

(1973) 09 GAU CK 0001

In the Gauhati High Court

Case No : Civil Rule No's. 22 and 124 to 136 of 1970

Srikrishna Stores and Another

APPELLANT

Vs

Superintendent of Taxes and Others

RESPONDENT

Date of Decision : 11-09-1973

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1974) 34 STC 216

Hon'ble Judges : R.S. Bindra, J;D. Pathak, J

Bench : Division Bench

Advocate : J.C. Medhi, -General, for the Appellant; T.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

R.S. Bindra, J.—This batch of 14 writ petitions under Article 226 of the Constitution by various merchants of Gauhati can be dealt with in this common judgment as the facts disclosed by them are almost parallel and the points of law involved are identical.

2. We may reproduce the facts of Civil Rule No. 124 of 1970 as a sample. The petitioner Srikrishna Stores, Gauhati, is a registered dealer for the purpose of the Assam Sales Tax Act, 1947, hereinafter called the Act. That petitioner submitted his return for the period ending 30th September, 1967, to respondent No. 1, the Superintendent of Taxes, Gauhati, and in course of time produced its books of account and relevant documents before that officer at the latter's behest. Respondent No. 1 assessed the petitioner to a total tax of Rs. 1,350.33 on including in the turnover the amount charged by the petitioner for the tailored garments supplied to various customers. It appears that respondent No. 1 assessed such garments as "ready-made garments", an item entered at No. 2 in Schedule II appended to the Act. The petitioner having felt aggrieved against the assessment of those articles as "ready-made garments" filed an appeal before the Assistant Commissioner, but before that appeal could be decided he filed the

instant, writ petition challenging the finding of the Superintendent of Taxes that the garments of which the sale price was included in the turnover appropriately fall within the description of "ready-made garments".

3. The respondents have joined issue with the petitioner on the point that the articles in question do not answer the description of "ready-made garments". In addition, it is pleaded that the petitioner having not exhausted his departmental remedies he had no right in law to file the present writ petition.

4. The learned Advocate-General, Assam, has invited our attention to the Supreme Court decisions in *Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, and *V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another*, to reinforce his submission that the present writ petitions are misconceived. Beyond doubt it was held in the first-mentioned authority that the Income Tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action. It was held in that case that the assessee having an adequate remedy under the Income Tax Act, which he could have availed of, but had failed to utilise the same, there was no adequate grounds made out for entertaining the writ petition. Where the aggrieved party has an alternative remedy, the Supreme Court held further, the High Court "would be slow to entertain a petition challenging an order of a taxing authority which is ex facie with jurisdiction", and that a petition for writ of certiorari may lie to the High Court where the order is on the face of it erroneous or raises the question of jurisdiction or of infringement of fundamental rights of the petitioner.

5. In the second of the two authorities cited by the learned Advocate-General, it was held by the Supreme Court, which had to deal with a case under the Imports and Exports (Control) Act, 1947, that unless the Collector's decision is found to be perverse, neither the High Court nor the Supreme Court could interfere with it. Elaborating the proposition further, the Supreme Court said that if the view taken by the customs authorities as to the scope and applicability of the different I. T. C. Schedules be a reasonable view there should be no interference with the decision of the customs authorities.

6. Sri S. K. Sen, the learned Counsel representing the writ petitioners, had, on the other hand, brought to our notice a decision of the Supreme Court in *State of West Bengal Vs. North Adjai Coal Co. Ltd.*, wherein it was held that normally before a petition under Article 226 is entertained, there should be recourse to statutory authorities which have power to give relief. However, the Supreme Court added that is a rule of practice and not of jurisdiction and that, as such, the High Court is competent to entertain a petition even where the aggrieved party has not exhausted the remedies available under the statute before the departmental authorities. We would like to mention that this was a case under the Bengal Finance (Sales Tax) Act, 1941, and, as such, it has a clear bearing on

the present writ petitions which are all, as stated earlier, filed challenging the assessments made under the Act.

