
(1973) 11 DEL CK 0029

In the Delhi High Court

Case No : Civil Writ Appeal No. 906 of 1973

Prakash Roadlines (Pvt) Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-11-1973

Acts Referred:

Citation : (1974) ILR Delhi 516

Hon'ble Judges : V.S. Deshpande, J;S.I. Rangarajan, J

Bench : Division Bench

Advocate : Ramesh Chandra, S.S. Chadha and T.C.P. Lal, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The Terminal Tax Agency demanded from the petitioner on 23-7-1973 terminal tax of Rs. 157.38 livable on the goods brought into Delhi by the petitioner. The goods had been previously seized as having been brought into the Union territory of Delhi without payment of terminal tax. A penalty of ten times the amount of terminal tax was also, Therefore, demanded from the petitioner. On failure to pay the tax and the penalty within five days, the petitioner was told that the goods would be sold at its risk and responsibility. The legality of the demand of the tax as well as the penalty is challenged by the petitioner under the following circumstances .Tax

(2) Under Entry 52 of List Ii of the Seventh Schedule of the Constitution, a State legislature is competent to legislate about "taxes on the entry of goods into a local area for consumption, use or sale therein". Under Article 246(4) of the Constitution, Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Apparently, in exercise of this power, Parliament enacted section 170 to 183 in chapter Viii of the Delhi Municipal Corporation Act, 1957 (hereinafter called the Act) relating to taxation. The rates of the terminal tax on the different kinds of goods are specified in the

Tenth Schedule to the Act. u/s 178(1) terminal tax is livable on all goods brought into the Union territory of Delhi at the rates specified in the Tenth Schedule. u/s 179(1) the taxes shall be collected by the Central Government in such manner and through such agency as may be specified. The Government of India notification dated 7th April 1958 there under notified that the terminal tax levied u/s 178 shall be collected by the Central Government in accordance with the rules made u/s 183 of the Act through the agency of Commissioner, Municipal Corporation of Delhi and such agency shall be designated as the "Delhi Terminal Tax Agency". The Delhi Terminal Tax Rules, 1958 empowered the Terminal Tax Agency to appoint Terminal Tax Officer and other staff to collect the terminal tax. to seize the goods if the tax is not paid and to sell the goods for the recovery of the amount of the tax. Section 182 of the Act says that every person authorised under the provisions of the Act and the Rules made there under shall have, in respect of the collection of such tax and of the confiscation of goods in connection therewith, some powers as are conferred by any law for the time being in force on the Collector of Land Customs, Delhi. The power to confiscate the goods has not, however, been used against the petitioner in the present case.

(3) There is a dispute between the parties as to the nature of the goods brought into Delhi by the petitioner. According to the petitioner, they were empty gas cylinders. According to the Terminal Tax Agency (Respondent 2) they were fire extinguishers. The former are exempted from payment of tax while the latter are chargeable to tax. The petitioner has obtained possession of the seized goods from the respondents immediately after the filing of the writ petition. It is not known how the petitioner has disposed of the goods. This Court is not, Therefore, in a position to decide on the nature and the contents of the goods. It is a disputed question of fact between the parties which cannot be decided without oral evidence and is not, Therefore, suitable for decision by this Court. Secondly, the primary jurisdiction for deciding the nature and the contents of the goods has been conferred on the Terminal Tax Agency by the Delhi Terminal Tax Rules which lay down a complete procedure for inspection of the goods, for examination of the goods, for making seizure and confiscation of the goods and for recovery of the tax. Lastly, any person dissatisfied with the assessment of terminal tax on his goods has the right of appeal under rule 36 of the said Rules. Such appeal" has to be filed within 15 days of the date of the payment of the terminal tax. As no terminal tax has been paid so far, this remedy will be open to the petitioner if it pays the tax and after payment thereof. The question as to the liability of the petitioner as to the payment of the tax, the rate at which the tax is to be paid and the amount thereof is, Therefore, left to the decision of the Terminal Tax Officer and to. the decision of the appellate authority under the Delhi Terminal Tax Rules, 1958. That part of the writ petition which asks this Court to quash the order demanding payment of tax from the petitioner is.. Therefore, dismissed. Penalty

