

(1989) 01 MP CK 0020

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 3223 of 1987

Mulay Brothers

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 10-01-1989

Acts Referred:

Constitution of India, 1950 — Article 226
Madhya Pradesh Entry Tax Act, 1976 — Section 2, 3(1)
Madhya Pradesh General Sales Tax Act, 1958 — Section 2
Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 — Section 2, 3(1)

Citation : (1990) ILR (MP) 609 : (1989) MPLJ 422 : (1991) 81 STC 269

Hon'ble Judges : Y.B. Suryavanshi, J;C.P. Sen, J

Bench : Division Bench

Advocate : Rajan Pillai, N.S. Bhatt and S.P. Sharma, for the Appellant; R.K. Thakur, for the Respondent

Final Decision : Allowed

Judgement

C.P. Sen, J.

The petitioner-firm is seeking a declaration that it is not covered either under the M.P. General Sales Tax Act, 1958 (hereinafter referred to as "the Sales Tax Act"), or the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred to as "the Entry Tax Act") and, therefore, it is not liable to be registered under any of these Acts or to pay any tax. The petitioner is also seeking quashing of the notice dated June 8, 1987, issued by the Sales Tax Officer (respondent No. 2), u/s 29(1) of the Sales Tax Act for production of account books from the beginning of the business till todate, and the order of the Sales Tax Officer (respondent No. 3) dated September 10, 1987, to submit particulars about all the purchases made between the period December 1, 1986 to March 31, 1987 and April 1, 1987 to August 31, 1987, in regard to its work at Malajkhand, which according to the petitioner is a pure labour contract for excavation of rock and earth for levelling the ground.

The petitioner is a partnership firm, having its head office at Aurangabad in the State of Maharashtra where it is registered as a dealer under the Bombay Sales Tax Act, 1959 and has taken work at Malajkhanda, district Balaghat in the State of Madhya Pradesh. The petitioner is a contractor and undertakes labour/works contracts in different parts of India. The contract undertaken is exclusively in the nature of labour contract. The petitioner, on December 1, 1986, entered into an agreement with the Hindustan Copper Ltd., a Government of India undertaking (hereinafter referred to as "the Government Co.") which is extracting copper ore by employing the open cast method, for which excess earth above the level from where copper ore is located, is to be removed. The work of removal of excess earth, i.e., excavation and removal of about 2 million cubic metres of waste rock and earth has been entrusted to the petitioner. The total contract is valued at Rs. 5.30 crores, which is to be executed within a period of 20 months from the date of its execution. The terms and conditions are incorporated in the said agreement and the petitioner is not required to sell, supply or consume any material in execution of the work. For execution of the work, besides engaging labour, the petitioner has to use various machineries, like scrapers, bulldozers, loaders, piling excavators and tippers. For working its machineries, the petitioner requires diesel about 4 to 5 thousand litres, and lubricating oil 150 litres per day and also spare parts for operation and maintenance of its machineries. There is no sale of the diesel, lubricating oil or spares to the Government company, but the same were exclusively required for operation and maintenance of machineries. The petitioner is purchasing diesel, lubricating oil and spares in the State of Madhya Pradesh and in the State of Maharashtra and other places. Some of these materials are required to be transported to the State of Madhya Pradesh from outside the State and has to pass through Rajegaon check-post in Balaghat district. The petitioner, not being a dealer within the meaning of Section 2(d) of the Sales Tax Act and the petitioner not executing any works contract, as defined in Section 2(m) of the Entry Tax Act, it is not necessary for the petitioner to get registered under any of these Acts, nor submit any return or pay any tax. The petitioner-firm was surprised to receive the notice dated June 8, 1987, u/s 29(1) of the Sales Tax Act for production of the account books from the beginning of the business till today before the Sales Tax Officer, Balaghat (respondent No. 2). The petitioner raised a written objection that the firm and its activities in the State of M.P. do not make it liable for payment of any tax under these two enactments. In spite of clarifying the matter, the Sales Tax Officer, Chhindwara (respondent No. 3) required the petitioner to get itself registered under both these Acts. This was also objected to by the petitioner, yet, the Sales Tax Officer directed the petitioner to furnish full details of all the purchases made from outside the State between the period December 1, 1986 to March 31, 1987 and April 1, 1987 to August 31, 1987, including the bringing of bulldozers, trucks, dumpers and earth removing equipments at Malajkhanda, which is without jurisdiction and uncalled for. Therefore, the petitioner filed this petition, seeking the aforesaid reliefs. The respondents, in their return, admitted the factual position stated by the petitioner-firm about the contract given to it at Malajkhanda

