
(2002) 03 AHC CK 0010

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 741 of 2001

P.N.C. Construction Company Limited

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 14-03-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Trade Tax Act, 1948 — Section 2, 4B, 4B(2)

Citation : (2002) 128 STC 476

Hon'ble Judges : S.K. Sen, C.J; S. Rafat Alam, J

Bench : Division Bench

Advocate : Bharat Ji Agarwal, P.K. Misra and Piyush Agrawal, for the Appellant; Kesarwani and R.G. Padia, for the Respondent

Final Decision : Allowed

Judgement

S.R. Alam, J.—This petition under Article 226 of the Constitution is directed against the notice dated May 9, 2001 issued by the Trade Tax Officer, Sector 14, Agra, calling upon the petitioner to appear before him on May 16, 2001 and to file written reply as to why the recognition certificate issued under Sub-section (2), Section 4-B of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act") be not cancelled.

2. We have heard Shri Bharat Ji Agarwal, learned Senior Counsel appearing for the petitioner, Mr. Kesarwani, learned Standing Counsel appearing for respondents Nos. 1 to 3 and Dr. R.G. Padia, learned counsel appearing for respondents Nos. 4 and 5.

3. It appears that the petitioner is a public limited company incorporated under the Indian Companies Act, 1956 and registered under the U.P. and Central Sales Tax Acts. It entered into a contract with National Highway Authority of India, New Delhi, for the construction of 4/6 lane of national highways of north, south, east and west of the Agra Gwalior section of NH-3 and for laning of 24 kms. to 41 kms. of Agra Bholpur section of NH-3 in the State of U.P. Besides that, work of

maintenance and repair of NH-2 U.P.-3 in the State of U.P. was also given. It was also awarded work by the Construction Division, Agra and Mathura for strengthening and widening the roads and maintenance and repairs of certain roads. It applied for grant of recognition certificate u/s 4-B of the Act for the purchase of raw material for manufacture of hot mix material in its hot mix plant. The Trade Tax Officer rejected the request of the petitioner against which an appeal was preferred before the Deputy Commissioner (Appeals), Trade Tax, which was also dismissed vide order dated April 24, 1997. The aggrieved petitioner thereafter preferred Second Appeal No. 75 of 1997 before the Trade Tax Tribunal, Agra. The learned Trade Tax Tribunal, Agra, having heard the parties found that the hot mix material is manufactured by the appellant-petitioner in the hot mix plant from cement, sand, grits, bitumen, etc., for the construction of roads. It is also found that for manufacturing hot mix material recognition certificate is granted to National Highway Construction Company, Mathura, and Oriental Construction Engineers Ltd., Mathura. The learned Tribunal, therefore, allowed the appeal and directed the assessing authority to grant recognition certificate for the purchase of raw material against form 3-B at a concessional rate of tax. Consequently, the Trade Tax Officer/assessing authority issued recognition certificate in favour of the petitioner for the purchase of bitumen, furnace oil, H.S.D. and lubricant. The petitioner thereafter pursuant to the recognition certificate purchased various raw materials against form 3-B. The Commissioner, Trade Tax, U.P., however, issued circular on January 17, 2001 intimating that the purchase of the materials, which are used in the construction of road, cannot be made against form 3-B. It was followed by another circular dated February 23, 2001 to the effect that the recognition certificate issued u/s 4-B of the Act to the dealer with regard to purchase of bitumen chemical compound and grits against form 3-B should be reviewed by the issuing authority. Pursuant to the aforesaid circular the impugned notice dated May 19, 2001 is issued as to why the same should not be cancelled.

4. Shri Bharatji Agarwal, learned counsel for the petitioner, contended that the goods used in execution of works contract like construction of buildings or construction of roads amounts to sale of goods and, therefore, requisite declaration forms can be given for the purchase of raw material in respect of such contracts. It is further argued that the revenue did not challenge the order of the learned Trade Tax Tribunal passed in second appeal preferred by the petitioner by filing revision as provided u/s 11(1) of the Act and, therefore, order of the Tribunal dated July 19, 1997 attained finality and the recognition certificate granted pursuant thereto cannot now be cancelled on the basis of the circular issued by the Commissioner, Trade Tax. It is also submitted that the petitioner has accepted the contract keeping in view the cost of purchase of bitumen and other materials against form 3-B as it holds a valid recognition certificate u/s 4-B(2) of the Act and now if the recognition certificate is cancelled in that event he will have to purchase raw materials such as bitumen, etc., by paying tax at the rate of 20 per cent rendering whole contract inviable and it may

be compelled to stop the construction.