(4) Under Chapter Xxii of the Act relating to powers, procedure, offences and penalties under the sub-heading "Offences and penalties" occur sections 461 to

473. Section 461 provides for the punishment of persons who contravene any of the provisions of the Act listed in the first column of the Table in the Twelfth Schedule. The second column of the Twelfth Schedule describes the nature of the contravention. The third and the fourth columns prescribe the fine or imprisonment, as the case may be, being the punishment for such contravention. These contraventions do not include the non-payment of or evasion to pay the terminal tax. These offences are triable in the Courts of Municipal Magistrates appointed u/s 469.

(5) Sections 463 and 464 deal with punishment for bringing into Delhi goods liable to terminal tax without the payment of such tax and for evasion of the payment of terminal tax by introduction of goods liable to pay that tax. As the decision of the writ petition depends on the construction of these sections, they are reproduced below:-

"463. Whoever brings within the Union territory of Delhi any goods liable to terminal tax without the payment of such tax shall, on conviction, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both, and the court trying an offence under this section may, on such conviction, also confiscate the goods in respect of which the offence has been committed .464. Where any goods imported into Delhi are liable to the payment of terminal tax, any person who, with the intention of evading payment of the tax introduces or attempts to introduce or causes or abets the introduction of any such goods within the Union territory of Delhi, upon which payment of terminal tax due on such introduction, has neither been made nor tendered, shall be punishable with fine which may extend to ten times the amount of such terminal tax".

(6) The contention of the petitioner is that its goods were allowed to cross the barrier by the Terminal Tax Agency on the view that the goods were not liable for the payment of tax. Soon after the goods were brought into Delhi, they were seized and a demand for the tax and the penalty ten times the amount of tax was made. The petitioner contends that if the goods could at all be said to have been brought into Delhi without the payment of terminal tax, the terminal tax agency could only prosecute the petitioner u/s 463 and try to obtain its conviction for having committed the offence punishable there under. The petitioner could be made to suffer only the punishment "which may be inflicted on it by the Magistrate having jurisdiction. The petitioner disputes the legality of the penalty demanded from it by the terminal tax agency under the impression that such penalty is liable u/s 464. Alternatively the petitioner contends that even u/s 464 the penalty can be imposed only by the Magistrate after the petitioner is prosecuted and convicted for the offence punishable there under. Since this has not been done, the petitioner is not liable to pay the penalty.

(7) According to the respondents, the goods of the petitioner were brought by the petitioner into Delhi without stopping at the terminal tax barrier and without paying the terminal tax. They were found by the Market Checking Squad inside

Delhi. After it was found that the terminal tax on them had not been paid, the demand for tax plus penalty was made from the driver of the vehicle in which the goods were found. After he refused to pay the tax and the penalty, the impugned order was issued against the petitioner. It was argued for the respondents that penalty was demanded from the petitioner u/s 464. The respondents argue that section 464 does not contemplate prosecution and conviction and the penalty there under is not livable by the Magistrate. On the other hand, the respondents argue that it was livable by the Commissioner or his agent the Terminal Tax Officer acting under the Delhi Terminal Tax Rules, 1958 because penalty is only a multiple of the tax due and. Therefore, the power to recover tax included the power to recover penalty. Reliance was placed on the observation of the Supreme Court in State of U. P. Vs. Dyer Meakin Breweries Ltd., , to that effect. But in that case the power to levy penalty was given to the Sales Tax Officer by the statute itself and the only question was which Sales Tax Officer was competent to do so. But neither sections 178 and 179 nor section 464 gives power to levy penalty to any one. It is an open question whether a provision for the levy and collection of penalty could have been made in the Delhi Terminal Tax Rules, 1958 framed u/s 183. But these Rules do not contain any such provision. It is clear, Therefore, to us that penalty could not be recovered under the said Rules as they stand presently.

