

(2003) 01 RAJ CK 0077
In the Rajasthan High Court
Case No : Civil Special Appeal No. 153 of 2002

Shekhawat Explosives	Vs	APPELLANT
State of Rajasthan and Another		RESPONDENT

Date of Decision : 21-01-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Sales Tax Act, 1994 — Section 2(38), 4, 4(1), 84

Citation : (2003) 1 RLW 648 : (2004) 137 STC 326 : (2003) 2 WLC 398 : (2003) 1 WLN 462

Hon'ble Judges : P.C. Tatia, J; M.R. Calla, J

Bench : Division Bench

Advocate : Dinesh Mehta, for the Appellant; Manoj Bhandari, for the Respondent

Final Decision : Allowed

Judgement

Calla, J.—Heard learned counsel for the parties.

2. This appeal u/s 18 of the Rajasthan High Court Ordinance is directed against the order dated 24th Nov., 2001 whereby the writ petition filed by the appellant against the order of assessment in the matter of Sales Tax has been dismissed as not maintainable by the learned Single Judge on the ground that a statutory remedy of appeal was available to the petitioner. The parties are not at dispute that the remedy u/s 84 of the Rajasthan Sales Tax Act, 1994 is there so as to challenge the order passed by the Assessing Officer against the order of assessment.

3. Learned counsel for the appellant submits that the remedy of the appeal as aforesaid is coupled with an onerous condition of depositing the amount as assessed by the Assessing Officer under the Sales Tax Act and, therefore, unless the due amount is deposited, the appeal cannot be entertained. It is also the case of the appellant that he is not in a position even to deposit the 10% of the amount and he submits that it was not at all the case in which the petition could be dismissed on the ground of alternative remedy of statutory appeal as

described above. Learned counsel Sh. Mehta has placed reliance on a decision of the Supreme Court delivered in the case of H.K. Dada (India) Ltd. v. State of Madhya Pradesh and Ors. (1), in which Section 22(1) of C.P. and Berar Sales Tax Act was considered, which provided for an appeal as under:-

"22(1) Any dealer aggrieved by an order under this Act may, in the prescribed manner, appeal to the prescribed authority against the order:

Provided that no appeal against an order of assessment, with or without penalty shall be admitted by the said authority unless such appeal is accompanied by a satisfactory proof of the payment of the tax, with penalty, if any, in respect of which the appeal has been preferred." The provisions of Section 22(1) of C.P. and Berar Sales Tax Act placed a substantial restriction on the assessee's right of appeal in as much as the requirement was that the payment of the entire assessed amount has to be made as the condition precedent to the admission of the appeal and, therefore, the question was as to whether the imposition of such a restriction effects the assessee's right of appeal or not. The Supreme Court held it to be the settled position of law that the right of appeal was not a mere matter of procedure, but was a vested right, which is inherent in a party from the commencement of the action of the court of first instance and such right could not be taken away except by an express provision or by necessary implication. In yet another case of Customs Collector, Bombay v. Shantilal and Co. (2). the Supreme Court held that remedy by way of an appeal against the order of confiscation and imposition of a large penalty under the Sea Customs Act is not an effective remedy because no appeal can be filed unless the large penalty imposed upon the petitioner has first been deposited. (4). Learned counsel Sh. Manoj Bhandari, on the other hand, has argued that in the facts of this case, such an onerous condition is not there because the remedy of appeal can be availed only by depositing 10% of the dues under the assessment order. According to him, the aforesaid decisions are of no help to the present appellant. He has also cited before us the judgment of the Supreme Court delivered in the case of Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad and Ors. (3), wherein it has been held that right to appeal being a statutory right and not an inherent right, it is for the legislature to decide whether to make the right subject to any condition or not. The remedies other than appeal are also available under the Act, i.e., Bombay Municipal Corporation Act, 1949. The Supreme Court held that the precondition of deposit under clause (e) and fixation of upper limit of 25% for exemption under the proviso were valid and not violative of Article 14. It was further held that the right of appeal was the creature of statute and was not an inherent right and the statute could make the remedy conditional or qualified. Learned counsel Sh. Bhandari has also placed reliance on the decision of the Supreme Court in the case of Shyam Kishore and Ors. v. Municipal Corporation of Delhi and Anr. (4). In para No. 35 of this judgment while quoting the judgment of Nandlal v. State of Haryana (5), it has been quoted that the right of appeal is a creature of statute and there is no reason why the legislature while granting the right cannot impose conditions for

exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right to be almost illusory. In yet another case of *Vijay Prakash D. Mehta and Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay (6)*, the Supreme Court held that the right to appeal is a statutory right and it can be circumscribed by the conditions and such right could not be whittled down. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial adjudications.

