(2006) 02 GAU CK 0037

In the Gauhati High Court

Case No : Writ Petition No''s. 5369, 7812 and 7896 of 2002

S.S. Photographic Lab. Pvt. Ltd. APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 01-02-2006

Acts Referred:
Assam General Sales Tax Act, 1993 — Section 16, 17, 17(3), 17(5), 2(33)
Constitution of India, 1950 — Article 141, 246(3), 366(20A), 366(29A)

Citation : (2006) 3 GLT 495 : (2006) 145 STC 156

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : J. Bora, for the Appellant; K.N. Chowdhury, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The common challenge, is to the imposed liability to tax under the Assam General Sales Tax Act, 1993 (hereinafter referred to as "the Act"), allegedly thrust on the petitioners, however for different assessment periods. The petitioners having unsuccessfully contended before the respondent-authorities that considering the nature of the business, in which they are engaged, the demand is untenable in law, have approached this Court for redress. As identical questions of law are involved, all the three petitions were heard together and are being disposed of by this common order.

2. I have heard Mr. J. Bora, learned Counsel for the petitioners and Mr. K.N. Chowdhury, learned Additional Advocate-General, Assam, for the respondents.

3. The thumbnail facts necessary to provide the contextual background may be noted. First the petitioners'' version. The petitioner M/s. Photographic Laboratory Pvt. Limited, is a private limited company incorporated under the Companies Act, 1956 with its place of business at SS Road Lakhtokia, Guwahati, Assam. Initially, it was a proprietorship concern up to December 31, 1996 in the name and style of M/s. SS Colour Lab of which Shri Sanat Kumar Dey [petitioner in W.P. (C) No.

5369 of 2002], was the proprietor. The petitioner-company, a new industrial unit under the Industrial Policy of Assam, 1991 has been granted the eligibility certificate and it is entitled to claim sales tax exemption for the period from March 18, 1994 to March 17, 2001. According to the petitioners, in course of business, they received photo negatives from various customers for the purpose of processing the same into positive photographs and prints for delivery thereof, against some job charges and that the process does not involve any sale of goods or transfer of property in goods as comprehended u/s 8(i)(e) of the Act. In response to the notices in the year 1997, asking them to explain why their business transactions would not be treated as "works contract" under the Act, they submitted their written replies, contending that having regard to the nature of business, no tax under the Act was payable by them. Inspite thereof the respondent No. 3 made summary assessment for the years 1993-94, 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99, on the basis of the materials available from their books of accounts seized in the meantime and raised demands of various amounts for the aforementioned periods, payable by way of tax under the Act. Being aggrieved, appeals were preferred before the respondent No. 2, the Deputy Commissioner of Taxes (Appeals), Guwahati, against the assessments for the year 1993-94, 1994-95, 1995-96 as well as for the periods April 1, 1996 to December 31, 1996 and January 1, 1997 to March 31, 1997 under the Act. The appellate authority by order dated April 30, 2002 dismissed the appeals and confirmed the assessments made by the respondent No. 3.

4. During the assessment years 1997-98 and 1998-99, the petitioner-company submitted quarterly returns to the respondent No. 3, who by order dated August 6, 2002 completed the assessment u/s 17(5) of the Act and determined amounts of Rs. 6,15,678 and Rs. 7,94,379, as tax payable with interest for the said assessment years. Accordingly, demand was raised for the payment thereof. The assessment years corresponding to the writ petitions under adjudication are as hereunder :

W.P. (C) No. 5369 of 2002--01.07.1993 to 31.03.1994, 1994-95, 1995-96, 01.04.1996 to 31.12.1996,

W.P.(C) No. 7896 of 2002--01.01.1997 to 31.03.1997,

W.P.(C) No. 7812 of 2002--1997-98, 1998-99.

5. The petitioners'' plea in essence before the appellate authority, was that the transactions in course of their business could not be considered as "works contract" within the meaning of the Act. Further, no transfer of any property in goods being involved in their business pursuits, they were not assessable to tax thereunder. According to them, the works executed in their laboratory against the charges realised, were services rendered based on skill and expertise, construable as service contract inseparable from the materials like paper, chemicals, etc., utilised in the process. The activities involved in executing the job orders being indivisible and as no transfer of property in goods was involved

therein, Section 8(1)(e) and 8(3)(iv)(b) of the Act, were not attracted so as to render them assessable to tax under the Act. The approach of the respondent-authorities was opposed to the letter and spirit of the definition of the expression "tax on the sale or purchase of goods" provided in article 366(29A) of the Constitution of India, they pleaded.

