
(2007) 01 GAU CK 0049
In the Gauhati High Court

Sufur Ali	Vs	APPELLANT
State of Assam and Others		RESPONDENT

Date of Decision : 19-01-2007

Acts Referred:

Central Sales Tax Act, 1956 — Section 9
Constitution of India, 1950 — Article 226

Citation : (2007) 2 GLT 232 : (2007) 10 VST 499

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner, who is a registered dealer under the Assam General Sales Tax Act, 1993, has assailed the legality and validity of the order passed by the Deputy Commissioner of Taxes, i.e., the appellate authority and the consequential assessment order made by the Superintendent of Taxes.

2. The brief facts leading to the filing of the instant writ petition are that the petitioner was settled with a Sand and Gravel Mahal namely, Khoraghat Sand-cum-Gravel Mahal-I for the tenure 1993-95 with the total bid value of Rs. 32,70,001. The settlement was made by order dated April 6, 1993 for the aforesaid period.

3. According to the petitioner, he had paid the entire bid money, but due to certain difficulties, faced by him, he could not extract the entire quantity of sand and gravel. Situated thus, he had prayed for extension of the Mahal period and the jurisdictional Divisional Forest Officer also granted the extension up to April 5, 1997 by his letter dated February 26, 1997. In spite of such extension granted, the petitioner could not extract the entire quantity, but his prayer for further extension was rejected by the Government by its letter dated January 6, 1998.

4. According to the petitioner, he had maintained proper books of account

relating to the said business and submitted necessary returns with due payment of tax as required under the provisions of the Assam General Sales Tax Act, 1993. However, since the petitioner could not file necessary returns of turnover for the assessment year 1993-94, he was summarily assessed u/s 17(5) of the Act by the Superintendent of Taxes, Dhubri, by his order dated March 29, 1995. Being aggrieved by such summary assessment, the petitioner preferred an appeal before the Deputy Commissioner of Taxes (Appeals), Guwahati vide appeal petition dated July 18, 1995.

5. During the pendency of the appeal, respondent No. 4, i.e., the Superintendent of Taxes, Dhubri assessed the petitioner u/s 17(4) of the Act for the assessment years 1994-95 and 1995-96 vide orders dated March 22, 1996 and June 3, 1996, respectively. According to the petitioner, he had produced all the books of account relating to his business for the assessment years 1994-95 and 1995-96 at the time of hearing which were thoroughly verified by respondent No. 4 and in absence of any irregularity found, the said books of account were accepted by the respondent No. 4 as correct and complete.

6. In the meantime, the appeal preferred by the petitioner was allowed and the appellate authority set aside the summary assessment order dated March 29, 1995 for the assessment year 1993-94 vide his order dated August 20, 1997, directing respondent No. 4 to make fresh assessment after giving reasonable opportunity of hearing and taking into consideration the goods removal statement dated May 2, 1995 issued by the Forest Ranger, Khoraghat Range.

7. After the aforesaid appellate order, dated August 20, 1997, respondent No. 4 reassessed the petitioner for the assessment year 1993-94 u/s 17(4) of the Act by his order dated November 10, 1997. According to the petitioner, during the course of hearing, he had produced all the books of account relating to his business along with the aforesaid order of settlement and all other relevant letters and documents which were issued by the Forest Department and the same were verified by respondent No. 4. No infirmity could be detected and accordingly, the books of account were accepted as correct and complete.

8. As regard the assessment orders for the assessment years 1996-97 and 1997-98, it is the case of the petitioner that the same were made u/s 17(4) of the Act by respondent No. 4 after allowing reasonable opportunity of being heard. The assessment orders on that basis were passed on January 16, 1998 and November 15, 2000, respectively. On that occasion also, the petitioner had produced all the books of account relating to his business and the same were duly verified by respondent No. 4. According to the petitioner, while passing the orders, the assessing authority took into consideration the reports dated September 22, 1997 and November 7, 2000 submitted by the concerned Inspector of Taxes. It is the stand of the petitioner that in the reports, the quantity of sand and gravel extracted by the petitioner during the period of settlement and the prevailing market value were mentioned.

9. When the matter rested thus, the petitioner received the notice dated September 25, 1999 issued by the Superintendent of Taxes, Dhubri, directing the petitioner to show cause as to why he should not be reassessed u/s 18 of the Act enhancing the turnover up to Rs. 13,67,606 and Rs. 12,15,101 for the assessment years 1993-94 and 1994-95, respectively on the basis of the total bid money paid by the petitioner during those two years. By the notice, the petitioner was further directed to show cause as to why penalty should not be imposed u/s 23(1)(g) of the Act for alleged concealment of turnover.

