

(2005) 02 GAU CK 0028
In the Gauhati High Court
Case No : Writ Petition (C) No. 300 of 2004

S.P. Road Link and Others

APPELLANT

Vs

State of Tripura and Another

RESPONDENT

Date of Decision : 02-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 19(1), 301, 302, 303, 304
Tripura Sales Tax Act, 1976 — Section 29, 29(4), 30, 32, 32(1)
Tripura Sales Tax Rules, 1976 — Rule 36A, 46, 46A, 46A(2), 46A(3)

Citation : (2006) 2 GLT 90 : (2006) 144 STC 380

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : A.L. Saha and J. Pal, for the Appellant; U.B. Saha, Senior Government Advocate and A. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.

The petitioners have prayed for directing the respondents for granting registration, as transporter, carrier and transporting agent as required u/s 38-B of the Tripura Sales Tax Act, 1976 (for short called, "the Act") read with Rule 64-A of the Tripura Sales Tax Rules, 1976 (for short called, "the Rules") without any security deposit.

1. The brief facts necessary for adjudication of the writ petition are that the petitioners a partnership firm having five partners, are seeking registration under Rule 65 of Rules for running business as transporter, carrier and trading agent of taxable goods, had submitted an application dated October 7, 2002 to the Superintendent of Taxes, followed by other applications dated December 8, 2003, February 28, 2004, May 9, 2004 and July 9, 2004 to the Commissioner of Taxes, State Government of Tripura, stating that the firm shall abide by the rules and regulations and direction of tax authorities showing willingness to deposit Rs. 2.5

lakhs as bank guarantee and remaining deposits in installments. According to the petitioner, no order in respect of registration was communicated by the Commissioner of Taxes except the approval given on the file on July 15, 2004 of the proposal of the Superintendent of Taxes to the following effect:

The applicant may be asked to deposit an amount of Rs. 10 lakhs only as security money by challan at a time for getting registration certificate for doing transport business if kindly approved.

2. The relevant provisions of "the Act" and "the Rules" are quoted as follows :

29. Offences and penalties.-Whoever

(1) carries on business as a dealer and acts in contravention of any of the provisions of this Act; or

(2) fails, without reasonable cause, to submit in due time any return as required by or under the provisions of this Act, or submits a false return ; or

(3) fails, when required by or under the provisions of this Act, to keep accounts or records of sales ; or

(4) fails, when required by or under the provisions of this Act to produce any accounts, evidence or documents or to furnish any information ; or

(5) fails or neglects to comply with any requirement made of him under the provisions of this Act ; or

(6) knowingly produces incorrect accounts, registers or documents, or knowingly furnishes incorrect information ; or

shall, on conviction before a Judicial Magistrate and in addition to any tax including interest if any, or penalty or both that may be due from him, be punishable with imprisonment which may extend to six months or with fine not exceeding one thousand rupees or with both, and when the offence is a continuing one, with a daily fine not exceeding fifty rupees during the period of continuance of the offence....

Section 30 :

30. False statement in declaration.?Whoever makes a statement in verification or declaration in connection with any proceedings under this Act which is false, and which he either knows or believes to be false, or does not believe to be true, shall, on conviction before a Judicial Magistrate, be punishable with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Section 32 :

32. Composition of offences.?(1) Subject to such conditions as may be prescribed, the Commissioner may, either before or after institution of criminal

proceedings under this Act, except from the person who has committed or is reasonably suspected of having committed an offence under this Act or the Rules made thereunder, by way of composition of such offence,?

(a) where the offence consists of the failure to pay, or the evasion of, any tax recoverable under this Act, in addition to the tax including interest if any or penalty or both so recoverable, a sum of money not exceeding one thousand rupees or double the amount of the tax recoverable, whichever is greater, and

(b) in any other case a sum of money not exceeding one thousand rupees in addition to tax recoverable.

(2) On payment of such sum as may be determined by the Commissioner under Sub-section (1), no further proceedings shall be taken against the person concerned in respect of the same offence.

36-A. Maintenance of accounts by carriers.?(1) Notwithstanding anything contained in any other Act, any transporter, carrier or transporting agent operating its transport business in Tripura, shall maintain proper account of goods transported to or outside Tripura through it in the manner prescribed and shall on demand by the Commissioner be liable to furnish in the prescribed manner such information as the Commissioner may require relating to the transportation of such goods and shall also be bound to produce books of accounts for inspection and examination by the Commissioner.

