(2004) 04 MP CK 0030

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 175 of 2003

Vyapar Mandal Mandi APPELLANT

Vs

State of Madhya Pradesh and Others RESPONDENT

Date of Decision : 19-04-2004

Acts Referred:

Madhya Pradesh Municipal Limits Rules, 1996 — Rule 3, 4, 5, 6
Madhya Pradesh Municipalities Act, 1961 — Section 127, 160, 164, 165, 166

Citation : AIR 2005 MP 9 : (2004) 2 JLJ 434 : (2004) 2 MPHT 552 : (2004) 2 MPJR 38 : (2004) 2 MPLJ 482

Hon'ble Judges : S.S. Jha, J;A.K. Gohil, J

Bench : Division Bench

Advocate : Mahesh Goyal, for the Appellant; Brijesh Sharma, Government Advocate for the Respondent No. 1, S.K. Agnihotri, for the Respondent No. 2 and 3 and D.K. Katare, for the Respondent No. 4, for the Respondent

Judgement

S.S. Jha, J.

Appellant has filed a writ petition before the single Bench under Articles 226 and 227 of the Constitution of India for quashing the resolution of respondent No. 2 Municipal Council, Morena and respondent No. 3 President-In-Council, Morena granting contract for recovery of terminal tax to respondent No. 4 Neeraj Sharma. Appellant petitioner has challenged the action of the State Government whereby the State Government has set aside the order dated 6-2-2003 passed by the Collector, District Morena. Petitioner had further prayed that the agreement dated 23-6-2003 and the supplementary agreement dated 10-7-2003 between Municipal Council, Morena and respondent No. 4 Neeraj Sharma be quashed being contrary to law. Petition has been dismissed by the single Bench. Thereafter, this letters patent appeal is filed.

Counsel for the appellant submitted that rules known as Terminal Tax (Assessment and Collection) on the goods exported from M.P. Municipal Limits Rules, 1996 (hereinafter, referred to as the "Rules of 1996") have been framed.

Rule 3 of the said Rules of 1996 provides that every person, businessman, establishment and the license holder under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 shall be responsible to collect the terminal tax on the goods at the rate specified in the Schedule, if he himself exports any goods as shown in the schedule or sale for the purpose of export. Rule 4 provides that the person, businessman, establishment or license holder, as mentioned in Rule 3 shall deposit in the Municipal Treasury the amount of terminal tax collected during the last months on the goods exported from the Municipal limits through their shop establishment along with the return upto 10th day of every month. Rule 5 provides that on examination of the return, if the Municipal Commissioner or the Chief Municipal Officer, as the case may be, requires any additional information, he shall give notice to the person concerned, businessman, establishment or in case of Krishi Upaj Mandi its license holder, and they shall submit such information within thirty days from the date of receipt of such notice. Competent Authority i.e., Chief Municipal Officer in the cases of Municipal Council and Nagar Panchayat and Commissioner in the case of Municipal Corporation may enter in the shop concerned, establishment or Mandi as the case may be to enquire into the information furnished in the return and may inspect the record as may be necessary. Rule 7 provides that on failure to submit the return and deposit terminal tax with the Municipal Treasury within the specified period, surcharge at the rate of five percent per month shall be levied and in case of submission of wrong return, the amount equal to ten times of the tax shall be payable. Counsel for the appellant submitted that the concerned assessee is required to recover the terminal tax and deposit with the Municipal Treasury and submit return. Authority, if not satisfied with the return may take action as provided under Rules 5 and 6 of the Rules of 1996 and if no return is filed, then surcharge may be recovered under Rule 7 or penalty be imposed for furnishing wrong return. He submitted that in these circumstances act of the respondent-Municipal Council in granting contract for recovery of export tax is contrary to law and such procedure is impermissible under the law. Counsel for the appellant further submitted that a representation was submitted to the Collector, Morena and the Collector, Morena vide order dated 6-2-2003 has stayed the proceedings of granting contract for recovery of terminal tax. Respondents proceeded with the auction and granted contract for recovery of export tax to respondent No. 4 Neeraj Sharma. Petition was opposed by the respondents and considering the rival contentions single Bench has dismissed the petition. In support of his contention, Counsel for the appellant has referred to the single Bench judgment of this Court in the case of Moolji Bhai and Others Vs. State of Madhya Pradesh and Another, wherein in Para 5 of the judgment, it is held that terminal tax cannot be collected at the check post, barrier or Naka by stopping trucks or other vehicles in which goods are being carried. The system of recovery of terminal tax must be discontinued. Rule 4 of the Rules of 1996, tax is to be deposited every month by 10th of the following month with the Municipal Treasury with the prescribed return. This is really self assessment subject to the checks and balances provided in Rules 4 to 8 of the Rules of 1996. Direction was given that the tax can be charged as per the Rules of 1996 by respondent Nagar Panchayat and the contractor is not empowered to recover the tax. Counsel for the appellant submitted that in view of the aforesaid judgment, order of the single Bench deserves to be set aside and action of respondent Municipal Council be quashed and agreement in favour of respondent No. 4 be declared null and void being contrary to law.

