(2011) 05 AHC CK 0332

In the Allahabad High Court

Case No : Writ Tax No. 756 of 2011

Shiv Shakti Trading Co. APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 24-05-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Value Added Tax Act, 2008 — Section 48, 48(1)(iii), 48(7), 50, 50(4)

Citation : (2013) 58 VST 29

Hon'ble Judges : Ferdino Inacio Rebello, C.J;Prakash Krishna, J

Bench : Division Bench

Advocate : Rahul Agarwal, for the Appellant; S.P. Kesarwani, for the Respondent

Final Decision : Dismissed

Judgement

1. By consent of parties, this petition has been heard and disposed of finally at the admission stage itself, without calling for any counter affidavit considering the controversy involved. The petitioner, by means of the present writ petition has impugned the seizure order dated May 7, 2011, on the following grounds:

(i) Section 50 of the U.P. Value Added Tax Act does not permit seizure of a consignment being imported into the State of U.P. on the ground of undervaluation the entire proceedings suffer from an inherent lack of jurisdiction and are void ab initio;.

(ii) The notice to show cause dated May 2, 2011 issued by respondent No. 2 did not specify the basis for alleging undervaluation of the consignment the notice was vague and did not give sufficient opportunity to meet out the case of the consignment not having been properly valued; it was no notice in the eyes of law.

(iii) The order dated May 7, 2011 has been passed without fulfilling the preconditions necessary for concluding undervaluation of the consignment the State has not discharged its burden of proving undervaluation of the consignment the order is illegal and liable to be set aside.

2. Though these are three grounds raised in the petition, we propose to consider ground No. 1 and in addition the question whether the importer/ transporter, has a remedy under the U.P. Value Added Tax Act by way of appeal and/or revision.

3. The petitioner, a proprietary concern, contends that its TIN No. 09985603867 was suspended on May 4, 2011 and subsequently cancelled on May 10, 2011. These orders, according to the petitioner, have been passed ex parte, without observing the principles of natural justice and in violation of the statutory norms. The petitioner has challenged these two orders by filing separate proceedings. In the instant case, what is challenged is the order of seizure dated May 7, 2011 passed by respondent No. 2.

4. According to the petitioner, it purchased footwear from Bhiwadi, near Alwar in the State of Rajasthan. It carried the products from Bhiwadi to Delhi by local transport and then booked the consignment from Delhi to Ballia through S.S. Forwarding Agency. The consignment was dispatched by a truck. Along with the consignment, the retail invoices, goods receipts and Form XXXVIII No. 18138400503 issued by the petitioner were being carried. On May 2, 2011, the consignment was intercepted by respondent No. 2 in Etawah, and a show-cause notice was issued to the owner of the truck requiring him to show cause as to why the consignment be not seized. The notice was issued u/s 50 of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as "the U.P. VAT Act"). A reply to the said notice was submitted by the owner of the vehicle to respondent No. 2 through the petitioner. As it was alleged in the notice that the goods were undervalued, the petitioner demanded, from the respondents, the basis for alleging the same. The petitioner denied that the goods were undervalued and contended that the charge of undervaluation was unsustainable. The power to seize goods on the ground of undervaluation was not available under the U.P. VAT Act. It was, therefore, contended that the proceedings are void ab initio. Respondent No. 2, by order dated May 7, 2011, rejected the reply submitted by the petitioner, estimated the value of the consignment as Rs. 6,37,320 and also directed for security deposit of Rs. 2,96,504 before the goods are released.

5. At the hearing of this petition, on behalf of the petitioner, learned counsel submits that, u/s 50 of the U.P. VAT Act, no power is conferred to seize the goods on the ground of undervaluation. It is next submitted that there is no remedy available to the petitioner by way of appeal or revision and, consequently, the petitioner has approached this court by invoking its extraordinary jurisdiction. It is also submitted that, as the notice does not specify the basis for undervaluation of the consignment, the same is vague and is no notice in the eyes of law. It is further submitted that the petitioner was not afforded sufficient opportunity. Lastly, it is submitted that the order of seizure has been passed without fulfilling the necessary requirements and, consequently, the same is illegal and liable to be quashed.

6. On the other hand, on behalf of the respondents, learned standing counsel submits that there is power of seizure u/s 50 of the U.P. VAT Act. It is further

submitted that, as the petitioner has a remedy by way of filing an appeal, as also by moving under the first proviso to sub-section (7) of section 48 of the U.P. VAT Act, this court should not exercise its extraordinary jurisdiction. In respect of other contention, it is submitted that as the owner of the vehicle has filed reply to the show cause through the petitioner, the petitioner has submitted itself to the jurisdiction of the respondents and, as such, even if the petitioner is aggrieved, the proper remedy would be to firstly move under the first proviso to sub-section (7) of section 48 of the U.P. VAT Act and then, if aggrieved, to move under the provisions of section 57(4) of the U.P. VAT Act.