by the Government company and the agreement entered into with that company, but contended that in view of the amendment of Article 466 of the Constitution, the State Governments are empowered to levy tax on the goods supplied for the execution of the works contract and accordingly the definition of "sale" in Clause 2(n) of the Act was amended with effect from July 1, 1984, so as to include transfer of goods in the execution of the works contract. As the petitioner started its work after July 1, 1984, it is liable to be included within the meaning of "dealer" u/s 2(d) of the Act. Any raw material or incidental goods utilised for the work is also liable for entry tax u/s 3(1)(b) of the Entry Tax Act. The works contract of the petitioner is fully covered by the incidence of taxation under both these Acts. Therefore, proceedings were started by the Sales Tax Officer, Balaghat, and the Sales Tax Officer, Flying Squad, Chhindwara. There is no illegality or infirmity in the proceedings. The petitioner is liable to be taxed for the works contract being executed in the State of Madhya Pradesh under both these enactments. The check-posts have been erected at different places to check evasion of tax under these enactments. Therefore, the notice dated June 8, 1987 and the order passed for production of accounts on September 10, 1987 are valid and legal and require no interference, since the petitioner-firm failed to get itself registered. Under the definition of the "works contract" u/s 2(m) of the Act, labour contract is also included. The turnover of the petitioner is more than Rs. 50,000 per annum. Besides no final order has yet been passed by the Sales Tax Officer and the petition is premature. Against the order that may be passed, the petitioner has a right of appeal under these Acts. Therefore, the petition is liable to be dismissed with costs.

Before going into the merits of the case, we have to consider the preliminary objection raised by the learned Deputy Advocate-General that the petition not being against any final order and merely against the notice issued for production of documents and the order passed for that purpose, it is premature. Against the final order of assessment that may be passed by the Sales Tax Officer, the petitioner has a right of appeal u/s 38 of the Sales Tax Act. The objection is misconceived, since the petitioner is challenging the notice and the order directing production of the account books, on the ground that the firm is not liable to the incidence of taxation under the Sales Tax Act and the Entry Tax Act, and the notice issued and the order passed by the Sales Tax Officer are illegal and without jurisdiction. It is not necessary for the petitioner to get itself registered as a dealer under the Sales Tax Act or the Entry Tax Act, or to submit any return or to pay tax under these two enactments, as its activities at Malajkhanda in the State of Madhya Pradesh do not bring it within the purview of these enactments. The Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, has held :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a

person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction u/s 34 of the Income Tax Act."

The Supreme Court further held that when an action of the Income Tax Officer is without jurisdiction, though there is other remedy available under the Income Tax Act, that is not sufficient reason for refusing to give relief by a writ prohibiting the authority from acting without jurisdiction.

Section 4 is the charging section under the Sales Tax Act, providing that every dealer whose turnover during the period of twelve months immediately preceding the commencement of this Act exceeds the limit specified in Sub-section (5) shall from such commencement be liable to pay tax under this Act on his taxable turnover in respect of sales or supplies effected in Madhya Pradesh. Sub-section (5)(cc) provides that in relation to a dealer who enters into a works contract and in the execution thereof supplies goods, the limit shall be fifty thousand rupees. Section 7 provides for levy of purchase tax and every dealer, who, in the course of his business purchases any goods, specified in Schedule II, which are used or consumed in manufacture or processing of goods, or used or consumed otherwise, shall be liable to pay tax. u/s 2(d) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration. Section 29 empowers the sales tax authorities to require production of accounts and documents and to inspect, search and seize books of accounts, documents and goods. Section 29-A deals with establishment of check-posts. An appeal is provided u/s 38 against an order of assessment.