Counsel for the respondents submitted that contention of the appellant that Municipal Council has no power to recover any tax imposed under the Madhya Pradesh Municipalities Act, 1961 (hereinafter, referred to as the "Act") by public auction or by private contractor is misconceived. He submitted that Section 160 of the Act confers powers upon the Municipal Council or Nagar Panchayat. It provides that the Municipal Council may, by public auction or private contract lease the recovery of any of the taxes or fees which may be imposed under the Act subject to the conditions and limitation, if any prescribed by the State Government in this behalf. He submitted that the Municipal Council is empowered to recover the tax including the terminal tax u/s 127 (6) (n) of the Act and powers to recover the tax can be given to a contractor by a public auction or otherwise. He submitted that the Rules of 1996 framed are for the purpose of levy and assessment and provides the manner of collection of terminal tax and if the tax is not deposited by the assessee on his own, then same is liable to be recovered/collected under the provisions of Section 160 of the Act. He submitted that Full Bench of this Court in the case of Sindhi Sahiti Multi Purpose and Transport Cooperative Society Ltd., Bhopal and Anr. v. State of M.P. and Anr. (1995 MPLJ 176) has upheld the right of the Municipal Council to recover tax through auction. He referred to the observations of the Full Bench in Paragraphs 22, 23 and 24 of the Judgment. Paragraph 24 is reproduced below :--

"24. Taxation and collection of tax are no doubt sovereign functions. The sovereign himself or itself cannot collect the tax. Tax has to be collected through appropriate agency. The agency can be a permanent cadre of employees. The agency can also be temporary agents on whom is conferred the authority to collect the tax, however, of course subject to the control of the sovereign or the local body. Under the bye-laws, what is intended is creation of such an agency. The agent cannot be expected to attend to the job without any remuneration. Where the employees collect the tax, they deposit the entire amount in the municipal fund and draw their pay. The same method could be followed under the scheme of auction. The successful bidder could be required to deposit the entire collection in the municipal fund and he may be separately paid for his exertion. Under the bye-laws, instead of depositing the entire amount and taking back the remuneration, the net amount is required to be deposited. Where the collection agency has to be remunerated, remuneration may be fixed on any reasonable basis including percentage or a lump sum. At the same time, the local body may secure guarantee of minimum collection. All these factors are taken into consideration in devising the mode of collection by auction. The local body is assured of minimum collection which is as a matter of fact the maximum possible amount realisable. The local body is secured from loss likely to cause by inefficiency of the collection agent. At the same time, the same agent is assured of remuneration. We are unable to agree that the scheme propounded by the bye-laws is contrary to any of the provisions of the Act. The fact that collection of tax is made through an agency which necessarily has to work under the authority of the local body cannot contravene the provisions of Article 265 of the Constitution. There is no specific provision in the Act requiring collection of tax to be made only through permanent employees of the local body. Arrangement for collection is left to be made by the local body subject to the broad scheme of the Act. The local body has made bye-laws providing for collection of tax by auction. We are unable to agree that this mode of collection is contrary to the Act and the intention of the legislature. We are also unable to agree that the contractor and the staff are beyond the restrictions of law. There is no data in support of the contention that the arrangements secured by the contractor would fetch him undue profit. On the other hand, the data provided by the local body. We, therefore, reject the contention of the petitioners and uphold the mode of collection challenged by the petitioners.

