State Of Madhya Pradesh And Ors vs Bharat Heavy Electricals on 14 August, 1997

Equivalent citations: AIR 1997 SUPREME COURT 3285, 1997 AIR SCW 3348, 1997 (5) SCALE 471, 1997 (7) SCC 1, (1997) 7 JT 427 (SC), 1997 (7) JT 427, 1997 (2) UJ (SC) 551, 1998 BRLJ 82, (1997) 106 STC 604, (1997) 43 KANTLJ(TRIB) 438, (1997) 7 SUPREME 365, (1997) 5 SCALE 471, (1998) 99 ELT 33, (2004) 117 ECR 271

Bench: J. S. Verma, B. N. Kirpal

PETITIONER:
STATE OF MADHYA PRADESH AND ORS.

Vs.

RESPONDENT:
BHARAT HEAVY ELECTRICALS

DATE OF JUDGMENT: 14/08/1997

BENCH:
J. S. VERMA, B. N. KIRPAL

ACT:

HEADNOTE:

JUDGMENT:

W I T H C.A. NOS. 199, 1486, 200, 201, 202, 203, 204, 243, 3333 of 1996 and Civil Appeal No. 5096 of 1997 J U D G M E N T Kirpal. J.

The common question of law which arises in these appeals by special leave relates of the validity of Section 7(5) of the The Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred to, for the sake of convenience `the Entry Tax Act). The said provision having been successfully challenged by the respondents before the Madhya Pradesh High Court, the State of Madhya Pradesh has filed the present appeals.

The facts, which are relevant for deciding the point in issue lie within a very narrow compass. The respondent are stated to be engaged in sale and purchase of various articles as raw material, some of which are brought into the local areas. They manufacture the finished goods which are sold in local areas in which they are manufactured and, subsequently, are sold outside the local area. The respondents are all registered dealers both under the Central and the State Sales Tax Act and its is the provisions of the act which are applied for assessment and recovery of entry tax.

The Entry Tax was enacted with the object of levying tax on the goods brought into the local area for consumption use of sale therein. Section 3 is the charging section and sub-section (1)(a) and (b) which are relevant are as follows:

> "3. Incidence of taxation -[1] There shall be levied an entry tax- [a] on the entry in the course of business of a dealer of goods specified in Schedule II, into each local area for consumption, use or sale therein; and [b] on the entry in the course of business of a dealer of goods specified in Schedule III, into each local area for consumption for use of such goods as (raw material or incidental goods) or as packing material or in the execution of work contracts but not for sale therein;
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> and such tax shall be paid by every dealer liable to tax under the Sale Tax Act who has effected entry of such goods:
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> [4]..... [5] Where a registered dealer referred to in sub-section (1) or sub-section (2) has, in the course of his business, sold local goods to other registered dealer and has failed to made the statement referred to in sub-section (1) [....], it shall be presumed that he has facilitated the evasion of entry tax on the local goods so sold and accordingly he shall be liable to pay penalty equal to [ten times] the amount of entry tax payable on such goods as if they were not goods of local origin. [6]....."

Prior to this amendment on 20th October, 1982, the penalty which was provided by sub-section [5] of Section 7 was only one and a half time the amount of entry tax payable on the goods. With the penalty having been increased, as a consequence of amendment of sub-section [5] of Section 7, the respondents filed writ petitions in the Madhya Pradesh High Court challenging the validity of the said provision.

The main ground on which the challenge was base, on behalf of the respondents before the High Court, was that the levy of the penalty of ten times the amount of tax was confiscatory in nature and was ultra vires of the provisions of the Act and was also violative of Articles 14 and 19 of the Constitution of India. It was the contention of the respondents that the presumption contained in sub-section [5] of Section 7, which was regarded as not being rebuttable was ultra vires as it did not give any direction to the assessing authority to reduce or waive the penalty on the ground of absence of mala fide or any trivial or technical defect.

The High Court construed Section 7[5] of the Entry Tax Act to mean that the presumption contained therein was not rebuttable and secondly the penalty which could be imposed for non-compliance was ten times the amount of tax which could not be reduced and therefore, it was confiscatory in nature. Consequently, the High Court came to the conclusion that the provisions of Section 7[5] of the Entry Tax Act were ultra vires.

On behalf of the appellants it is submitted by Mr. G.L. Sanghi learned senior counsel, that the High Court erred in coming to the conclusion that Section 7[5] was ultra vires. He drew our attention to an observation in the judgment of the High Court which seems to suggest that the Advocate General, appearing on behalf of the appellants herein, had submitted that Section 7[5] should be read down. The High Court had observed that this was not possible and the scheme of the Act did not confer jurisdiction on the authorities to reduce the penalty.

Mr. Sanghi contended that this approach of the High Court was incorrect and he submitted that looking at the scheme of the Act as a whole and Section 7 in particular he would concede that the presumption raised in sub-section [5] of Section 7 was rebuttable and, secondly, the said provision did not provide for a fixed rate of penalty.

