
(2001) 01 GAU CK 0023

In the Gauhati High Court

Case No : Civil Rule No. 3987 of 1991 (Gau) Civil Rule No. 179 of 1991 (AGT)

Pranab Kumar Saha

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 12-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 184
Partnership Act, 1932 — Section 19, 32, 32(3), 33
Tripura Sales Tax Act, 1976 — Section 21, 26A

Citation : (2001) 1 GLT 214

Hon'ble Judges : H.K.K. Singh, J

Bench : Single Bench

Advocate : Mr. A.M. Lodha and Mr. A. Lodha, for the Appellant; Mr. U.B. Saha and Mr. S. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioner is a registered contractor under the Government of Tripura, He undertook a contract work under an agreement entered into between himself and the Director of Food & Civil Supplies Department, Government of Tripura for transportation of food grains from FCI Depot, Barpeta Road, Guwahati to Central Stores, A.D.Nagar, Agartala. The copy of the work order dated 27.2.1991 is at Annexure-1. According to the petitioner, the said work was executed by a partnership firm under the name and style M/s Radha Gobinda Brick Industries.. The copy of the unregistered partnership deed is found at Annexure-3. It so happens that the said partnership firm defaulted in making payment of the requisite tax payable under the provisions of the Tripura Sales Tax Act, 1976 (hereinafter referred to as "the Act"). For the purpose of recovery of the said amount of tax being Rs. 3,21,633.70 paise, notice dated 5.8.1991 (Annexure-4 to the writ petition) was issued to the Director of Food & Civil Supplies, Government of Tripura, respondent No. 3 as per provisions of Section 26A of the Act. A copy of the said notice was also served upon the petitioner. In reply, the

petitioner submitted his representation dated 12th August, 1991 (Annexure-5 to the writ petition) to the Superintendent of Taxes, Charge-III, Government of Tripura, Agartala, respondent No. 2 praying for withdrawing and canceling the notice. But the said representation was rejected. Another notice dated 26.8.1991 (Annexure-6 to the writ petition) was also issued to the respondent No.3 and a copy of the same was also furnished to the petitioner intimating that his representation dated 12.8.1991 could not be entertained as per law.

2. In this application under Article 226 of the Constitution of India the petitioner has challenged and also questioned the legality of the notices dated 5.8.1991 (Annexure-4 to the writ petition) and 21.8.1991 (Annexure-6 to the writ petition) issued by the Superintendent of Taxes, Charge-III, Government of Tripura, Agartala.

3.1 have heard Mr. A.M. Lodh, the learned senior counsel assisted by Mr.A. Lodh, the learned counsel for the petitioner & Mr. U.B. Saha, learned Senior Government Advocate assisted by Mr. S. Chakraborty, the learned counsel for the respondents.

4. According to Mr. Lodh, the learned senior counsel for the petitioner, the aforesaid contract work was taken/executed by the partnership firm of which the petitioner was a partner but, according to the terms of the partnership deed the petitioner had retired from the partnership firm and as such any amount of tax payable by the partnership firm has to be paid by the firm or by the surviving continued partners. According to Mr. Lodh the petitioner issued a notice of retirement from the partnership on 18.2.1991 (Annexure-2 to the writ petition) wherein it was intimated that he intended to retire from partnership with effect from 1.4.1991 and it was further intimated that partnership be accordingly dissolved by mutual consent on and from 1st day of April, 1991. Thus, main thrust of the argument of the learned senior counsel of the petitioner is that the firm was a partnership at will and it was dissolved by the aforesaid notice or the petitioner had retired from the partnership with effect from 1.4.1991. Thus, the petitioner is not at all liable for payment of any tax under the provisions of the Act.

5. Mr. Saha, the learned Senior Government Advocate for the respondents on the other hand submitted that the petition is not maintainable as the petitioner has not taken recourse to statutory remedy available u/s 21 of the Act and the learned senior counsel also submitted that the matter involved disputed questions of facts with regard to continuance or subsistence of a partnership firm, and in this regard he drew my attention to some declaration made by the partners of the firm under the provisions of the Income Tax Act, 1961 and the Rules framed thereunder (Annexure-R/1, R/2 & R/3) to show that the petitioner continued to be a member of the firm in respect of the assessment year and as such the petitioner is liable to pay the said tax and the procedure for recovery of the tax under the Act is quite proper and legal.

6. The contract was awarded in the name of the petitioner (Annexure-1). But according to the petitioner, the contract was performed by the partnership firm and in the correspondences (Annexure-4 and Annexure-6) the name of the firm : M/s Radha Gobinda Brick Industries is also found. Thus, for the time being, it is assumed that the contract work was taken and performed by the partnership firm.

