(2014) 09 TP CK 0003

In the Tripura High Court

Case No : C.R.P. No. 76 of 2009

Ruchi Soya Industries Ltd. APPELLANT

Vs

State of Tripura and Others RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Tripura Value Added Tax Act, 2004 — Section 18(1), 2(7), 29, 67, 68

Citation : (2015) 78 VST 273

Hon'ble Judges : Deepak Gupta, C.J;S. Talapatra, J

Bench : Division Bench

Advocate : S.C. Saha, Advocates for the Appellant; S. Chakraborty, Additional Government Advocate, Advocates for the Respondent

Judgement

Deepak Gupta, C.J.—By means of this petition the petitioner has prayed that the order of seizure, dated December 18, 2008 and the order, dated July 25, 2009, passed in Revision Case No. 33 of 2009 be quashed and has further prayed that the respondents should pay a sum of Rs. 9,92,000 being the value of the transported goods along with the interest at bank rate. The petitioner-appellant is a company duly incorporated under the Companies Act, 1956. The company has authorised Sri Samir Kumar Paul to file the present petition.

2. Briefly stated the facts of the case are that according to the petitioner-company it transported 1,600 cartons of "palmolein" oil from Guwahati to Agartala. The case of the petitioner-company is that this was a stock transfer and not a sale. The value of the goods was shown to be Rs. 4,80,000. Since there were 1600 cartons, the cost per carton worked out to Rs. 300 per carton. Each carton contained ten packets of oil and the cost of each packet worked out to Rs. 30.

3. The truck bearing No. TR-01H-1792 carrying the goods was stopped at Churaibari check-post and the officer-in-charge of the Churaibari check-post was of the view that the goods had been undervalued. According to him, since the maximum retail price of each packet containing one liter of oil was shown to be

Rs. 72, the cost of 10 packets in one carton worked out to Rs. 720 and the cost of 1,600 cartons worked out to Rs. 11,52,000 and on this ground, the goods were seized. The seizure order was handed over to Pinku Das the driver of the vehicle. It would also be pertinent to mention that the truck in question was also owned by the petitioner-company.

4. Against the order of seizure dated December 18, 2012, the petitioner-company filed a revision petition before the Commissioner of Taxes, Agartala, within the period of limitation and the said petition was received in the office of the Commissioner on March 9, 2009. On May 19, 2009 notice of this petition was issued for May 23, 2009. The matter was finally listed on July 23, 2009 when it was pointed out that the entire seized goods had been auctioned and sold in a public auction held on February 25, 2009 for a sum of Rs. 1,76,000 only. Since the auction had been completed the revision petition was disposed of. Against this order the petitioner has filed the present revision petition.

5. The civil revision petition was filed on September 22, 2009 but no reply was filed. On February 17, 2014 we had passed a detailed order which reads as follows:

"February 17, 2014

No reply has been filed in this revision petition.

The facts of this petition make startling reading.

The petitioner deals in the sale and purchase of oils and according to the petitioner it transported palmolein oil of the value of Rs. 4,80,000 into the State of Tripura. This palmolein oil was kept in 1600 boxes. Therefore, the cost of each box was stated to be Rs. 300.

These boxes were seized by the officer-in-charge, Churaibari Check-post, North Tripura, on December 18, 2008 on the ground that the maximum retail price (MRP) mentioned on the smaller packets is Rs. 72 per litre and each box contains ten smaller packets and therefore the cost of each box is Rs. 720 and as such the total value of 1,600 boxes is Rs. 11,52,000.

The value of goods is never determined on the MRP reflected. Many factors have to be taken into consideration. The manufacturer, the wholesaler, the retailer are all entitled to reasonable profits also.

Assuming for the sake of argument that the seizure was proper, we have been told that thereafter, the entire consignment was put to auction and was auctioned for a sum of Rs. 1,76,000.

At least at the time of auction, the assessing officer should have realised that the value declared is a reasonable and should have intimated the assessee that he can; come and take his palmolein oil. According to the petitioner, no information was given to him.

The Department is directed to place the entire records of the auction and also how the advertisement was issued with regard to the action, before us on the next date.

List on March 4, 2014.

A copy of this order be supplied to Mr. S. Chakraborty, learned Additional Government Advocate."

6. Now the records have been produced before us and after perusal of the records we are of the view that the manner in which the goods have been seized and sold is highly improper. The stand of the State is that since the goods were undervalued the State was entitled to seize the goods and furthermore, the goods have been sold in accordance with the Rules.