7. With the above background, we may now proceed to firstly consider the first contention advanced on behalf of the petitioner, namely, that there is no power of seizure in the authority u/s 50 of the U.P. VAT Act. Relevant are sub-sections (1), (4) and (5) of section 50, which are reproduced below:

50. Import of goods into the State by road against declaration -- (1) Any person (hereinafter in this section referred to as the importer) who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than the goods named and described in First Schedule in such quantity or measure or of such value, as may be notified by the State Government in this behalf, in connection with business, shall either obtain the prescribed form of declaration in such manner as maybe prescribed from the assessing authority having jurisdiction over the area; where his principal place of business is situated or, in case there is no such place, where he ordinarily resides or shall download from official website of the Department in such manner as may be prescribed:

Provided that where the importer intends to bring, import or otherwise receive such goods otherwise than in connection with business, he may, at his option, in the like manner obtain the prescribed form of certificate.

... (4) Where the officer making the search or inspection under this section finds any person transporting or attempting or abetting to transport any goods to which this section applies without being covered by the proper and genuine documents referred to in the preceding sub-sections and if, for reason to be recorded, he is satisfied after giving such person an opportunity of being heard that such goods were being so transported in an attempt to evade assessment or payment of tax due or likely to be due under this Act, he may order detention of such goods.

(5) The provisions of sub-sections (3), (7), (8), (9) and (10) of section 48 shall mutatis mutandis apply to goods detained under subsection (4), as they apply to goods seized under that section.

8. A perusal, therefore, of the above provisions would show that, any person who imports into the State from any place outside the State any goods, shall obtain the prescribed form of declaration in such manner as may be prescribed from the assessing authority having jurisdiction over the area, where his principal place of

business is situated or, in case there is no such place, where he ordinarily resides. Sub-section (4) of section 50 confers power in the officer, making the search or inspection under this section, who finds any person transporting or attempting Or abetting to transport any goods to which this section applies without being covered by the proper and genuine documents referred to in the preceding sub-sections and for the reason to be recorded, if he is satisfied, after giving such person an opportunity of being heard, that such goods were being so transported in an attempt to evade assessment or payment of tax due or likely to be due under this Act, he may order detention of such goods. By virtue of subsection (5) of section 50, various provisions of section 48 of the U.P. VAT Act, which are the machinery provisions, have been made applicable to the goods under sub-section (4). One such provisions is sub-section (7) of section 48, under which the officer seizing the goods, can release the goods on calling upon the dealer or the person-in-charge, and indicating the amount not exceeding the amount which will be sufficient to cover the penalty likely to be imposed, to deposit the said amount in cash. Under the first proviso to this sub-section, the Commissioner or such other officer, not below the rank of a Deputy Commissioner, as may be authorised by the Commissioner, for sufficient reasons to be recorded in writing can direct for release of the goods without any deposit or on depositing such lesser amount or furnishing security in such form other than cash or indemnify bond, as he may deem fit.

9. A consideration of this section would indicate that the goods have to be imported by filling in the prescribed declaration form, and indicating the quantity or measure and value of the goods. This contemplates that the quantity, measure or value are the real quantity, measure or value and not short quantity or measure or being undervalued. If this is so read, then sub-section (4) of section 50 can be correctly understood, as the expression used is "proper and genuine documents". A document, which does not correctly state the value cannot be said to be a proper document.

10. The learned counsel for the petitioner, however, invites our attention to section 48(1)(iii) of the U.P. VAT Act, which was inserted by the U.P. Value Added Tax (Amendment) Act, 2009 (Act No. 11 of 2009). The learned counsel, for that purpose, relies on the judgment of a learned single judge of this court in the case of Commissioner of Trade Tax v. Delhi Calcutta Carrying Corporation, Delhi [2003] UPTC 929. This was a case under the provisions of section 28A of the U.P. Trade Tax Act, 1948. The learned counsel submits that the said provisions are in pari materia with section 50 of the U.P. VAT Act. In the said case, the question before the learned single judge, was in respect of seizure of goods on the ground that the goods were, prima facie, undervalued. The learned single judge placed reliance on a decision of this court in Commissioner of Sales Tax v. Macdowell and Company Ltd., Ghaziabad [2001] UPTC 1042, wherein it was held, that if the consignment, was duly accompanied by all relevant documents and if the goods were undervalued, the same could be considered in the regular assessment proceedings, but that would not warrant seizure of the goods. The learned judge,

then proceeded to hold that the Tribunal had given a finding of fact that the goods were accompanied by all the relevant documents and consequently, held that merely on the ground of undervaluation there is no ground for seizure of the goods We may mention that in the case of Macdowell and Company Ltd. [2001] UPTC 1042, the learned judge in paragraph 11 has specifically observed that the declaration forms were found to be genuine and no defects were found.