(8) The following questions, Therefore, arose for decision:-

(1) Whether the penalty was recoverable u/s 464 without the prosecution and conviction of the petitioner? (2) If so, who had the power to impose the penalty? (3) Who had the power to recover the same from the petitioner? and (4) By what procedure was the penalty to be recovered?

(9) The first thing to be considered is whether the action against the petitioner could have been taken only u/s 463 and whether it could not be taken u/s 464. If section 463 alone could apply, then the writ petition would be entitled to succeed inasmuch as action u/s 463 can be taken only after the petitioner is prosecuted and convicted. On a careful comparison of sections 463 and 464, we find the following similarities and differences between them.

SIMILARITIES.-(1) Both contemplate "punishment". (2) Both contemplate imposition of "fine" as punishment. (3) Both deal with goods which are liable to payment of terminal tax but are imported into Delhi without the payment of tax. **Differences:-** (1) Section 463 definitely contemplates prosecution and conviction by a court of law. It uses the words "the court trying an offence under this section may, on such conviction" etc. Section 464 does not refer to any conviction by any court of law. (2) The marginal heading of section 463 is "punishment for offences relating to terminal tax" and that of section 464 is "penalty for evasion of terminal taxes".

(10) The word "offence" more often contemplates criminal prosecution in a court of law while the word "penalty" is a monetary infliction which may be imposed

either by a court of law or by an administrative or a revenue authority. It is true that the word "offence" as defined in section 3(38) of the General clauses Act means any act or omission made punishable by any law for the time being in force. The word has, Therefore, a wide connotation which can include both a criminal offence leading to a conviction and a civil or a revenue offence which may result only in a monetary penalty without prosecution and conviction. Similarly, the word "penalty" has an equally broad connotation. "Penalty" in the broad sense may be defined as any suffering by way of forfeiture, deprivation or disability imposed as a punishment by law or judicial authority in respect of an act prohibited by statute. (4, Words and Phrases legally Defined, 99). The Oxford Dictionary echoes the same conception by referring to a loss, disability or disadvantage of some kind fixed by law for some offence. It is not, Therefore, the use of the words "offence" and "penalty" which in itself is conclusive, the former implying prosecution and conviction in a criminal court and the latter in a civil or a revenue adjudication. But the difference between a merely penal law and the criminal law is well established.

(11) Section 167 of the Sea Customs Act, 1878 which was also incorporated in the Land Customs Act, 1924 (both of which are now reenacted as Customs Act of 1962) contained both penal and criminal provisions. In *Maqbool Hussain Vs. The State of Bombay*, , the petitioner had been already penalised u/s 167(8) of the Sea Customs Act before he was prosecuted u/s 23 of the Foreign Exchange Regulation Act for the same offence. He contended that this was contrary to Article 20(2) of the Constitution by virtue of which "no person shall be prosecuted and punished for the same offence more than once". The contention was rejected because the penal action u/s 167(8) did not amount to a prosecution which could be only in a criminal court. The penalty u/s 167(8), was on the other hand, imposed by an administrative authority, that is, the Customs Officer who was not a court of law. In *Thomas Dana v. The state of Punjab* (1959) Supp. 1 SCR 274, it was recognised that in imposing penalties, the Customs officers had to act judicially in the sense that they had to follow the natural justice procedure. Nevertheless, it was emphasised that they were not courts of law and acted as administrative authorities. This leads us to other differences between sections 463 and 464.

(12) The fine u/s 463 could extend only to one thousand rupees but u/s 464 it could extend to ten times the amount of the terminal tax. These two different ways of expressing the amount of fine show the different nature of the proceedings in which these fines are imposed. u/s 32 of the Code of Criminal Procedure, the amount of fine which a Magistrate First Class can impose is limited to rupees two thousand. The Municipal Magistrates appointed u/s 469 of the Act shall be deemed to be Magistrates appointed u/s 12 of the Code of Criminal Procedure in view of sub-section (6) thereof. Of course, section 1(2) of the Code of Criminal Procedure says "nothing herein contained shall affect any special or local law in force or any special jurisdiction or power conferred, or any special form of procedure prescribed. by any other law for the time being in