The transporter has to make a declaration in form XXIV, which is an obligation cast on such transporter by virtue of Section 38(2) read with sub-rule (3) of rule 46A, which requires the transporter to obtain form XXIV from the Superintendent of Taxes on payment of such fees as may be specified by the Commissioner. Transporter is further obliged to maintain a register of the accounts of such forms serially.

Section 38 :

38. Erection of check-post.?(1) The State Government may, by notification, set up and erect, in such manner as may be prescribed, check-posts and barriers at any place in the State with a view to prevent the evasion of tax payable under this Act.

(2) Every person transporting taxable goods shall, at any check-post or barrier referred to in Sub-section (1) and before crossing such check-post or barrier, file before the officer-in-charge of the check-post or barrier, a correct and complete declaration of the goods in such form and in such manner as may be prescribed.

(3) The officer-in-charge of the check-post or barrier for the purpose of satisfying himself that the provisions of Sub-section (2) are not being contravened, and subject to such restrictions as may be prescribed, intercept, detain and search any vehicle or boat which may be suspected of being used for contravening such provisions.

(4) The officer-in-charge of the check-post or barrier or any other officer, who may be authorised by the State Government in this behalf may, for the purpose of verifying whether taxable goods are being transported in contravention of the provision of Sub-section (2) of Section 38 and subject to such restrictions as may be prescribed, seize any taxable goods which, he has reason to believe are being transported in contravention of the provisions of Sub-section (2) together with any container or other materials for the packing of taxable goods.

(5) When any taxable goods are seized under Sub-section (4), the officer-in-charge of the check-post or barrier or any other officer referred to in that sub-section shall, as soon as may be, report the same to the Commissioner for appropriate action.

38-B. For carrying out the purposes of Section 38 every transporter, carrier or transporting agent operating its transport business relating to taxable goods in Tripura shall be required to obtain a certificate of registration in the prescribed manner from the Commissioner of Taxes on payment of such fees as may be prescribed.

Rule 46-A :

46-A. (1) Every declaration to be given under Sub-section (2) of Section 38 shall contain a correct and complete accounts of the goods carried by the transporter and shall be in form XXIV, in duplicate, and duly signed by him :

Provided that if the space provided in form XXIV is not sufficient for making the entries, separate annexure may be attached to the form for the purpose which should be duly signed by him.

(2) The officer-in-charge of the check-post or the barrier on being satisfied about the correctness of the statements made and particulars contained in the declaration in form XXIV, shall seal it with his official seal and give a permit. One copy of the permit shall thereupon be returned to the transporter and the other copy shall be retained by the officer-in-charge :

Provided that a transporter who has obtained a permit at the first check-post or barrier under sub-rule (2) shall not be required to make any further declaration at other check-post or barrier in respect of only so much of the consignments to which the permit relates.

(3) The transporter shall obtain form XXIV from the Superintendent of Taxes concerned on payment of such price as may be specified by the Commissioner. The form shall be serially numbered and account shall be maintained in register. No other form XXIV except those supplied from the office of Superintendent of Taxes shall be entertained with effect from such date as the Commissioner may notify by publication in the local newspapers and official gazette.

Rule 63-A :

63-A. Power to search at any place by officer-in-charge of a check-post,

Superintendent of Taxes or any officer specially empowered by the Commissioner.?(1) Notwithstanding anything contained in any other provision of these Rules, at every check-post or barrier or at any other place, when so required by the officer-in-charge of such check-post or barrier, by any Superintendent of Taxes or by any officer empowered by the Commissioner of Taxes in this behalf for the purpose of preventing the evasion of taxes payable under the Act, the driver or any other person in-charge of goods vehicles, shall stop the vehicle and keep it stationary as long as may be required by such officer to search the goods vehicle or part thereof, examine the contents therein and inspect all records relating to the goods carried which are in the possession of such driver or other person-in-charge thereof, who shall, if so required, give his name and address and the name and address of the owner of the vehicle as well as those of the consignor and consignee of the goods.

