

**(1958) 06 GAU CK 0007**  
**In the Gauhati High Court**  
**Case No : Civil Rule No. 126 of 1955**

M.L. Dalmia and Co. Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

**Date of Decision :** 30-06-1958

**Acts Referred:**

Assam Sales Tax Act, 1947 — Section 10, 19, 2(12)

**Citation :** AIR 1958 Guw 169 : (1959) 10 STC 41

**Hon'ble Judges :** Sarjoo Prasad, C.J.; Haliram Deka, J; G. Mehrotra, J

**Bench :** Full Bench

**Advocate :** S.L. Sharma and N.M. Lahiri, for the Appellant; D.N. Medhi, Sr. Government Advocate, for the Respondent

**Final Decision :** Allowed

## Judgement

Sarjoo Prasad, C.J.—The petitioner is a limited company and carries on the business of a building contractor. It has moved for a writ of mandamus or certiorari quashing the orders of the Sales Tax Officer directing the petitioner to get itself registered under the Sales Tax Act and requiring it to pay sales tax on its out-turn.

2. It was served with a notice u/s 10 of the Assam Sales Tax Act (Act XVII of 1947) and required to get itself registered as a dealer under the Act. By another notice it was also called upon to produce its accounts beginning from 1st April, 1950, to 31st March, 1954, with reference to its aforesaid business. The petitioner was thereafter also served with a notice u/s 19 of the Act, under which the Sales Tax Officer is empowered to assess a dealer in case of his failure to get himself registered and if the officer has information in his possession that the dealer was evading payment of tax. The petitioners objected to the notices in question and denied its liability to pay sales tax or to get itself registered under the Act. It is submitted that it was not doing any business of selling or supplying goods, it was simply a building contractor and undertook contracts for construction of buildings in which the petitioner also supplied the materials that

were requisite for the purpose and for the whole of which contract it received payment in a lump sum. The Sales Tax Authorities however insisted on the registration of the petitioner as a dealer under the Act and claimed that it was liable to be assessed for the business which it carried on. The question therefore which arose for consideration is whether a building contractor as such was liable to pay sales tax and get itself registered under the law in respect of the materials supplied for such building when there was no separate agreement for the price of these materials, except for the building as a whole. When the matter came up to us at an earlier stage, we considered it desirable, in view of the sharp conflict of judicial opinion on the point, to make a reference to this Full Bench.

3. The petitioner has strongly relied upon the decision in *Gannon Dunkerley and Co., (Madras) Ltd. v. State of Madras* [1954] 5 S.T.C. 216(Mad). The department, on the contrary, refers to other decisions which take the opposite view in favour of the department and particularly relies upon the definition of the [1954] 5 S.T.C. 216(GH). words "sale" and "sale price" under the Assam Sales Tax Act. The word "sale" as defined in Section 2(12) of the Act, inter alia, "includes a transfer of property in goods involved in the execution of a contract." The word "contract" has been defined in Sub-section (2) of that section as meaning any "agreement of carrying out for cash or deferred payment or other valuable consideration", amongst others, the construction of any building or other immovable property. Therefore according to the contention of the department the business carried on by the petitioner in execution of a contract is also included within the definition of "sale" as given in the Assam Sales Tax Act and as such its turnover is liable to assessment. Reference is also made to the word "sale price" as defined in Sub-section (13) of Section 2 in the said Act, where also under Clause (b) it says that "sale price" means

the amount payable to a dealer as valuable consideration for the carrying out of any contract, less such fraction of such amount as represents the prescribed proportion of the cost of labour used in carrying out such contract.

4. The above provisions of the Sales Tax Act are challenged by the petitioner as ultra vires the Government of India Act, 1935. The decisions in *Pandit Banarsi Das v. State of Madhya Pradesh* [1955] 6 S.T.C. 93. and *Bhuramal v. State of Rajasthan* [1957] 8 S.T.C. 463, favour the view of the department.