7. Section 67 of the Tripura Value Added Tax Act, 2004 (hereinafter referred to as, "the Act") deals with the establishment of check-posts for inspection of goods in transport. Under sub-section (1) of section 67 the Government has been empowered to establish check-posts with a view to prevent avoidance and evasion of tax. Sub-section (2) of section 67 requires that the driver or person-in-charge of a vehicle shall carry with him the records of the goods including challans, bills of sale or dispatch memos signed by the consignee or transporter of the goods. He is also required to co-operate with the officers of the Excise Department. Sub-section (3) of section 67 entitles the officers empowered by the State Government to stop the vehicle carrying the goods for inspection.

8. Sub-sections (4), (5), (6) and (7) of section 67 deal with the seizure of goods and read as follows:

"67. (4) Where any goods in movement are without documents, or are not supported by documents as referred to in sub-section (2), or documents produced appeared to be false or forged, the officer-in-charge of the check-post or the officer empowered under sub-section (3), may--

(a) direct the driver or the person in-charge of the vehicle or carrier or of the goods not to part with the goods in any manner including by transporting or re-booking, till a verification is done or an enquiry is made/which shall not take more than seven days;

(b)seize the goods for reasons to be recorded in writing and shall give receipt of the goods to the person from whose possession or control they are seized;

(5) The officer-in-charge of the check-post or the officer empowered under sub-section (3), after having given the person in-charge of the goods a reasonable opportunity of being heard and after having held such enquiry as he may deem fit, shall impose for possession or movement of goods, whether seized or not, in violation of the provisions of clause (a) of sub-section (2) or for submission of false or forged documents in addition to tax leviable, a penalty equal to double the amount of tax, or rupees one thousand, whichever is higher.

(6) During the pendency of the proceeding under sub-section (5), if any one prays for being impleaded as a party to the case on the ground of involvement of his interest therein, the said officer-in-charge or the empowered officer on being satisfied, may permit him to be included as a party to the case; and thereafter, all provisions of this section shall mutatis mutandis apply to him.

(7) The officer-in-charge of the check-post or the officer empowered under sub-section (3) may release the goods to the owner of the goods or to any person duly authorised by such owner on payment of the tax and penalty imposed under sub-section (5)."

9. A bare perusal of the aforesaid provisions shows that under sub-section (4) of section 67 where the goods are being transported without documents or are not supported by documents specifically mentioned in sub-section (2) then the officer-in-charge of the check-post or the officer empowered can seize the goods. Such officer can also seize the goods even when the documents produced appear to be false or forged. It is obvious that the officer in such a case must give reasons as to why he considers the documents to be false or forged. Under clause (a) of sub-section (4) the officer can direct the driver or the person in-charge of the vehicle not to part with the goods by transporting or re-booking till verification is done and this must be done within seven days. Clause (b) of sub-section (4) gives power to the officer to seize the goods for reasons to be recorded in writing and on such seizure the officer has to give receipt of the goods to the person from whose possession or control they are seized.

10. When we read sub-section (4) carefully the power of seizure is only given when the documents are either not produced or the documents produced appear to be false or forged. Sub-section (5) of section 67 empowers the officer-in-charge of the check-post or the officer specifically empowered in this behalf to impose tax and penalty.

11. Section 68 deals with the disposal of seized goods and reads as follows:

"68. (1) The Commissioner may, subject to the provisions of section 80, dispose of by public auction any taxable goods seized under clause (b) of sub-section (4) of section 67 in such manner as may be prescribed, and so much of the sale proceeds of the auction, after deducting the cost of conducting the auction/as may be required for payment of the dues on account of tax and penalty, shall be appropriated towards the same and the balance, if any, should be paid to the person from whom the goods were seized or to the owner of such goods.

(2) Notwithstanding anything contained elsewhere in this Act, for the purpose of this section, the amount of tax payable for the taxable goods sold by auction, shall be determined on the basis of the sale proceeds of the goods sold by public auction under sub-section (1) and the penalty leviable thereon may extend to one hundred and fifty per cent of the tax so calculated.

(3) Nothing in this section shall absolve a person from any other penalty to which

he may be liable for violation of any provision of the Act."