The petitioner-firm has undertaken works contract for excavation and removal of waste rock and earth at Malajkhand and for that purpose uses various machineries, like scrapers, bulldozers, pukling excavators and tippers and for the operation and maintenance of these machineries, the petitioner consumes about 4 to 5 thousand litres of diesel and 150 litres of lubricant oil and spare parts, some of which are transported from outside the State of Madhya Pradesh. For the execution of the work, the petitioner is not required to supply any goods to the Government company. It is only required to extract rock/earth and dump them in various dumps at specified locations under its contract. The waste material exclusively belong to the Government company and the petitioner has no right, title or interest in the site or waste material so extracted. Disposal of waste material has to be by the order of the Engineer-in-charge of the works of the company. Therefore, the petitioner is not supplying any goods or consuming them for executing the work. It is merely consuming some diesel oil, lubricating oil and spare parts for operating and maintaining its machineries, which are used for executing the work. Clearly, therefore, the petitioner is not a dealer in the Madhya Pradesh State within the meaning of the M.P. General Sales Tax Act.

The relevant charging section under the Entry Tax Act is Section 3(1)(b), which provides that on the entry in the course of business of a dealer of goods specified in Schedule III, into each local area for consumption or use of such goods, as raw material or incidental goods or as packing material or in the execution of works contract, but not for sale therein, entry tax shall be paid by every dealer liable to tax under the Sales Tax Act, who has effected entry of such goods. Works contract has been defined in Section 2(m) to mean contracts relating to construction of works like buildings, dams and bridges and other immovable property, erection of factories, installation of machinery and fittings and installations to movable or immovable property in the execution whereof goods are consumed or used but not sold. u/s 2(bb), "incidental goods" means goods other than raw material and packing material for use by a dealer in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power.

The question is whether the petitioner is liable to pay entry tax for importing diesel, lubricating oil and spare parts and the machineries to the site of the work from outside the State of Madhya Pradesh for executing the work. In fact, the machineries brought to the site by the petitioner are its assets and those machineries are transferred from one place to another and they are brought back after the work is over. The work undertaken by the petitioner at Malajkhanda does not bring it within the definition of "works contracts" u/s 2(m) of the Act, which relates to construction of buildings, dams, bridges and other immovable property, erection of factories, installation of machineries, etc. The petitioner's work is only for excavation and removal of waste rock and earth, i.e., the levelling of the ground for facilitating the Government company for extracting copper ore by employing open cast method. The petitioner is not constructing any building, dam, bridges or erecting any factory or installing any machinery or fittings. Though diesel, etc., come under Schedule III, as mentioned in the charging Section 3(1)(b), but since these goods are not utilised in any works contract the petitioner is not liable to pay any entry tax for bringing these goods to the site of work. Besides, it is not required to consume or use any goods for executing the work. The diesel and lubricating oil and spare parts are being used for operation and maintenance of the machineries and not used as raw material in making any product. Therefore, the work undertaken by the petitioner does not come within the definition of "works contracts" u/s 2(m), nor the petitioner is liable to pay any entry tax. The Supreme Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Thomas Stephen and Co. Ltd., Quilon, has held :

"The cashew shells in the instant case, had been used by the assessee, a manufacturing company, as fuel in the kiln. The cashew shells did not get transformed into the end-product. They have not been used as raw materials in the manufacture of the goods. These have been used only as an aid in the manufacture of the goods by the assessee. Consumption must be in the manufacture as raw material or of other components which go into the making of

the end-product to come within the mischief of the section. Cashew shells do not tend to the making of the end-product. Goods used for ancillary purposes like fuel in the process of manufacture, do not fall within Section 5-A(1)(a) of the Act. Cashew shells, therefore, do not attract levy of tax u/s 5-A. The same is the position with regard to the lime shell and consumed stores, which have been used by the assessee only in the maintenance of the kiln and the factory and not used in the manufacture of the end-product."

