THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

WRIT PETITION.15984 OF 2016

ORDER: *(Per Hon'ble Sri Justice M.Satyanarayana Murthy)*

With the consent of both Sri Chandraiah Naidu, learned counsel for the petitioner, and Sri Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes, the writ petition is disposed of at the stage of admission itself.

This writ petition is filed challenging the assessment order in Rc.No.120/2009/SA1 dated 04.02.2016 and penalty order in Rc.No.120/2009/SA1 dated 31.03.2016 passed by the 3rd respondent and to declare the same as illegal, arbitrary and contrary to the provisions of the Andhra Pradesh Value Added Tax Act, 2005 (for short hereinafter referred to as 'The Act').

The petitioner's company, a registered dealer under the Telangana State VAT Act, is carrying on business of manufacturing plastic, wooden, iron furniture and other household articles, having its corporate office at KPHB Colony and its manufacturing unit at S.No.147 Beside Kadevi Industries, Ankireddypalli Village, Keesara Mandal, Ranga Reddy District, Telangana State. Further, the petitioner purchased raw material from M/s Daily Up Group (HK) Company Limited, China, vide Invoice No.TT20150823DUFAY dated 21.09.2015, BE No.2925845/14/10/2015/N/H and the goods were imported from Shekou Port, China to Chennai Port through shipment and reached Chennai Port on 14.10.2015. Thereafter, requisite custom duty was paid and the goods were taken delivery.

While transporting the goods in two lorries bearing Nos. AP 29 V 3869 and AP 04 TU 5877 from Chennai Port to the petitioner's manufacturing unit at Ranga Reddy District, they entered through Tada border check post, Nellore on 21.10.2015. It is the case of the petitioner that the drivers of the two lorries could not obtain the transit passes by paying necessary charges, as, the police did not allow the drivers to stop the vehicles on the ground of passage of VIP's convoy on that particular route and particular day, in view of the programme of laying of foundation stone at the capital city of Amaravati in Andhra Pradesh, but however, they proceeded further and reached Guntur.

While proceeding towards Nalgonda District via Guntur, a check was conducted by the 3rd respondent for two lorries at Srinivasa Petrol Bunk, Narketpalli Addanki Crossroads. On demand by the 3rd respondent, the drivers handed over all the relevant documents and records such as way bills, KK forms, bill of entry issued by the concerned custom authorities at Chennai, Self Printed CST e-way bill and self declaration forms. The drivers also explained the reason for their failure to obtain transit pass while entering into the State of Andhra Pradesh, through Tada border check post at Nellore. Dissatisfied with the explanation offered by the drivers, the 3rd respondent detained the goods along with the lorries by issuing Form-610 dated 21.10.2015, on the ground that the goods were being transported in the vehicles from Chennai Port to Ranga Reddy District, Telangana State, without self CST Way Bill and transit pass and for violation of Sub-section (6) of Section 45 of the A.P. VAT Act, 2005 read with Rule 56 of the AP VAT Rules.

The petitioner filed W.P.No.35371 of 2015 challenging the detention of goods and vehicles, this Court while ordering notice before admission, directed the respondents to release the vehicles along with the seized goods belonging to the petitioner, subject to payment of tax as demanded in the show cause notice dated 26.10.2015. It was also made clear that the amount to be paid by the petitioner shall be subject to the final order that may be passed by the respondents/authorities after considering the explanation submitted by the petitioner to the show cause notice. Subsequently, the petitioner complied with the directions issued by this Court and got the goods released and transported the goods to its the manufacturing unit. To the show-cause notice dated 26.10.2015, the petitioner submitted an explanation to 3rd respondent and the same was returned for the reason that it does not contain the signature and it was filed in his individual capacity. Thereafter, the dealer after complying the objections raised by the 3rd respondent, again submitted his explanation vide letter dated 19.11.2015 on behalf of the firm.

