of the State as provided under Entry 54 of List II of the Seventh Schedule of the Constitution.

(ii) Power to seize and confiscate and levy penalty in respect of goods carried in the vehicle whether sold or not within the State of Bihar as contemplated under Sub-section (2B) and Sub-section (3) of Section 31 of the Act for contravention of Sub-section (2a) of Section 31 of the Act is not ancillary to power to levy sales tax conferred to the State Legislature under Entry 54 of List II of the Seventh Schedule of the Constitution.

(iii) The provisions of Sub-sections (2a) and (2b) of Section 31 of the Act are violative of Articles 301 and 304 of the Constitution.

(iv) The provisions of Sub-section (2a) and Sub-section (3) of Section 31 of the Act confer unbridled and unguided power on the prescribed authority without any guideline to seize, confiscate the goods transported within the State of Bihar and to impose penalty to the extent of three times of the amount of tax calculated on the value of the goods, for contravention of Sub-section (2a) of Section 31 of the Act and is therefore hit by Article 14 of the Constitution of India.

The other common grounds urged in these petitions are:

(a) Sub-section (2b) and Sub-section (3) of Section 31 of the Act confers as arbitrary power without any guidelines on the prescribed authority under the provisions of the Act to seize, confiscate the goods with the carrier transported within the State of Bihar and to impose penalty to the extent of three times of the tax payable on the goods simply for contravention of the provisions of Sub-section (2a) of Section 31 of the Act irrespective of the fact as to whether the goods carried are sold or not within the State of Bihar and is, therefore, hit by Article 14 of the Constitution of India.

(b) No notification prescribing and/or adopting form of declaration to be carried by a person transporting goods as contemplated under Sub-section (2a) of Section 31 of the Act after provision was substituted by the Bihar Ordinance 20 of 1993, there cannot be any contravention of Sub-section (2a) of Section 31 of the Act for not carrying any form of declaration by the transporter of goods through the State of Bihar and, as such, the prescribed authority acted illegally and without jurisdiction in seizing the goods and carrier and/or vehicle of the goods transported by the petitioners through the State of Bihar, in exercise of power under Sub-section (2b) of Section 31 of the Act and imposing penalty under Sub-section (3) of Section 31 of the Act, for alleged contravention of Sub-section (2a) of Section 31 of the Act.

2. We have heard learned Counsel for the petitioners, learned advocate General and Mr. M.Y. Eqbal, learned G.A. on behalf of the State.

3. Before adverting to the rival contentions, it is appropriate to make some reference to the legislative history. The unamended provisions of Sub-section (2a) of Section 31 of the Act had been in force for a considerable period till the provisions were substituted by Bihar Act 7 of 1984. The substituted Sub-section (2a) of Section 31 of the Act substituted in place of earlier provisions by Section 9 of the Bihar Act 7 of 1984 reads as follows:

(2a) A person transporting goods shall carry a declaration in such form as may be prescribed by the Commissioner supported by either a cash memo, bill or a challan, in case the movement is otherwise than as a result of sale, in respect of goods which is being transported on a goods carrier, or a vessel and shall produce such challan, cash memo or bill along with the aforesaid form of declaration on demand before the prescribe authority;

Provided that the Commissioner, by notification in this respect, may prescribe a

form of declaration or adopt a form of declaration or permit prescribed for the purpose of Sections 34 and 35 of this part, and, he may also prescribe in the said notification, the manner in which such declaration or permit shall be utilised for verification and assessment of tax payable under this part:

Provided further that the Commissioner may exempt any person or dealer or class of registered dealers from the requirement of this Sub-section.

(2) In Sub-section (3) for the full stop after the words "whichever is greater" a colon shall be substituted and the following proviso shall be inserted thereafter:-

Provided that notwithstanding anything contained in this sub-Section where the circumstances of the case or checking of the goods carrier or vessel demand any action relating to inspection, search and seizure of the goods loaded on the goods carrier or vessel, by the prescribed authority, the provisions of Sub-sections (3), (5), (6) and (7) of Section 33, shall mutatis mutandis apply.