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Rule 64-A :

64-A. Registration of transporter, etc.?(1) No transporter, carrier, or transporting agent shall operate its transport business in Tripura relating to taxable goods without being registered with the Commissioner of Taxes in such a manner as he may direct.

(2) A transporter, carrier or transporting agent already operating transport business in Tripura relating to taxable goods, shall, within a period of 30 (thirty) days from the date of commencement of these Rules (Eleventh Amendment) apply to the Commissioner of Taxes for registration.

(3) If a transporter, carrier or a transporting agent carries or transports any taxable goods in contravention of the provisions of the Act or the Rules, his registration shall be liable to be cancelled or suspended for such period as may be determined by the Commissioner of Taxes after giving him a reasonable opportunity of being heard.

(4) Every transporter, carrier or transporting agent operating its transport business in Tripura shall maintain a register in form XXII, a true and correct account of every consignment of goods transported into Tripura, and in form XXIII of goods transported outside Tripura, through it.

(5) No taxable goods shall be delivered by the transporters, carriers or transporting agents unless the requirements laid down in Rules 46 and 47 have been complied with.

(6) No delivery of taxable goods shall be given by the transporter without obtaining a copy of declaration in form XVIII signed by the Superintendent of Taxes/Inspector of Taxes.

There is another provision in "the Act" for registration of "dealer", i.e., any person who sells taxable goods, manufactured, made or processed by him in

Tripura or brought by him into Tripura from any place outside Tripura for the purpose of sale in Tripura and include the Government and any person making a sale u/s 3A. Sections 5 and 6 of "the Act" provides for registration of dealers who shall carry on business of taxable goods. Section 7 of the Act has provided for demanding security from the dealer who has been registered. The Section 7 of the Act reads as follows :

7. Certificate of registration.?(1) A dealer registered u/s 5 or Section 6 shall be granted a certificate of registration in such form as may be prescribed, which shall specify the name or names of goods in which at the time of the grant of the said certificates the dealer carries on business, and such other particulars as may be prescribed:

Provided that the Commissioner may for good or sufficient reasons demand from a dealer who has been registered or a person who has applied for registration u/s 5 or a person who has been required to get himself registered u/s 6, reasonable security for proper payment of tax.

3. According to the petitioners, the decision of the respondent requiring the petitioner-firm to deposit an amount of Rs. 10 lakhs as security money by challan at a time for getting registration for doing transport business is illegal, and ignoring the proposal of petitioners for depositing the bank security or minimum security deposit in 10 monthly installments is also bad as for depositing such a heavy amount of Rs. 10 lakhs as security money the petitioners have to take loan from the bank and have also to pay interest thereon. More so, not taking any decision on the part of the respondents in respect of payment of interest on the deposit of such security money is also not fair.

4. The petitioners in facts and circumstances have proposed to argue as follows :

(i) There cannot be any restriction upon the business of transport without following the procedure provided under article 304(b) of the Constitution.

(ii) The decision of the respondent No. 2, i.e., Commissioner of Taxes is against the legislative guidelines and policy of "the Act" and "the Rules".

(iii) The demand of Rs. 10 lakhs as security money for granting certificate of registration for transport business is an unreasonable restriction.

5. According to the petitioners two types of registration, namely, registration for dealers as well as for transporters are acknowledged in "the Act". The Legislature in its wisdom has expressly provided for in "the Act" that the Commissioner may demand security money from the dealers for their registration u/s 7(1) of the Act ; but there is no such provision of demand of security money for registration of the transporters. In this context, learned counsel for the petitioners has referred seven-Judge decision of In re Article 143, Constitution of India and Delhi Laws Act (1912) etc. AIR 1951 SC 332 : para 74 indicated as below :

(1) The Legislature must normally discharge its primary legislative function itself and not through others. (2) once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be best way to give effect to its intention and policy in making a particular law, and that it may utilise any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel Legislature.

The above decision of the honourable Supreme Court has been summarized in *Rajnarin Singh Vs. The Chairman, Patna Administration Committee, Patna and Another*, by indicating that Legislature cannot delegate essential legislative function which consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct.