12. Under sub-section (1) the Commissioner is entitled to dispose of the seized goods in a public auction for payment of dues on account of tax and penalty. Under sub-section (2) the tax payable for the taxable goods sold by auction is to be determined on the basis of the sale proceeds of the goods sold by public auction and the penalty leviable thereon may extend to 150 per cent of the tax so calculated. A bare reading of the sub-section (2) clearly shows that when tax has to be recovered it shall be calculated by taking the value of the goods to be equal to the sale proceeds of the goods sold by public auction. Therefore, if the goods are sold for Rs. 1,00,000 in public auction the tax has to be calculated by taking the value of the goods at Rs. 1,00,000. The penalty shall also be levied accordingly.

13. Coming to the Tripura Value Added Tax Rules, 2005, the relevant rule is rule 71(5) which reads as follows:

"71. (5) If the person from whom the goods are seized does not opt for composition of the offence within a period of one month from the date of seizure or having compounded the offence or penalty imposed does not pay the amount in due time as provided in sub-rule (4), the Superintendent with the previous sanction of the Commissioner, shall issue a proclamation in form No. XXVIII for auction for sale of such seized goods on a fixed date, place and time. The description of the taxable goods shall be mentioned in the proclamation. The proclamation shall be published in at least one local newspaper. The auction shall be conducted by the Superintendent or any other officer authorised by the Commissioner."

14. A reading of this rule clearly shows that if the goods have to be put to auction the order for sale of the goods by auction can be passed by the Superintendent with the previous sanction of the Commissioner. The proclamation of auction has to be published in at least one newspaper. The auction is required to be conducted by a superintendent or any other officer so authorised by the Commissioner. The auction is to be governed by the conditions laid down in form 28.

15. First we shall deal with the issue as to whether the order of seizure in this case was proper or not. As discussed earlier the power to seize is granted only when the goods are without documents or are not supported by documents mentioned in sub-section (2) or the officer-in-charge of the check-post is of the view that the documents are false or forged. In the present case the documents were there. Admittedly, the documents were not forged but according to the State, the value of the goods given in the documents was incorrect. The reason given by the officer-in-charge of the check-post is that since the maximum retail price was shown to be Rs. 72 per liter the value of the goods worked out to Rs. 11,52,000 as against Rs. 4,80,000. The officer did not at all consider the fact that the petitioner was the manufacturer of the goods and this was in a sense a

case of stock transfer. The goods would have been sold to the stockist, then to the wholesaler and then to the retailer. Each of these would be entitled to some profit. We do not understand how the officer-in-charge of the check post could say with certainty that the goods were undervalued.

16. The Act empowers the officer to take two actions. The first action is, to direct the driver or person-in-charge of the vehicle not to part with the goods, in any manner, till verification is done or an inquiry is made. Therefore, if the officer-in-charge of the check-post has some doubt with regard to the value of the goods, he should preferably follow the first rule. Seizure of the goods is a penal action and normally seizure should only be done where the goods are not accompanied by any document or the documents on the face of it are forged. Where the only difference is with regard to the value of the goods, the officer should not normally seize the goods but should direct the driver or the person in-charge not to sell them till verification of the price is made. In many cases, like the present case, where the registered dealers are transporting the goods, it may not be necessary to seize the goods. The value of the goods can be noted down and the goods can be handed over to the driver or the person-in-charge of the vehicle under a surety bond that after they are taken to the destination they shall be produced before the concerned taxation officer. The seizure of goods should be the last resort and not the first action to be taken by the officer-in-charge of the checks-post. In the present case action of seizure was based on no evidence and is totally illegal.

17. Next comes the question that even if the goods are seized in what manner they should be auctioned. Goods may be transported by a consignor to a consignee through a transporter. The driver of the truck may have no concern with the seizure of the goods. Those goods do not belong to him and he is not bothered whether loss is caused to the consignor or consignee. If goods are seized and the name of the consignor and/or the consignee is mentioned in the documents, then we are of the considered view that the officer-in-charge of the check-post is required to issue notice to the consignor and consignee before auctioning the goods.

18. We are aware that in the present case the truck also belonged to the petitioner-company. However, we have to settle the law with regard to seizure and disposal of goods in all cases. The rules of natural justice are an integral part of our jurisprudence. Any action which affects the rights of any party cannot be taken unless notice has been issued to the said party. Therefore, before imposing penalty or selling the goods, the officer-in-charge of the check-post must issue notice to the consignor or the consignee. It is true that Act and the Rules do not specifically provide for issuance of such notice(s), but we are clearly of the view that no penal action can be taken without notice to the affected party and therefore, the requirement of issuing notice must be read into section 67 of the Act.