By the Bihar Ordinance 14 of 1989 Sub-section (2b) of Section 31 of the Act was inserted which reads as follows:

(2b) Prescribed authority may in order to verify that the " transportation of goods is being made according to Sub-section (2a) intercept, detain a carrier or vehicle and may search and if the said officer is satisfied on such verification that the transportation of goods is being made in contravention of provisions of Sub-section (2a) in a manner likely to deprive of the taxes payable he may, notwithstanding anything contained in this part, seize the goods or carrier or the vehicle with the goods and impound the documents.

Thereafter by the Bihar Ordinance 20 of 1993 Sub-sections (2a) and (2b) of Section 31 of the Bihar Finance Act substituted-which are under challenge in these petitions. Sub-sections (2a) and (2b) of Section 31 as substituted by the Bihar Ordinance 20 of 1993 and subsequently enacted as an Act of the Legislature of the State of Bihar are quoted below:

(2a) A person transporting goods shall carry a declaration in such form as may be prescribed by the Commissioner supported by a cash memo or bill in case the movement is as a result of sale or a challan in case the movement is otherwise than as a result of sale, in respect of goods which is being transported on a goods carrier, vehicle or a vessel or- is otherwise in transit or in transit storage and shall produce such cash memo or bill or challan as the case may be, along with the aforesaid form of declaration on demand before the prescribed authority;

Provided that the Commissioner, by notification in this respect, may prescribe a form of declaration or adopt a form of declaration or permit prescribed for the purpose of Sections 34 and 35 of this part and, he may also prescribe in the said notification the manner in which such declaration or permit shall be utilised for verification and assessment of tax payable under this part:

Provided further that the Commissioner may exempt any person or dealer or

class of registered dealers from the requirement of this Sub-section.

(ii) Sub-Section (2b) shall be substituted by the following and shall always be deemed to have been so substituted, namely-

(2b) The prescribed authority may in order to verify that the transportation of goods is being made in accordance with the provisions of Sub-section (2a) intercept, detain and may search any carrier, vehicle or vessel and may also search the warehouse or godown or any other such place of transit storage where goods are kept in course of transportation and, if, the said authority is satisfied on such verification and search that the transportation of goods is being made in contravention of the provisions of Sub-section (2a) or in a manner which" is likely to lead to evasion of tax payable, he may, notwithstanding anything contained in this part, seize the goods or the carrier or vehicle or vessel along with the goods and documents relating to the goods and the carrier, vehicle or vessel.

4. For proper appreciation of the rival contentions, it is also necessary have a look into the other provisions of Sub-section .(3) of Section 31 of the Act which reads as follows:

(3) If any clearing, booking or forwarding agent or Dalai or person transporting goods contravenes the provision of Sub-section (1) or (2a) in a manner which is likely to lead to evasion of any tax payable under this part, the prescribed authority may, without any prejudice to any action u/s 49 of this part on the charge of abatement, after giving the person concerned an opportunity of being heard in the manner prescribed, direct him to pay by way of penalty, an amount which shall be equal to three times the amount of tax calculated on the value of goods in respect of which no particulars or information or incorrect particulars or information has been furnished under Sub-section (1) or no cash memo or bill or challan and the prescribed declaration by the Commissioner under Sub-section (2a) has been produced before the prescribed authority under Sub-section (2a) or rupees one thousand whichever is greater.

5. Learned Counsel for the petitioners submitted that ancillary power under the Taxing Statute, namely, Entry 54 of List II of the Seventh Schedule of the Constitution cannot travel beyond the legislative competence of the State to interfere with the inter-State trade in the garb of prevention of evasion of tax inasmuch as it is beyond the legislative competence of the State to impose tax or penalty for raising revenue to the State under Entry 54 of List II of the Seventh Schedule of the Constitution in respect of inter-State sale transaction. The competence of the State Legislature is confined to levy tax and penalty on the sale or purchase of goods within the State i.e. in respect of inter-State transaction of sale and purchase but the State has not Legislative competence to levy tax and penalty on the sale or purchase of goods transported in connection with the inter-state sale transaction. Learned Counsel for the petitioners submitted that although the widest import and significance should be given to

the specified field of legislation but incidental and the ancillary power to prevent evasion of tax cannot take within its sweep the power to seize and confiscate and to levy penalty in respect of goods which are transported through the State whether sold or not within the State. The State Legislature is competent to make legislation for collection of tax and to levy penalty in respect of transaction of sale and purchase of good within the State. But the provision of Sub-sections (2a) and (2b) of Section 31 of the Act has given the unrestricted power on the taxing authority to levy penalty and to confiscate the goods transported through the State of Bihar even in connection, with the inter-State sale although the State has no jurisdiction to levy tax or penalty on goods transported in connection with inter-State sale transaction.