Counsel for the respondents submitted that it is not necessary that the tax collecting machinery should be the employees of Municipal Council but tax can be recovered through any other person authorised by the Act. Collection of tax by auction is common in the Municipal Council. Even today, all the Municipalities are collecting toll tax by auction as there may be cases where regular employees of the Corporation are not able to realise whole tax due. It is common experience that Municipal Council or the Municipality has not been successful in collecting entire amount of tax. However, in cases of auction, minimum amount of tax is ensured. u/s 106 of the Act, Municipal Council has to make expenses for recovery of taxes whereas in the cases of recovery by mode of auction, the contractor may be saving a part of collection for himself as remuneration including some profit which may be fixed on any reasonable basis including percentage or a lump sum. The amount so deposited by the contractor has been held as all money raised by taxes for the purpose of the Act u/s 105. Full Bench has considered the functioning of taxation and collection of taxes and further requirement of crediting the amount of funds to Municipal funds and auction or right to collect taxes. He further submitted that once power is conferred to recover the tax by the Municipal Council, then Municipal Council has power to auction recovery of tax through third agency u/s 160 of the Act. Counsel for the respondents further submitted that in the light of aforesaid Full Bench decision of this Court, judgment in the case of Moolji Bhai and others (supra) is per incuriam as that judgment has not considered the scope of Section 160 of the Act. Appellant''s contention that recovery of terminal tax by way of auction is bad in law is wholly misconceived. Rules of 1996 are procedural in nature for recovery of tax and they cannot override the main Act. When Municipal Council has power to recover the tax which is validly imposed, then appellant is liable to pay the tax.

We have considered the arguments of the Counsel for both the parties.

Section 127 of the Act empowers the Municipal Council to impose tax under the Act. This section relates to imposition of tax specified in Sub-section (1) subject to any general or special order which the State Government may make in this behalf and Sub-section (6) (n) provides for terminal tax on goods or animals exported from the limits of the Municipal Council. Thus, this tax can be recovered subject to any general or special order which the State Government may make. Powers had been conferred upon the Municipal Council and the manner of collection is provided under the Rules of 1996. Rules 3 to 7 of the Rules of 1996 are reproduced below :--

"3. Every person, businessman, establishment and the license holder under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (No. 24 of 1973), shall be responsible to collect the terminal tax or the goods at the rate specified in the Schedule, if the himself exports any goods as shown in the schedule or sale for the purpose of export.

The person, businessman, establishment or license holder, as mentioned in Rule 3 shall deposit in the Municipal Treasury the amount of terminal tax collected during the last month on the goods exported from the Municipal limits, through their shop establishment alongwith the return up to 10th day of every month.

If on the examination of the return, the Municipal Commissioner or the Chief Municipal Officer, as the case may be required any additional information, he shall give the notice to the person concerned, businessman, establishment or in case of Krishi Upaj Mandi, its license holder, and they shall submit such information within 30 days from the date of receipt of such notice.

The Municipal Commissioner/Chief Municipal Officer, as the case may be or any Municipal Officer/employee authorised by them, with the prior approval of Commissioner in case of Municipal Corporation and Chief Municipal Officer and in case of Municipality and Nagar Panchayat, may enter in the shop concerned, establishment or Mandi, as the case may be, to enquire into the information given in the return and may inspect the record as may be necessary.

If the return is not submitted or the amount of terminal tax is not deposited in the Municipal Treasury within the period specified in Rule 4, a surcharge at the rate of five per cent per month shall be payable and in case of submission of wrong return, the amount equal to ten times of the tax shall be payable :

Provided that with the approval of the State Government, the amount of penalty may be reduced."

Thus, under the provisions of the Rules of 1996, it is mandatory for the person, businessman, establishment and license holder under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam to collect terminal tax on the goods at the rate specified in the Schedule and shall deposit in the Municipal Treasury the amount of terminal tax collected during the last month on the goods exported from the Municipal limits through their shop, establishment alongwith return upon 10th day of every month. Thus, requirement of law is that every assessee mentioned in Rule 3 shall deposit the tax collected and submit his return on or before 10th day of every month. After return is filed, it will be scrutinised by the Authority under Rule 5, and if the Authority finds that some additional information is required, notice shall be given to the concerned assessee to furnish additional information and the assessee is required to furnish such information within a period of thirty days from the date of receipt of such notice. Rule 6 empowers the Municipal Authority to enter in the shop concerned, establishment or mandi to enquire into the information given in the return and may inspect the record if necessary. After this assessment, amount due is to be assessed. If Assessing Authority finds that return is not proper or incorrect or return is not filed properly, it may impose surcharge for not submitting the return and failure to deposit the terminal tax. Surcharge may be levied at the rate of five percent per month and in case of submission of wrong return, penalty equal to ten times of the tax shall be payable. However, with the approval of the State Government, Municipal Council may reduce the penalty.