7. We feel satisfied on going through the various authorities cited by the parties" counsel that the rule requiring exhaustion of statutory remedies before the writ petition can be filed is purely a rule of policy, convenience and discretion rather than a rule of law binding on the High Court. In this respect we invite reference to another decision of the Supreme Court in the case of Baburam v. Zila Parishad AIR 1969 SC 656. Ramaswami, J., held therein, while speaking for the court, that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue prerogative writ. It is true, it was said further, that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and, where such a remedy exists, it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. Another weighty observation made by the court was that it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion, rather than a rule of law and the court may therefore in exceptional cases issue a writ, such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted. In view of these clear-cut decisions of the Supreme Court we feel satisfied that the jurisdiction of this Court is not barred in deciding the present writ petitions. We have reached the conclusion that it is appropriate that the legal points raised in these petitions should be dealt with by the High Court for enlightenment of the litigant public and also the taxing authorities, and it is this consideration which has weighed with us in holding that though an alternative statutory remedy may be available we should decide the writ petitions on merits.

8. This takes us to the consideration of the principal question debated in this Court. That question is whether irrespective of the facts bearing on and circumstances attending an individual transaction where-under the petitioner has supplied a measured piece of textile to a customer and has also undertaken the stitching thereof into a required garment, and the petitioner got the garment prepared from its tailoring department, such garment shall fall in the category of "ready-made garments". The expression "ready-made garment" is not defined in the Act. In the Oxford Pocket Dictionary, the expression "ready-made" is defined in reference to clothes "as made in standard sizes and not to customers" measurement" and, according to the Chambers's Twentieth Century Dictionary, "ready-made" means "made before sale, not made to order". In the Webster's World Dictionary, the expression "ready-made" is defined thus: "made so as to put ready for use or sale at once; not made to order". The connotation of the expression "ready-made garment" used in Schedule II of the Act is, according to the common concept of the people, the garments which are ready for sale in a shop and which the customer can straightaway purchase on payment of the price

without having anything to do with it during the course of its preparation. According to the allegations made in the writ petition of Srikrishna Stores, what normally happens is that a customer firstly comes to the textile department of the stores, chooses a particular piece of cloth, probably pays its price, and then orders that the proprietor of the stores may get a particular garment prepared from his own tailors of the cloth selected by him. It is easy to assume that in such a case the tailor would take the measurements of the customer so that the required garment when ready fits him. Not quite unoften the tailor tries the garment on the customer before finalising its stitching. It is not disputed on behalf of the respondents that all these processes are gone through before the customer can take delivery of the prepared garment. In our opinion, such a garment would not answer the description of "ready-made garment" but can more aptly be described as a "garment made to order". As such, such a garment cannot be assessed as ready-made garment under the Act. A peculiar feature of the garment we are concerned with is that it is earmarked for an individual and it cannot be sold by the dealer to someone else, whereas ready-made garment, does not bear the tag of being subject of an agreement of sale with any one.

9. However, that finding does not conclude the fate of the petitions for item No. 3 of Schedule II of the Act makes "other goods" also taxable and it remains to be determined if the sale price of such garments is liable to tax as sale of "other goods". Item No. 3 reads: "Other goods (other than the goods taxable under the Assam Finance (Sales Tax) Act, 1956, and the Assam (Sales of Petroleum and Petroleum Products, including Motor Spirit and Lubricants) Taxation Act, 1955." The expression "goods" is defined in Section 2(4) of the Act to mean all kinds of movable property other than newspapers, actionable claims, stocks, shares or securities, and includes all materials, articles and commodities, whether or not to be used for the purposes referred to in Sub-clauses (a) and (b) of Clause (2) of the Act. The garments made to order, it looks clear to us, do fall within the sweep of this definition of goods, and this conclusion is not challenged before us by the learned Counsel for the writ petitioner. Therefore, if sale of the garments made to order is not assessable as sale of ready-made garments, it is surely assessable as sale of "other goods". However, here again we have to sound a word of caution. Section 7(1) of the Act states that subject to the conditions and exceptions, if any, set out in Schedule III attached to the Act, the sales of goods specified therein shall be exempted from taxation under the Act. A reference to Schedule III would show that items Nos. 39, 42 and 45 exempt endi and muga cloth, handloom cloth woven out of handspun cotton yarn, and all varieties of textiles, namely, cotton, woollen or silken including rayon, art silk or nylon, whether manufactured by handloom, power-loom or otherwise. It is not inconceivable that, in a given case, a customer may purchase a piece of cloth from the petitioner's stores and on concluding that transaction of purchase, place a separate order with the petitioner in its tailoring department for stitching that piece of cloth into a particular garment. If the two transactions are clearly dissociated from each other, then the sale or the purchase of the piece of cloth

