**IN THE HIGH COURT OF BOMBAY AT GOA**

**LD-VC-CW NO. 279 OF 2020**

JSW Steel Ltd. & anr. ….. Petitioners

***V e r s u s***

State of Goa & anr. ….. Respondents

Mr Mukul Rohatgi, Mr Venkatesh Dhond, Senior Advocates with Mr A. Gosavi, Mr Ninad Laad, Mr A. Hazamdar, Mr Ivo D'Costa, Mr Athrar Naik and Mr Amey Phadte, Advocates for the Petitioners.

Mr Deep Shirodkar, Additional Government Advocate for the Respondents.

**Coram:- DAMA SESHADRI NAIDU &**
**M. S. JAWALKAR, JJ.**

**Date**: **22nd October 2020**

**PC.**

The petitioner, a Company, has filed this Writ Petition, challenging the constitutional validity of the Goa Rural Improvement and Welfare Cess Act, 2000, and the Rules made thereunder. The challenge is confined to the levy of cess on inter-State transportation of goods by rail from the Port in Goa to other States, such as Karnataka.

2. Today, the learned Additional Government Advocate waived notice for the respondents. Then, we wanted to have the respondents' pleadings on record for us to appreciate the dispute the petitioners have raised. But Shri Deep Shirodkar, the learned Additional Government Advocate, has stressed that the respondents have a preliminary objection about the maintainability of the Writ Petition. According to him, the State has issued only a show-cause

notice; the petitioners may as well have replied with all the grounds available to them. Instead, they rushed to the Court.

3. In this context, Shri Shirodkar, the learned Additional Government Advocate has also drawn our attention to the scope of the notices: a mere notice, as he puts it, to the petitioners to show cause why they should not be levied the cess under the Act. He has also drawn our attention to the reply said to have been issued by the petitioners. Shri Shirodkar has placed particular emphasis on the petitioners' response to the show-cause notice. In fact, the petitioners have sought time to come out with a detailed reply. In a sense, Shri Shirodkar would have this Court conclude that having not raised any objection to the respondents' notice on the merits, the petitioner's challenging the vires of the statute is premature.

4. As to this Court's role, Shri Shirodkar underlines that the Court does not indulge in judicial invalidation of legislation for the mere asking. Plainly put, no one should be permitted to assail any piece of legislation without a reasonable cause; adjudication in vacuum should be shunned. Shri Shirodkar has relied on *Kusum Ingots & Alloys Ltd. v. Union of India*[1].

5. In the end, the learned Additional Government Advocate has summarized his arguments and submitted that the petitioners might answer the show-cause notices with all pleas available to them and allow the authorities to adjudicate on the issue. Only in that eventuality should this Court have

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1 (2004) 6 SCC 254

jurisdiction to redress, if ever, the petitioners' grievances arising from that official exercise.

6. On the other hand, Shri Mukul Rohatgi, the learned Senior Counsel, instructed by the petitioners' counsel Shri A. Gosavi, has submitted that it is elementary that the maintainability of any judicial proceedings ought to be decided based on the petitioner's pleadings, rather than the respondent's defence. In fact, the defence at this stage assumes no importance.

7. According to the learned Senior Counsel, the petitioners have taken a plea that by the way, the authorities intend to apply the law to the petitioners, it falls foul of the constitutional scheme as to distributing powers in the federal set up. By any reckoning, if the State tries to stretch the statutory scheme to cover the petitioners, too, it certainly exposes itself to judicial review and should stand declared as ultra vires. He has also pointed out that this Court will make all efforts to save the legislation and, for that purpose, it may read it down. All this should take place once the respondents place their defence on record.

8. Shri Rohatgi has also pointed out that the respondent authorities function within the statutory parameters. So they cannot be sitting in appeal over, much less deciding the vires of, the legislation or its competence. The learned Senior Counsel has also drawn our attention to constitutional scheme with specific emphasis on Entries 30, 89, and 92B of the Union List and Entry 56 of the State List in Schedule VIII to the Constitution. Besides, he has taken

us through certain statutory provisions, such as section 2(a), 3, and 4 of the Act, too.

