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Court No. - 1

Case :- MISC. BENCH No. - 29277 of 2016

Petitioner :- Instakart Services Pvt. Ltd. Thru. Its Authorised Signatory

Respondent :- State Of U.P. Thru Special Secy. Institutional Finance & Ors

Counsel for Petitioner :- Saurabh Lavania

Counsel for Respondent :- C.S.C.

Hon'ble Amreshwar Pratap Sahi,J.

Hon'ble Ravindra Nath Mishra-II,J.

Heard Sri Tarun Gulati, learned counsel for the petitioner and Sri H.P. Srivastava, learned Additional Chief Standing counsel for the respondent No.1 and 2.

Issue notice to the learned Advocate General.

This Court had called upon the respondents to obtain instructions under the order dated 13.12.2016 extracted hereinbelow:-

"Heard Shri Tarun Gulati, learned counsel for the petitioner and Shri H.P. Shrivastava, learned Addl. Chief Standing Counsel for the respondent/State.

This petition questions the legality of the imposition of tax of entry on goods as inserted by way of an amendment in the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 and Uttar Pradesh Tax on Entry of Goods into Local Areas (Amendment) Act, 2016 (UP Act No.18 of 2016) notified on 16th September, 2016.

Apart from the other contentions raised, the two primary contentions that have been advanced before the Court are to the effect that this imposition of tax on specified goods as per Section 4A is discriminatory, inasmuch as, the tax is being imposed only on goods being brought from outside the State through e-commerce or online purchase. The challenge is that the mode of transaction cannot be the foundation or basis of such imposition, inasmuch as, the constitution bench judgment in the case of M/s Jindal Stainless Ltd. & Anr. Vs. State of Haryana & Ors. and other connected appeals - 2016 SCC OnLine SC 1260 has dealt with the matter and

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in view of the ratio of the aforesaid decision such discrimination being practised by the State renders the provisions of Section 4A ultravires as being violative of Articles 14, 286 & 304(a) of the Constitution of India.

The second limb of the argument on the constitutionality and validity of such imposition is being advanced on the ground that by virtue of the 101st amendment to the Constitution vide notification dated 08th September, 2016, Entry 52 from List II of the VIIth schedule has been completely omitted, and by virtue of Clause-19 of the said notification namely the Constitution Amendment Act, 2016, only such laws were saved for the period of one year that existed immediately before the commencement of the said act.

The contention is that the impugned enactment has been notified on 16th September, 2016 and consequently on the date of such notification, the absence of legislative competence was writ large as Entry 52 of List II had already been deleted and consequently, the imposition of such tax under an incompetent legislation would be impermissible.

To substantiate his submissions Shri Gulati has invited the attention of the Court to the Division Bench judgment of the Patna High Court in the case of M/s Instakart Services Pvt. Ltd. Vs. State of Bihar-Civil Writ Jurisdiction Case No. 6155 of 2016 alongwith other connected appeals decided on 27th September, 2016. Apart from this, the imposition of such entry tax in the State of Uttarakhand has also been assailed in W.P.M.S. No.432 of 2016 by the same petitioner where an interim order has been passed on 16th March, 2016.

Shri Gulati, however, submits that in addition to the aforesaid issues raised and considered by the two High Courts there is a peculiar element in the present case where the issue of discrimination as also the issue of legislative competence is involved. He, consequently, prays for an interim relief.

The petition has been opposed by the State.

In view of the contentions so raised it would be appropriate that the learned counsel for the State is called upon to receive its instructions on behalf of the State and assist the Court on Monday i.e. on 19.12.2016.

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List on 19.12.2016.

A copy of the order be given to the learned Chief Standing Counsel for necessary compliance today."

Today, learned Additional Chief Standing Counsel has produced the gist of the instructions given in writing by the Commissioner Commercial Tax, Government of Uttar Pradesh, Lucknow responding to the queries raised by the Court under the order aforesaid.

Learned Additional Chief Standing Counsel has urged that since Clause 19 of the Constitution (One Hundred and First Amendment) Act, 2016 saves the existing provisions of the Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 for a period of one year until amended or repealed by a competent Legislature, then in that event, the Legislature was competent to have brought into force the provisions of Section 4-A by the impugned notification that is under challenge before this Court. Thus, there was no lack of legislative competence and consequently, this argument on behalf of the petitioners cannot be sustained.