While the matter stood thus, W.P.No. 35371 of 2015 was disposed of by this Court by an order dated 23.11.2015, leaving it open to the respondents/authorities to take necessary action in accordance with law. In the intervening time, the 3rd respondent passed the impugned order in Rc.No.120/2009/SA1 dated 04.02.2016, confirming the proposed VAT of Rs.2,15,874/-, without considering the explanation submitted by the petitioner.

The 3rd respondent issued penalty show cause notice in Rc.No.120/2009/SA1 dated 10.02.2016, proposing to levy a penalty of Rs.4,31,748/- for contravention of Section 45(7)(a) of the AP VAT Act 2005. Thereafter, the petitioner submitted his explanation dated 27.02.2016 to the show cause notice dated 10.02.2016. It is specifically asserted in paragraph 4 of the explanation that the petitioner has no intention to evade the tax and that the goods crossed border check post, to prove the same, he has enclosed the way bill issued by the Commercial Taxes Department which clearly establishes that the said goods are imported goods and not liable for tax and not intended for sale in the State of Andhra Pradesh. It is also submitted that inspite of submitting all the relevant documents to substantiate the explanation, the third respondent has passed order dated 04.02.2016. Dissatisfied with the explanation submitted by the petitioner, the third respondent came to the conclusion that the petitioner had contravened Section 45(7)(a) of the AP VAT Act, 2005, and confirmed penalty of Rs.4,31,748/- as proposed in the penalty show cause notice dated 10.02.2016.

Sri Chandraiah Naidu, learned counsel for the petitioner, while contending that the presumption under Section 47 of the A.P.VAT Act is rebuttable, by producing CST e-way bills before the 3rd respondent, the petitioner could rebut the presumption and proved that the goods were not sold within the limits of State of Andhra Pradesh and the goods crossed the border check post of Andhra Pradesh. Thus, the petitioner is not liable either for payment of VAT on the goods and penalty for the alleged contravention of Section 47 of A.P. VAT Act. In support of his contentions, he placed reliance on the judgment of the Supreme Court rendered in "**Sodhi Transport Co. and others v. State of U.P and others**[1]".

Whereas, Sri Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes, contended that as the petitioner failed to obtain transit pass while passing through the State of Andhra Pradesh, therefore, the goods are liable to be confiscated to the State. In the absence of proof of crossing the vehicle with goods, the border check post of Andhra Pradesh, the petitioner is liable for payment of tax, penalty and accordingly, the 3rd respondent imposed tax and penalty by following the necessary procedure. In support of his contentions, he placed reliance on the judgment of the Supreme Court rendered in "***Assistant Commerical Taxes Officer v. Bajaj Electricals Limited***[2]".

Undisputedly, the petitioner while entering into the State of Andhra Pradesh through Tada border check post did not obtain entry pass to go to Ranga Reddy District, where the manufacturing unit of the petitioner is situated and he explained the reason for not obtaining the entry pass at the border check post, Tada, Nellore District. However, the vehicle and goods were detained by the 3rd respondent for non-compliance of Section 47 of A.P.VAT Act, despite, the explanation offered by the driver of the vehicle.

The petitioner approached this Court by filing a Writ Petition No.35371 of 2015 challenging the detention notice; this Court passed an interim order on 30.10.2015 directing the 3rd respondent to release the goods and vehicle subject to payment of tax. Finally, the writ petition was disposed of by this Court on 23.11.2015.

After disposal of the Writ Petition No.35371 of 2015, a show-cause notice was issued to the petitioner by the 3rd respondent proposing to levy tax of Rs.2,15,874/- in

Form 305-A of A.P. VAT Act. The petitioner submitted his explanation to the said show-cause notice raising several contentions, but the 3rd respondent passed an order

in Form 305 of A.P.VAT Act dated 04.02.2016 confirming the proposed VAT of Rs.2,15,874/-. The assessment order is also under challenge in this writ petition for non consideration of the explanation submitted by the petitioner.