6. In support of the contention, learned Counsel for the petitioners has placed reliance on the decisions of the Supreme Court in the case of *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, and in the case of *Hans Raj Bagrecha Vs. State of Bihar and Others*, . In the case of *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, the validity of the provisions of Section 42 of the Madras General Sales Tax Act, 1959 came for consideration before a Constitution Bench of the Hon"ble Supreme Court. Section 42 of the Madras General Sales Tax Act, 1959 quoted in paragraph 3 of the said judgment is as follows:

(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 of any other person on charge of any vehicular boat shall stop the vehicle or boat, as the case may be, and keep it stationary as long as many 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 any in lieu of confiscation-

(a) in cases whether 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.

By Sub-section (2) the driver or any person in charge of the Vehicle is required to stop the vehicle and to allow the officer in charge of the check post or barrier to examine the contents in the vehicle, and to inspect all records relating the vehicle, and to inspect all records relating to the goods carried in the vehicle. The officer in charge of the check post or barrier is invested with power by Sub-section (3) to seize and confiscate any goods which are carried and are not covered by the documents specified therein. The officer is required when ordering confiscation to give the person affected option to pay penalty in lieu of confiscation.

In paragraph 4 of the judgment the Hon'ble Supreme Court held:

Entry 54 of List II of the Seventh Schedule to the Constitution authorises the State Legislature to legislate in respect of taxes on the sale or purchase of goods. A legislative entry does not merely enunciate powers: it specifies a field of legislation and the widest impost and significance should be attached to it, power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein. A taxing entry therefore, confers power upon the Legislature to legislate for matters ancillary or incidental including provision for preventing evasion of tax-Sub-ss.(1) and (2) of S. 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 authorised 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.

In the case of *Hansraj Bagrecha v. State of Bihar and Ors.* (supra) the Hon"ble Supreme Court has held that Rule 31B and the notification were ultra vires the State Government and must be struck down. The power of the State Legislature is restricted to legislate in respect of intra-State transactions of sale and purchase and to Matters ancillary or incidental thereto: it has no power to legislate for levy of tax on sale and purchase in course of inter-State transactions. The power conferred by Section 42 authorising the imposition of restriction on transport or movement of goods may, therefore, only be exercised in respect of levy, collection and recovery of tax on transactions of intra-State sale or purchase. When Rule 31-B. seeks to prohibit transport of goods to any place outside the State of Bihar unless a certificate is obtained from the appropriate authority, it seeks to prohibit transport of goods pursuant to transactions which may not even be of the nature of sale or purchase transactions, in any case it restricts transport pursuant to transactions in the course of inter-State trade and commerce. The operation of the rule is not restricted only to transactions in the course of intra-State trade and commerce. On that account it is ultra vires the State Government. For the same reasons the notification dated December 26,1967, is also unauthorised.

7. In support of the contention the learned Counsel for the petitioners has placed reliance on the following decisions of the Hon"ble Supreme Court.

(1) in the case of *Sales tax Officer v.* AIR 1968 S.C. 1991

(2) in the case of *The Joint Commercial Tax Officer, Harbour Division, II-Madras Vs. The Young Men's Indian Association (Regd.), Madras and Others,* .

(3) in the case of *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar,* .

(4) in the case of *The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc.,* .

8. Learned Advocate General, on the other hand, submitted that Sub-sections (2a) and (2b) of Section 31 of the Act and the rules framed there under are not unconstitutional and that enactment of the provisions of Sub-sections (2a) and (2b) of Section 31 of the Act are within the legislative competence of the State Legislature. Learned Advocate General submitted that it is well settled that a legislative entry does not merely enunciate powers, but it specifies a field of legislation and the widest import and significance should be attached to it. Power

