(2007) 12 OHC CK 0028

In the Orissa High Court

Tatiruni Bapuji and Others APPELLANT

Vs

State of Orissa and Another RESPONDENT

Date of Decision : 03-12-2007

Acts Referred:
Constitution of India, 1950 — Article 19, 265, 301

Citation : (2008) 105 CLT 570 : (2008) 1 OLR 98 : (2008) 16 VST 472

Hon'ble Judges : A.K. Ganguly, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—Petitioners 35 in number who are the truck owners have filed this writ petition being aggrieved by the action of the opposite party No. 2-Sales Tax Officer, Unified Check Gate, Girisola, Ganjam (hereinafter called "the S.T.O.") for collecting sales tax from them on the fish transported by their trucks from the State of Andhra Pradesh to the States of West Bengal or Bihar. The reliefs sought in this writ petition are as follows:

(i) The action of the S.T.O. in collecting tax on fish carried by the trucks of the petitioners from the State of Andhra Pradesh to the States of West Bengal or Bihar is contrary to law and not sustainable. Hence the sales tax so collected vide Annexure-1 series, 2 series, 3 series and 4 series should be refunded to them;

(ii) Direction should be given to the opposite parties not to realize any amount from the petitioners in respect of fish carried by them from the consignors in Andhra Pradesh to the consignees in West Bengal and other States; and

(iii) For quashing Rule 94(4) (a) of the O.S.T. Rules, 1947.

2. Briefly stated, the case of the petitioners is that they are transporters and are engaged in transporting fish from the consignors in the State of Andhra Pradesh to the consignees in the States of West Bengal or Bihar. While proceeding from Andhra Pradesh to West Bengal or Bihar they have to move through the State of Orissa. The S.T.O. in excess exercise of his power under the Orissa Sales Tax Act, 1947 (hereinafter referred to as the ''Act'') has resorted to forcible realization of

tax on fish with penalty carried by the petitioners from Andhra Pradesh to West Bengal or Bihar at the Unified Check Gate, Girisola (hereinafter called as the "check-gate"). The consignors fill up the way bills in Form-X under the Andhra Pradesh Sales Tax Rules indicating the address of the consignees of West Bengal and Bihar. It is the sole responsibility of the petitioners to carry the fish to the destination of the consignments within the stipulated period of time in good condition which is virtually a race against time as fish is a highly perishable commodity. Taking advantage of this, the S.T.O. forcibly stops the vehicles at the aforesaid check gates and issues notice u/s VI(A) in the name of the consignor and serves the same on the driver of the vehicle. Along with the Form-VI(A) another notice in Form No. X (A) is given to the driver concerned indicating therein that the consignor has to pay Rs. 4,500/- under the Act and thereafter the S.T.O. informs the driver that unless and until the driver pays an amount of Rs. 4,500/- i.e., of Rs. 4,000/- towards sales tax and Rs. 500/- as penalty, the said vehicle would not be allowed to pass. A way bill in Form-XXXII is also filled up by the S.T.O. and in accordance with the declaration given in the way bill under Form-X of the Andhra Pradesh Sales Tax Rules, the driver is forced to sign on the same. According to the petitioners, to legalize his action, in the way bill, usually the S.T.O. points out the defects in the following manner:

The vehicle bearing No. AP-16-T-1718 earlier resorted to fraudulent practice of unloading the fish in the State of Orissa and evaded payment of tax for which your conduct is suspicious and there is reasonable apprehension of loss of tax from the goods consigned by you.

3. It is the further case of the petitioners that since they are not doing any business in the State of Orissa, the collection of tax under the Act from them is without any authority of law and the same amounts to gross abuse of power which infringes their right to carry on trade and business as guaranteed by the Constitution of India under Article 19(1)(g) and the said action is also violative of Article 301 of the Constitution. The said collection of tax has been challenged by the petitioners as without authority of law and violative of Article 265 of the Constitution of India. The petitioners further challenge that Rule 94(4)(a) of the Orissa Sales Tax Rules, 1947 (hereinafter referred to as the ''Rules'') is ultra vires the Act and that tax cannot be imposed on the ground of likelihood of evasion of tax.