will be exempt from taxation under item No. 45 of Schedule III, and since labour involved in stitching is not taxable, all that may remain to be assessed is the price of thread, buttons and metalware that may have been used in preparing the particular garment. However, as may normally turn out to be the case, if the customer selects the piece of cloth and places an order for making a particular garment out of it and the entire process constitutes one contract, then he (the customer) shall be purchasing a garment made to order which shall be liable to assessment as "other goods", an item entered at No. 3 of Schedule II of the Act. These illustrative cases make it abundantly clear that the assessment cannot be made by any rule of thumb. Each individual transaction will have to be looked into with a view to determine its true nature.

10. The expression "sale" is defined in Section 2(12) of the Act and that definition, we feel, would be of considerable help in determining whether the piece of cloth of which the garment to order is made had been sold out by the dealer before the purchaser placed an order for its being stitched into a particular garment, or whether the purchase of the piece of cloth forms an integral and inseparable part of the entire transaction ending with the delivery of the garment prepared out of it. The expression "sale" is defined to mean "any transfer of property in goods by any person for cash or deferred payment or other valuable consideration" and "includes a transfer by separate agreement and for money consideration of goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge". The definition of "sale" as originally incorporated in the Act was amended into its present shape, we feel, to overcome the difficulty pointed out by the Supreme Court in the case of *Slate of Madras v. Gannon Dunkerley & Co.*¹ It is manifest from the definition as at present that unless the property in the goods is transferred to the purchaser respecting goods involved in the execution of a contract, by a separate agreement, no sale comes about between the parties concerned in the transaction. However, if the article supplied pursuant to a contract itself is one, the sale of which is liable to tax, such as garment made on order, which is assessable as "other goods", unlike the building contract in the case of *Gannon Dunkerley* [1968] 9 S.T.C. 353 (SC) it may be assessable as such. It will be noticed that the definition of "sale" is composed of two parts, which we may mention as "meaning definition" and "inclusive definition" and their fields of operation are distinctly different. The expression "contract" is defined in Section 2(2) of the Act. to mean, inter alia, any agreement for carrying out for cash or deferred payment or other valuable consideration the preparation of any movable property. Therefore, the making of a garment out of a piece of cloth provided by the dealer to a customer would bring about a contract between them for the preparation of the garment.

11. It looks appropriate to refer to the definition of the expression "sale price" given in Section 2(13) of the Act, for we feel it has relevancy to the assessment of the garments prepared on order. The definition clause reads as under: "Sale price" means the amount payable to a dealer as valuable consideration for (a)

the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer with or in respect of the goods at the time of, or before, delivery thereof, other than the cost of freight or delivery or the cost of installation where such cost is separately charged; or (b) the carrying out of any contract, less such fraction of such amount as represents the prescribed proportion of the cost of labour used in carrying out such contract. It is apparent that in terms of Clause (b) the whole of the amount paid by the customer as the price of the garment prepared on order, shall not be considered as sale price for the purposes of the Act. The true sale price which shall be taken into account in finding out the turnover of the dealer, who supplied the garment made on order, would be the amount payable to him as the price of the garment less such fraction of the total amount paid as represents the prescribed proportion of the cost of labour used in carrying out such contract. Hence, while assessing the sale price of the various garments on order supplied by a dealer the assessing authority cannot ignore the definition of the expression "sale price".

12. The above discussion of the various provisions of the Act and other connected matters leave no room for doubt, that the method adopted by the assessing authorities respecting the garments prepared on order and sold by the petitioner may not be perfect, for it appears that the authorities have not taken note of the various determining factors as also the relevant provisions of the Act. Consequently, we are left with no alternative but to allow the writ petitions, quash the assessment order in each case by writs of certiorari, and remand the cases to respondent No. 1. The remand in each case is made in exercise of our powers under Article 227 of the Constitution. We direct respondent No. 1 to proceed afresh in each case with the assessment in the light of the observations made in this judgment. Since this set of 14 cases avowedly partake the nature of test cases and the questions of law bearing on the interpretation of various provisions of the Act are almost *res Integra*, we leave the parties to bear their own costs.

D. Pathak, J.

I agree.