The next submission of the learned Additional Chief Standing Counsel is that State had to replenish its revenue and in aid of such exercise of power the introduction of the aforesaid provisions cannot be said to be unjustified.

Thirdly, he submits that such imposition does not attract the issue of discrimination as raised by the petitioner and hence there being no unconstitutional exercise of power so as to create a restriction on trade commerce or intercourse between the States, the imposition can be clearly sustained constitutionally. He therefore submits that the grounds raised being one of policy are also supported in view of the law laid down by the Apex Court in **Bhavesh D. Parish and others. Vs. Union of India and another (2000) 5 SCC 471.**

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Replying to the aforesaid submissions, learned counsel for the petitioner submits that firstly, Clause 19 of the Constitution (One Hundred and First Amendment) Act, 2016 only saves the then existing provisions for a period of one year and therefore, the charging Section i.e., Section 4 of 2007 Act, continues to exist and which could have been amended by the State Legislature. In view of the aforesaid saving provision of Clause 19 what could have been amended or repealed, was the existing provisions and no fresh charge or levy or tax could have been introduced that has been done by introducing Section 4-A under the impugned amendment.

He further submits that discrimination is at large and even otherwise, such inter-State commerce cannot be impeded in view of the constitutional protection guaranteed to the States under the federal structure of the Constitution. It is urged that this would create unlawful fiscal barriers that would result in unprecedented price hikes and would be an additional burden not only on the traders but also on the public at large. He therefore submits that the amendment is not only unconstitutional but is also against the public interest.

It is then submitted that what has been done under Section 4-A is an act of excessive delegation conferring powers on the Commissioner Commercial Tax which could not have been done without making a provision in the enactment itself in the absence of any power to charge the tax itself. The prescription by way of a procedure for taxing on an entry of specified goods through Online Purchase or E-Commerce that too, even for personal use, was not taxable prior to the introduction of the impugned amendment and therefore under Clause 19 of the Constitution (One Hundred and First Amendment) Act, 2016, no such powers have been saved with the State Legislature upon the abolition of Entry 52 of List 2 in the VII Schedule of the Constitution of India. Thus, the

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Legislature was completely denuded of its authority in legislating such an amendment which introduces a completely new taxing procedure and consequently, the levy of tax on entry of goods through Online Purchase or E-Commerce particularly for personal use, is beyond the authority of the State.

Learned counsel for the petitioner then submitted with the aid of the judgment of the Apex Court in the case of **Health For Millions. Vs. Union of India and others: (2014) 14 SCC 496**, and also an interim provision made by the Uttarakhand High Court in Writ Petition No.432 of 2016, vide order dated 16.03.2016 to urge, that in order to protect the revenue of the State, the petitioner shall furnish Bank Guarantee to the authorities concerned by mentioning it appropriately in the prescribed form for any such liability that may arise upon final decision in the writ petition.

We have considered the submissions raised and prima facie we find this amendment inserted by way of U.P. Act No.18 of 2016 to be completely beyond the authority and competence of the State Legislature as it ex facie introduces the levy of tax which was not existing under the old Act and therefore, could not be introduced by way of the amendment as has been done now. Consequently, Clause 19 of Constitution (One Hundred and First Amendment) Act, 2016 does not in any way prima facie saves the imposition of the tax through Online Purchase or E-Commerce particularly for personal use. Thus there is a complete lack of legislative competence as such the impugned provisions are rendered unconstitutional.

We therefore, on a prima facie consideration and after having heard the State on the aforesaid issues raised, find this to be a fit case for grant of an interim relief for the reasons aforesaid during the pendency of the writ petition as such

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exercise has been made permissible as per the ratio of **Health For Millions** case (supra).

Consequently, as an interim measure, the petitioner shall be entitled to trade through E-Commerce and on Online Purchase system but for the said purpose, the petitioner in order to secure the interest of the State shall furnish Bank Guarantee to the satisfaction of the authorities concerned by mentioning in the form prescribed for the said purpose in respect of such transactions.

Learned Chief Standing Counsel may file a counter affidavit within three weeks. One week's time is granted for filing rejoinder affidavit thereafter.

Since the issue relates to the realization of revenue by the State, it would be appropriate that the matter is disposed of at the earliest and consequently, we direct that the matter shall come up on 20.01.2017 for admission.

A certified copy of this order be given to the parties counsel today on usual charges.

Order Date :- 19.12.2016
Rajneesh)

[Ravindra Nath Mishra-II,J.] [Amreshwar Pratap Sahi,J.]