6. According to the petitioners demand for Rs. 10 lakhs in cash as security deposit for registration of the transporter is in conflict with the guidelines/ legislative policy of "the Act" inasmuch as the Legislature has taken a policy decision that the Commissioner of Taxes may demand security deposit from the dealers only and not from the transporters, more so, the Commissioner could demand "fees" (as mentioned in Section 38-B of the Act) from the transporters for the purpose of registration, as such the demand of security money is unreasonable.

7. According to the learned counsel for the petitioners, while exercising his power under Rule 64-A the Commissioner of Taxes cannot supersede his limits and scope of his jurisdiction u/s 38-B of the Act, i.e., the Commissioner could neither prescribe any security money nor could demand any security money other than the fees for registration provided u/s 38-B in the name of the word "in such a manner as he may direct" provided in Rule 64-A of "the Rules". According to the learned counsel for the petitioner demand of security for obtaining certificate of registration is an exorbitant money which hampers in reality or burdens trade and commerce of the petitioners and is creating indirectly hindrances on freedom of trade and business and such heavy demand of security money is an abrogation and effacement of the legislative power provided in the Act.

8. According to the petitioners, the demand of security is a restriction as it "directly and immediately affects" the free movement of trade and such demand cannot be termed as a regulatory measure as the Commissioner of Taxes intends to exercise unauthorized discretion and to impose indirectly burden of taxation by way of abuse of his discretion ignoring that tax law was to strictly interpreted.

9. It has further been argued on behalf of the petitioners that demand of such security by Commissioner of Taxes is a restriction to the transport business

besides offending articles 301 and 304(b) of the Constitution. While placing reliance upon seven-Judge decision of the honourable Supreme Court in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, it has been submitted that irrespective of its source, if law directly and immediately affects the free movement of trade, it would be restriction on the freedom of business. The relevant paragraph 10 is quoted as below :

...That which in reality facilitates trade and commerce is not a restriction, and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade but the distinction, if it has to be drawn, is real and clear. For the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. So long as a tax remains compensatory or regulatory it cannot operate as a hindrance.

According to the petitioner in the above decision the Supreme Court has also considered its earlier judgment in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, where, the validity of the Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1954 was challenged on the ground that it violates the provisions of article 301 and was not saved by article 304(b) of the Constitution where the Supreme Court had upheld "the Act" under challenge declaring the same as void.

10. According to the petitioners though the validity of Section 38-B of "the Act" and Rule 64-A of the Rules have been upheld in *Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others*, but this decision was in consideration of the fact that the honourable Supreme Court did not find any of the provisions of the Act was any way placing liability over the transporter which was otherwise on a dealer under this Act. Para 13 at page 620 of STC; para 15 at page 725 of AIR reads as below :

The maintenance of accounts by the transporter u/s 36A is only to help the taxing authority to trace the dealer, fix the goods transported correlating with such dealers transporting such goods for fixing taxable liability in this regard. There is no provision, which fixes any liability on the transporters, carriers, etc., which is on a dealer. Liability, if at all, is only if such transporters, carriers, etc., do not disclose what is required and what is within his knowledge to help the authorities to collect the tax from escaping dealers which, but for this, would escape. Section 29 speaks of offences covering both dealers and non-dealers as is evident by the opening word "whoever". Sub-section (4), to which learned counsel referred to, obligates a person to produce any accounts, evidence or documents or to furnish any information as required by the concerned authority. Of course, all this would be what one is required to maintain and in the case of transporters, carriers, etc., what the relevant provisions require him to do. If he is required to maintain or produce some document which he has to maintain

under a statute, and if he does not produce it then of course he should be made liable for offence. It is only on his failure to do this, that is treated as an offence, punishment as it is one of the legitimate weapons to enforce one to help the authorities. Such information and documents sought are either with or within the knowledge of transporter. As aforesaid, this is for the sole objective of ascertaining a consignor and consignee of the taxable goods which the transporter is carrying. Such requirement has no correlation with the sale and purchase of the goods or to treat a transporter as dealer and consequently, no obligation is cast on him to pay any tax, interest or penalties which a dealer is required to pay. Similarly Section 30 refers to offence only when a false declaration is made in connection with any proceedings under this Act, which he either knows or believes to be false, or does not believe to be true. Again, the conviction under it is only for making false declaration which is within his knowledge. How can this constitute to be a ground for legislative competence ? This provision is only to see that the correct statement of facts are brought out. One is punished only if he knows or believes to be false, yet does not disclose it or even does not believe to be true, but still makes statement to the contrary. u/s 29(4) and Section 30, the offences in case committed by transporter are relatable to checking of evasion of tax, then composition of offence u/s 32, would also confine itself within this sphere. We do not find any of these provisions in any way placing any liability on the transporter which is otherwise on a dealer under this Act. Similarly, as aforesaid, the maintenance of account by the transporters, carriers, etc., u/s 36A is only to render help to the authorities in checking the evasion of tax. This does not put any such obligation on the transporter to hold that these provisions transgress the legislative competence of the State Legislature.