4. Counter affidavit has been filed by the Opposite party No. 2 refuting the claim and controverting the averments made in the writ petition. It is stated in paragraph-8 of the counter affidavit that most of the petitioners have resorted to a clever ploy of evading legitimate tax due to the department by preparing false way bills to show that the goods are intended to pass through the territory of the State of Orissa the destination being outside the State whereas in fact they are unloading the goods inside the State of Orissa resulting in sale of the goods without payment of tax that is legitimately due to the department. It is stated further that basing on the earlier reports of such detection of evasion of tax by

the Mobile and Intelligence Wings of the department, no alternative is left out on the part of the department except to realize the tax in respect of vehicles which have in the past indulged in evasion of tax. In paragraph-15 of the said counter, it is stated that the departmental officer has also recorded the statement of some persons in charge of the vehicle admitting delivery of goods inside the State of Orissa as stated above. The opposite parties in support of their stand have enclosed copies of some of the reports of the Commercial Tax Officers with the counter affidavit. It is further stated that the consignors of fish are not registered under the Act having their fixed place of business inside the State and are not permanent residents of the State of Orissa for which tax is realized from them at the entry point at the border check gate. Besides, since the identity of the consignors and their whereabouts are not known to the department, it would not be feasible to collect tax from them by resorting to regular method of assessment. Therefore, the Revenue authorities have exercised the power vested in them under Rule 94 of the Rules read with Section 16-A of the Act and collect tax from the petitioners at the check gate.

5. In the above backdrop, now the question which falls for consideration by this Court is whether the S.T.O. is justified to collect tax at the check gate on the fish transported by the petitioners by their vehicles from the State of Andhra Pradesh to the States of West Bengal or Bihar through the State of Orissa on the apprehension that the said fish would be unloaded inside the State of Orissa after passing through the entry check gate. The next question that needs consideration is whether the tax so collected from the petitioners can be retained by the opposite parties without passing any assessment order justifying the said collection.

6. Now in the instant case, it is not disputed that the fish is brought from the State of Andhra Pradesh and while it is in transit, tax is collected by the S.T.O. at the check gate from the driver who is in charge of the goods (fish). The most important test to be applied before imposing tax on sale or purchase is whether the title in goods has passed for a consideration and that the transaction of sale is complete. A mere transfer of goods from one place to another cannot amount to sale. Unless there has been a transfer of property no question of complete sale will arise. Admittedly, in the instant case tax has been collected at the check gate while the fish was in transit and no complete sale has been effected inside the State of Orissa. However, to check evasion of tax various provisions are provided in fiscal statute for collection of tax on ad hoc basis with necessary safe-guards for setting up the same against the actual tax liability of a dealer to be determined later. Under the Act similar provisions are made in Section 16-A of the Act read with Rule 94 of the Rules and Section 12-B. u/s 16-A of the Act read with Rule 94 of the Rules barriers and check posts are set up and officers are empowered to check any vehicle, seized goods carried in contravention of any provisions of the Act or Rules and to collect tax where there is likelihood of evasion of tax in respect of goods carried in any vehicle, boat. Such provisions are not violative of freedom of trade and commerce under the Constitution. (See

Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, ; Commissioner of Sales Tax and Another Vs. M/s. P.T. Enterprises and Another, ; State of Rajasthan and Another Vs. M/s D.P. Metals, .

This Court also in Kamal Kumar Goel v. State of Orissa, reported in (1975) 35 STC 343 SC, held that Section 16-A of the Act and Rule 94 of the Rules are within the legislative competency of the State Legislature under entry-54 of List-II of the Seventh Schedule at the Constitution and are intra vires.

7. In the case at hand, tax has been collected by the S.T.O. exercising power vested in him u/s 16-A of the Act read with Rule 94 of the Rules even in absence of a complete sale. Requirement of Rule 94 is that there should be reasonable apprehension. Any apprehension is not enough because the Rules require recording of reason for apprehension. For coming to a conclusion that there is likelihood and/or possibility of evasion of tax there must be some foundation for entertaining such a view. Relevant portions of Section 16-A of the Act and Rule 94 of the Rules are extracted hereunder:

16-A. Establishment of check-post or barrier and inspection of goods while in transit-

(1) If the State Government 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 setting up of a check-post or the creation of a barrier or both, at such place or places as may be notified.

(2) At every check-post or barrier mentioned in Sub-section (1), or at any other place when so required by any officer empowered by the (Commissioner) 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 reasonably be necessary, and allow 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...

