(1991) 07 KAR CK 0014

In the Karnataka High Court

Case No : Writ Appeal No. 1536 of 1991

Sathu D''souza APPELLANT

Vs

Commercial Tax Officer (Intelligence), Bellary and another RESPONDENT

Date of Decision : 16-07-1991

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 28 A (3), 28 AA, 28 AA (4), 28 AA (5), 5 (5)

Citation : (1991) ILR (Kar) 2637

Hon'ble Judges : S. Mohan, C.J;N.Y. Hanumanthappa, J

Bench : Division Bench

Advocate : S.V. Subramanyam, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Judgement

S. Mohan, C.J.—The short question that arises for our consideration in this case is whether the notice issued against the appellant u/s 28-AA(4) of the Karnataka Sales Tax Act read with rule 23F(2) and (3) of Rules, in No. CTO/INT/BLY/90-91 dated 9th January, 1991, proposing to levy tax of Rs. 29,700 as well as notice of even dated proposing to levy penalty of Rs. 9,000 are valid in law ? We may also add, for the sake of convenience, pursuant to this proposal notice the appellant filed his detailed explanation. On consideration of all that explanation, by order dated 15th April, 1991, under assessment No. 1/90-91, the assessment has been made as under :

"Order u/s 28-AA(5) of the Act, 1957.

The goods vehicle which failed to deliver the transit passes issued to the driver on 18th December, 1990, and consequently notice u/s 28-AA(5) was issued and served on the owner of the vehicle on 17th February, 1991.

The learned Advocate representing the goods vehicle has filed objections stating that the proposed penalty is too much and because it is lawful to levy, it cannot be levied. There should be reasonability in the levy of penalty.

Considering the facts of the case, I feel the reasonable penalty will be Rs. 9,000 considering the total amount of tax. Accordingly a penalty of Rs. 9,000 is levied u/s 28-AA(5) of the Act.

Demand notice will issue accordingly."

Pursuant to this assessment, a demand notice was issued under the following terms :

"GOVERNMENT OF KARNATAKA (Commercial Taxes Department) (See u/s 28-AA and rule 18A) Year of assessment : 1990-91 Registration Certificate No. Vehicle No. CTX 9556

To

M/s. Sri Sathu D''Souza, S/o Albere D''Souza, Nityananda House, Madanathiary, Belthangadi Taluk.

Notice

Take notice that you have been finally assessed under the Karnataka Sales Tax Act, 1957, to tax of Rs. 29,700 and penalty of Rs. 9,000 (total rupees thirty-eight thousand seven hundred only) for the year ending 1990-91 when your vehicle transporting vanaspathi was checked on 18th December, 1990 and transit passes which were issued were not delivered at the last exit check post as required by the law. You have to pay a sum of Rs. 38,700 (rupees thirty-eight thousand seven hundred) only. This balance of tax shall be paid within twenty-one days from the date of service of this notice :

By money to the undersigned or By crossed cheque in favour of the undersigned or By remittance into the Government treasury or By crossed demand draft or Crossed postal order

to the Commercial Tax Officer/Assistant Commercial Tax Officer, failing which, the amount will be recovered as if it were an arrear of land revenue and you will be liable to penalty as provided in section13 of the Karnataka Sales Tax Act, 1957.

Tax Penalty Total Total tax payable : 29,000 9,000 38,700 Total tax paid : Nil Nil Nil Balance due : 29,700 9,000 38,700 Date of assessment : 15-4-1991."

It was at this stage the appellant approached this Court by way of W.P. No. 11739 of 1991. The one and the only contention urged before the learned single Judge was that there is no specific empowerment u/s 28-AA(4) enabling the Commercial Tax Officer (Intelligence), Bellary, to issue notice, much less to make assessment; the order was without jurisdiction.

2. Before the learned single Judge on behalf of the Revenue, Notification bearing No. FD 177 CSE 90(I) dated 27th July, 1990, along with corrigendum dated 30th August, 1990, was produced. From that the learned Judge drew the conclusion that the Commercial Tax Officer (Intelligence). Bellary, had been empowered u/s 28-A(3) to exercise powers under the said section; therefore, the proper remedy of the appellant would be to prefer an appeal against the order of the

assessment and accordingly he dismissed the writ petition after granting time of one month to prefer an appeal.