19. Once the goods are seized, the officer who has seized the goods must issue

notice to the consignor and consignee. If the person to whom the notice has been given does not appear within one month then the goods can be auctioned. This auction must be conducted in accordance with the Act and the Rules. Sub-rule (5) of rule 71 clearly lays down that such auction has to be conducted by the Superintendent with the previous sanction of the Commissioner. Under section 2(7) of the Tripura VAT Act, the "Commissioner" has been defined to mean any person appointed by the State Government to be the Commissioner of Taxes. Section 18(1) of the Act permits the State Government to appoint a Commissioner of Taxes and such other persons to assist him.

20. From the records we could not find any material to indicate that the sanction of the Commissioner had been taken before putting the goods to auction. We have already made reference to rule 71(5) which clearly lays down that Superintendent is to conduct the auction with the previous sanction of the Commissioner. It has been urged before us that the powers of the Commissioner have been vested in the Superintendent. Our attention has been drawn to the notification dated 1st April, 2006 wherein the powers of Commissioner have been delegated to the Superintendent of Taxes. In this notification there is no mention of section 67 or rule 71. Even otherwise we are clearly of the view that when the Superintendent, who is the lower authority, is required under the Rules to seek prior sanction of the Commissioner, then he cannot himself become both the authority applying for sanction and the authority granting sanction. In such an eventuality the sanction has to be granted by the Commissioner or some other higher authority specially empowered in this behalf. Therefore, the auction was conducted without any proper sanction.

21. The notice of the auction has been published only in one newspaper, i.e., the "Daily Desher Katha" on February 22, 2009 and the auction conducted on February 25, 2009. When the goods are to be put to auction, some longer notice must be given so that the intending purchaser not only reads the notice of auction of goods but can also arrange funds for taking part in the auction. We are clearly of the view that normally a minimum period of 15 days must be provided between the publication of the auction notice in the newspaper and the date of auction.

22. We are shocked to note that the reserve price of the palmolein oil had been fixed at Rs. 1,68,640. We fail to understand how this reserved price has been fixed. According to the petitioner-company, the value of the goods was Rs. 4,80,000. The officer-in-charge of the check-post who seized the goods assessed the value of the same at Rs. 11,52,000. Therefore, we fail to understand how the value of the goods when being put to auction was fixed at Rs. 1,68,640. When specifically asked to explain how this value has been fixed we were informed that this value has been fixed in terms of the communication issued by the Assistant Commissioner of Taxes on September 26, 2003 which lays down a formula that the reserved price should be fixed by fixing three times the rate of tax payable on the price estimated by the officer seizing the goods plus five per cent for

overhead cost. Copy of this communication, dated 26.9.2003, reads as follows:

"No. F.1-6(37)-TAX/96(P-1)/15577 Government of Tripura, Office of the Commissioner of Taxes.

Dated, Agartala, the 26th Sept., 2003.

To The Superintendents of Taxes, Choraibari Check-post, North Tripura.

Sub : Proposal for re-auction.

Ref: Letter No. V-6/ST/CRB/522 dated September 3, 2003.

Sir,

With reference to the subject noted above, I am directed to inform you that the proposal dated September 3, 2003 for reauction of unclaimed seized goods has been considered. You are requested to process the matter afresh after fixing the date for re-auction and send the copy of proclamation issued by you to this office for publication at the earliest.

But from the next time, for other seized goods, you are directed to initiate the proposal for auction fixing the reserve price of seized goods as per the following formula.

Yours faithfully, (P. Banerjee), Asstt. Commissioner of Taxes, Government of Tripura."

23. We fail to understand how the Assistant Commissioner has been empowered to issue such a communication. In a welfare State, we expect the State to work for the benefit of the citizens. It appears that this formula has been fixed by only ensuring that the tax and penalty is recovered. We are shocked by this attitude of the State. We are constrained to observe that the State cannot act like an unscrupulous person. Why should the State fix the reserve price at less than the value shown by the dealer? In the present case, the dealer had shown the value of the goods at Rs. 4,80,000. The seizing authority had valued goods at Rs. 11,52,000 but the reserve price was fixed at Rs. 1,68,640 and finally the goods were auctioned for a paltry amount of Rs. 1,76,000 which means that 16,000 liters of palmolein oil have been sold for Rs. 1,76,000, i.e., at Rs. 11 per litre. This is absolutely shocking and gives rise to a doubt that the officials manning the check-post are hand in glove with the persons who take part in the auctions so that valuable goods are sold away at throw away prices.