7. According to Mr. Lodh the partnership firm was a partnership at will and the petitioner issued notice of retirement (Annexure-2) intending to retire from the partnership with effect from 1.4.1991. As there has been a controversy between the parties as to whether the partnership was a partnership at will and also whether the petitioner had retired with effect from 1.4.1991 the relevant portion of the partnership deed i.e. clause 15 regarding retirement of a partner and clause 17 regarding dissolution of the partnership are reproduced below:-

"Clause-15: That if at any time during the continuance of the partnership of any of the parties desire to retire from the partnership, he/she may do so on giving the others of them at least 2 months written notice and shall be paid by the remaining parties such sum, if any, found due to him/her on taking proper accounts upto the date of retirement. Unless otherwise agreed, the retiring partner shall remain liable to any according to his/ her share the Income Tax and/ or other imposition that may be assessed on the firm and also that may be assessed in his/her individual name as partners of the firm upto the date of retirement. The retiring partner shall be deemed to have relinquished all his/ her claim, interest and right in the partnership including goodwill and the continuing partners shall indemnify him/her against the debts and liabilities of the firm except the income tax etc."

"Clause-17: That, the partnership will be dissolved: If all the parties so agree upon, and upon dissolution, the partnership shall be wound up and its assets and liabilities shall be dealt with in accordance with the provision-" of Indian Partnership Act, 1932."

8. A perusal of Clause-17 extracted above, can never lead to any conclusion that partnership was a partnership at will. (Karumuthu Thiagarajan Chettiar and Another Vs. E.M. Muthappa Chettiar, M.O.H. Uduman and others Vs. M.O.H. Aslum, . regarding retirement from partnership Mr. Lodh submitted that by issuing notice dated 18.2.1991 (Annexure-2) the petitioner had retired from partnership with effect from 1.4.1991". Thus, according to the terms of the partnership deed the petitioner is not liable to pay any tax. As against this Mr. Saha submitted that even as per provision of Clause-15, the petitioner shall remain liable to pay Income Tax or other imposition that may be assessed on the firm and also that may be assessed in the individual name of the petitioner as partner of the firm after the date of retirement.

9. The provision regarding retirement is contained in Section 33 of the Indian Partnership Act, 1932 and the same is reproduced below: -

"Retirement of a partner.-(I) A partner may retire,-

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement :

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm."

10. In our present case, the pleaded case of the petitioner is that as per Clause-15 of the deed of partnership he had retired by issuing the notice dated 18.2.1991 (Annexure-2). It cannot be ascertained as to whether since after issuance of notice dated 18.2.1991 (Annexure-2) any agreement had been entered into between the petitioner and the other members regarding the liabilities of the petitioner. Again, as per sub-section (3) of Section 32 of the Indian Partnership Act, as noted above, the retiring partner shall continue to be liable as partner to the third parties for any act done by the firm which would have been an act of the firm if done before the retirement, until public notice is given of the retirement. There is no pleading on behalf of the petitioner that any such public notice was given.

11. u/s 19 of the Act there is a provision under the heading - Liability in case of discontinued firm or association. It reads as follows :-

"Where the business carried on by a firm or an association of persons, other than a company as defined in the Companies Act, 1956, is discontinued or the association of persons is dissolved. the tax shall be levied upon and recovered jointly and severally, from every person who at the time of such discontinuance or dissolution was a partner of such firm or member of such association; and all the provisions of this Act, shall apply accordingly."

12. From the above provision it is clear that the member even of a discontinued or dissolved firm is jointly or severally liable to pay the tax if he was a member

at the "time of dissolution/ discontinuation of the firm. As noticed above, it is not clear as to whether the firm has been dissolved or the petitioner had retired from the partnership firm and if so, his liabilities were settled by the partners mutually and again there is no material to show that there was any public notice for retirement as contemplated by Section 32 of the Indian Partnership Act. Further, according to the respondents, as per Annexure-R/1 the petitioner continued to be a member of the firm even on 2.6.1991 as per declaration made by him (petitioner) and other members of the firm u/s 184 Clause 7 of the Income Tax Act. In this regard the submission of Mr. Saha that this disputed question of fact could have been very well agitated and determined by the statutory authority, namely, revisional authority u/s 21 of the Act has force.

13. It may here be noted that the special mode of recovery as provided in Section 26A of the Act has a non obstante clause over-riding anything contained in any law or contract to the contrary. In our present case for the reasons and conclusion as recorded above I am of the opinion that the petitioner has not been able to make out a case calling interference of this court under Article 226 of the Constitution. Resultantly the present writ petition is not maintainable and it is accordingly dismissed but without costs.

14. It may be observed herein that if the petitioner has any cause of action against any other member of the firm for recovery of any amount which the petitioner shall have paid or realised by the authority in response to the notice under Annexures-A/4 and A/6, he may proceed in accordance with the provisions of law.