11. In our opinion, it would not be possible for us to follow the judgment of the learned judge in Delhi Calcutta Carrying Corporation [2003] UPTC 929 rendered under the provisions of the U.P. Trade Tax Act. The reasons being that it is incumbent on a person, who is importing goods, to declare the true value of the goods. Failure to declare the true value of goods would result in the document being held not to be a proper document in the context of the valuation.

12. It was then submitted that the power of seizure, if at all, is located u/s 48 of the U.P. VAT Act. From a perusal of sections 48 and 50 of the U.P. VAT Act, we find that section 50 is in respect of importing goods into the State by road against declaration, whereas section 48 confers general power in respect of seizure of goods. The Legislature itself has conferred power of detention in respect of goods being imported u/s 50, if not covered by proper and genuine documents and by virtue of section 50(5) has incorporated the machinery provisions of section 48 into section 50. We, therefore, have no hesitation to hold that u/s 50(4) of the U.P. VAT Act, the officer making search has power to detain goods not covered by a proper and/or genuine documents.

13. We therefore have no hesitation in holding that the power to seize goods imported into the State without proper or genuine document is located in section 50(4).

14. We may now consider the issue as to what is the remedy available to a person whose goods have been seized ? Does the U.P. VAT Act provide no remedy under the Act against seizure of goods and the only remedy available to such person is by way of invoking the extraordinary jurisdiction of this court ? Reliance was placed oh the judgment of a learned single judge of this court dated May 2, 2011 in Pan Parag Indian Limited Vs. Commissioner, Commercial Tax, (Sales/Trade Tax Revision No. 278 of 2011) to hold that neither the Commissioner or the Officer authorized not below the rank of Deputy Commissioner u/s 48(7) nor the Tribunal under the U.P. VAT Act, has power to decide the validity of the seizure order and, consequently the court had no jurisdiction to entertain a revision. The argument advanced on behalf of the petitioner therein that section 48 of the U.P. VAT Act, empowers the Commissioner or officer authorised not below the rank of the Deputy Commissioner, for sufficient reasons to be recorded in writing, to release the goods without any deposit or on depositing such lesser amount, would inherently mean that the authority can decide the validity of the seizure order, was rejected.

15. We find that a learned single judge, by order dated May 9, 2011 in

Mehndipur Balaji Impex (P) Ltd. v. Commissioner of Commercial Taxes Sales/ Trade Tax Revision No. 324 of 2011, has referred the issue as to whether the appeal or revision lies against the seizure of goods, for consideration by a larger Bench, finding prima facie inconsistency in two Division Bench judgments. In the case of Rida International v. State of U.P.1 (Writ Tax No. 2166 of 2009), the Division Bench by judgment dated November 17, 2009, dismissed the writ petition on the ground of availability of alternative remedy. In the case of Gupta Suppliers Company Vs. Commissioner, Commercial Tax, U.P. and Others, , a learned Division Bench has taken a view that the plea of alternative remedy is no bar in maintaining a writ petition against the seizure order, though this was at an interim stage.

16. We may, now examine the two judgments on which reliance has been placed. In Rida International v. State of U.P. (Writ Tax No. 2166 of 2009) the court was pleased to note that an order passed u/s 48(7) of the U.P. VAT Act is appealable u/s 57(4) of the said Act, and that, it goes without saying that the order passed by the Tribunal is revisable by the High Court. The question arose before the court, whether the legality of the seizure could be gone into in proceedings under the first proviso to section 57(4) of the U.P. VAT Act. The learned Bench observed that, on recording reasons, the authority can order release of goods even without asking for any security, and it will necessarily follow that if the seizure order is bad, he can grant the relief, which necessarily requires examination of validity of the seizure order. The court, then, specifically observed that "the question of validity of the seizure order is required to be gone into by the authority concerned before fixing the amount to be deposited by the dealer for releasing of the goods."

17. As regards Gupta Suppliers Company Vs. Commissioner, Commercial Tax, U.P. and Others, , this was an interim order. The attention of the learned Division Bench was admittedly not invited to the judgment in Rida International1 (Writ Tax No. 2166 of 2009). The contention raised before the learned Division Bench in Gupta Suppliers Company Vs. Commissioner, Commercial Tax, U.P. and Others, was that, there was alternative remedy. The learned Bench was pleased to observe that no appeal would lie under the Act against the order of seizure. The learned Bench also observed that in a case where the order passed by the authority is wholly without jurisdiction and if such an order affects the rights of the petitioner, the High Court would be justified in entertaining a petition under article 226 of the Constitution of India without requiring the, petitioner to take recourse to other remedy available under the Act. Insofar as this judgment is concerned, we may point out, firstly, that it is an interim order. Even otherwise, apart from a bald observation, the statutory provisions were not referred to, and what was basically under consideration was the plea of alternative remedy and not the issue whether remedy by way of application lay under the Act. At the highest, that can be said to be a prima facie observation, as the matter is yet to be decided finally.