24. We may again refer to sub-section (2) of section 68 of the Act which lays down that notwithstanding anything else contained, the amount of tax payable for the taxable goods sold by auction shall be determined on the basis of the sale proceeds of the goods sold by public auction under Sub-section (1) and the penalty leviable thereon may extend to 150 per cent of the tax so calculated. It is thus clear that when the goods were sold for Rs. 1,76,000 the tax had to be calculated by taking the value of the goods at Rs. 1,76,000 and the penalty could

not exceed 150 per cent We fail to understand how the tax has been calculated on a sum of Rs. 11,52,000 when the goods have been sold for Rs. 1,76,000.

25. We may make reference to the judgment of the apex court in Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , wherein the apex court dealing with the very wide powers of financial corporation empowering it to sell the properties of the defaulting loanees held as follows (pages 11 to 14 and 16 in 78 Comp Cas):

"15. Section 29 confers very wide power on the corporation to ensure prompt payment by arming it with effective measures to realise the arrears. But the simplicity of the language is not an index of the enormous power stored in it. From notice to pay the arrears, it extends to taking over management and even possession with a right to transfer it by sale. Every wide power, the exercise of which has far reaching repercussions, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good, the responsibility is far graver. It demands a purposeful approach. The exercise of discretion should be objective. The test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. Power under section 29 of the Act to take possession of a defaulting unit and transfer it by sale requires the authority to act cautiously, honestly, fairly and reasonably..

17. The sale may be either by, public auction or private contract. In either case, the trustee has to keep in mind that he must obtain the most advantageous price. Kerr an Receivers,, 17th Edition, at page 208, stated that ''a receiver, however, is not expected any more than a trustee or an executor to take more care of the property entrusted to him than he would have as a reasonably prudent man of business''. In, Halsbury''s Laws of England, 4th -Edition, Volume 39, at para 919, it is stated that the ''receiver will be compelled to show that he has acted with perfect regularity and has used such degree of prudence as would be expected from a private individual in relation to his own affairs''. The trustee or a receiver is, therefore, duty-bound to protect and preserve the property in his possession and the standard of conduct expected of him,, in dealing with the property or sale thereof, is, what a prudent owner would exercise in dealing with his own property or estate. The degree of care expected of him in handling property taken possession of is measured by the degree of care expected of a person acting as trustee, executors or assignees. The object and endeavour

should also be to secure maximum advantage or price in a sale of the property in lots or as a whole as exigencies warrant.

18. The Corporation or its officers or servants as trustees are bound to exercise their power in good faith in selling or dealing with the property of the debtor as an ordinary prudent man would exercise in the management of his own affairs to preserve and protect his own estate. Therefore, the acts of the officer or servant of the Corporation should be reasonable, just and fair which must meet the eye and the offer accepted must be competitive and every attempt should be made to secure the maximum price possible to liquidate the liabilities incurred by the industrial concern or the debtor under the Act.

....

21. The sale by public auction or tender or private negotiation should be a bona fide action. First is universally recognised to be the best and most fair method. It is expected to fetch the best competitive price and is beyond reproach..."

26. As far as the present auction is concerned, it does not comply either with the provisions of the Act or the Rules or even with any reasonable view which can be taken in such a matter. The rate at which the oil was auctioned clearly indicates that the officer who seized the goods was not aware of the market value of the oil. How could he hold that the market value of the oil was Rs. 72 per litre but while fixing the reserved price of the oil fixed it at little more than Rs. 10 per litre? This by itself shows that the auction is totally arbitrary and unconscionable: The procedure followed is so arbitrary that it shocks the judicial conscience of this court and as such is liable to be set aside in exercise of the writ jurisdiction. In this view of the matter, we are of the considered view that the entire action of the State is highly irresponsible, arbitrary and unconscionable and is-, therefore, liable to be struck down. The same is, accordingly, struck down.

27. The petitioner has been deprived of his goods and he has been paid nothing. Therefore, while setting aside the seizure order and after holding that the auction is totally illegal, we direct that the State shall pay to the petitioner a sum of Rs. 4,80,000 which was the'' declared value of goods after deducting therefrom the amount of tax payable on palmolein oil of the value of Rs. 4,80,000. No penalty shall be levied. The balance amount be paid along with interest at 12 per cent per annum from the date of seizure of the goods till payment of the amount along with costs of this petition which are assessed at Rs. 20,000. The amount be paid latest by 31st December, 2014.

28. The Registrar General is directed to send a copy of this judgment to the Chief Secretary as well as the Commissioner of Taxes, who shall ensure that the aforesaid judgment is followed in letter and spirit in future. With these observations the revision petition is disposed.