9. Emphasizing the constitutional constraints as to the State's legislative competence, the learned Senior Counsel has submitted that the first petitioner imports the coal to the port at Goa and then transports exclusively by train to other parts of the country. So, unless the transportation is through the inland roads of the State, this statute will have no application. According to him, much depends on the interpretation of the provisions, which are generic as to the nature of transportation. In the end, he asserts that the petitioners do have a cause of action for a notice from an authority lacking power is void. And the entire official exercise based on that void show-cause notice renders itself *non-est*. To drive home his point, the learned Senior Counsel has relied on *Union of India v. VICCO Laboratories*[2].

10. Heard Shri Mukul Rohatgi, the learned Senior Counsel for the petitioners and Shri Deep Shirodkar, learned Additional Government Advocate for the respondents.

11. Here, the facts, as the petitioners have pleaded, are clear. The respondents issued the first show-cause notice two years ago. Now, now recently they have come with the second one. They wanted the petitioners to show cause why the cess under the Act should not be levied on their coal they are importing to and transporting from Goa.

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2 2007(13) SCC 270

12. Indeed, there can be no quarrel about the well-established legal proposition that about the maintainability of any judicial proceedings, the suitor's cause as pleaded alone matters—not the defence, though. The petitioners have come up with a definite case that the authorities have no power to tax or levy cess on them under the Act. This assertion is on the premise that they have been using the railways to transport. And the "railways" falls under Union List.

13. According to the petitioners, if the respondents interpret the term "transport" in the Act to include the railways as well, then the Act becomes constitutionally susceptible. Therefore, even a show cause notice, according to the petitioners, could not be sustained because the authority that issues lacks the power. And it is essentially a question of *vires*.

14. In *VICCO Laboratories*, the Supreme Court has held that normally the writ court should not interfere at the show-cause stage. But this rule is not without exceptions. If an authority issues a show-cause notice either without jurisdiction or by abusing the process of law, certainly in that case, the writ court will not hesitate to interfere even at the notice stage. Of course, a mere assertion by the writ petitioner that notice was without jurisdiction or abusive of legal process would not suffice; it should be *prima facie* established to be so.

15. True, in terms of the dictum in *Kusum Ingots***,** the Supreme Court has held that "passing of a legislation by itself in our opinion does not confer any such right to file a writ petition unless a cause of action arises therefor". A

distinction between legislation and executive action should be borne in mind while determining the said question. When it receives the presidential assent and is published in the Official Gazette, unless specifically excluded, parliamentary legislation will apply to the entire territory of India. If the passing of legislation gives rise to a cause of action, a writ petition questioning the constitutionality can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled, would not determine a constitutional question in a vacuum.

16. In fact, *Kusum Ingots* has given its judicial imprimatur to the doctrine of constitutional avoidance. It is the rule of last resort, espousing judicial minimalism. If the Court is in a position to adjudicate the dispute brought before it on other grounds than those that impinge on the vires of the Act, the former must be the preferred option. Only under compelling circumstances should a Constitutional Court consider the vires of a validly legislated enactment. Simply stated, when the validity of an act is drawn in question, it is a cardinal principle that this Court will first ascertain whether constructing the statute is fairly possible by which that question may be avoided.

17. Here, it is for the respondents to come up with the defence and establish that the statutory vires need not be gone into. And, then, that may enable this Court to comprehend the contentions and decide whether the vires

should be gone into. Therefore, prima facie, we reckon that the petitioners' plea before us calls into question the show-cause notice as void—that is, emanating from an authority exercising his powers under an enactment that is legislatively suspect.

18. As a result, we hold that the petition is maintainable. The respondents may come up with their defence in the course of time.

Stand over to 26.11.2020.

**M. S. JAWALKAR** **DAMA SESHADRI NAIDU, J.**

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