

(1971) 09 GUJ CK 0013
In the Gujarat High Court
Case No : First Appeal No. 208 of 1964

State of Gujarat

APPELLANT

Vs

Shah Construction Co. and Another

RESPONDENT

Date of Decision : 27-09-1971

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 11, 12B, 2(1), 2(13), 2(6)

Citation : (1972) 29 STC 64

Hon'ble Judges : J.M. Sheth, J;A.A. Dave, J

Bench : Division Bench

Advocate : G.N. Desai, Government Pleader, for the Appellant; U.P. Jadeja and G.M. Vidyarthi, Assistant Government Pleader, for the Respondent

Judgement

Sheth, J.—This is an appeal directed against the judgment and decree passed by the learned Civil Judge, Senior Division, Himatnagar, in

Special Civil Suit No. 1 of 1961, dated 21st February, 1963.

2. The facts leading to this appeal, briefly stated, are as under :

The plaintiff is a registered partnership firm, doing business as contractors. They had taken a contract for constructing an asphalt road on National

Highway No. 8 from Raigadh to Ratanpur and from Himatnagar to Raigadh, from the Government. Exhibit 41 is the original tender which was

signed by one of the partners of the firm and by the Executive Engineer on behalf of the Government.

3. As per the contract, Government had to supply to the contractors the necessary asphalt for the road. Accordingly, it was supplied by the Public

Works Department of the State. Running bills were prepared. The contractors had to pay the price of those materials supplied. From the running

bills of payments, in addition to the cost of materials, sales tax was also

deducted. According to the plaintiff, cost of materials included the sales tax and still, however, sales tax was again deducted from the payment of bills. Thus, the sales tax was charged twice on the same materials. According to the plaintiff, the Government was not a dealer, much less a registered dealer. Under the contract, the Government had to supply the materials to the contractors and so the materials were supplied. As per the contract, property in goods did not pass to the contractors. It remained the absolute property of the Government. The Government was, therefore, not justified in making these deductions. The deductions were illegal. They were wrongly recovered and hence, for the refund of the amount of such deductions made, the present suit was filed. The claim was in all for a sum of Rs. 15,500, which included the total sum deducted, viz., Rs. 13,867.53; Rs. 1,632.47 was claimed by way of damages in lieu of interest calculated at the rate of 6 per cent. per annum.

4. On behalf of defendants Nos. 1 and 3, in their written statement, exhibit 13, the contention urged was that there was a term in the contract itself whereunder a contractor was bound to pay the sales tax if such Act was in force. The Government was a dealer as defined in the relevant Sales Tax Act. Recovery of sales tax was, therefore, legal and valid. The suit should, therefore, be dismissed.

5. Defendant No. 2, State of Maharashtra, filed its written statement, exhibit 20, whereunder also similar contention was raised.

Plaintiff's manager has been examined at exhibit 40.

6. The learned trial Judge negatived the contentions raised on behalf of the defendants and passed a decree in favour of the plaintiff for a sum of Rs. 15,500 with future interest at the rate of 6 per cent. per annum on the sum of Rs. 13,867.53 from the date of the suit till payment. Defendant No. 1 was directed to pay the costs of the plaintiff. Defendants were directed to bear their own costs.

7. Being dissatisfied with that judgment and decree, the State of Gujarat, defendant No. 1, and the Executive Engineer, Public Works Department, defendant No. 2, have filed the present appeal to this court.

8. The only contention urged by the learned Government Pleader before us was that in view of the definition of the word "sale" given in Section 2(13) of the Bombay Sales Tax Act, 1953 (which will be hereinafter referred to as

""the Act""), and the definition of the word ""dealer"" given in section 2(6) of the Act, the transaction of supplying materials, viz., asphalt, by the appellants to the plaintiffs would amount to ""sale"" within the meaning of section 2(13) of the Act, and the Government could be said to be a ""dealer"" within the meaning of the word ""dealer"" given in section 2(6) of the Act. It was, therefore, contended by him that the contractors were liable to pay the sales tax to the appellants and the Government had, therefore, made the deductions from the bills of the contractors rightly and legally. Plaintiff-respondent No. 1 was, therefore, not entitled to get a decree as has been passed by the learned trial Judge.

9. In our opinion, it is difficult to accept the argument advanced by Mr. Desai, learned Government Pleader, that the Government can be said to be a dealer.

Dealer"" has been defined in section 2(6) of the Act as under :

""dealer"" means any person who carries on the business of selling or buying goods in the pre-Reorganisation State of Bombay excluding the transferred territories, whether for commission, remuneration or otherwise and includes a State Government which carries on such business and any society, club or association which sells goods to, or buys goods from, its members.

It is, therefore, evident that the Government can be said to be a ""dealer"" within the meaning of this clause only if one can come to the conclusion that the Government carries on the business of selling or buying goods in the area in question. The learned Government Pleader has not been able to point out anything to us from the record that the Government was carrying on the business of selling or buying goods, viz., asphalt. The learned trial Judge has, in our opinion, rightly come to the conclusion that the Government cannot be said to be a ""dealer"" within the meaning of section 2(6) of the Act.