to legislation a specified topic includes power to legislate in respect of matters ancillary or incidental including provision for preventing evasion of tax. The provisions are nothing but regulatory and does not any way interfere with the inter-State trade. The enactment of the provisions falls squarely within the incidental and ancillary power under Entry 54 of List II of the Seventh Schedule of the Constitution of India. Learned Advocate General submitted that the provisions of Sub-sections (2a) and (2b) and Sub-section (3) of Section 31 of the Act are not without any guideline, there is proper guideline for exercise of power under the provisions of the Act. It is specially stated that the prescribed authority will exercise power if the transporter of goods contravenes the provisions of Sub-section (2a) of Section 31 of the Act in a manner which is likely to deprive the State of the tax payable. The provisions of Sub-sections (2a) and (2b) of Section 31 of the Act does not contemplate imposition of any tax but only penalty which has been inserted by way of regulatory measure to prevent evasion of tax by clandestine transportation of goods, learned Advocate General further submitted that the Hon'ble Supreme Court in the judgment passed in the case of State of Bihar and Others Vs. Harihar Prasad Debuka and Others, have impliedly upheld the provisions of Sub-section (2a) of Section 31 of the Act. As such, there is no scope for challenging the provisions of Sub-section (2a) of Section 31 of the Act on the allegation that the provisions are violative of Articles 301 and 304 of the Constitution of India.

9. Before going deep into the question as to whether Sub-section (2a) of Section 31 of the Act is ultra vires of the State Legislature and violative of Articles 301 and 304 of the Constitution, it is expedient to consider the submissions of the learned advocate General that in view of what has been held by the Supreme Court that in view of what has been held by the Supreme Court in the case of State of Bihar and Others Vs. Harihar Prasad Debuka and Others, there is hardly a scope to consider the question of validity of the provisions of Sub-sections (2a) and (2b) of Section 31 of the Act. The backdrop of the case may be stated in a nutshell. After substitution of Sub-section (2a) of Section 31 of the Act by the Bihar Act 7 of 1984, the Commissioner of Taxes in terms of the substituted provisions of Sub-section (2a) of Section 31 of the Act issued notification No. 1432 dated 28.12.1985, adopting forms 28A and 28B which to be carried on goods carrier or vessel for transporting goods through the State of Bihar.

10. The validity of Sub-section (2a) of Section 31 of the Act substituted by Bihar Act 7 of 1984 and form 28A and 28B adopted by the notification dated 28.12.1985 issued by the Commissioner of taxes, was challenged in a writ petition in this Court by one Madan Mohan Tiwari contending that Sub-section (2a) of Section 31 of the Act was beyond the ambit of the power of State Legislature under Entry 54 of List II of the Seventh Schedule inasmuch as the provisions of Sub-section was tantamount to interference with the inter State trade. A Division Bench of this Court by the judgment passed on May 14, 1986 reported in Madan Mohan Tiwari and Others Vs. State of Bihar and Others, held that Sub-section (2a) and Sub-section (3) of Section 31 of the Act and the

notification No. S.O. 1432 dated 28.12.1985 requiring transporters of goods to apply for and obtain a permit for the transport of consignment of goods through the State of Bihar and empowering an officer to verify the documents and impose a penalty if there was an attempt to evade sales tax, embraced only such provisions which are enacted to prevent the evasion of sales tax, ensured bonafide transactions and stop clandestine trade and the Legislation was made in the exercise of power incidental or ancillary to the levy of sales tax and squarely fall within entry 54 of List II of the Seventh Schedule and were not unconstitutional. Thereafter in the case of Harihar Prasad Debuka and Anr. v. State of Bihar and Ors. against the Notification No. S.O. 1432 dated December 18, 1985 adopting Forms No. 28A and 28B to be carried by a goods carrier, transporting goods through the State of Bihar was challenged and considered by a larger Bench and this Court by the judgment delivered in November 18, 1986 reversed the decision of the decision in the case of Madan Mohan Tiwari (supra) holding that the amended provisions of Sub-section (2a) of Section 31 of the Bihar Finance Act, 1981, comprehensively authorise the prescription of a declaration form which must be carried, inter alia, by motor vehicles carrying goods in transit through the Bihar State even in the course of inter-state trade. In exercise of the power conferred under the above provisions, Notification No. S.O. 1432 dated 28th December, 1985, was issued prescribing the form of declaration and the manner in which the same shall be utilised for verification and assessment. The notification and forms are applicable in respect of goods being brought into the State and being sent out of the State in excess of the quantity notified u/s 35 by every goods carrier of vessel and includes the transport of all goods even in inter-State trade through the State of Bihar. The notification further provides that if the prescribed form is found blank or does not contain all the minute particulars required in every column it would be deemed to be a violation of the provisions of Sub-section (2a) of Section 31 of the Act. The notification dated 28.12.1985 was, therefore, violative of Articles 301 and 304 of the Constitution.