force". The Delhi Municipal Corporation Act, 1957 could be regarded both as a special as well as a local law. It could, Therefore, expressly authorise a Magistrate First Class to impose a fine exceeding rupees two thousand. If the legislature intended to do so, it would have done so in clear terms. But the method of computing the penalty as a multiple of the tax livable adopted in section 464 can hardly be considered as the expression of a clear legislative intention to authorise the Magistrate to levy a fine exceeding rupees two thousand. For, the amount of penalty u/s 464 is uncertain. It would depend on the amount of tax which itself would depend on the rate of tax and the particular category of goods which are the subject-matter of tax. Normally, the Magistrate is not concerned with determining the nature of the goods and the rate of tax applicable to the goods. That is the function of the assessing authority, namely, the Terminal Tax Officer. This is why it is more appropriate to think that the Magistrate operates u/s 463 while the Terminal Tax Officer operates u/s 464. This distinction is supported by the analogy of other statutes. For instance, a merely criminal statute like the Indian Penal Code provides for amounts of fine according to the gravity of the offence. On the other hand, provisions in the nature of revenue and taxation penalties in the Sea Customs Act, 1878, Customs Act, 1962, Income Tax Acts of 1922 and 1961, the Central Excises and Salt Act, 1944 and also the various Sales Tax Acts authorise administrative authorities to impose penalties which are multiples or percentages of the taxes payable. The legislative practice is, Therefore, in favor of regarding section 464 as a penal provision as distinguished from the criminal provision contained in section 463.

(13) The words ""brings within the Union territory of Delhi" used in section 463 may be contrasted with the words "introduces or attempts to introduce or causes or abets the introduction of any such goods within the Union territory of Delhi" used in section 464. It appears, Therefore, that while section 463 deals with a person who directly brings the goods into the Union territory of Delhi without payment of tax, section 464 deals with a person who indirectly introduces the goods which have been imported into Delhi and which were liable to the payment of terminal tax. While the driver of a vehicle or a person who actually carries the goods on his person would be covered by section 463, a person who imports the goods by Railway or by other modes of transportation driven by other persons would be covered 3 by section 464. As the Legislature has advisedly used different words to denote the actions in sections 463 and 464, it would be more reasonable to think that the two actions themselves were intended to be different. Therefore, even though, one of the senses of the word "introduced" has the meaning of the word "bring", the Legislature could not have intended these two different words to mean the same thing in different sections. If the legislature had intended to mean the same thing by these two words, then it would have been quite unnecessary for the legislature to have two different sections of the Act to deal with the same action. Further, if these two sections were to prescribe different punishments for the same Act, their validity would be liable to be challenged on the ground that they are contrary to Article 14 of the

Constitution. It is a recognised canon of construction of statutes that, if possible, statute should be so construed as to be constitutional rather than as to be unconstitutional. This also inclines us to think that the scope of these two sections is different.

(14) Shri Ramesh Chandra, learned counsel for the petitioner, who gave us valuable assistance in perusing the various provisions of the Delhi Municipal Corporation Act and the other statutes referred to above, then argued that section 464 was an incomplete provision of law being a *casus omissus*. For, it did not specify the authority who was competent to impose the penalty there under and also did not prescribe the procedure by which the penalty was to be recovered. He contrasted it in this respect with sections 155 and 156 of the Act under which the Commissioner was empowered to levy municipal taxes and the procedure for recovery of municipal taxes was laid down. He also pointed out that even the levy and recovery of terminal tax under sections 178 and 179 indicated the authority who was to levy the tax and who was to collect it. In this respect, section 464, according to the learned counsel, was totally vague.

(15) Shri T.C.B.M. Lal, for the Terminal Tax Agency, answered the first objection by relying on sections 59 and 491 of the Act. The relevant part of section 59 is as follows:-

" SAVE as otherwise provided in this Act, the entire executive power for the purpose of carrying out the provisions of this Act.....and of any other Act for the time being in force which confers any power or imposes any duty on the Corporation, shall vest in the Commissioner".