10. In response to the said notice, the petitioner by his reply dated February 15, 1999 denied the concealment of turnover. During the course of hearing, he has also verbally challenged the legality of the purported action u/s 18 of the Act for reopening of the assessment years 1993-94 and 1994-95. After such hearing of the matter, respondent No. 4 passed the order dated March 1, 1999 u/s 18 of the Act levying tax and interest for the assessment years 1993-94 and 1994-95. In addition to the tax and interest, the amount of Rs. 5,000 for each of the aforesaid assessment years was also imposed as penalty u/s 23(1)(g) of the Act and the notice of demands in respect of such amount was served upon the petitioner.

11. The petitioner applied for the certified copy of the assessment orders and on receipt of the same, came to know that the original assessment orders dated November 10, 1997 and March 22, 1996 for the assessment years 1993-94 and 1994-95 were reopened on the basis of the audit objection. Being aggrieved by the order, the petitioner preferred appeals before respondent No. 3. The appellate authority by its order dated August 14, 2000, while setting aside the orders of assessment dated March 1, 1999, rejected the plea of the petitioner relating to "the sale price" reflected in the petitioner's regular books of account and directed the Superintendent of Taxes, Dhubri, i.e., respondent No. 4 to assess the petitioner estimating "the sale price" on pro rata basis taking into consideration the entire bid money spreading over 5 assessment years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98, respectively. According to the petitioner, since no appeals had been preferred against the orders of assessment dated September 3, 1996, January 16, 1998 and November 15, 2000 pertaining to the assessment years 1995-96, 1996-97 and 1997-98, respectively, on the basis of the books of account of the petitioner, the appellate authority could not have directed respondent No. 4 to reassess the aforesaid three orders of assessment without setting aside the same.

12. Pursuant to the aforesaid order passed by the appellate authority, respondent No. 4 reassessed the petitioner for all the five assessment years by his order dated May 25, 2001 estimating "the sale price" on pro rata basis taking into consideration the entire bid money which according to the petitioner, was made without giving any opportunity of being heard. It is the case of the petitioner that he had all along maintained regular books of account of his business and had been regularly submitting the returns. Such books of account

having been thoroughly verified by respondent No. 4 at the time of original assessment in respect of the aforesaid five assessment years and the orders having been passed on that basis, there was no scope for reopening the matter. It is the further stand of the petitioner that the subsequent reopening of the original assessment orders at the behest of the Accountant General (Audit) was beyond jurisdiction and competence of the respondents. According to the petitioner, the matter has been mechanically reopened and the impugned order has been passed under intimidatory influence of the views of the Accountant General (Audit) without there being independent application of mind. It is the further plea of the petitioner that respondent No. 4 committed error in law in invoking Section 18 of the Assam General Sales Tax Act, 1993.

13. The respondents have filed their counter-affidavit justifying the impugned action. In paragraph 5 of the counter-affidavit, it has been stated that the turnovers disclosed by the returns submitted by the petitioner for the relevant periods compared to the bid money coupled with the amount paid for extension which stood at Rs. 32,64,510 reflected that the petitioner did not submit proper books of account relating to his business. According to the respondents, the original assessments cannot pose a bar against the subsequent reassessment based on new information of actually applied quantum of inputs during the relevant years. Referring to the reply furnished to the show cause notice dated September 25, 1999, the respondents in their counter-affidavit have stated that the petitioner did not furnish any explanation for the very wide gap between his inflow of receipt and outgo of expenditure for the periods under consideration. It has further been stated that the petitioner conveniently omitted to describe the comparative position of his assets and liabilities for the relevant years. As regards the plea of the petitioner that the condition precedent for exercising the jurisdiction u/s 18 of the Act was not available, the respondents in their counter-affidavit have stated that the assessing authority had proceeded against the petitioner only after receipt of definite information about the escapement of turnover in the original assessment orders. The audit being a highly professional body can be fully relied upon so far as the authenticity of information is generally concerned, the respondents have contended.

14. As regards the plea of the petitioner regarding power and jurisdiction of the appellate authority, the respondents have stated the following in para 23 of the counter-affidavit:

(a) There was nothing wrong on the part of the assessing authority while initiating proceedings u/s 18 based upon information supplied by the audits.

(b) The appellate authority while disposing the appeal set aside only the reassessment orders for the years 1993-94 and 1994-95 which were directly the subject-matter of the appeal. As regards the remaining periods of 1995-96, 1996-97, the implication was complete reassessment u/s 18 covering the entire tenure of the mahal since justifiable orders for 1993-94 and 1994-95 could not have been passed in isolation, given the integrality of the circumstances of the

case.

(c) The figures of turnovers disclosed by the books of account maintained by the dealer were too make-believe to be allowed credence. This was further accentuated by the absence of any explanatory statements of assets and liabilities of the dealers for the ten years in question.