11. On the other hand Mr. U.B. Saha, learned Senior Government Advocate appearing for the State-respondents, has submitted that in connection with the issuance of certificate of registration, Superintendent of Taxes had issued instructions to the concerned Inspector of Taxes to make an inquiry and submit the detail report. Accordingly in the report dated November 26, 2002 following irregularities were found on the part of the petitioners :

(i) The petitioner-firm does not have separate bank account in the name of the firm.

(ii) Except Shri Mohan Lal Deb, others have no movable and immovable properties and during enquiry Shri Mohan Lal Deb one of the partners of the firm had stated that he is the owner of 3 trucks/vehicles bearing No. TR-01-A-1789, TR-01-A-1514 and TRL 2104, but he however has failed to produce relevant papers and documents in support of his claim. Shri Deb has also stated that the partners did not own office or godown outside the State of Tripura. However, they will hire the office building-cum-godown at Station Road, Kanunagar, Kolkata-89 but has failed to produce any documentary evidence to that effect.

(iii) The firm is going to establish its depot and godown outside in West Bengal.

The details of the godown and office addresses of the firm outside the station of Tripura were also not indicated.

(iv) One of the partners of the firm Shri Deb has stated that the firm has Rs. 7 lakhs as capital account for the State transport business but in support of the monitory strength he has produced cash certificate/bank balance for an amount of Rs. 3,50,911 only in the name of the partners and has also stated that the rest of the amount may be borrowed from their relatives.

(v) Certificate of registration in favour of the petitioners-firm were to be completed and the same could not be issued till requirements were completed.

12. While inviting attention of this Court to the assertions made in different paragraphs of the counter-affidavit the learned counsel for the respondents has submitted that such similar demand of security of Rs. 10 lakhs was made from those other transporters intending to get certificate of registration under the Act and as many as twenty such transporters have obtained registration in the like manner without showing any objection. In fact, the demand of security money of Rs. 10 lakhs from the transporters was in reference to the approval dated November 24, 2003 of the minutes of monthly meeting of sales tax held in the office of the Commissioner of Taxes, Agartala and the same was also circulated to all the concerned by letter dated December 2, 2003. These documents were shown to the court along with other materials on record ; however, these were not placed by way of affidavit. According to the learned counsel for the respondents there was no provision of demanding the security money in installments, more so, when the transporters intending to carry transport business have to be financially sound as the trade and business is expensive. According to the learned counsel for the respondents the demand of Rs. 10 lakhs as security money is in consonance to the requirement of Section 38 of the Act and such is legal and reasonable as the words "in such manner as he may direct" mentioned in "Rule 64A" provide sufficient power and wide scope to the Commissioner of Taxes for making the demand of security in question which is well within his power being derived under the Act. No material has been brought for and on behalf of the petitioners which could indicate that the firm has been discriminated vis-a-vis other transporters in respect of the demand of security money, moreso, the petitioners were expected to fulfil the requirements and the lapses still exist on their part despite the fact that learned counsel had acknowledged and noted by putting his signature on July 20, 2004 on the records of the tax department.

13. According to the petitioners although the respondents have stated in para 16 of the counter-affidavit that demand for security money for transport business is legal and reasonable, however, the respondents have not furnished copy of any rule, regulation or notification showing that the respondent No. 2 has been authorised to demand such security money and when the Commissioner of Taxes as a statutory functionary has made order based on certain grounds then its validity must be judged by the reasons so mentioned and cannot be

supplemented by fresh reasons in the shape of affidavit or otherwise. In this context a reference has been made of the decision of the honourable Supreme Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,

...when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

These aspects however, have been denied by the respondents by saying that the demand of security was made keeping in view the interest of Revenue in the facts and circumstances and that order was noted by the learned counsel for the petitioner on July 20, 2004 as indicated above and, as such, petitioner-firm being aware about such demand could not say that these are as an after-thought.

