(2002) 09 RAJ CK 0060

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3961 of 2002

Shekhawat Brothers APPELLANT

Vs

State and Others RESPONDENT

Date of Decision : 17-09-2002

Acts Referred:
Rajasthan Sales Tax Act, 1994 — Section 74(1)

Citation : (2003) 4 RLW 2585 : (2003) 1 WLC 164

Hon'ble Judges : K.S. Rathore, J

Bench : Single Bench

Advocate : Jagdeep Dhankar and Praveen Balwada, Shilendra Balwada and Sushil Sharma, for the Appellant; K.K. Sharma and G.S. Bapna, for the Respondent

Final Decision : Dismissed

Judgement

Rathore, J.—This Court issued notice to the respondents on 10.7.2002 and also passed interim order to this effect that the operation of the order dated 29.6.2002 to the extent it relates to the termination of the contract agreement, shall remain terminated.

2. On 24.7.2002, Mr. Bapna appearing on behalf of Taxation Department, filed a reply and the counsel for the applicant Mr. K.K. Sharma submitted the application for impleadment as a party which was allowed and the applicant Banas Enterprises was impleaded as a party respondent.

3. This writ petition is directed against the order dated 29.6.2002 (annexure-2) passed by the respondent No. 3.

4. Brief facts of the case are that the agreement for collection of sales tax on bazri u/s 79(1) of the Rajasthan Sales Tax Act, 1994 (for short, the Act of 1994) has executed between the State of Rajasthan and the petitioner on 29.9.2001 as the bid offer by the petitioner was accepted and the petitioner was permitted to collect the sales tax at the check posts namely: Baroni, Motuka, Nadhri, Gehlod

Ghat in circle C.T.O. Tonk.

5. The petitioner after fulfillment of the requisite requirement as per the terms and conditions of the agreement, deposited the security amount of Rupees one crore ninety lacs and fifty thousand.

6. The Contractor upon collection of such tax shall require to issue printed receipts for the amount of tax collected on the bazri and shall also record the time and date of dispatch of the said commodity and shall retain its duplicate with him. The rates are also fixed under the contract agreement for levying the tax on bazri per truck upto 200 feet Rs. 110/-; per truck upto 300 feet Rs. 155/- and per truck upto 400 feet Rs. 210/- and the contract is awarded for the period of one year i.e. from 1.10.1991 to 30.9.1992.

7. Learned Senior Advocate Mr. jagdeep Dhankar submits that in view of the terms and conditions of the contract agreement the petitioner started its business and also regularly paying the monthly installment as stipulated in the contract agreement.

8. The main controversy arises only after the receipt of the order dated 29.6.2002 whereby the Sales Tax Department informed the petitioner that the in violating the Condition No. 25 of the tender document.

9. This order dated 29.6.2002 has been challenged by the learned counsel for the petitioner on the ground that whether it is permissible to read terms and condition of auction notice as part and parcel of a duly executed written agreement even when such written agreement does not provide for incorporation of the terms and condition of the auction notice.

10. This order is also challenged on the ground that as per Indian Contract Act, 1972 whether it is permissible to read terms and conditions of the auction notice as integral part of written agreement excluded thereafter without the written agreement so provide.

11. Shri K.K. Sharma appearing on behalf of the applicant Banas Enterprises placed Annexure-6 issued by the Sales Tax Department wherein Condition No. 25 stipulates that the petitioner shall not recover any tax from the registered contractor of the Department and the petitioner is agreed upon the terms and conditions and also signed and acknowledged the same.

12. The main challenge by the learned counsel for the petitioner is that condition No. 25 is not binding upon the petitioner and the learned counsel for the petitioner Mr. Dhanker referred Section 79 of the Act of 1994 which stipulates as under:-

"79. Establishment of check-post on contract basis - (1) Where the Commissioner is of the view that without establishing a department check-post, it is in the interest of the State to collect a fixed sum of tax on contract basis, in respect of all kinds of building stones, marble and granite in all their form (gitti, Bazri, all other goods specified under Clause (9) of Section 2 and animals at a particular point") or for a specified area, he may, through a contract, permit a contractor to collect such tax at such point or for such ares, on such terms and conditions are may be specified by him, for a period not exceeding two years at a time.

(4) The contractor shall not collect tax on the goods under Sub-section (1) exceeding the amount of tax leviable thereon under the provisions of the Act.

(5) Where a contractor violates the provisions of Sub-section (4), the Commissioner or any officer not below the rank of Assistant Commercial Taxes Officer authorised by the Commissioner, shall after affording an opportunity of being heard direct that such contractor shall pay by way of penalty, in addition to the amount of excess tax collected, a sum equal to double the amount of excess tax collected by him or any other person on him behalf.