15. I have heard Mr. J. Borah, learned Counsel along with Mr. P.K. Kalita, learned Counsel for the petitioner as well as Mr. R. Dubey, learned Standing Counsel, Finance. Mr. Borah, learned Counsel for the petitioner. Apart from his elaborate argument, he has also placed reliance on the following decisions:

- (1) Shree Monohar Lal Chopra v. State of West Bengal [1992] 87 STC 283 (WBTT).
- (2) Bhimraj Madanlal Vs. State of Bihar and Another,
- (3) Sikaria Sons and Co. v. Superintendent of Taxes [1973] 31 STC 25 (Gauhati).
- (4) The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow,
- (5) State of Andhra Pradesh Vs. Ratna Sree Box Makers,
- (6) J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another,
- (7) Lucknow Skin Co. v. State of U.P. [1998] 108 STC 569 (All).
- (8) Haryana Co-operative Sugar Mills Limited v. State of Haryana [1997] 107 STC 103 (P & H).
- (9) Girdharlal and Company Vs. State of Andhra Pradesh,
- (10) Commissioner of Sales Tax Vs. Madhu Chemical Works,
- (11) Vinod Trading Co. v. State of Assam [2006] 144 STC 573 (Gauhati).

16. Mr. Dubey, learned Standing Counsel, Finance, apart from arguing on merit of the case, also raised the plea of non-maintainability of the writ petition, there being alternative remedy by way of preferring the appeal against the impugned order.

17. Although there is challenge to the appellate order dated August 14, 2000 by which the reassessment order dated March 1, 1999 was set aside, the petitioner is aggrieved by rejection of "the sale price" reflected in the petitioner's books of account. According to the petitioner, the direction of the appellate authority to the assessing authority to reassess the petitioner estimating "the sale price" on pro rata basis taking into consideration the entire bid money spreading over five assessment years, i.e., 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98 was arbitrary. However, the petitioner did not take recourse to either the departmental remedy or remedy elsewhere by challenging that part of the order

of the appellate authority. Instead, he waited for the consequential order to be passed by the assessing authority which eventually was passed on May 25, 2001. According to the petitioner, the order was passed without giving any opportunity of hearing to him. The assessing authority has passed five independent orders pertaining to five assessment years, the orders have been passed on the basis of the aforesaid appellate orders and the directions contained therein. In all the impugned orders, the direction of the appellate authority has been recorded and contrary to the stand of the petitioner that he was not given the opportunity of hearing, it is evident from the impugned orders that due notice was issued to the petitioner for production of the books of account in response to which one Shri G.C. Das, a part time accountant of the petitioner appeared before the assessing authority and produced the books of account.

18. If the petitioner is aggrieved by the impugned orders of assessment, the proper course for him is to avail of alternative remedy of preferring appeals as was done by him on earlier occasions. Instead, he has invoked the writ jurisdiction of this Court towards making the challenge to the assessment orders. While doing so, he has also assailed the appellate order dated August 14, 2000 by which the matter was remanded back to the assessing authority. However, the only ground of challenge to that part of the order by which the appellate authority issued direction to the assessing authority to reassess the petitioner estimating "the sale price" on pro rata basis taking into consideration the entire bid money spreading over five assessment years is that the appellate authority could not have issued such a direction in view of the fact that no appeal was preferred against the orders of assessment pertaining to the years 1995-96, 1996-97 and 1997-98.

19. The above ground has been urged in the writ petition without first making any grievance against the appellate order. Rather, the petitioner submitted to the jurisdiction of the assessing authority in terms of the said appellate order and now, being aggrieved by the impugned orders of assessment has also collaterally challenged the parent order, i.e., the appellate order on the basis of which the impugned orders of reassessment have been passed. I am of the considered opinion that the petitioner cannot make a challenge to the appellate order dated August 14, 2000 after having submitted to the follow up action initiated by the assessing authority in terms of the said appellate order, which is also only when the petitioner found that the impugned orders of reassessment are contrary to his expectation. He cannot challenge the appellate order dated August 14, 2000 collaterally while challenging the impugned orders of reassessment. He first took a chance for favourable consideration in terms of the appellate order dated August 14, 2000 and thereafter, has turned round the same when he found that the orders of reassessment are not favourable to him.

20. There is no dispute that the impugned orders are appellable orders and thus, the petitioner has an alternative remedy of preferring appeals against the same. The provisions for appeal are inbuilt in the Act. In fact, the petitioner on earlier

occasions had approached the appellate authority making the grievance against the assessment orders. But the petitioner invoked the writ jurisdiction of this Court without exhausting the departmental remedy and while doing so, has also collaterally challenged the appellate order dated August 14, 2000.