5. On the other hand, Shri Kesarwani, learned Standing Counsel opposed the writ petition and submitted that the impugned order is merely a notice calling upon the petitioner to show cause and therefore, this petition is premature and the appropriate remedy available to the petitioner is to raise all the contentions before the assessing authority. He, however, contended that the goods manufactured by the petitioner cannot be sold either in the State or in the course of inter-State trade as provided under Sub-section (2) of Section 4-B of the Act nor the final product of the petitioner is for sale hence the benefit of Section 4-B of the Act is not available to the petitioner. In short the submission is that the goods manufactured by the petitioner is not intended to be sold and, therefore, benefit of Section 4-B cannot be extended to the petitioner and the impugned notices for cancellation of recognition certificate has rightly been issued.

6. We have considered the submissions made on both sides. Admittedly, the petitioner is manufacturing hot mix materials out of different raw materials purchased against form 3-B issued to the petitioner in pursuance of the recognition certificate granted u/s 4-B(2) of the Act. It is also not disputed in the counter-affidavit filed by the department that the hot mix materials manufactured by the petitioner is used in carrying on the works of the construction, repairing and maintenance of roads.

7. The scope of "tax on sale and purchase of goods" is enlarged after the new definition introduced in Clause (29-A) of Article 466 of the Constitution of India by the 46th Amendment, and it includes the transfer, delivery or supply of goods that may take place in any transaction enumerated in Sub-clauses (a) to (f) of Clause (29-A) of Article 466 of the Constitution. Accordingly, Section 3-F was inserted by U.P. Act No. 25 of 1985 in the U.P. Trade Tax Act providing for levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. The definition of "sale" given in the Act was also substituted and defined in Clause (h) of Section 2 as under :

"2(h) "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration, and includes--

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration ;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract ;

(iii) the delivery of goods on hire-purchase or any system of payment by instalments ;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration ;

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration ; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration."

8. Therefore the goods used in the execution of works contract are deemed to be sold. "Goods" is defined in Section 2(d) of the Act in the following terms :

" "goods" means every kind or class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things attached to, or fastened to anything permanently attached to, the earth which under the contract of sale are agreed to be severed but does not include actionable claims, stocks, shares, securities "or postal stationery sold by the Postal Department"."

"Manufacture" is also defined u/s 2(e-l) of the Act which is as under :

""manufacture" means producing, making, mining, collecting, extracting, altering, ornamenting, finishing or otherwise processing, treating or adapting any goods ; but does not include such manufacture or manufacturing processes as may be prescribed."

9. In the case in hand, the activity of petitioner is to manufacture hot mix material from different raw materials such as bitumen, concrete, grits, chemicals, etc., in its hot mix plant. For that purpose the petitioner has got four hot mix plants and after processing the raw materials in the hot mix plant, the produce which comes out is entirely different product than those used as raw materials in the process of manufacturing and is known as hot mix material which is used in the construction of roads or its repairing. The Trade Tax Tribunal in its order dated July 19, 1997 found that the petitioner manufactures hot mix material in hot mix plants by using different materials and it is used in the construction of roads which amounts to sale under the definition of "sale" given in the Act and thus, the petitioner satisfies the condition laid down in Section 4-B(2) of the Act for grant of recognition certificate.

10. In paragraphs 4, 7, 10 and 16 of the writ petition, it has specifically been pleaded that the hot mix material manufactured by the petitioner is used in the repair, maintenance and construction of roads in the execution of works contract and this had not been specifically denied in the counter-affidavit filed on behalf of the department. The stand taken in the counter-affidavit, in short, is that the goods manufactured by the petitioner, i.e., the hot mix material is not intended to be sold, hence the benefit of Section 4-B of the Act is not available to him, which cannot be accepted in view of the legal position that the goods used in the execution of works contract are deemed to be sold. Therefore, looking to the

activities of the petitioner which is not specifically denied even before this Court in the counter-affidavit, we are of the view that the petitioner fulfils the requirement of law for availing the benefit of Section 4-B of the Act.

11. The recognition certificate u/s 4-B(ii) of the Act was granted to the petitioner pursuant to the order of the learned Trade Tax Tribunal dated July 19, 1997 in Second Appeal No. 75 of 1997 for the purchase of raw material against form 3-B with effect from March 1, 1997, i.e., from the date of application and, the respondents did not challenge the order of the learned Trade Tax Tribunal by preferring revision u/s 11 of the Act, thus it became final and binding on the parties.

12. It is well-settled legal position that the Revenue Officers are bound by the decision of the appellate authority. The Trade Tax Tribunal being appellate authority, its order is binding upon the assessing authority and the revenue who functions under the jurisdiction of the Tribunal. The apex Court in the case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., held that the principles of judicial discipline require that the order of the appellate authorities should be followed unreservedly by the subordinate authorities and if this healthy rule is not followed the result will only be undue harassment to assesseees and chaos in administration of tax laws.