A penalty show-cause notice dated 10.02.2016 was served on the petitioner by Registered Post calling upon the petitioner to pay penalty of Rs.4,31,748/- for contravention of Section 45 (7) (a) of A.P.VAT Act. The petitioner submitted his explanation contending that the goods crossed the border check post at Kodikonda, entered into the State of Telangana and enclosed the copies of e-way bills for perusal of the 3rd respondent, but the 3rd respondent without considering the specific contention of the petitioner raised in paragraph No.4 of the explanation, passed the assessment order.

In the penalty order dated 31.03.2016, the 3rd respondent did not note the specific contention of the petitioner about vehicle and goods crossing border check post and entering into the Telangana. The 3rd respondent observed simply that the dealer has failed to discharge the burden that the goods under transport were not intended for sale or unloading within the State of Andhra Pradesh. The entire order is silent regarding consideration of e-way bills enclosed to the explanation, evidencing crossing of border check post and entering into the State of Telangana. Thus, the 3rd respondent did not consider the specific plea and documents enclosed to the explanation submitted to the penalty show-cause notice, passed the impugned order dated 31.03.2016. The penalty order is arbitrary since it was passed without considering any document enclosed to the explanation.

The presumption contained under Section 47 of the A.P. VAT Act is rebuttable presumption and the dealer/petitioner can rebut the presumption that the goods crossed the border check post of State of Andhra Pradesh and not intended for sale in the State of Andhra Pradesh by producing evidence. Section 47 of the A.P. VAT Act obligates the driver or the person-in-charge of the vehicle to obtain transit pass while coming from any place outside the State and bound for any other place in the State, in the prescribed manner and deliver it to the officer-in-charge of the border check post i.e. last check post or barrier before his exit from the State, failing which the authority shall presume that the goods carried thereby have been sold within the State by the owner or person-in-charge of the vehicle. Rule 58 of the Rules framed under the Act further contemplates that a transit pass has to be obtained on payment of fee of Rs.50/- in cash or by way of Demand Draft or treasury challan to the officer-in-charge of the check post or barrier after his entry into the State. Proviso thereto further clarified that if the driver or person-in-charge of the goods vehicle plans to enter into the State through a route on which there is no check post at the border of the State, he shall obtain, prior to entry into State Border, transit pass from nearest check post or generate online e-Transit pass from the website created for this purpose, make self entry online the date of entry into State and in case he is exiting from State Border through a route on which there is no check post, he shall also make self entry online the date of exit from State. The driver or the person-in-charge of the goods vehicle shall carry the original and duplicate copies of the transit pass and shall tender the original copy to the officer-in-charge of the last check post or barrier before his exit from the State. But in the present case, the driver of the vehicle or the person-in-charge, admittedly failed to obtain the transit pass and contravened Section 45 (7) (a) of the Act. However, the liability to pay tax and penalty would arise if the person-in-charge of vehicle failed to rebut the presumption contained in Section 47 of A.P. VAT Act. In the present case, the petitioner allegedly submitted e-way bills, on which the exit check-post affixed its stamp to establish that the goods were not sold within the State of Andhra Pradesh and crossed the border check post, entered into the State of Telangana. When such rebuttal evidence brought on record, the 3rd respondent would have considered the evidence produced before him to rebut the statutory presumption contained in Section 47 of the A.P. VAT Act, but simply the 3rd respondent ignored the documents produced by the petitioner and imposed penalty.

While dealing with 'rebuttable presumption' under Section 28, 28-B of U.P. Sales Tax Act, the Supreme Court has laid down the principle in Sodhi Transport Co. and others v. State of U.P and others (referred supra), that, the words "it shall be presumed" in Section 28-B only require the authorities concerned to raise a rebuttable presumption, that the goods must have been sold in the State if the transit pass is not handed over to the officer at the check-post or the barrier near the place of exit from the State. A statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the legislature cannot otherwise levy. A rebuttable presumption has the effect of shifting the burden of proof. The authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the State and in doing so relies upon the statutory rule of presumption contained in Section 28-B of the Act which may be rebutted by the person against whom action is taken under Section 28-B. The person concerned having opportunity to displace the presumption by leading evidence, there is no unconstitutionality in it. When once a finding is recorded that a person has sold the goods which he had brought inside the State, he would be a dealer even according to the definition of the word 'dealer' as it stood from the very commencement of the Act subject to the other conditions prescribed in this behalf being fulfilled. There is, therefore, no substance in the contention that a transporter was being made liable for the first time after 1979 with retrospective effect to pay sales tax on a transaction which is not a sale.