The work undertaken by the petitioner is in the nature of labour contract and it does not come within the purview of works contract, as defined in the Act. In case the petitioner was required to execute the work entirely by employing labour and not any machinery, it cannot be made to pay any tax under these two enactments, and merely use of machinery for facilitating the work to be executed will not alter the situation.

The Supreme Court in *Vanguard Rolling Shutters and Steel Works Vs. The Commissioner of Sales Tax*, has held :

"It was therefore, clear that the transaction was a composite consolidated contract which was one and indivisible comprising labour and services executed for a lump sum. It was also clear that the materials were not merely supplied to the owner so as to pass as chattel simpliciter, but were actually fixed to an immovable property and after the same were fixed and erected they became a permanent fixture so as to become an accretion to the immovable property. The term in the contract providing for the advance payment of the entire price was a term meant for the convenience of the parties as the contractor did not want to take any risk for delayed payment of goods, but the contract would be completed only after the shutters were finally assembled at the site and fixed according to the specifications which was essentially the responsibility of the contractor. In these circumstances, the conclusion was inescapable that the present contract could not be said to be a pure and simple sale of goods or materials as chattels but was a works contract and the transaction was therefore not exigible to tax."

Relying on this decision, the Supreme Court, in *Sentinel Rolling Shutters and Engineering Company (Pvt.) Ltd. Vs. The Commissioner of Sales Tax*, has held :

"The erection and installation of the rolling shutter cannot be said to be incidental to its manufacture and supply. It is a fundamental and integral part of the contract because without it the rolling shutter does not come into being. The rolling shutters come into existence as a unit when the component parts are fixed in position on the premises and it becomes the property of the customer as soon as it comes into being. There is no transfer of property in the rolling shutter by the manufacturer to the customer as a chattel. It is essentially a transaction for fabricating component parts and fixing them on the premises so as to constitute a rolling shutter. The contract is thus clearly and indisputably a contract for work and labour and not a contract for sale."

In that case, the complete unit of the rolling shutters was not fabricated by the

assessee but it only manufactured the component parts and it was only when the component parts were fitted into position and fixed in the premises that the rolling shutter came into being as a commercial article. The petitioner's case, here, is even higher than the case of the rolling shutters, inasmuch as the petitioner, in the execution of the work, is not required to supply or consume any material. It has merely to excavate waste rocks and earth, and dump it at the specified place. However, the learned Deputy Advocate-General relied on a decision of the Supreme Court in *Commissioner of Sales Tax, Gujarat Vs. Sabarmati Reti Udyog Sahakari Mandali Ltd.*, that a contract of sale is a contract whose main object is the transfer of the property in and the delivery of the possession of, a chattel as a chattel to the buyer. It was entered into with the Government for manufacture and supply of kiln-burnt bricks, which were manufactured by the earth excavated from the Government land. It was a contract of sale and not a works contract and the assessee was liable to sales tax. In that case, it was not only to manufacture of bricks but also to sell them to the Government, i.e., the delivery of bricks after manufacture, was a chattel for consideration.

Accordingly the petition is allowed and it is declared that the petitioner-firm is not exigible to payment of any tax under the M.P. General Sales Tax Act, 1958, and under the M.P. Sthaniya Kshetra Me Mal Ke Pravesha Par Kar Adhiniyam, 1976, and consequently, the notice issued on June 8, 1987 and the order passed on September 10, 1987, are quashed. Under the circumstances, parties are to bear their own costs. The outstanding security amount shall be refunded to the petitioner.