14. As an alternative, it has been submitted on behalf of the petitioners that in view of the decision of the Allahabad High Court (single Bench) reported in Kar Mobile Limited v. Commissioner of Sales Tax [1994] 93 STC 232 ALL, the irregularity found while seizing the goods being brought in reference to Section 28A and in derogation to the provisions of Section 13-A(6) of the U.P. Sales Tax Act, 1948, the security other than cash was taken to be sufficient in the facts and circumstances. I am afraid that this judgment shall not have a universal application as the same was passed in particular facts and circumstances.

15. Mr. U.B. Saha, learned Senior Government Advocate, has submitted as below :

(A) In the light of para 11 of the decision reported in AIR 2004 SCW 3682 (Ramesh Singh Photti v. State of A.P.) the inference by the Commissioner of Taxes has been drawn not in isolation but in the totality of the facts and circumstances and on the existing grounds and on the records of the case.

(B) In view of the decision of the Supreme Court in M/s. Orient Paper and Industries Ltd. and another Vs. State of Orissa and others, it is the ratio decidendi which is binding and not some observations only made in the judgment.

(C) In view of the decision of Gangadhar Behera and Others Vs. State of Orissa, the words of judgment are to be understood in the facts of a particular case as the same word may give different meaning in different situation.

28. Above being the position, we find no substance in the plea that evidence of eye witnesses is not sufficient to fasten guilt by application of Section 149. So far as the observations made in Kamaksha Rai and Others Vs. State of U.P., it is to be noted that the decision in the said case was rendered in a different factual scenario altogether. There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. [See Padmasundara Rao and Others Vs. State of Tamil Nadu and Others,].

The same view has also been taken by the Supreme Court in Padmasundara Rao and Others Vs. State of Tamil Nadu and Others,

(D) In para 7 of The Regional Manager and Another Vs. Pawan Kumar Dubey, it has been indicated as :

It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

(E) In view of the decision of the Supreme Court in 1999 Supp (3) SC 3323 (Subhash Photographic v. Union of India) the State has wide discretionary power to regulate the economic matter and the court is not to interfere with the decision of the Government policy.

(F) In view of the decision of the Supreme Court in Geo Miller and Co. Pvt. Ltd. and Others Vs. State of M.P. and Others, imposition of entry tax levied under the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam was treated as compensatory tax and was said not to be violating the provision of article 301 as well as the article 304(b) of the Constitution.

(G) In Subodhaya Chit Fund (P) Ltd. and another, Vs. Director of Chits, Madras and another etc., where amended provision of the Tamil Nadu Chit Funds Act (24 of 1961) (since repealed) Section 12 (as amended by Act No. 14 of 1975) requiring foremen to deposit cash amount as security for realisation of chit amount was treated to be in public interest and necessary to regulate trade and was held not invalid in view of provision of articles 301, 19(I)(g) of the Constitution and the said amendment was treated as variation in the form of restriction which was already inherent in the original "Act" which had got the sanction of the President of India.

16. According to Mr. U.B. Saha, for the respondents, the discretion and the exercise of power made by the Commissioner of Taxes under "the Act" is a reasonable discretion of a prudent man based on rationality as the discretion has been applied on the basis of materials available on record. In order to elaborate the discretion applied in the present case, following decisions have been referred :

According to paragraph 19 of Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import,

(a) If the application is u/s 151, C.P.C., invoking inherent jurisdiction of the court to grant stay, the burden will be on the party seeking stay to establish facts for

exercise of discretion in favour of such party.

How, the discretion vested in the court to grant or refuse the stay of suit would be exercised in a given case would, however, depend upon various circumstances, although to grant the stay would still be a matter within the discretion of the court.