13. The apex Court in the case of Authorised Officer (Land Reforms) Vs. M.M. Krishnamurthy Chetty[OVERRULED], held that it is well-settled that even order which may not be strictly legal, become final and are binding between the parties if they are not challenged before the superior court. Similar view was again reiterated by the apex Court in the case of V.S. Charati Vs. Hussein Nhanu Jamadar (Dead) by Lrs, and in para 9 of that judgment it was observed that a decision simply because it may be wrong, would not thereupon become a nullity. It would continue to bind the parties unless set aside. Therefore, the respondents having not challenged the order of the learned Sales Tax Tribunal dated July 19, 1997 are bound by the same.

14. Besides that from a perusal of the impugned notice dated May 9, 2001, it is apparent that the proceeding for cancellation of recognition certificate is being initiated on account of two circulars dated January 7, 2001 and February 23, 2001 issued by the Commissioner of Trade Tax, U.P., Lucknow. There is no allegation in the notice that the petitioner has violated any terms or conditions of the recognition certificate or it is being misused, nor it is alleged that the raw materials purchased on the basis of recognition certificate are not being utilised in the construction of roads pursuant to the works contract. Had it been the case where it has been found that the assessee or the petitioner has misused the recognition certificate or not used the raw material purchased against form 3-B for the purpose it has been issued, in that event, the assessing authority or the competent authority could have initiated proceeding for cancellation of recognition certificate. But merely on the basis of the aforesaid two circulars issued by the Commissioner of Trade Tax much after the grant of recognition

certificate, which in our view, cannot be enforced with retrospective effect, it does not justify initiation of proceeding for cancellation of the recognition certificate granted pursuant to the order of the Sales Tax Tribunal which was never challenged by the department by filing revision u/s 11 of the Act and thus, the order of the learned Tribunal became final and binding on the parties and now it is not open for the revenue to sit over the judgment on the basis of aforesaid two circulars. By not filing revision against the order of the learned Tribunal, it would be deemed that the Revenue has accepted the order and now it cannot turn around to nullify the order which they could have very well assailed in appropriate proceeding provided under the Act itself. In that view of the matter, the order of the learned Tribunal is binding on the Revenue and the impugned notice is without jurisdiction.

15. The contention of the learned Standing Counsel that at this stage only notice has been issued and, therefore, this petition does not lie at this stage is also of no substance for the reason that it is well-settled legal position that where the order or proceeding is wholly without jurisdiction, this Court can entertain the writ petition and may pass appropriate order. Since we have already concluded in the foregoing paragraphs of this judgment that the impugned notice is without jurisdiction, this Court can entertain the writ petition while exercising its jurisdiction under Articles 226/227 of the Constitution of India and the petitioner cannot be relegated to the jurisdiction of the assessing authority to show cause and explain the position before him, specially when the statement of facts averred in the writ petition is not denied so far as it relates to the activities of the petitioner, and also in the absence of any allegation regarding misuse of the recognition certificate. That apart, the assessing authority, i.e., Trade Tax Officer, Sector 14, Agra, respondent No. 3 being subordinate to the Commissioner of Trade Tax, is bound by the circulars and, therefore, asking the petitioner to give show cause pursuant to the notice would be illusory and an empty formality.

16. Learned Standing Counsel pointed out that in Writ Petition No. 970 of 2001 (Khattar & Co. Pvt. Ltd. v. State of U.P.) reported in [2002] 128 STC 401 this Court against the order of the Assistant Commissioner (Assessment-9), Trade Tax Agra, cancelling the certificate issued u/s 4-B of the Act, refused to entertain the writ petition and directed that petitioner to exhaust alternative remedy by way of appeal provided u/s 9 of the Act. The record of Writ Petition No. 970 of 2001 was also placed before us along with the instant writ petition. A perusal of the record shows that in that case the writ petition was preferred against the final order dated July 30, 2001 cancelling the recognition certificate. It further appears that earlier the notice was issued under Rule 25-Ka(9) to show cause as to why the recognition certificate should not be cancelled for violating the provisions of Section 4-B of the Act, pursuant to which show cause was filed before the assessing authority and thereafter, by a reasoned order dated July 30, 2001, the recognition certificate was cancelled. Since in that case final order was passed, therefore, this Court directed to exhaust the statutory remedy of appeal, whereas in the case in hand, there is no allegation of violation of any terms and

conditions of the recognition certificate or of the provisions contained in Section 4-B of the Act nor there is any allegation of misuse of recognition certificate or of form 3-B and the petitioner approached this Court immediately after issuance of notice instead of submitting to the jurisdiction of the assessing authority. Therefore, the case of the present petitioner cannot be equated with that of Writ Petition No. 970 of 2001.

17. In view of the discussions made above, the writ petition succeeds and is allowed. The impugned notice dated May 9. 2001 and the proceeding initiated pursuant thereto, are quashed. There shall, however, be no order as to costs.