(6) Where a contractor violates any of the terms or conditions of the contract, the Commissioner may, after recording reason in writing terminate the contract at any time and shall be empowered to recover the full amount of tax as stipulated under the contract from such contractor, as if such amount was a demand of tax under the Act"

13. Section 79 (1) categorically provides contract to collect a fix sum of tax on contract basis shall be or specified area. Thus, collection of tax u/s 79 is area specific and is rationally can have only one interpretation i.e. in the specified area the contractor alone to the exclusion of any other authority including the State Government shall be the power to collect tax Similarly, Sub-section 4 of Section 79 stipulates that the contractor shall not collect tax on the goods under Sub-section (1) exceeding amount of tax leviable thereon under the provisions of the Act.

14. Learned counsel for the petitioner submits the assuming that this Annexure-6 is agreed by the petitioner and condition No. 25 is applicable to the petitioner even then also this relates only to Barony check post and not to other places under the contract i.e. Motuka, Nadhri and Gehlod Ghat in Circle City, Tonk and auction notice Annexure-R/1 provides that there shall be no collection from registered dealer and terms and conditions of the auction notice have to be taken as part and parcel of the agreement. He further submits that condition No. 25 provides that there will be no collection from the registered dealer of the department, is of no significance.

15. Mr. Dhankar further submits that assuming though not admitting if at all there is such condition No. 25 and has been accepted by the petitioner then also this is not applicable to the petitioner. Since this stipulation in condition as per Contract Act is not permissible and acceptance must be absolutely and unqualified. Therefore, in such circumstances, the terms and conditions of the auction notice cannot be taken to be concluded contract between the parties. Learned Counsel for the petitioner placed reliance on the following authorities:-

1. State of Orrisa v. Hari Narain (1)

2. Kilburn Engineering Ltd. v. Oil & Natural Gas Corporation Ltd. and Ors. (2)

3. Raj Choudhary v. Union of India and Ors. (3)

4. Punit Beriwala v. Suva Sanyal and Anr. (4)

5. Urmila & Co. Pvt. v. J.M. Baxi & Co. (5)

6. Harnam Singh and Ors. v. Smt. Purbi Devi and Ors. (6)

16. And while placing reliance on the aforementioned judgments learned counsel for the petitioner submits that it is trite legal preposition that no term and condition that goes contrary to an express provision of law can be accepted. The condition that sales tax shall not be collected from a registered dealer is contrary to Section 79 of the Act.

17. The language of Section 3 of the Rajasthan Sales Tax Act, 1994 is indeed very significant, it imparts authority "subject to the provisions of this Act" i.e. subject to Section 79 of the Act. In sharp contradiction to this, there is not such restriction in Section 79 of the Act. Thus, Section 79 of the Act would have over-riding effect. Thus, the rights that accrue by virtue of an agreement u/s 79 of the Act will over-ride any authority which may be available u/s 3 of the Act.

18. On behalf of Commercial Taxation Department, Mr. G.S. Bapna submits that the respondent No. 4 issued auction notice in terms of Section 79 (1) of the Rajasthan Sales Tax Act, 1994, but the petitioner had suppressed this notice from the Court. It is mentioned in the notice that condition No. 11 is incorporated that contractor shall not collect any tax on the movement of the goods sold by registered dealer with sale, bill or challan and about this condition, petitioner was well aware about condition No. 11 and the petitioner knowing well that he is not entitled to collect any tax from the goods sold by the registered dealer.

19. Mr. Bapna further submits that the petitioner accepted the terms and conditions of the auction on 30.9.2001. The condition No. 25 of the above condition contained that contractor shall not collect any tax from the registered dealer and this condition is to be read with the condition of the auction.

20. Mr. Bapna further submits that check-post was established to check the evasion of the tax u/s 78 of the Act of 1994. However, u/s 79, there is provision to give contract of the check-post for the collection of tax on casual trading items mentioned u/s 79. To check evasion of tax on these items, check-post u/s 79 are given on contract. Under the Rajasthan Sales Tax act, the registered dealer is liable to pay tax u/s 3 and he is entitled to collect tax on sales effected by him. Thus when the registered dealer collects the tax on the sale effect by him and issue bill and challan then there is no question of tax on the sale effected by the registered dealer, therefore, the agreement dated 29.9.2001 is to be read with the terms and conditions of auction notice which is part and parcel of the agreement execute by the contractor.

21. Mr. Bapna further submits that the respondents are entitled to give direction to the petitioner under condition No. 7 of the agreement which is in accordance with the provisions of Section 3.4.79(4) of the Act of 1994 and Rule 15 of the Rules.

22. In support of his contentions, he referred Annexure-R/1 & R/2. Annexure-R/1 is the auction notice in the auction notice in condition No. 11 is incorporated and the petitioner knowing fully given his offer which was accepted by the respondents.

23. Further vide Annexure-R/2 this condition was reiterated in the form of condition No. 25 which stipulates that petitioner shall not recover any tax from the registered dealer qua this condition No. 25 is acknowledge by the petitioner.

24. Since this condition has been accepted by the petitioner and has not raised any objection at the time of grant of acceptance of the tender of the petitioners and he started collection of tax as per terms and conditions of Annexure-R/2 (the tender document).