Section 491 authorises the Commissioner to delegate "any power conferred or any duty imposed on him by or under this Act" to any other municipal employees or officers. In exercise of this power, the Commissioner has issued notification No. F.4(10)/67-Law. Corp/4. dated 11th May 1967, a copy of which is produced by the Corporation and is placed on the paper-book. Under this notification, the Commissioner has directed that his powers shall also be exercised by the Terminal Tax officer to realise a fine which may extend to ten times the amount of terminal tax u/s 464.

(16) As contrasted with sections 155 and 156 as also 178 and 179, section 464 does not itself indicate the authority empowered to impose the penalty under it. The reason is that the Legislature adopts either of the two methods in specifying the authorities authorised to impose punishments or penalties. Such an authority may either be indicated in the provision under which the punishment or penalty is imposed or it may be indicated in a residuary provision without being mentioned in each of the sections authorising the imposition of penalties and punishments. For instances, section 465 of the Act provides for imposition of penalties whenever a notice or an order issued under the Act is disobeyed. That is to say, the provisions dealing with the issue of a notice or an order do not themselves indicate the consequences of disobedience but this residuary

provision provides for all such acts of disobedience. In section 465 also it is not indicated as to who is to levy the penalty and how it is to be recovered. Presumably, recourse to sections 59 and 491 would have to be taken to make a complete sense of section 465 also.

(17) The expression "for the purpose of carrying out the provisions of this Act" used in section 59 is the standard phrase used in most of the statutes in those sections which authorise the making of rules by the Government or by some other authority. These Rules are to be made for "carrying out the provisions of the Act". This expression has, Therefore, acquired a definite meaning. It means that the implementation or the enforcement of the provisions of the Act has to be done by the framing of the Rules. Therefore, whenever action has to be taken under the provision of an Act, it could be said that such action would be to carry out the provisions of the Act. If we construe this expression in section 59 in this sense, it becomes clear that the Commissioner, Municipal Corporation of Delhi, has the authority to take action u/s 464, namely, the action to impose or realise the penalty there under. Section 464 is a part of the Delhi Municipal Corporation Act, 1957 and, Therefore, imposition of the penalty there under would amount to "carrying out the provisions of the Act". If so, read with section 59, section 464 cannot be regarded as incomplete in this respect.

(18) It is true that section 464 is a penal provision and as such it has to be construed strictly. What is more, the penalty there under is a multiple of a tax which has not been paid. The English decisions are full of observations that a taxing statute or a penal statute must be strictly construed. At the same time, it is the duty of the Courts in construing statutes to make sense of the statutes, if possible. Formerly, the Courts in England were imbued with common law doctrines and were generally hostile to the encroachment of statutes on the common law; particularly in taxing and penal statutes, the Courts in the olden days were inclined to be unhelpful and technical. This resulted at times in defeating the statutory provisions though with a little bit of helpful attitude, sense could have been made out of the statutes. Recently, even in England, the attitude of the Courts is changing. In 1949, Lord Justice Denning said in *Seaford Court Estates Ltd. v. Asher* (1949) 2 K.B. 481 as follows :-

" WHENEVER a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise: and that, even if it were. it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized "The learned judge went on to observe at page 499 as follows:-- "When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief

which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature".

(19) Similarly, the expression "executive power" used in section 59 is capable of being easily understood. Same expression has been used in the Constitution of India in Articles 53, 73 and 77 regarding the executive power of the President of India and the executive action to be taken by him. The executive power of the President is co terminus with the legislative power of Parliament. Therefore, whatever can be done by Parliament by way of legislation can be done by the President by the executive action insofar as such executive action does not require to be preceded by legislation and if it does not interfere with the rights of anyone. In D.S. Sharma Vs. Union of India and Others, we had occasion to consider the meaning of "executive power". We held that power exercisable under a statute was executive power whether it consisted of executive action or rule-making. Therefore, the power of the commissioner u/s 59 could be executive power as it is conferred on him by a statute and as it is to be used for acting under the statute. We are of the view, Therefore, that the authority to impose or realise the fine u/s 464 is given to the Commissioner by the residuary section 59 and u/s 491 the Commissioner was empowered to delegate such authority to the Terminal Tax Officer. The notification by the Government of India dated 7th April 1958 designated the Commissioner as the Terminal Tax Agency. The Commissioner had the power to appoint Terminal Tax Officer under the Delhi Terminal Tax Rules, 1958. The Terminal Tax Officer was, Therefore, a municipal employee to whom the power of the Commissioner u/s 59 could be delegated u/s 491. We are of the view, Therefore, that in this respect, there is no lacuna u/s 464.