The analysis of the principles, which have been laid down in the aforesaid decisions clearly show that unless the conditions are so onerous and harsh that it becomes well nigh impossible for the aggrieved party to avail the remedy of appeal effectively, such remedy of appeal has to be invoked and it has to be decided on the facts and circumstances of each case in the light of the relevant provisions, which are under consideration of that particular statute, but no principle of universal application can be laid down either won in this regard. In the facts of the present case, the learned Single Judge has not examined the relevant aspects and has straightway proceeded to dismiss the petition on the ground of alternate remedy without taking into consideration the facts and circumstances and the relevant provisions of the statute. The petition has been dismissed by making a bald observation that he did not consider it just and proper to entertain the writ petition.

5. In any case, both the sides requested us that the matter may be examined on merits also. We, therefore, heard learned counsel on the merits of the case. Learned counsel Sh. Mehta has argued that the job work, which was undertaken by the present appellant was that of blasting and in this job is blasting the explosives were used, which stood exhausted in the process of blasting itself, therefore, there is no effective sale of any explosive by the appellant so as to make it leviable for charging the Sales Tax under the provisions of the Act and, therefore, the order as has been passed by the Assessing Officer was bad from very inspection. Section 2(38) of the Rajasthan Sales Tax Act defines as to what is the sale and the same is reproduced as under for ready reference:-

"2(38) "sale" with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration and includes,-

(i) a transfer, otherwise than in pursuance of a contract, of property in 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) any delivery of goods on hire-purchase or other system of payment by instalments;

(iv) a transfer of the right to use goods for any purpose (whether or not for a

specified period) for cash, deferred payment or other valuable consideration;

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

(vi) a 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 is for cash, deferred payment or other valuable consideration; and such transfer, delivery or supply shall be deemed to be a sale and the word "purchase" or "buy" shall be construed accordingly;

Explanation I.- Notwithstanding anything contained in this Act, where any goods are sold in packing, the packing material in such case shall be deemed to have been sold with the goods, unless otherwise proved by the dealer.

Explanation II.- A sale or purchase shall be deemed" to take place inside the State,-

(a) in a case falling under Sub-clause (ii), if the goods are in the State at the time of their use, application or incorporation in the execution of a works contract, notwithstanding that the agreement for the works contract has been wholly or in part entered into outside the State or that the goods have been wholly or in part moved from outside the State; and

(b) in a case falling under Sub-clause (iv), if the goods are used by the lessee within the State, whether or not for a specified period, notwithstanding that the agreement for the lease has been made outside the State or that the goods have been moved from outside the State or the goods have been delivered to the lessee outside the State.

Explanation III.- Where there is a single contract of sale or purchase in respect of goods stored or ascertained in the State as well as at places outside the State, the goods stored or ascertained in the State shall be deemed sold separately in or from the State.

Explanation IV.-Where the work under the works contract is spread over in many States including the State of Raj., the part of the work done within this State shall be deemed to be the sale made in the State, irrespective of the place of agreement for works or the point of movement of goods involved in the execution of that works contract.

The charging section is Section 4 under Chapter-II, i.e. Levy of Tax and its Rate and it has been clearly provided under Sub-section 1 of Section 4 that the tax payable by the dealer under this Act, shall be at single point in the series of sales by successive dealers, as may be prescribed and shall be levied at such rates not exceeding fifty per cent on the taxable turnover, as may be notified by the State Government in the Official Gazette. A conjoint reading of the provisions of Sub-section 2(38) and Sub-section 4(1) makes it clear that in such matters when a

job of blasting is undertaken, the use of explosives in such job can neither be termed as sale within the meaning of Rajasthan Sales Tax Act nor it could be subjected to the levy of the Tax. Learned counsel Sh. Bhandari has argued before us rather he was pains to argue on the basis of Section 2(38) Clause (ii) that it remains a case of sale because it involved a transfer of property in goods and he submits that the explosives had been purchased by the appellant on the basis of the form "C" supplied by the department and on that basis he did avail certain concession. Even if that be so, it will not give the status of sale to such process of extention. Even if it is a case of transfer of property though the property does not stand transferred in any physical form, it stands exhausted in the process of the execution of the works contract. Unless any tranaction is given the status of sale within the meaning of Section 2(38), there is no question of charging Sales Tax thereon. In case, the appellant has made any misuse of the form "C" and has wrongly availed any concession or has taken any undue benefit or unlawful gain, which otherwise could not be available to him, it is always open for the concerned authorities to lake appropriate action against him in accordance with law, but that does not mean that he could be made liable to pay Sales Tax on such transaction (which does not amount to sale) on the basis of which job of blasting was undertaken and completed and in the process thereof the explosives were made use of.

6. We, therefore, find that this appeal must succeed on its own merits, the order dated 24th Nov., 2001 passed by the learned Single Judge is set aside. This appeal as well as the writ petition are allowed and impugned assessment order dated 29th Sept., 2001 (Annex. 7) is quashed and set aside. The parties are left to bear their own costs.