The above assertions were negated holding that in executing the works entrusted in course of their business, the petitioners were engaged in "works contract" as defined u/s 2(38)(iv) of the Act and thus chargeable to tax u/s 8(1)(e) of the Act, in view of article 366(29A) of the Constitution of India and entry No. 24 of Schedule VI of the Act. As photo papers, chemicals, etc., are involved at the delivery of the finished products to the customer, according to the respondents, there is a transfer of property in goods in execution of the job orders attracting tax liability under the Act. It being within the legislative competence of the State Legislature to enact the Act, in view of the constitutional empowerment traceable in article 246(3) of the Constitution of India and entry No. 54 to the State List, the demand was unassailable, they asserted.

6. Mr. Bora has argued that the petitioners'' business transactions are exclusively service based against the charges therefore and do not in any manner witness transfer of property in goods and therefore the same being not a sale u/s 2(33) of the Act, no tax is payable thereunder. There being neither any transfer of property in goods in the transactions undertaken by the petitioners, nor any intention to that effect being manifested in their dealings with their customers, no tax contemplated u/s 8(1) of the Act is leviable and therefore, the impugned assessments and demands being without any authority of law are liable to be adjudged as such. According to him, the photo paper, chemicals and other raw materials applied in the process for developing the photo rolls and their negatives thereof to obtain the photo prints being an inseparable part of the process undertaken, no transfer of property in such papers, chemicals, etc., is conceivable and therefore, the assessment and demand made is not authorised under the Act. The learned Counsel, however, did not dispute that the business undertakings of the petitioners'' amounted to "works contract" of the nature at item No. 24 enumerated in Schedule VI to the Act. The computation of the amount of tax payable has not been questioned. To put it differently the challenge is exclusively against the liability to be taxed under the Act and no more.

7. Mr. Bora, pressed into service the following decisions in support of his arguments: M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], (2002) 1 GLT 276 Vishwa Vimohan Jha v. State of Meghalaya 2003 1 GLT 275 New Frontier Colour Laboratories Pvt. Ltd. v. Commissioner of Taxes and order of this Court in Civil Rule No. 4736 of 1997 Photovisual (Assam) Private Limited v. Commissioner of Taxes.

8. The learned Additional Advocate-General per contra has argued that following the Constitution (Forty-sixth Amendment) Act, 1982, Clause (29A) of article 366

was inserted defining "tax on sale or purchase of goods" to mean amongst others, a tax on the transfer of property in goods (whether as goods or in some other form), involved in the execution of a works contract, thus making it permissible for the State authorities to levy sales tax on the value of goods involved in a works contract divisible into one for sale of goods and another for supply of labour and services. As the business activities of the petitioners amounted to works contract under the Act, as is identifiable in item No. 24 of the Sixth Schedule thereof, it was well within the dominion of the respondents to decipher the transfer of property in goods involved therein and make due assessment of the tax payable in accordance with the said legislation. Any transfer of property in goods involved in a works contract being chargeable to tax as is explicit from Section 8(1)(e) of the Act, Mr. Choudhury, has urged that in the facts and circumstances of the case, the assessment and demand of tax is unexceptionable. According to him, the decision of the apex Court in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], relied upon by the petitioners, is no longer a good law in the face of the subsequent decision of the apex Court in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, . He maintained that in the teeth of the ratio in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , the petitioners'' assertions based on M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], and the other decisions of this Court structured thereon, are of no avail.

9. The learned Additional Advocate-General in order to trace the background of the insertion of Clause (29A) of article 366 of the Constitution of India referred to the decision of the apex Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, . He contended that the constitutional amendment was occasioned to overcome the decision of the apex Court in the The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , to the effect that a works contract was an indivisible one and the turnover of the goods used in the execution thereof, was not exigible to sales tax. According to Mr. Choudhury, with the insertion of Clause (29A) of article 366 of the Constitution of India, a transfer of property in goods involved in the execution of a works contract would be deemed to be a sale of those goods. Thus, the interdiction on the exaction on the turnover of the goods used in the execution of a works contract before the above amendment was lifted, conceding a power to the State to charge such tax on the value of the goods, in the same way as is leviable on the price of the goods and materials supplied, for instance in a building contract.