11. The decision of the Full Bench was challenged in Civil Appeals No. 346-347 of 1988 before the Hon"ble Supreme Court in the case of State of Bihar and Others Vs. Harihar Prasad Debuka and Others, and the Hon"ble Supreme Court by the judgment passed in the said civil appeals reversed the judgment of the Full Bench of this Court holding that the notification No. S.O. 1432 dated 28.12.1985 adopting Forms No. 28A and 28B and directing that the prescribed form should be carried on goods carrier or vessel for transporting of goods through the State of Bihar was a measure in the exercise of power incidental to levy sales tax and not ultra vires of Articles 301 and 304. In paragraphs 18 and 19 of the said judgment the Hon"ble Supreme Court held as follows:

18. Coming to the impugned Notification and the two adopted Forms, namely, Forms XXVIIIA and XXVIIIB we find that there is no imposition of any tax by them. It is, therefore, pertinent to ask what this measure actually does. Does it directly and immediately restrain inter-State trade, commerce and intercourse?

Does it place the inter State carrier in a superior or advantageous position to that occupied by inter-State carrier? Does it restrict inter-State trade, commerce and intercourse? What are the direct and indirect effects of this measure and whether it amounts to a prohibition or a mere regulation? If it is a mere regulation then only the motive, purpose or policy of the State Government would be relevant. However, if it amounts to a prohibition that would not be relevant. If it has any effect on inter-State trade, we have to ascertain the essence or incidence thereof.

19. The Notification only prescribed the declaration Forms to be carried on a goods carrier or vessel for transporting goods through the State of Bihar. It does not prohibit transportation of the goods. Before the High Court it was not disputed that the Notification and the Forms were applicable in respect of goods being brought into the State and being sent out of the State in excess of the quantity notified u/s 35 of the Act on every goods carrier or vessel. Thus, it would be applicable to the transport of all goods carried inter-State in Bihar, and inter-State to and through the State of Bihar. Further CI. (II) of the Notification states that if the prescribed Form is found blank or does not contain all the required particulars it would be deemed to be a violation of the provisions of Sub-Section (2a) of Section 31 of the Act entailing penalties for the infraction thereof. Counsel for the State submits that Form XXVIII A (permit) is meant for those who are not registered as dealers and it has to be obtained from office, while Form XXVIII B (permit) can be filled up by the registered dealer himself. It is further submitted that the particulars are to be furnished by the persons and this would not affect the freedom of movement of the goods carried, and that it would facilitate transportation across and throughout the State of Bihar by showing the permit whenever required and thus, instead of hindering it will promote free movement of goods. We find no reason to disbelieve these statements. We are of the view that the permits will indirectly help assessment by ascertaining whether tax could be payable or not. The permit would enable the it, if and when needed and thus would promote rather than impede inter-State trade. A declaration may also, serve the public purpose by finding out unauthorised trade or business to which freedom of trade., commerce and intercourse would not apply. Thus, the impugned Notification has to be held to be a measure in exercise of power incidental to the levy of sales tax and it could not be said to have been a colorable exercise of power to impede, restrict or barricade inter-State trade in respect of which Bihar State legislature has no power to legislate. It is, to our mind, clearly distinguishable from the facts in *Hans Raj Bagrecha Vs. State of Bihar and Others*, . The commonness between the two is in insistence of despatch certificate in Bagrecha and a permit in the instate case. But there the similarity ends. While There was no ex-facie purpose disclosed in the Bagrecha prohibitory Notification, in the instant case the Notification ex-facie shows the purpose, namely, to prevent evasion and facilitate assessment of sales tax. The insistence on a permit in respect of goods entering the State in course of inter-State trade could also be necessary to distinguish the goods that would be transported across the territory of State and those which would reach the