3. In this appeal before us the only point that is urged is the Notification dated 27th July, 1990 as modified on 30th August, 1990, does not empower the Commercial Tax Officer (Intelligence), Bellary as required u/s 28-AA(4). Therefore, the learned Judge had misread the notifications. Consequently, the order calls for interference.

4. We directed the learned Government Advocate to produce the empowerment u/s 28-AA(4). On production of Notification No. FD 105 CSL 90 dated 23rd May, 1990, it is argued by the learned Government Advocate that the officer who is empowered to issue pass at the check post or barrier u/s 28-AA(1) is the officer enable to tax; therefore the notice as well as the subsequent assessment are valid in law.

5. In order to determine the controversy, it is necessary on our part to set out the legal background. Section 28-A talks of establishment of check post or barrier and inspection of goods while in transit. In sub-section (1) it states as under :

"(1) If the State Government or the Commissioner consider it necessary 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 establishment of a check post or the erection of a barrier, or both, at such place or places as may be notified."

Sub-section (2) is omitted as not necessary for our purpose. Now we come to sub-section (3) which states as under :

"(3) At every check post or barrier, or at any other place when so required by any officer empowered by the State Government in this behalf, the driver or any other person in charge of a goods vehicle or boat shall stop the vehicle or boat, as the case may be, and keep it stationary as long as may be required by 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.

Explanation. - For purposes of sub-section (2) and (3), the officer-in-charge of check post or barrier shall be an officer not below the rank of an Assistant Commercial Tax Officer and not higher in rank than an Assistant Commissioner of Commercial Taxes, and any other officer not below the rank of a Commercial Tax Inspector as may be empowered by the Commissioner."

From the above it would be clear that any person not below the rank of a Commercial Tax Inspector and not above the rank of the Assistant Commissioner of Commercial Taxes could be authorised to be an officer under sub-section (3).

It is at this juncture the Notification No. FD 177 CSE 90(I) dated 27th July, 1990, along with the corrigendum dated 30th August, 1990, become relevant. Those notifications are extracted below :

"GOVERNMENT OF KARNATAKA

No. FD 177 CSE 90(I) Karnataka Government Secretariat, Vidhana Soudha, Bangalore.

Date 27-7-1990.

Notification

In exercise of the powers conferred by sub-section (3) of section 28-A of the Karnataka Sales Tax Act, 1957 (Karnataka Act 25 of 1957) the Government of Karnataka hereby empowers the officers specified below the exercise the powers under the said sub-section at any places within the State :

Sl. No. Designation (1) Deputy Commissioner of Commercial Taxes (Intelligence), East Zone, Bellary. (2) Deputy Commissioner of Commercial Taxes (Intelligence), East Zone, Mangalore. (3) Assistant Commissioner of Commercial Taxes (Intelligence), West Zone, Mangalore. (4) Assistant Commissioner of Commercial Taxes (Intelligence), East Zone, Bellary. (5) Commercial Tax Officers (Intelligence), West Zone, Mangalore. (6) Commercial Tax Officer, East Zone, Bellary. (7) Assistant Commercial Tax Officers, West Zone, Mangalore. (8) Assistant Commercial Tax Officers, East Zone, Bellary. By order and in the name of the Governor of Karnataka Sd/- (R. M. KAMATH) Under Secretary to Government, Finance Department (CT-II)."

"GOVERNMENT OF KARNATAKA

No. FD 177 CSE 90(I) Karnataka Government Secretariat, Vidhana Soudha, Bangalore.

Dated 30th August, 1990.

Corrigendum

In Notification No. FD 177 CSE 90(I) dated 27th July, 1990, the designation of the officers at serial Nos. 6, 7 and 8 shall be read as under :

(6) The Commercial Tax Officers (Intelligence), East Zone, Bellary.

(7) Assistant Commercial Tax Officers (Intelligence), West Zone, Mangalore.

(8) Assistant Commercial Tax Officer (Intelligence) East Zone, Bellary.

By order and in the name of the Governor of Karnataka

Sd/- (R. M. KAMATH) Under Secretary to Government, Finance Department (CT-Service)."

One of the officers who is authorised in this case is the Commercial Tax Officer

(Intelligence), Bellary.