(b) In (2001) 1 SCC 182 (Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant) the Supreme Court has held as below :

22. The performance of those duties entails the exercise of the Minister's discretion, and I think what was said by Lord Halsbury in *Sharp v. Wakefield* [1891] ACJ 173 : 60 LJMC 73 : 64 LT 180 (HL) is important to consider with reference to the exercise of such discretion. He there said :

"Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion : *Rooke's case* (1598) 5 Co Rep 99b, 100a, according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

(c) In *Dhurandhar Prasad Singh Vs. Jai Prakash University and Others*, , it has been held that "it does not mean that in each and every case the revisional court is obliged to consider question of facts as well like a first appellate court, but the court has discretion to consider the same in appropriate cases whenever it is found expedient and not in each and every case. Discretion, undoubtedly, means judicial discretion and not whim, caprice or fancy of a Judge. Powers of review cannot be invoked unless it is shown that there is error apparent on the face of the record in the order sought to be reviewed.

(d) In AIR 2004 SCW 1385 (*Uma Devi Nambiar v. T.C. Sidhan*) the discretion is said to be given on matters of procedure or punishment and relevant paragraph Nos. 26 and 27 are to be quoted:

26. If a certain latitude or liberty accorded by statute or rules to a Judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

27. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent Judges in somewhat different forms of words but with substantial identity. When a statute gives a Judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet.

17. While testing the validity of Section 38-B of the Act as well as Rule 64-A of the Rules in Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, the Supreme Court has approved the validity of above two provisions along with declaring the legislative competency of sections 29, 30, 32, 36-A of the Act and Rules 46-A, 36-A of the Rules. The Supreme Court has also considered different provisions of sections 29, 30, 32, 36, 37, 38 and in view of the judgment of Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, the procedure adopted by the Commissioner in respect of prescribing any direction as indicated in Rule 64-A was left to the wisdom of the Commissioner of Taxes as contended by the learned Senior Government Advocate for the respondents, the petitioners cannot be allowed to say now that the demand of security money is unreasonable when they are ready on their own to pay Rs. 2.5 lakhs and are asking for payment of remaining amount of security in installments.

18. As observed by the Supreme Court in Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, the provisions of "the Act" as mentioned in foregoing paragraphs (2) above are only to streamline assessment and to check the evasion of sales tax. The sale obligation casts on the transporters to achieve such purpose, is a necessary concomitant of any taxing statute. The offence and penalties referred to in Section 29(4) of the Act when read with other sub-clauses of that section and further read with Section 30 reveal that it is only a mechanism to, make collection of tax more effective and purposeful. Sub-section (4) of Section 29 constitutes offence only when one fails to produce such account or form, as one is required under law when required by the concerned authorities. This is a necessary corollary for which an obligation is cast on the transporters to do certain things. The threat of imposition of penalties in view of the offence are only to keep guard over the transporters so that they may not fail to produce such documents as required, but for this the very objective to trace real dealer for tax and penalty would be defeated. Thus, the obligations cast on the transporter are really in aid to the taxing authorities. The provisions of Section 30 constitute offence when a false statement is declared. This is followed by the composition of offences u/s 32. Section 36-A requires the maintenance of accounts. Similarly the same criteria is referable to the aforesaid rules. They are all in aid of the mechanism evolved to check evasion of tax. Therefore on analogy the requirement of obtaining a certificate of registration certificate u/s 38-B and making declaration in form XXIV under Sub-rule (3) of Rule 46-A could not be construed as to constitute and infer that it put impediments in free-flow of trade or business while entering into or going out of the State of Tripura.

19. It is necessary to scrutinize the conditions and demand of security under Rule 64-A in exercise of requirement of Section 38-B to see what are the obligations cast on the transporters and what could be the purpose of such requirement and obligation. Is it in any way burden of taxing over transporters or putting impediments in the transport business to make it beyond the power and