We find merit in this contention. According to Section 3 the goods imported from outside the State which enter into any local area and are sold for consumption, use and sale therein are liable to pay entry tax if they belong to the categories mentioned in Schedule II. Thus goods which are manufactured in the local area become taxable only when they first enter into a local area other than the local area of its origin. It is in order to trace the goods manufacture in any local area and to ensure that the goods do not escape tax on their subsequent entry into another local area that certain checks and counter checks have been provided and in this connection Section 7 contains the requirement for registered dealer who sells the goods to make statement referred to in this section. The main purpose of the statement required to be furnished under Section 7 is to isolate the non-local goods from the local goods. There can be several good reasons why a registered dealer may have failed to make the statement required to be furnished by him by sub-section [1] and sub-section [2] of Section 7/ In our opinion it could not be the intention of the legislature that an accidental omission or non-furnishing of the statement of a good an valid reason must necessarily lead to the presumption that the registered dealer had the intention of facilitating the evasion of entry tax. Mr. Sanghi rightly drew our attention to a somewhat similar provision which was contained in Section 28B of the UP Sale Tax Act, 1948. The said section related to transit of goods by road through the State and the issue of transit passes. The said section reads as follows:

> "28B. Transit of goods by road through the State and issue of transit pass - When a vehicle coming from any place outside the State and bound for any other place outside the State passes through the State, the driver or other person in charge of such vehicle shall obtain in the prescribed manner a transit pass from the officer in charge of the first check-post or barrier after his entry into the State and deliver it to the officer in charge of the check-post or barrier before his exist from the State, falling which it shall be presumed that the goods carried thereby have been sold with the State by the owner or person in charge of the vehicle."

In order to determine whether the aforesaid words "shall be presumed" occurring in Section 28B were rebuttable or not this Court in Sodhi Transport and Anr. Etc. Etc. Vs. State of U.P. and Anr. Etc. Etc. [1986] 1 SCR 939) referred to Section 4 of the Indian Evidence Act and then observed at page 953 as follows:

> "..These words i.e. `shall presume' are being used in India Judicial lore for over a century to convey that they lay down rebuttable presumption in respect of matter with reference which they are used and we should expect that the U.P. legislature also has used them in the same sense in which Indian courts have understood them over a long period and not as laying down a rue conclusive proof.
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> In fact these presumptions are not peculiar to the Indian Evidence Act. They are generally used whenever facts are to be ascertained by a judicial process." In our opinion Mr. Sanghi is right in submitting that Section 7 should be read as containing a rebuttable presumption. This would mean that it will be open to the registered dealer to satisfy the authorities concerned that the non-submission of the statement under sub-section [1] and [2] of Section 7 was not with the intention to faciliate the evasion of the entry tax. In other words, sub-section [5] of Section 7 places the burden of proof on the registered dealer to show that the non-submission of the statement under sub-sections [1] and [2] of Section 7 was not with a view to faciliate the evasion of entry tax. If a registered dealer is unable to satisfy the authorities in this regard then in the absence of satisfaction, the presumption is that non-submission of statement has facilitate the evasion of entry tax. Construing Section 7(5) to contain a rebuttable presumption it does not suffer from any vice. It cannot then he held invalid as conducted by the High Court. It is the misconstruction of the provision which misted the High Court to the contrary conclusion.
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> It is not necessary for us to decide whether the provision for levy of penalty equal to ten times the amount of entry tax would be confiscatory and therefore, ultra vires since Mr. Sanghi, in fairness, submitted that the State treats is as the maximum limit and not fixed amount of penalty leaving no discretion for imposition of lesser penalty. This stand of the State itself concedes that the assessing authorities are not bound to levy fixed penalty equal to ten times the amount of entry tax whenever the provision of Section 7[5] are attracted. Depending upon the facts of each case the assessing authority has to decide as to what would be the reasonable amount of penalty to be imposed the maximum being ten times the amount of the entry tax. So construed sub-section [5] of Section 7 cannot be regard as confiscatory. Consequently, this also cannot be a ground for holding Section 7[5] to be ultra vires.
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> From the aforesaid it follows that Section 7[5] has to be construed to mean that the presumption contained therein is rebuttable and secondly the penalty of ten time the amount of entry tax stipulated therein is only the maximum amount which could be levied and the assessing authority has the discretion to levy lesser amount, depending upon the facts and circumstances of each case. Construing Section 7[5] in this

manner the decision of the High Court that Section 7[5] is ultra vires cannot be sustained.

For the aforesaid reason these appeals are allowed. The judgment of the High Court and the assessment, if any made are set aside, the assessing authority shall now determine afresh the amount of penalty, if any which is to be levied under Section 7[5] of the Entry Tax Act. Such determination shall take piece only after notice and reasonable opportunity of being heard is afforded to the respondent. There will be no order as to costs.