25. This petition is filed by the petitioner in the month of July when about two months left for completion of contract period i.e. on 31.9.2002.

26. Mr. K.K. Sharma states that M/s. Shekhawat Brothers have obtained the contract of tax collection of Bazri and was allowed to establish the the check post at Baroni, Motuka, Nadhri & Gehlod Ghat in Circle City, Tonk in accordance with the provision of Section 79 of the Act of 1994. As per the petitioner he alone has the authority to collect tax and no other person or authority is entitled to collect the same and he states that the petitioner has not informed the Court all the correct facts.

27. Mr. Sharma submits that the applicant is duly registered under the provisions of the Act of 1994 and has also been registered as a dealer u/s 7(1) of the Central Sales Tax Act, 1956. The licence of the firm renewed from 1.1.2002 to 31.12.2004.

28. M/s. Banas Enterprises being registered dealer and dealing in Bazri, therefore, is permitted under the provisions of Rajasthan sales Tax Act to recover the tax from the persons who purchased commodity from Banas Enterprises and deposits the. same with the Department.

29. Mr. K.K. Sharma submits that under the provisions of Rajasthan Sales Tax Act, the tax can be charged only one and the tax shall be charged at the circle point in the series of sales as provided u/s 5 of the Act.

30. Mr. Sharma further submits that in the auction notice issued by the State Government, Clause 11 is incorporated in the notice itself wherein it was specifically mentioned that the contractor shall not be entitled to collect tax from any person who is transporting mineral on the basis of a bill/challan issued by the registered dealer. Further detailed terms and conditions of the auction had

also notified. Clause 25 of the aforesaid conditions which specifically provides that a contractor shall not be entitled to recovery tax from any registered dealer. Therefore, condition of the auction notice as well as the terms and conditions on the basis of which the contract was given to the petitioner clearly stipulate that the petitioner is not entitled to recover tax from the registered dealer as well as from any person who was transporting goods on the basis of sate bill/challan issued by the registered dealer.

31. Mr. K.K. Sharma also placed the bills which are issued by the Banas Enterprises for perusal of this Court and also filed copies of the other bills which are issued by the petitioner which shows that the tax was recovered by the petitioner on the same manner again upon which tax is already deducted by the registered dealer. This is nothing but to harass the applicant Banas Enterprises. Therefore, Banas Enterprises had no option other than to file representation before the Sales Tax Authorities and on receipt of this representation and after verifying the fact that the petitioner is charging the tax from whom who have already paid sales tax, therefore, the Additional Commissioner (Anti Vision), Sales Tax had issued the order dated 29.6.2002 direction the petitioner not to recover tax from the registered dealer.

32. Mr. K.K. Sharma also referred Section 3 (4) of the Act of 1994 & Rules 15 of the Rules. In support of his contentions, he referred the judgments reported in 1984 SCC 634 : 1963 SC 1685 .

33. Heard rival submissions of the learned counsel for the parties and gone through the material available on the record as well as the relevant provision of the Rajasthan Sales Tax Act, 1994 and also carefully gone through the judgments referred before me by the respective parties.

34. It is evident by the pleading of the parties that the dispute is only that whether the petitioner is entitled to recover the sales tax of the commodity (bazri) sold by the registered dealer or not. As the petitioner has submitted that condition of auction notice as well as other conditions cannot be termed as a part of the contract agreement and the condition No. 11 as mentioned in the auction notice also not have any implication as it was not incorporated in the contract agreement which is executed between the State Government and the petitioner and the condition No. 25 of Annexure R/2 also not applicable by which further condition is imposed and the conditions are agreed by the petitioner.

35. It is no doubt true that the petitioner has accepted the condition in the auction notice and that in the tender document and he never objected with regard to these two conditions and he started his business and now at the verge of completion of the contract the petitioner wants to challenge these conditions which are already agreed upon by the petitioner on the pretext that the acceptance must be absolute and unqualified, the petitioner would have challenged at the first instance itself and would not have agreed to such condition earlier and at this stage the petitioner cannot challenge the conditions

and accepts part of the conditions which suits to him and challenge part of it which does not suit to him.

36. It is also pertinent to mention here that if the Department does not stipulate the condition in the tender document the Department must have received the offer much higher then the presently offered by the petitioner.

37. Under such circumstances, at this stage, the petitioner cannot challenge the order dated 29.6.2002 passed by the Department and the respondents are able to prove that the petitioner is charging sales tax on the commodity (Bazri) upon which registered dealer already charged sales tax, therefore, i is clear violation of the condition No. 25 and the respondent Sales Tax Department has rightly issued the order dated 29.6.2002.

38. In view of the facts and circumstances of the case and in view of the discussion made hereinabove, this Court does not require any interference in the order dated 29.6.2002. The writ petitioner is misconceived and devoid of merit and same deserves to be dismissed.

39. Consequently, the writ petition stands dismissed with no orders as to costs.