consumption point within the State, and to ascertain whether tax would be payable in the latter category. We are, therefore, of the view that the ratio decidendi of the Bagrecha case would not be applicable, to the facts of the instant case. We are also of the view that the facts in Sodhi Transport Co. and others Vs. State of U.P. and others, would be nearer to the facts of the instant case. In this case Section 28 of the Uttar Pradesh Sales Tax Act, 1948 authorised the State Government to establish check-posts and barriers with a view to preventing evasion of tax or other dues payable under the Act in respect of sale of goods in the State. Section 28-B added by the UP. Act 1 of the 1973, makes provision for the procedure to be followed by persons who intend to transport goods from outside the State by road through the State to destinations outside the State. It provides that when a vehicle coming from any place outside the State and bound for any other place outside the State passes through the State, the driver or the other person in-charge of such vehicle shall obtain in the prescribed manner a transit pass from the officer in charge of the first check post or barrier after his entry into the State the deliver it to the officer in-charge of the check post or barrier before exit from the State. If he fails to do so it shall be presumed that the goods carried thereby have been sold within the State by the owner or person in-charge of the vehicle R.87 of the Uttar Pradesh Sales Tax (first Amendment) Rules, 1977 provides that a person who wishes to obtain a transit pass shall make an application in the prescribed form to the office in charge of the check post concerned. It also provides for the issue of private pass in triplicate and for inspection of the documents, consignments and goods to ensure that the statement are true.

12. Learned Counsel for the petitioners submitted that in paragraph 7 of the said judgment the Hon"ble Supreme Court has noted that the vires of Sub-section (2a) of Section 31 of the Act where under the notification was issued by the Commissioner, and the Rules 41 and 42(1) framed there under were not challenged before the High Court of before this Court. As such, the Hon"ble Supreme Court had not the occasion to consider the legislative competence of the State of Bihar to enact Sub-sections (2a) and (2b) of Section 31 of the Act in the light of the decision of the Constitution Bench in the case of The Check Post Officer and Others Vs. K.P. Abdulla and Bros., Learned Counsel for the petitioners further submitted that the decision of the Constitution bench in the case of Check Post Officer (supra) was not placed before the Hon"ble Supreme Court whereas ratios of decidendi in the said case squarely applies to the facts to the present case. Learned Counsel for the petitioners further submitted that a bare reading of Sub-sections (2a) and (2b) of Section 31 of the Act, it becomes apparent that the provisions are neither incidental nor ancillary to the powers conferred by Entry 54 of List II of the Seventh Schedule inasmuch as the State Legislature has no power to legislate to impose tax or penalty on goods unless intra-State sales transactions thereof takes place. However, the provisions of Sub-sections (2a) and (2b) of Section 31 of the Act embrace not only the intra-State sale transaction but also inter-State sale transaction.

13. On perusal of the judgment passed by the Hon''ble Supreme Court in the case of State of Bihar and Others Vs. Harihar Prasad Debuka and Others, ; I find that although the vires of Sub-section (2a) of Section 31 or Sub-section (2b) of Section 31 the Act and the rules framed thereunder were not challenged either in the High Court or in the Supreme Court, the observations made in the said judgment indicates that impliedly the validity of Sub-section (2a) of Section 31 of the Act has been sustained. In that view of the matter, I find force in the submissions of the learned Advocate General that there was no scope to consider the validity of Sub-section (2a) and (2b) of Section 31 of the Act and the rules framed thereunder,

14. It is not disputed that after Sub-section (2a) and (2b) of Section 31 of the Act was substituted by, new provision by the Ordinance No. 20 of 1993, no notification was issued by the Commissioner of Taxes prescribing or adopting form of declaration. Now, the question arises as to whether after the provision of Sub-sections (2a) and (2b) of Section 31 of the Act was substituted by the Bihar Ordinance No. 20 of 1993, it was essential to issue notification by the Commissioner of Taxes prescribing form of declaration or adopting form of declaration or not, and whether in absence of such notification prescribing form of declaration or adopting form of declaration, a person transporting goods through the State of Bihar can be said to have violated the provisions of Sub-section (2a) of Section 31 of the Act for not carrying the forms of declaration, of from carrying defective forms, of dectoration, which were adopted by the notification dated 28.12.1985 for giving effect to old provision of Sub-section (2a) of Section 31 of the Act.