10. Referring profusely to the decision rendered in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , the learned Additional Advocate-General argued that the decisions of this Court in Vishwa Vimohan Jha (2002) 1 GLT 276, New Frontier Colour Laboratories (2003) 1 GLT 275 and Photo Visual (Assam) Put. Ltd. (C.R. No. 4736 of 1997) founded on M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], are of per incuriam being obvious the law laid down in M/s. Associated Cement

Companies Ltd. Vs. Commissioner of Customs, . According to Mr. Choudhury, therefore, the petitions bear no merit and are therefore liable to be dismissed.

11. I have carefully considered the rival submissions. Before adverting to the authorities cited at the bar, it would be discreet to notice the relevant provisions of the Constitution and the Act, having a bearing on the issues to be adjudicated upon. Clause (29A) of article 366 of the Constitution of India inserted by the Constitution (46th Amendment) Act, 1982 is extracted hereinbelow :

Article 366(29A).... ''Tax on the sale or purchase of goods, includes...(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract ;...and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

Entry No. 54 of the State List appearing in the Schedule VII of the Constitution of India, dealing with taxes on the sale or purchase of goods is couched in the following language :

Entry No. 54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry No. 92-A of List I.

12. The Act, is therefore a statute enacted in exercise of the power conferred in Article 246(3) read with entry No. 54 of List II as above. The preamble proclaims that it is a legislation to amalgamate and consolidate the laws relating to levy of tax on the sale or purchase of goods in the State of Assam.

13. The word "sale" is defined in section 2(33) to mean with all the grammatical variations and cognate expressions, any transfer of property in goods by any person for cash, deferred payment or other valuable consideration, and includes :

(i) ...

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

14. Section 2(38) defines "works contract" to mean and includes any agreement for carrying out :

(i) to (iii)...

(iv) The fitting out or fabrication, assembling, altering, or reassembling blending, furnishing, improving, processing or otherwise treating or adopting any goods.

Under section 8, tax leviable u/s 7 for any year shall be charged on the taxable turnover during such year--

(a) to (d)...

(e) In respect of any transfer of property in goods (whether as goods or any other form) involved in a works contracts of the nature specified in Schedule VI, at the rate or rates specified in that Schedule.

Section 8(3) defines "taxable turnover" to be the gross turnover reduced by the turnover and or such amount as has been outlined therein.

Under Section 17, the assessing officer may, if a dealer fails to furnish a return as required u/s 16 or having furnished the return fails to comply with the notice issued u/s 17(3) or fails to get himself registered, make to the best of his judgment, assessment of tax payable by such dealer.

15. A combined reading of the provisions of the Constitution and the Act, referred to above, makes it abundantly clear that with the 46th Amendment of the Constitution, a levy on the transfer of property in goods (whether as goods or in some other form), involved in the execution of a works contract is comprehended to be a tax on the sale or purchase of goods. Clause (29A) of article 366 makes it manifest that a transfer of property in goods (whether as goods or any other form), involved in the execution of a works contract is deemed to be a sale of those goods by the person making the transfer and a purchase thereof, by the person to whom the transfer is made. It is therefore, that such a transfer is within the sweep of the definition of "sale" provided in Section 2(33) of the Act and is thus exigible to tax u/s 8(1)(e) thereof at the rate or rates, corresponding to the goods referred to in Schedule VI thereof. Item 24 of the said Schedule runs thus :

-- Description of works Percentage of deduction Rate of tax contract u/s 8(3)(iv)(b) (per cent) not more than % -- 24. Processing and supplying 15 8 of photograph, photo prints, photo negatives including photographing with camera, X-ray and other scanning machines. --

16. Bearing in mind, the admitted enterprises of the petitioners in course of their business dealings, the same in my opinion, are well within the ambit of "works contract" envisaged in the above entry. Indeed, as observed hereinabove, the above aspect has not been assailed by the petitioners. The pleaded facts are also not in dispute having remained uncontroverted in absence of a counter by the respondents. With this background, it is now time to turn to the precedential law.