(20) We may point out, however, that even the Commissioner was not quite sure when he issued the notification of 11th May 1967 as to whether section 464 was restricted only to the imposition of a monetary penalty or whether it contemplated a criminal prosecution. He, Therefore, provided for both these eventualities. In this notification, he has provided for the composition of the offence punishable u/s 464 by realisation of the same amount of fine by way of composition u/s 468(1). If our view as to the nature of section 464 is correct, there would be no occasion for composition of any offence punishable u/s 464 under the provisions of section 468. For, section 468 would appear to have used the word "compoundable" in the same sense in which the said word is used in section 345 Criminal Procedure Code. If so, section 468 would contemplate composition only of criminal offences as distinguished from penal ones.

(21) The next lacuna alleged in section 464 was as to the procedure for recovery of penalty. We find that section 455 is a residuary general provision which runs as follows:-

" IN any case not expressly provided" for in this Act or any bye-law made there under any sum due to the Corporation on account of any charge, costs, expenses, fees, rates or rent or on any other account under this Act or any such

bye-law may be recoverable from any person from whom such sum is due as an arrear of tax. under this Act: Provided that no proceedings for the recovery of any sum under this section shall be commenced after the expiry of three years from the date on which such sum becomes due".

(22) As the Central Government has designated the Commissioner of Municipal Corporation of Delhi as the Terminal Tax Agency and as section 59 also authorises the Commissioner to recover the penalty u/s 464, it would appear that the amount of penalty is "due to the Corporation" within the meaning of section 455. It could not be due to the Central Government which has nothing to do with the recovery of penalty but which has confined itself only to the recovery of tax. The penalty must, Therefore, be payable to the Corporation of which the Commissioner is the executive officer. The penalty is, Therefore, recoverable in the same manner as the tax is recoverable u/s 155 to 157 of the Delhi Municipal Corporation Act, 1957. This lacuna also, Therefore, does not exist and we are able to make a complete sense of section 464 in the context of the other provisions of the Delhi Municipal Corporation Act, 1957. We, Therefore, find that the Terminal Tax Officer is competent to demand and recover penalty u/s 464 of the Act.

(23) Section 464 is, however, a penal provision. Section 167 of the Sea Customs Act, 1878 was also a penal provision. In Maqbool Hussain's case (at page 742 of the report) the Supreme Court pointed out that there was no procedure prescribed to be followed by the Customs Officer in the matter of enforcement of the levy and safeguarding the recovery of the sea customs duties or in adjudicating the penalty for non-payment of the duty. Nevertheless, the Supreme Court pointed out in the later decisions culminating in Thomas Dana's case (at page 288) that the Collector in imposing confiscation and penalty has to act judicially. This is also, in accordance with the general rule of construction that any action involving adverse civil consequences has to be taken by the competent authority after hearing the party against whom the action has to be taken. Whenever a statute is silent, this requirement of natural justice would be read into the statute by way of statutory construction (Indian Institute of Technology v. Mangat Singh 1973 (2) G.L.R. 46). We are of the view, Therefore, that the petitioner is also entitled to show cause why the penalty should not be levied and collected from it u/s 464. We, Therefore, regard the impugned order as a notice to show cause issued to the petitioner why the penalty should not be recovered from it. The petitioner shall show cause to the Respondent No. 2 within five days from today (being the time stipulated in the notice as to why the penalty should not be recovered from it The action to recover the penalty from it shall not be taken till such cause is shown by the petitioner.

(24) Subject to these observations, the writ petition is dismissed. In view of the uncertainty which had attained to the meaning of section 464 so far, we order the parties to bear their own costs.