15. Learned Advocate General submitted that in view of the provisions of Section 27 of the Bihar & Orissa General Clauses Act the earlier forms prescribed under the provisions of the Act which stood substituted by Ordinance No. 20 of 1993 would hold the field and has to be carried by a person transporting goods through the State of Bihar and for non-carrying of forms 28A and 28B would amount to contravention of the provisions of Sub-section (2a) of Section 31 of the Act. Learned Counsel for the petitioners, on the other hand, submitted that Section 11 of the Bihar & Orissa General Clauses Act provides that unless it is otherwise expressly provided any notification, orders etc. not inconsistent with the provisions would continue remain inforce whereas substituted provisions of Sub-section (2a) expressly provides that the Commissioner of Taxes would prescribe a form by a notification and/or may adopt the earlier form and, as such for giving effect to the substituted provisions of Sub-section (2a) of Section 31 of the Act, it was essential to prescribe or adopt the form of declaration by the Commissioner of Taxes by a notification and that in the asbsence of any such notification prescribing or adopting the form of declaration person transporting goods through the State of Bihar without carrying Forms 28A and 28B, adopted by the notification dated 28.12.1985 in the exercise of power under the old provision of Sub-section (2a) of Section 31 of the Act before substitution thereof by the Ordinance 20 of 1993, cannot be said to have violated the provision of

Sub-section (2a) of Section 31 of the Act.

16. To appreciate the rival contentions, it is appropriate to quote Section 27 of the Bihar & Orissa General Clauses Act, 1917 Act 1 of 1917 which is hereunder:

27. Constitution or orders, etc., issued under enactments repealed and re-enacted.-Where any enactment is repealed and re-enacted by a Bihar and Orissa Act (or Bihar Act), with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, bye-law or form, made or issued under the repealed enactment, shall so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, bye-law or form, made or issued under the provisions so re-enacted.

17. In this connection reference may be made to the decisions of the Hon''ble Supreme Court in the case of Firm A.T.B. Mehtab Majid and Co. v. State of Madras and Anr. AIR 1963 S.C 923 and in the case of Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co., . In the case of Firm A.T.B. Mehtab Majid and Co. (supra) in paragraph 20 of the judgment the Hon''ble Supreme Court has held that

Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.

Following the said decision, in the case of Koteswar Vittal Kamath (supra) in paragraph 6 of the judgment the Hon''ble Supreme Court amongst other has held:

The process of substitution consists of two steps. First the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect and it was for this reason that the Court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived.

In the said decision the Hon''ble Supreme Court further held that there is distinction between supersession of a rule and substitution of a rule.

18. It is to be noted that after Sub-section (2a) of Section 31 of the Act was substituted by the Act 7 of 1984, the Commissioner of Taxes by the Notification No. S.O. 1432 dated 28.12.1985, adopted the forms 28A and 28B which were to be carried by a person, transporting a goods through the State of Bihar. Besides provisions of new Sub-section (2a) of the notification is at avariance with the provisions of old Sub-section (2a) of Section 31 of the Act inasmuch as the Sub-section (2a) after substitution by Ordinance 20 of 1993 mandates keeping the declaration form in transit or in transit storage which was not there in the old provision of Sub-section (2a) of Section 31 of the Act before substitution of the Ordinance 20 of 1993.