18. Let us now examine the various provisions to find out, whether an appeal lies under the U.P. VAT Act. Section 48(7), by virtue of section 50(5) of the U.P. VAT Act have, mutatis mutandis, been made applicable to the goods detained under sub-section (4) of section 48. Section 48(7) of the U.P. VAT Act reads as under:

48. Power to seize goods.-(1) to (6)...

(7) The officer seizing the goods shall serve on the dealer or, as the case may be, the person in charge an order in writing mentioning the fact of such seizure and indicating the amount not exceeding such amount as would be sufficient to cover the penalty likely to be imposed, on deposit whereof in cash, the goods so seized may be released in favour of the dealer or, as the case may be, the person in charge:

Provided that the Commissioner or such other officer, not below the rank of a Deputy Commissioner, as may be authorised in this behalf by the Commissioner, may, for sufficient reasons to be recorded in writing, direct that the goods be released without any deposit or on depositing such lesser amount, or furnishing security in such form other than cash or indemnity bond, as he may deem fit.

Provided further that in case of a person, who is not a registered dealer and against whom penalty order referred to in sub-section (5) has been passed, filing of return by such person and assessment of tax on him may not be necessary.

19. It would, thus, be clear that under the first proviso, against the order of the officer, on an application to the Commissioner, the Commissioner, for sufficient reasons, can direct the release of goods without any deposit or on depositing such lesser amount, or furnishing security in such form other than cash or indemnity bond, as he may deem fit. The officer concerned, in terms of section 48(7), can only order deposit in cash for release of the goods. The proviso is in the nature of remedy available to a party insofar as the security amount to be furnished in respect of the goods which have been seized as the officers under that proviso can dispense with deposit of cash.

20. The next relevant provision is section 55 of the U.P. VAT Act, which provides for appeal against an order made by the assessing authority other than an order mentioned in sub-section (7) of section 48. Assuming without finally deciding, in view of the incorporation of the machinery provisions of section 48 into section 50, an appeal u/s 55(1) would not lie in respect of an order made u/s 48(7), but insofar as revision is concerned, u/s 56(4) of the U.P. VAT Act, a person aggrieved by an order, against which an appeal does not lie u/s 55, is entitled to file an application for revision. We may also refer to section 57(4) of the U.P. VAT Act, which reads as under:

57. Tribunal.--(1) to (3)...

(4) Any person aggrieved by an order passed u/s 55, section 56, a decision u/s 59 or a direction under the proviso of sub-section (7) of section 48 may, within ninety days from the date of service of the copy of such order, decision or

direction on him, prefer an appeal to the Tribunal:

Provided that where order passed by the appellate authority u/s 55 is an order in respect of demand of any security, not being security demanded for release of goods seized under any provisions of this Act, appeal under this section may be filed only after furnishing security, fixed by the appellate authority u/s 55:

Provided further that where the disputed amount of tax, fee or penalty does not exceed two thousand rupees and no question of law is involved, the appellant may, at his option, request the Tribunal in writing for summary disposal of his appeal; whereupon the Tribunal may decide the appeal accordingly.

Explanation.--For the purposes of this sub-section, the expression any person in relation to any order passed by an authority other than the Commissioner includes the Commissioner and, in relation to any order passed by the Commissioner includes the State Government.

21. It will thus be clear that a person aggrieved by an order passed under sub-section (7) of section 48, can prefer an appeal to the Tribunal. This is a statutory provision which has been provided for. This specifically speaks of an order passed under section. 48(7). An order passed u/s 48(7) would be, both under the main sub-section as also an order passed under the proviso. The argument, that it is not open to the officer or the Commissioner to examine the validity of the seizure/detention, is misplaced. Grant of interim relief necessarily contemplates prima facie satisfaction on the merit of the matter, in what judicially we recognize as a prima facie case. So, unless there be a prima facie, case, the question of granting interim relief for release of goods without deposit as provided under the proviso, would not arise. We have, therefore, no hesitation to hold that a person aggrieved against an order of seizure has a remedy u/s 57(4) of the U.P. VAT Act. We therefore, approve the view taken in Rida International v. State of U.P.1 (Writ Tax No. 2166 of 2009) to which one of us (Justice Prakash Krishna) was a Member.

22. At the outset, we have mentioned that the law as settled is that availability of alternative remedy is by itself no ground for this court not to exercise its extraordinary jurisdiction. The parameter of exercise of extraordinary jurisdiction has been laid down in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

23. In our opinion, as the petitioner has an adequate alternative remedy, the present case would not be a fit case for this court to exercise its extraordinary jurisdiction. In the light of above, the petition fails and is hereby dismissed.

1 See page 40 infra.