17. In Builders Association of India and Others Vs. Union of India (UOI) and Others, the apex Court while dealing with the challenge to the levy of sales tax on the turnover relating to works contract, following the above constitutional amendment and the consequential changes in the various State laws, dilated, inter alia, on the reasons for the insertion of Clause (29A) in article 366 of the Constitution of India. Referring to its earlier decision in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., to the effect that a works contract was not divisible and therefore, the turnover of the goods used in the execution

thereof, was not assessable to sales tax, the apex Court held the view that the amendment was brought about to define "tax on the sale or purchase of goods" to include a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of works clarifying that such transfer would be deemed to be a sale of those goods by the person making it and a purchase thereof, by the person to whom the transfer is made. It ruled that the upshot of the definition was thus to enlarge the scope of "tax on sale or purchase of goods" so as to include in its ambit, the transfer, delivery or supply of goods that may take place under any of the transactions referred in Sub-clauses (a) to (f) of Article 366(29A) so much so that every such transfer, delivery or supply becomes subject to levy of sales tax. Consequently, the expression "tax on the sale or purchase of goods" in entry 54 of the State List would include a tax on the transfer of property in goods (whether as goods or any other form) involved in the execution of a works contract. Such levy thus logically became subject to the same discipline to which any levy under entry 54 of the State List was under the Constitution. The apex Court, therefore, was of the opinion that a works contract, which was hitherto indivisible, by a legal fiction consequential to the constitutional amendment, was rendered into one for sale of goods and the other for supply for labour and services. The States were thus empowered to levy sales tax on the value of goods involved in a works contract in the same way, in which such tax was leviable on the price of goods and materials supplied in a building contract entered into by two distinct and separate contracts earlier.

18. The question posed before the apex Court in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was whether the job rendered by a photographer in taking photographs, developing and printing films would amount to a "works contract" as contemplated under article 366(20A)(b) of the Constitution of India read with Section 2(9) of the Madhya Pradesh General Sales Tax Act, 1958 involved therein. The apex Court while recounting its observations in Builders Association of India and Others Vs. Union of India (UOI) and Others, was however of the view that the deemed compartmen-talisation of a works contract for levy of sales tax on the transfer of property in goods involved therein, would be permissible only, if the contract manifested a dominant intention to transfer such property and not where such transfer takes place as an incidents of the contract of service. It held against the power of the State to indulge in any microscopic division of contracts involving the value of materials used incidentally in such contracts. It further held that the work done by the photographer is only in the nature of a service contract not involving any sale of goods and therefore struck down the levy. In coming to its conclusion, the apex Court took note amongst others of its earlier decisions in Hindustan Aeronautics Ltd. v. State of Karnataka [1984] 55 STC 314 and Everest Copiers v. State of Tamil Nadu, (1996) 5 SCC 390

19. The decision in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], came up for consideration before apex Court in M/s. Associated Cement Companies Ltd. Vs. Commissioner of

Customs, , where their Lordships were of the view that the decision rendered in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], ran counter to the express provision contained in article 366(29A) and also the Constitution Bench decision in Builders Association of India and Others Vs. Union of India (UOI) and Others, . The relevant paragraph of the decision in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, is extracted hereinbelow for ready reference :

In arriving at the aforesaid conclusion the court referred to the decisions of this Court in Hindustan Aeronautics Ltd. Vs. State of Karnataka, and Everest Copiers v. State of Tamil Nadu, (1996) 5 SCC 390 . But both these cases related to pre-Forty-sixth Amendment era where in a works contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even, if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. The conclusion arrived at in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], , in our opinion, runs counter to the express provision contained in article 366(29A) as also of the Constitution Bench decision of this Court in Builders Association of India and Others Vs. Union of India (UOI) and Others,

Noticeably the verdict in the above reported case is by a Bench of three Judges whereas the decision in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was rendered by a division Bench of the apex Court.