Registered dealer"" has been defined u/s 2(11) of the Act as under :

""registered dealer"" means a dealer registered u/s 11 or deemed to be a registered dealer u/s 12-B.

It is not even suggested on behalf of the appellants that the Government was a registered dealer on having been registered u/s 11 or could be said

to have been deemed to be a registered dealer u/s 12-B of the Act.

10. Section 21, sub-section (1), of the Act reads :

No person shall collect any amount by way of sales tax or general sales tax in respect of sales of any goods which are declared, from time to time,

u/s 7 as sales on which such tax is not payable.

Sub-section (2) of it, which is material for our purpose, reads :

No person selling any goods shall collect from the purchaser any amount by way of the tax unless such person is a registered dealer and is liable

to pay the tax in respect of such sale.

The Government is not a dealer within the meaning of section 2(6) of the Act and much less is a registered dealer within the meaning of section

2(11) of the Act. The learned trial Judge has, therefore, rightly, in our opinion, come to the conclusion that the Government was not entitled to

recover sales tax from the contractor. Such deductions were wrongly made.

11. The learned trial Judge has referred to the decision of the Madras High Court in Gannon Dunkerley and Company (Madras) Limited v. State

of Madras ([1954] 5 S.T.C. 216; AIR 1954 Mad. 1130 .) in support of his conclusion. We need not refer to that decision, as an appeal was filed

against that decision and the Supreme Court itself has decided that question in The State of Madras Vs. Gannon Dunkerley and Co., (Madras)

Ltd., The relevant observations made therein are :

The expression "sale of goods" in entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property

passing therein pursuant to that agreement. In a building contract which is entire and indivisible, there is no sale of goods, and it is not within the

competence of the Provincial Legislature under entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.

Hence, the provisions of the Madras General Sales Tax Act which impose a tax on such materials as if there is a sale of them are ultra vires.

12. In the same volume, there is another decision of the Supreme Court in Firm of Peare Lal Hari Singh Vs. The State of Punjab and Another, . It

is observed therein also :

There is thus no sale of the materials made by the contractor in his construction and no tax can be levied therein.

In The State of Bombay Vs. Ratilal Vadilal and Bros., , after referring to the definition of the word ""dealer"" in the Bombay Sales Tax Act, 1953,

the following pertinent observations have been made by the Supreme Court :

It would appear that to be a dealer, the person must carry on the business of selling goods in the State of Bombay. The short question in this case,

therefore, was whether the respondents were carrying on such a business in respect of coal.

In para. 8, it is observed :

The scheme of the Control Order shows that no sale of coal could take place except to a person holding a certificate. A sale otherwise was in

contravention of the Control Order. The certificate which has been produced in the case, though made out in the name of the respondents, shows

the consumer as the consignee. It is thus plain that there was no sale by the colliery to the respondents, but directly to Karsandas, though through

the agency of the respondents. The respondents also, when they made out the bill to Karsandas, mentioned that he was the consignee, and that

they were only charging their "middlemen" commission. In these circumstances, it is difficult to hold that the colliery sold coal to the respondents,

and that they, in turn, sold it to Karsandas. There were no two sales involved; there was only one sale, and that was by the colliery to the

consumer. The respondents never became owners by purchase from the colliery, because the colliery would not have sold coal to them, nor could

they have bought it unless they had obtained a certificate. The position of the respondents was merely that of agents, arranging the sale to a

disclosed purchaser, though guaranteeing payment to the colliery on behalf of their principal. In view of what we have said, no business of selling

coal was disclosed in the instance cited before the Collector, and the order of the Tribunal was correct on the facts placed before it.

In the instant case also, we cannot say that the Government was doing any business of selling asphalt. Government could not have been said to be

a ""dealer"" within the meaning given in section 2(6) of the Act.

13. In this context, it is significant to note that in the tender, exhibit 41, clause (12), it is stated :

All materials supplied to the contractor shall remain the absolute property of Government, and shall on no account be removed from the site of the

works, and shall at all times be open to inspection by the Engineer-in-charge. Any such materials unused and in perfectly good condition at the time of completion or determination of the contract shall be returned to the Public Works Department store, if the Engineer-in-charge so requires by a notice in writing given under his hand; but the contractor shall not be entitled to return any such materials except with such consent and he shall have no claim for compensation on account of any such material supplied to him as aforesaid but remaining unused by him or for any wastage in or damage thereto.

This clause which is worded in these terms also indicates that the Government had never any intention of selling such materials (asphalt). In that view of the matter, it is not necessary to decide whether this would amount to a "sale" within the meaning of section 2(13) of the Act. The learned trial Judge has, therefore, rightly held that these deductions were illegal and he has rightly decreed the claim.

14. This was the only contention urged before us and that contention fails. The appeal, therefore, fails.

15. The appeal is dismissed. Appellant No. 1 to pay the costs of respondent No. 1. Respondent No. 2 to bear its own costs.

16. Appeal dismissed.