5. This Court is however relieved of giving any detailed decision on the point in view of the very recent pronouncement of the Supreme Court in *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd* [1958] 9 S.T.C. 353(Mad) on the analogous question which practically covers the points in dispute in the present case. That was an appeal from the judgment in *Gannon Dunkerley's case* [1954] 5 S.T.C. 216(Mad), to which I have already referred and on which the petitioner has strongly relied. In that case their Lordships were concerned with the interpretation of similar words in the definition of "goods" as given in Section 2(c) of the Madras Act, where the definition was amended to include materials "used in the construction, fitting out, improvement or repair of immovable

property or in the fitting out, improvement or repair of movable property" and the definition of "sale" in Section 2(h) was enlarged so as to include "a transfer of property in goods involved in the execution of a works contract". These words are similar in their import to the relevant provisions in the Act in question before us, which I have mentioned earlier. An explanation was also added to the word "turnover" in Section 2(i) of the Madras Act which runs as follows:-

Subject to such conditions and restrictions, if any, as may be prescribed in this behalf-

the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract.

6. It is significant that in substance these words are very similar to the words occurring in the definition of "sale price" in the Assam Act. Their Lordships after a consideration of the above provisions held that the expression "sale of goods" in Entry 48 in List II of Schedule VII of the Government of India Act, 1935, cannot be construed in its popular sense, but must be interpreted in its legal sense and should be given the same meaning as it has in the Sale of Goods Act, 1930. The expression "sale of goods" is a nomen juris, its essential ingredient being to sell movables for a price and property passing therein pursuant to that agreement. They further proceeded to observe that in a building contract which is one entire and indivisible-and that is its norm-there is no sale of goods and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale ; but the parties to the contract might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case according to their Lordships there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned. The Supreme Court therefore confirmed the view taken by the Madras High Court and disagreed with the opposite views expressed in some of the other cases. The present case, therefore, on the facts as they are, appears to fall under a building contract simpliciter, which is one and indivisible, and therefore the materials or goods that may have been supplied by the petitioner in the execution of those contracts would not fall within the definition of sale and as such were not assessable to tax under the Act. If, however, there exist distinct and separate contracts, one for the transfer of materials for money consideration and the other for payment of remuneration for services and for work done, the position would be different; and in that case the department would be competent to levy tax on the sale and supply of the materials which in fact were supplied under different agreements altogether independently of the building contract.

Similar observations were made by a Division Bench of this Court in disposing of Civil Rule No. 46 of 1957, G. B. Ghosh and Co. Ltd. v. Superintendent of Taxes, Jorhat, by an order dated 3rd July, 1957. The petitioner in that case denied that he sold any goods for the purpose of carrying out his contract. It was stated by him that in the execution of the contract certain articles were supplied, by the employers but other non-controlled materials, labour and technical skill for the work were provided by the petitioner for which he got a lump payment. The articles that he supplied, according to him, were not paid for separately, but that the property in those articles passed to the employers when the materials were fixed in the superstructure in pursuance of his contract to build along with the corpus of the structure itself. On those facts this Court observed as follows :

In our opinion, if he is able to satisfy the authorities concerned that on the transactions to which he refers or in respect of which he is alleged to be liable, there was actually no sale of goods concerned as contemplated by Section 2(12) of the Assam Sales Tax Act, 1947, he would not be liable to the assessment of any tax at all. If, on the contrary, the authorities find that actually there was sale of goods by the petitioner for which he received payments in specie, then there is no reason why they should not have jurisdiction to assess him.

7. We therefore hold that in this case, as the facts stand, the petitioner cannot be held to be a dealer within the meaning of the Sales Tax Act and he is not liable to be registered or assessed, simply because of the work which he carries on in execution of his contract of building. It must also be held that to the extent that the definition of "sale" or "sale price" has been enlarged in the Act to include materials supplied in execution of such contracts, without any separate agreement for them, they must be held to be ultra vires.

8. We accordingly allow the application and make the rule absolute but in the circumstances we would make no order for costs.

Mehtotra, J.

9. I agree.

Deka, J.

10. I agree.