20. A division Bench of this Court in Vishwa Vimohan Jha (2002) 1 GLT 276 relying on M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], upheld the contention of the appellant that there was no sale or deemed sale when the paper on which a photograph is developed is passed to the customer as the sale of the paper is not the dominant purpose of the contract.

21. The same view was taken by a single Bench of this Court in New Frontier Colour Laboratories Pvt. Ltd. (2003) 1 GLT 275.

22. Though while, rendering the order dated September 3, 2002, passed in Photovisual (Assam) Pvt. Ltd. (C.R. No. 4736 of 1997), the decision in Associated Cement Companies Ltd. [2001] 124 STC 59 (SC) : AIR 2001 SC 862 was referred to, the learned single Bench upheld the challenge to the levy by taking note only of an observation in paragraph 32 thereof, opining that thereby the

decision in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], did not stand overruled.

23. Apart from the fact that the above decisions of this Court had been rendered after M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , it is noticeable that while deciding the above cases, the same was not brought to the notice of this Court. In Photovisual (Assam) Pvt. Ltd. (C.R. No. 4736 of 1997), as well the attention of the court was not invited to the above extracted paragraph from M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, .

24. Significantly, the decision in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, is later in point of time and is also by a larger Bench. A plain reading of the observations contained in the quoted excerpt of the said decision and the conclusions recorded therein, in my considered view proclaims an unequivocal disapproval of the ratio in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], . Not only it has been observed therein that the decisions in Hindustan Aeronautics Ltd. Vs. State of Karnataka, and Everest Copiers v. State of Tamil Nadu, (1996) 5 SCC 390 on which the verdict of M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], rested, related to the pre-amendment period when the State had no jurisdiction in a works contract to impose sales tax on transfer of property in goods involved in the execution thereof, it was categorical in ruling that even if the dominant intention of the contract is to render a service, after the 46th Amendment of the Constitution, if such contract is a works contract, the State was empowered to levy sales tax on the materials used therein. The contrary view recorded in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], , was held to be opposed to article 366(29A), as well as the Constitution Bench decision of the court in Builders Association of India and Others Vs. Union of India (UOI) and Others, .

25. In view of such a resounding and unambiguous determination in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , I do not feel persuaded to uphold the petitioners'' plea on the basis of the ratio in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], . In my understanding, of the pleaded facts, the provisions of the Act and the Constitution of India referred to hereinabove as well the decision rendered in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, and the contours of assailment in the instant proceedings, the impugned assessment and demand do not suffer from any lack of jurisdiction or vitiating illegality warranting interference of this Court in the exercise of its power of judicial review.

26. The decision of the apex Court in Tata Consultancy Services v. State of Andhra Pradesh [2001] 122 STC 198, makes reference to M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , in a wholly different

context. As the decisions of this Court in Vishwa Vimohan Jha (2002) 1 GLT 276, New Frontier Laboratories (2003) 1 GLT 275, Photovisual (Assam) Pvt. Ltd. (C.R. No. 4736 of 1997) are based on M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], , for the above reasonings, with all respect and humility, I am unable to subscribe to the views expressed therein.

27. The above decisions of this Court being rendered at a point of time, subsequent to the one in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, those have to be construed as per incurium. This aspect of law of precedents was dwelt upon by the apex Court in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , expressing itself as hereinbelow :

''incuria'' literally means ''carelessness''. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The ''quotable in law'' is avoided and ignored if it is rendered, ''in ignoratium of a statute or other binding authority''. [1944] 1 KB 718 Young v. Bristol Aeroplane Co. Ltd., Same has been accepted, approved and adopted by this Court while interpreting article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu Vs. Rajdewan Dubey and Others, this Court, while pointing out the procedure to be followed when conflicting decisions are placed before a Bench, extracted a passage from Halsbury''s Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

28. The upshot of the above narrative, is that the impugned assessment and demand is sustainable in law and is thus upheld. The petitions being without any merit are dismissed.

29. Before parting, it has to be observed that in view of the decision of the apex Court in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, , which in my opinion has by implication overruled the ratio in M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], and the resultant conflict in decisions rendered by the different Benches of this Court, it would be in fitness of things that the matter be placed before the honourable Chief Justice for appropriate order(s), if deemed fit, to refer the issue before a larger Bench for a binding resolution thereof. No costs.