Question involved in the appeal is whether contractor can be empowered to recover the terminal tax. The contractor can recover the tax only when after final assessment order for recovery is passed against the assessee and such amount may be collected by the Contractor. Such contract can be auctioned. But recovery by contractor shall be in accordance with the agreement and as per Rules of 1996. Contractor is required to recover the dues under the Rules of 1996. However, if the assessee refuses to pay the amount to the contractor, contractor is not empowered to take any coercive action. On failure to deposit tax due by the assessee, contractor is required to report the matter to the Authorities of the Municipal Council and the Municipal Council shall initiate proceedings for recovery of the tax under the provisions of the Act. Chapter VIII which begins from Section 164 of the Act relates to recovery of Municipal Claims. Section 165 confers power upon the Authorities of the Municipal Council to recover arrears and such recovery can be made through the Magistrate having jurisdiction within the limits of the Municipality and such Magistrate may order recovery by distress and sale of any movable property or attachment and sale of immovable property belonging to such person within the limits of his jurisdiction. Thus power to recover arrears of demand by coercive method vests with the Magistrate u/s 165 of the Act and it cannot be exercised by contractor. Section 166 further provides extent of special provisions for recovery of taxes. It provides that in the event of the notification issued by the State Government, it may suspend operation of Sections 168 to 170 and every amount due on account of any tax shall be recoverable on an application to a Magistrate in the manner provided in Section 165. Section 167 provides for issuance of warrant. When in spite of service of notice of demand under Sub-section (3) of Section 164 the assessee has failed to pay the demanded dues within fifteen days, such sum with all cost of recovery may be recovered under a warrant in the form prescribed by Rules of 1996 by distress and sale of movable property belonging to such person, or by attachment and sale of the immovable property belonging to him.

Thus, power under Chapter VIII of the Act can be exercised by the Competent Authority and not by the contractor. We, therefore, hold that after final assessment if any sum is found due it will be collected through contractor but the contractor will not be empowered to recover the amount by coercion. If tax is not paid, then recovery should be made strictly in accordance with the Act as provided in Chapter VIII of the Act. Function of attachment and auction of movable and immovable property cannot be conferred upon the contractor and these functions can only be exercised by the Competent Authority empowered under the Act. The contractor can only ask for payment of tax due and he cannot take coercive method for recovery of tax. Contractor must approach the assessee establishment or firm between sunrise to sunset and furnish notice of demand. Assessee must pay the tax due. However, on refusal of the assessee to pay the dues on the ground that some appeal is filed and order of recovery is stayed or on some other ground, contractor shall report the matter to the Municipal Council ;and Municipal Council then shall proceed to recover the tax by method strictly under Chapter VIII of the Act. However, we clarity that before the order of final assessment is passed, contractor will not be entitled to recover from the assessee any amount of tax which has not been determined finally. Rules and the Act do not empower the contractor to enforce coercive recovery.

Intention of the Legislature u/s 160 of the Act is to empower Municipal Council to grant contract for recovery of tax by public auction or by private contractor. It provides that the Municipality may by public auction or by private contract lease recovery of any tax or fee which may be imposed under this Act subject to condition and limitation.

Thus, tax which is to be recovered can only be recovered if the amount is finally assessed. Considering the import of the agreement, it is clear that the contract is only for collecting the tax and not for recovery. However, power of recovery cannot be conferred upon the contractor as mode of recovery of tax is provided under Chapter VIII of the Act. Thus, the contractor is empowered to collect the tax assessed and he is not entitled to recover the tax. He has right to collect the tax. On his failure to collect the tax, he may inform the Municipal Council and Council shall initiate action for recovery under Sections 165, 166 and 167 of the Act and may proceed further for recovery under the provisions of Sections 168 to 171 of the Act as the case may be. The orders shall be subject to appeal u/s 172 of the Act.

In the result, judgment of the single Bench is modified to the extent indicated above. Appeal is disposed of without any order as to costs.