A presumption is not in itself evidence but only makes a prima facie case for the party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. Having regard to the definition of 'may presume' in Section 4 of the Evidence Act, it is open to a court, in its discretion, either to draw a presumption referred to in a law or not. The words "shall presume" require the court to draw a presumption accordingly, unless the fact is disproved. They contain a rule of rebuttable presumption. When presumption is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

In view of the law declared by the Apex Court, if the dealer or the person-in-charge of the goods vehicle is able to rebut the statutory presumption by producing satisfactory evidence that the goods were not intended for sale in State of Andhra Pradesh or the goods crossed border of Andhra Pradesh, such dealer or the person-in-charge of the vehicle is not liable to pay tax and penalty since the goods were not sold within the State of Andhra Pradesh, but the 3rd respondent did not consider the documents produced by the petitioner to rebut the statutory presumption, passed the impugned order by imposing penalty.

Sri Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes, though contended that since the person-in-charge of the vehicle did not obtain the transit pass, the petitioner is liable to pay tax and penalty, he placed reliance on the judgment rendered by the Supreme Court in Assistant Commercial Taxes Officer's case (referred supra), but the same is no way helpful for the reason that the petitioner enclosed copies of e-way bills to rebut the presumption. In the above said case, non-compliance of Section 78 (2) of the Rajasthan Sales Tax Act, 1994 was considered and held that production of Form ST 18-A was the responsibility of the transporter and the consignor and when the goods were not accompanied by Form ST 18-A or if the documents appear to be false or forged, then the person-in-charge of the check post may seize the goods recording the reasons in writing. The law laid down in the above judgment is not in dispute, but the principle laid down therein is not applicable to the facts and circumstances of the present case.

According to the law declared in Sodhi Transport Co. and others v. State of U.P and others (referred supra) when the dealer or person in-charge of vehicle proved that the goods were not sold within the State of Andhra Pradesh, the petitioner is not a dealer in

Andhra Pradesh as defined in Section 2 (10) of A.P. VAT Act and not liable to pay tax and penalty. In fact, in pursuance of the order passed by this Court in W.P.No.35371 of 2015 the petitioner got released the goods on payment of tax. After receiving a show-cause notice, the petitioner submitted his explanation, but the same was not considered by the 3rd respondent and passed an order levying tax of Rs.2,15,874/-. This Court cannot undertake the exercise of deciding whether the petitioner rebutted the presumption or not while exercising the power of judicial review under Article 226 of Constitution of India. Hence, if the impugned orders passed by the 3rd respondent in Rc.No.120/2009/SA1 dated 04.02.2016 and Rc.No.120/2009/SA1 dated 31.03.2016 are set aside as the documents enclosed to the reply submitted to the show-cause notice i.e. copies of e-way bills were not considered by the 3rd respondent and the 3rd respondent is directed to consider the evidence produced by the petitioner to rebut the presumption under Section 47 of the Act and pass appropriate orders in accordance with law, ends of justice would be met.

In view of the aforesaid discussion, the writ petition is disposed of setting aside the impugned orders passed by the 3rd respondent in Rc.No.120/2009/SA1 dated 04.02.2016 and Rc.No.120/2009/SA1 dated 31.03.2016 and

the 3rd respondent is directed to consider the material produced by the petitioner to rebut the presumption under Section 47 of the A.P. VAT Act and pass appropriate orders in accordance with law by recording reasons for the conclusion of the 3rd respondent. No order as to costs. Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand dismissed.

JUSTICE RAMESH RANGANATHAN

JUSTICE M.SATYANARAYANA MURTHY

24.06.2016.

Ksp

[1] (1986) 2 Supreme Court Cases 486

[2] (2009) 1 Supreme Court Cases 308