Rule 94. Check-post:

(1) The State Government may, be notification, direct the setting up of Check-post or erection of a barrier or both at such place or places in the State as may be specified in the notification. When the Check-post is set up upon a thoroughfare or road, barriers may be erected across the road or thoroughfare in the form of a contrivance to enable traffic being intercepted, detained and searched.

(2) The State Government may empower any officer not below the rank of an Assistant Sales Tax Officer to be in -charge of a Check-post or/and a barrier.

(3) The driver or the person in-charge of the goods vehicle or boat shall stop the vehicle or boat, as the case may be, at a check-post or barrier and keep it stationary as long as it is reasonably required by the officer-in-charge of the Check-post or barrier and allow examination of goods in the vehicle or boat and inspection of all the records connected with the goods in the vehicle or boat, including the way bill in Form XXXII.

(4) (a) If on such examination and inspection as referred to in Sub-rule (3), the Officer-in-charge of the check-post or barrier finds that the goods are not fully covered by a way bill in FORM XXXII or that the way bill is defective or incomplete or that there is evasion of tax, or apprehends, for reasons to be recorded in writing, that there is likelihood of evasion of tax in respect of the goods carried in any vehicle or boat, he shall, in order to prevent or check evasion of tax, serve on the owner of the goods or any person on his behalf a notice in FORM VI-B giving him an opportunity to rectify the defect or omission, if any, or an option to pay such amount as may be indicated by the Officer-in-charge of the check-post or barrier....

As discussed above, it is stated in the counter that most of the petitioners have resorted to clever ploy to evade legitimate tax due to the department by preparing false way bills to show that goods are intended to pass through the territory of the State of Orissa to reach the destination outside the State of Orissa. But, in fact, they are unloading the goods inside the State of Orissa resulting in sale of the goods without payment of legitimate tax. To this effect, reports have been submitted by the Commercial Tax Officers as well as officers of Mobile & Intelligence Wings of the department. In paragraph-15 of the said counter, it is also stated that departmental officers have recorded statement of some persons in charge of the vehicles admitting delivery of goods inside the State of Orissa. In the circumstances, it cannot be said that there is no reasonable apprehension on the part of the S.T.O. to collect tax from the petitioners at the check gate exercising power vested in him u/s 16-A of the Act read with Rule 94 of the Rules. Further contention of the petitioners that they being not the dealer as defined under the Act, collection of tax from them by the S.T.O. is contrary to the provisions of law. This contention of the petitioners merits no consideration in view of the clear provision in Rule 94 of the Rules which makes the owner of the goods or any person on his behalf liable to pay tax at the check gate on apprehension of evasion of tax.

8. However, the tax so collected by the S.T.O. at the check gate cannot be retained by the opposite parties without passing valid assessment order as provided under the Act allowing set up of the said tax against determination of the actual tax liability. So far as the dealers registered under the Act are concerned, provision has been made under Rule 36 of the Rules to avail set up of the tax paid at the check gate against their tax liability determined in the regular assessment order passed under the Act. Similarly, Section 12-B of the Act authorizes a Sales Tax Officer including an officer in charge of the check gate or

barriers with powers to provisionally or finally assess a casual dealer by issuing a notice in Form-IV-A to furnish a return of estimated turnover in Form-IV-C immediately. Section 12-B of the Act reads as follows:

12-B. Assessment of tax on casual dealers-

Notwithstanding anything in Section 12 and 12-A, it shall be open to an assessing authority, including the officer in charge of the check-post or barrier referred to in Section 16-A to make a provisional or final assessment on a casual dealer on the turnover of the purchase, or the sale of the goods, effected by him, in accordance with such rules as may be made in this behalf.

9. In the counter affidavit filed by the opposite parties, nothing is mentioned about passing of any assessment order subsequent to collection of tax at the check gate from the petitioners. This being the factual position, the petitioners are entitled to get refund of the amount collected from them vide Annexures-1 series, 2 series, 3 series and 4 series subject to production of any evidence to the effect that fish on which tax has been collected at the entry check gate, in reality, have passed through the exit check gate so as to reach the States of West Bengal or Bihar.

10. In view of the discussions made above, Rule 94 (4) (a) is not ultra vires the Act and the amount collected at the check gate by the S.T.O. is refundable to the petitioners on their adducing evidence to the effect that the fish on which tax has been collected at the check gate in fact has crossed the border exit check gate so as to reach the destination outside the State of Orissa.

With the above observation, the writ petition is disposed of. No costs.

A.K. Ganguly, C.J.

11. I agree.