6. With this we pass on to section 28-AA. That talks of transit of goods by road through the State and issue of transit pass. Sub-section (1) of the said section reads as under :

"(1) When a vehicle coming from any place outside the State and bound for any other place outside the State and carrying goods taxable under this Act passes through the State, the driver or any other person in-charge of such vehicle shall furnish the necessary information and obtain a transit pass in duplicate containing such particulars as may be prescribed from the officer-in-charge of the first check post or barrier after his entry into the State."

Then comes the important sub-section (4) which we extract below :

"(4) If the driver or any other person in-charge of the vehicle does not comply with sub-section (2), it shall be presumed that the goods carried thereby have been sold within the State by the owner of the vehicle and shall, notwithstanding anything contained in sub-section (5) of section 5, be assessed to tax by the officer empowered in this behalf in the prescribed manner."

7. A careful reading of the above sub-section will clearly disclose that this power is independent of the charging section, namely, section 5(5). That is clear by reason of non obstante clause. Where therefore the assessment is resorted u/s 28-AA(4), one cannot have recourse to section 5(5), the general charging section. That much is clear.

8. Then the only requirement is there must be a specific empowerment in this behalf. The whole question is, whether there is a specific empowerment in this behalf. That takes us to rule 18A. We will extract the entire rule.

"18A. Assessment of certain persons. - (1) Where a driver or person in-charge of the goods vehicle does not comply with sub-section (2) of section 28-AA, the owner of such vehicle shall be assessed to tax on the value of the goods carried thereby at the rates applicable to such goods under the provisions of the Act.

(2) Before making the assessment u/s 28-AA, the owner of the vehicle shall be given a reasonable opportunity of showing cause against such assessment.

(3) When making any assessment u/s 28-AA, the owner of the vehicle may also be directed to pay, in addition to the tax assessed, the penalty levied under sub-section (5) of section 28-AA.

(4) The tax and penalty levied u/s 28-AA, shall be recovered upon service of a notice in form 6 and the owner of the vehicle shall pay the sum demanded within the time and the manner specified in the notice."

It is also necessary for us to note that this rule had come to be amended by Notification No. FD 105 CSL 90 dated 23rd May, 1990, wherein sub-rule (5) had come to be introduced as under :

"(5) The authority for the purpose of sub-section (4) of section 28-AA and this rule shall be the officer-in-charge of the first check post or barrier issuing the transit pass under sub-section (1) of said section."

Thus therefore the officer who is enabled to issue the pass u/s 28-AA(1) is the officer who could validly assess u/s 28-AA(4). At this stage, we may also refer to rule 23F. Sub-rule (1) reads as follows :

"23F. The transit of goods by road through the State and issue of transit pass. - (1) The driver or the person in-charge of a goods vehicle shall, in order to obtain a pass u/s 28-AA, submit an application, in triplicate, in form 39-AA to the officer-in-charge of the check post or barrier, if any, established near the point of entry into the State or the first check post or barrier after his entry into the State (hereinafter referred to as ''the exit check post'')."

9. For the purpose of section 28-AA read with rules 18A and 23F, the question is who the officer is ? We have already seen that the Commercial Tax Officer (Intelligence), Bellary, is authorised u/s 28-A(3). It is that officer who is though of u/s 28-AA(1), namely, the Commercial Tax Officer (Intelligence), Bellary. It is the same officer who is empowered by reason of sub-rule (5) of rule 18A as introduced by the amendment Notification No. FD 105 CSL 90 dated 23rd May, 1990. Therefore for the purpose of all these rules, it is the Commercial Tax Officer (Intelligence), Bellary, who has every jurisdiction to assess. We may also add that even in the proposal notice dated 9th January, 1991, the proposal is issued u/s 28-AA(4) read with rule 23F(2) and (3). Therefore, (intelligence), Bellary, is the person who is empowered to assess in terms of section 28-AA(4). This power, as we observed above, is altogether an independent power than the regular assessment arising under the charging section 5(5). Consequently, we hold that no exception could be taken to the proposal notice dated 9th January, 1991, both in relation to the levy as well as the penalty. If this much is clear, it equally follows that he has every jurisdiction to make the assessment. That being the case, the proper course for the appellant will be to pursue the remedy against the order of assessment in the manner provided under the Karnataka Sales Tax Act. Thus, for a different reason than that of the learned Judge, we come to the same conclusion and dismiss the writ appeal.

10. Writ appeal dismissed.