scope of Commissioner not being in consonance to the legislative competence and ultra vires to the article 301 of the Constitution ? Whenever any goods is sold or purchased inside or outside the State, the incidence of tax and the quantum of tax have to be ascertained under the provisions of the relevant taxing statute. For this purpose it is necessary to fix a dealer, the taxable goods, place of sale or purchase of such goods and the quantum of tax. If a dealer in taxable goods transaction of sale or purchase escapes attention of the taxing authority, tax on such goods escaped with resultant loss to the State revenue. To overreach this possible escape, a mechanism is invariably brought in a statute to seal such loopholes of escape, of course prescribing some conditions or casting obligations on some to perform certain acts to reach this objective. Thus, maintaining accounts of goods transported into outside Tripura in the prescribed manner and to furnish in the prescribed manner such information, demand of security before granting certificate of registration, as the Commissioner requires, including filling of form XXIV are only for the said objective to be achieved with the help and aid of such transporter or carrier, etc. Such obligations and conditions by way of demanding security are only for identifying the consignor or consignee to fix liability on them in correlation with the goods carried by such transporter further requiring the disclosure of such goods with its quantity, value, weight, to help the taxing authority to assess such goods on such escaping dealer. These steps help the taxing authorities in collecting taxes, imposing penalties including punishing one for the offences committed. If such conditions of demand of security money or obligations are not put or not cast on such transporter then any dealer under a false name, can dispatch his taxable goods to another person through a transporter escaping his sales tax liability on such goods. It goes without saying that some such dealers and transporters do indulge in such illegal practices and some consignments are booked with consignee as self, without disclosing the name, registration number and address, of the consignee in the appropriate column of form XXIV. By incorrect, incomplete declaration in such forms, if not made punishable would defeat the very purpose of enacting these provisions and would help such clandestine dealers to escape the liability of tax.

20. The language of Section 38-B itself indicates that it has been brought in for carrying out the purposes of Section 38, which basically is to check evasion of tax. Under it, the various check-posts are set up ; the tax authorities are empowered to check any vehicle, seize goods being carried in contravention to any provisions of the Act and the Rules. Thus the requirements of certificate of registration by a transporter is also for the same purpose. It only applies to such transporters doing transport business relating to taxable goods in Tripura only. This certainly cannot be construed to be violative of article 301 of the Constitution. Article 301 provides freedom of trade, commerce and intercourse. This article is subject to the other provisions of this Part, namely, Part XIII which covers articles 301 to 307. Article 304(b) empowers the State Legislature to impose such reasonable restriction on the freedom of trade, commerce or

intercourse with or within the State as may be required under the public interest. When conditions are imposed in a provision made for a certificate of registration, which in the present case are, brought in by demand of security as aforesaid is really for checking the evasion of tax. Putting some conditions or demand of security in the interest of revenue to help the tax authorities to check the probable evasion of tax is within the ancillary and inherent scope provided u/s 38B and under the power of Commissioner in reference to Rule 64A. By such demand of security for registration of transporters or carriers it becomes feasible for the tax authorities to trace out such dealer escaping tax, through such transporters. The payment or deposit of fees prescribed u/s 38B is a statutory requirement which does not put an embargo or does not curb the power of imposition of any condition including the demand of security in the interest of revenue or to check evasion or escapement of tax, as such, demand of security money is not barred under Rule 64-A.

21. The submission of the petitioners in reference to reliance to the case of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , and *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, that the demand of security money in question is a restriction on the transport business as it directly and immediately affects free movement and transportation of goods and accordingly bring article 301 into play and non-compliance of any procedure in article 304(b), and conditions are unconstitutional and the demand of security money by Commissioner of Taxes is unauthorised and imposing burden hampering transport business is an abuse of discretionary power. These arguments of the petitioners do not seem to be legally correct. It is well-settled by the decision of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , that only such restrictions or impediments which directly or immediately impede the free-flow of trade, commerce and intercourse fall within the prohibition imposed by article 301. This Court did not accept the argument that all taxes whether or not their impact on trade is immediate or mediate, direct or remote should be governed by article 301. This view was further upheld in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and in *The State of Kerala Vs. A.B. Abdul Kadir and Others*, . Hence on this analogy the mere fact some conditions of demand of security imposed does not automatically bring article 301 into play. And the provisions of article 304(b) are not offended. When the validity of Section 38-B and Rule 64-A, inter alia, other provisions of Act and Rules were held valid by Supreme Court in case of *Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others*, then petitioners cannot derive benefit of some observations taking the same in isolation by segregating that from the complete observations and text of judgment of the Supreme Court while elaborating the provisions of the Act in respect of observance of procedural formalities provided in para AIR 1999 SC 726.

22. In view of the above observations demand of security under Rule 64-A by the Commissioner of Taxes for granting registration certificate u/s 38-B is legal and

well within the scope and is a reasonable exercise of power provided in the Act. The writ petition is devoid of merits as such it is dismissed.