19-A. On perusal of Sub-section(2a) of Section 31 as well as Section 27 of the Bihar & Orissa General Clauses Act(Act No. 1 of 1917), I am unable to accept the submission of the learned Advocate General that as per provisions of Section 27 of the Act, forms 28A and 28B, prescribed under the old provisions of Sub-section (2a) continue to hold the field in the absence of issuance of any notification by the Commissioner of Taxes, after the old provisions of the Act was substituted by the Ordinance 20 of 1993. I find force in the submission of the learned Counsel for the petitioner that substituted Sub-section (2a) of Section 31 of the Act having specifically provided that a person transporting goods shall carry form of declaration in such" form as may be prescribed by the Commissioner by a notification, while transporting the goods through the State of Bihar, for giving effect to the provision of Sub-section (2a) of Section 31 of the Act after the old provisions of Sub-section (2a) was substituted, it was essential to prescribe or adopt the form of declaration by the Commissioner by a notification. As such, in absence of any notification issued by the Commissioner prescribing or adopting form of declaration there is no scope for the prescribed authority to exercise power under Sub-sections (2b) and (3) of Section 31 of the Act on the ground of contravention of the provisions of Sub-section (2a) of Section 31 of the Act inasmuch as in the absence of any notification prescribing or adopting form of declaration it cannot be said that Sub-section (2a) of Section 31 of the Act has been contravened for not carrying the declaration form as contemplated under Sub-section (2a) of Section 31 of the Act. That being so, the impugned proceedings initiated against the petitioners on the allegation of contravention of the provisions of Sub-section (2a) of Section 31 of the Act for either not carrying the forms 28A and 28B or carrying the said forms with incomplete or with defective entries which were adopted by the notification No. S.O. 1432 dated 28.12.1985, prior to substitution of Sub-section (2a) of Section 31 of the Act, is illegal and without jurisdiction and on this ground alone the impugned proceedings initiated against the petitioners for alleged violation of Sub-section (2a) of Section 31 of the Act and the impugned

orders passed seizing the goods etc. of the petitioners and the orders imposing penalty in the exercise of power under Sub-section (2b) and Sub-section (3) of Section 31 of the Act are illegal and. without jurisdiction and cannot be sustained.

20. On the submission of the learned Counsel for the petitioners that merely for contravention of Sub-section (2a) of Section 31 of the Act for not carrying the prescribed form and/or carrying form with defective entries cannot per se entail penal provisions under Sub-section (2b) and Sub-section (3) of Section 31 of the Act. Learned Advocate General has fairly conceded that the mere contravention of the provision of Sub-section (2a) of Section 31 of the Act. may not attract penal action as contemplated under Sub-section (2b) of Sub-section (3) of Section 31 of the Act. Sub-Section (2b) provides that if the prescribed authority is satisfied on such verification and search that the transportation of goods is being made in contravention of the provisions of Sub-section (2a) or in a manner which is likely to lead to evasion of tax payable, he may, notwithstanding

anything contained in this party, seize the goods or the carrier or vehicle or vessel along with the goods and documents relating to the goods and the carrier, vehicle or vessel. Similarly Sub-section (3) of Section 31 of the Act provides that if any clearing, booking or forwarding agent or Dalai or person transporting goods contravenes the provision of Sub-Section (1) or (2a) in a manner which is likely to lead to evasion of any tax payable under this part, the prescribed authority may, without any prejudice to any action u/s 49 of this part on the charge of abetment, after giving the person concerned an opportunity of being heard in the manner prescribed, impose penalty. As such the condition precedent for seizing the goods or the carrier or vehicle or vessel along with the goods and documents relating to the goods and the carrier, vehicle or vessel in the exercise of power under Sub-section (2b) of Section 31 of the Act and imposing penalty in the exercise of power under Sub-section (3) of Section 31 of the Act is that the prescribed authority must be satisfied that the goods in question transported through the State of Bihar was sold or purchased in the State of Bihar and was clandestinely transported by evading payment of taxes due to the State. Such satisfaction must be arrived at on some positive materials and not on mere suspicion and the prescribed authority before proceeding to take action in the exercise of power under the provision of Sub-section (2b) and Sub-section (3) of Section 31 of the Act, must record reasons for deriving satisfaction that the goods transported through the State of Bihar, were, in fact sold or purchased in the State of Bihar and are being clandestinely transported, evading payment of taxes. In the absence of any materials disclosing that the goods transported are sold or purchased in the State of Bihar, any action in the exercise of power under Sub-section (2b) and Sub-section (3) of Section 31 of the Act for mere contravention of Sub-section (2a) of Section 31 of the Act, will be illegal and without jurisdiction.

21. For the reasons stated above, the petitions are allowed in part and the impugned proceedings as well as the orders passed in the connection (sec. a) of power under Sub-section (2b) and Sub-section (3) of Section 31 of the Act are quashed, penalty realised from the petitioners, if any, shall be refunded to them by the respondents within a period of one month from today.

I have not found it necessary to consider all the points raised in these writ petitions. That being so, it will remain open to the petitioners to raise the points in future which are not considered in this judgment. On the facts and circumstances of the case, I make no order as to costs.

Gurusharan Sharma, J.

22. I agree.