(1967) 05 GAU CK 0001

In the Gauhati High Court

Nabin Chandra Barooah APPELLANT

Vs

The State and Another RESPONDENT

Date of Decision : 03-05-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 38
Criminal Procedure Code, 1898 (CrPC) — Section 242

Citation : (1967) CriLJ 1714

Hon'ble Judges : C. Sanjeevarao Naidu, C.J

Bench : Single Bench

Judgement

C.S. Nayudu C.J.

1. The petitioner complains that he had been illegally convicted of the offences under Sections 34A, 38(4) and 38(9) of the Assam Sales Tax Act, 1947 as amended by the 1964 Amendment Act (hereinafter called ''the Act'').

2. Section 38(4) of the Act lays down that whoever not being a registered dealer, falsely represents, when purchasing goods, that he is a registered dealer, shall, on conviction before a Magistrate and in addition to any tax or penalty or both that may be due from him, be punishable with imprisonment which may extend to six mouths or with fine not exceeding one thousand rupees or with both. Section 38(9) deals with evading the payment of tax and says that whoever fraudulently or wilfully evades the payment of any tax due under the Act, or conceals his liability to such tax on conviction is liable to a similar punishment.

3. The petitioner''s firm was dealing in contract works including well-rings, culverts, slabs and other articles. In the year 1958 the question whether a contractor carrying on works such as building etc. works is liable to sales tax or not under the Act, came up for consideration before their Lordships of the Supreme Court and it was held therein that as the contractor does not buy or sell as a dealer but buys things for the purpose of carrying out his business, namely the contract work it cannot be said that the articles that go into the construction works could be treated as covered by the word ''sale'' coming within the purview

of the Act. Following the view expressed by their Lordships of the Supreme Court the Department appears to have cancelled the registration of the petitioner''s firm with retrospective effect from 1.4.1956 and the order of cancellation was communicated to the petitioner, as seen from the records, on 11.8.61. The offences complained against the petitioner are said to have been committed by the firm during the period from 1.4.56 to 11.8.61.

4. The contention of the petitioner is that he is not liable to any punishment under the sections, as during the period his actions were covered by the registration certificate issued in his favour by the Department, so that when he dealt with third persons in purchasing goods, he was acting as a registered dealer by virtue of the certificate which was issued in his favour and which was current at the time, He was thus entitled to act as if in fact it was in force, the registration of the firm having been cancelled as late as 11.8.61, although with retrospective effect.

Such being the case, the petitioner''s firm cannot be blamed or taken to task for having functioned under the certificate which was current at the time of the acts complained of. The petitioner, therefore, cannot be said to have committed any offence. It is true that as the registration was subsequently cancelled, the actions which were good at the time they were done, were regarded by the department as bad, and hence they have led to the prosecution in this case. I, therefore, feel that there is no justification at all for prosecuting the petitioner, as no offence could be said to have been committed.

5. It is argued by Mr, Bhattacharjee for the opposite parties that even though the offence u/s 38(4) may not be said to have been committed by the petitioner an offence u/s 38(9) is to be deemed to have been committed, in as much as, having collected the tax, he has not accounted for the same, and thus he must be regarded as having evaded the payment of tax. The position is very peculiar.

Mr. Khound, the learned Counsel for the petitioner points out that he was ready to pay the tax and render accounts to the Department but the Department could not help him by serving notices, or demanding tax and hence, if there is any delay in payment, he is not responsible. There is a serious doubt on this point and the petitioner is entitled to the benefit of it. Further, there must be proof forthcoming that there was wilful evasion of the payment of tax or concealment of his liability on the part of the petitioner, but there appears to be nothing on the record to this effect. In my considered opinion having regard to the fact that the cancellation took place on 11-8-61 and no demand has been made in regard to the tax by the Department, it cannot be said that the petitioner has committed any offence u/s 38(9).

6. The objection taken by Mr. Bhattacharjee is that the accused petitioner had pleaded guilty and, therefore, he cannot resile from his plea and cannot, therefore, escape punishment which was given to him on the basis of his plea of guilty. The answer given by Mr. Khound to this argument is that as this is a

summons case, the requirement of Section 242, Criminal P. C. does not appear to have been satisfied at all, and the accused had not been asked to show cause against his conviction and the admissions made by him have been treated as a plea of guilty and followed by conviction. There appears to be some force in this contention.

7. Another objection taken to the conviction is that under the Act, it is only the ''dealer'' that could be prosecuted. Section 38 refers to the ''dealer'' having committed an offence and the ''dealer'' is the firm and not an individual man. Whenever a firm is to be prosecuted, it is obvious that one cannot pick and choose which partner is to be prosecuted, as it would amount to dissecting the body of partners constituting the firm, which is not permissible under the law. The firm being the ''dealer'' the entire firm has to be prosecuted. Even then, the question is whether an inanimate thing like a firm can be made to suffer punishment as an individual. This however, is assumed on the basis of a fiction of law. The petitioner alone in this case is prosecuted and not the firm as a whole. Another partner of the firm has since died and others were left out. The mere fact that under civil law the liability of the partners for debt due from the firm is joint and several has no relevancy in criminal law wherein the firm as a whole is deemed to be the offender and liable to prosecution as such. The conviction in this case is, therefore, unsustainable in law. This prosecution was not, therefore, a valid prosecution and the conviction, therefore, cannot be upheld.

8. The convictions and sentences are eat aside and this revision petition is allowed and the petitioner is acquitted of the charge.