21. There is no dispute that the petitioners have got remedy of appeal, as statutorily provided, against the impugned orders. Chapter VIII of the ASGT Act deals with the appellate and revisional jurisdiction of the authorities. As per Section 33(6) of the Act no appeal against an order of assessment of tax with or without penalty or against an order imposing penalty shall lie unless such appeal is accompanied by satisfactory proof of the payment of tax including penalty, if any, which is admitted to be due or 20 per cent of the amount of tax including penalty, if any, which has been assessed or levied whichever is higher provided that the appellate authority or Tribunal may, if it thinks fit for reasons to be recorded in writing and subject to furnishing of such security as such authority may deem fit, admit an appeal against such order with part payment or without any payment of the disputed amount of tax including penalty, if any, required under this Sub-section with a view to mitigate undue hardship which is likely to be caused to the dealer or person if the payment of such disputed amount is insisted on.

22. This Court in *Eastern Agency v. State of Assam* reported in [2007] 7 VST 410 : [2006] 1 GLT 14 noticing the following common question involved in all the writ petitions, answered the same in the negative, against the petitioners (page 413 of STC):

The common questions to be dealt with in all these writ petitions is whether the assessment orders passed by the Superintendent of Taxes, Unit-B, Guwahati for the year 2001-2002 u/s 17(5) of the AGST Act, 1993 read with Section 9(2) of the CST Act, 1956 could be reviewed in exercise of discretionary power of this court under Article 226 in a case where the assessee approached the court without availing of the alternative remedy.

23. The above writ petitions were pertaining to submission of "C" forms in respect of sale of tea outside the State. The petitioners were issued with show cause notices as to why summary assessment as per the provisions of the Act would not be made on their failure to produce the books of account. In reply the petitioners informed the assessing authority that they would produce the books of account on receipt of the same from the registered dealers and requested for time. It was the case of the petitioners that they tried to collect the "C" forms from the purchases and on failure to procure the same craved for further time. On their failure to do so within the prescribed time, the notices of demand were served upon them. Being aggrieved they approached this Court by filing the writ petitions without availing the alternative remedy available by way of appeal.

24. Learned single judge upon discussions of the factual matrix and the laws applicable to the case including the decisions on which the parties placed

reliance, held the writ petitions to be not maintainable and accordingly directions were issued to approach the appellate authority. It was submitted at the bar that against this decision of the learned single judge, the petitioners preferred writ appeal and the same has been dismissed affirming the said judgment and order. Learned Counsel for the petitioners sought to distinguish the judgment projecting the alleged distinctive features of both the batch of writ petition.

25. In *State of Himachal Pradesh v. Gujarat Ambuja Cement* reported in [2005] 142 STC 1 : [2005] 6 SCC 499, the apex court while observing that despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution also observed (page 18 of STC):

At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

26. Similarly in the case of *L.K. Verma*, the apex court restating the circumstances in which alternative remedy is not a bar towards maintainability of writ petitions, also emphasised on the general principle not to entertain a writ petition *inter alia* on the ground of availability of an alternative remedy. This well-settled principle of the alternative remedy being not an absolute bar to exercise the writ jurisdiction under Article 226 of the Constitution of India is well recognised and need not be over-emphasised. At the same time, this principle cannot have universal application making the same applicable to all kinds of situations.

27. The petitioner has not contended and/or pleaded anything as to why they are not in a position to pursue the statutory remedy and as to how the principles involved towards invoking writ jurisdiction even if statutory remedy of appeal is provided for, are attracted in the instant case. The apex court in various decisions has consistently reminded that the writ court will refrain from exercising its jurisdiction inasmuch as the proceeding under Article 226 is not a substitute for statutory appeal. Compared to statutory appeal, the scope and ambit of the writ jurisdiction is necessarily circumscribed. Though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of alternative remedies one or the other before he resorts to constitutional remedy. As observed in the case of *Transmission Corporation of A.P. Vs. Ch. Prabhakar and Others*, , in proceedings under Article 226, the High Court cannot sit as a court of appeal to re-appreciate the evidence for itself or to correct an error of fact, however apparent it might be on the ground that the evidence on which it was based was not satisfactory or sufficient. The apex court further observed that the proceedings under Article

226 are not a substitute for an appeal.

28. The petitioner will get all the opportunity to explain their case before the appellate authority. On their failure before the said authority they will have another channel open by way of preferring further appeal to the appropriate authority. Thereafter also they will have other remedies open. Merely because the petitioner/appellant feel that they have a good case on merit, they cannot bypass the statutory alternative remedy by way of invoking the writ jurisdiction. In fact, they had invoked the jurisdiction of the statutory authority and it was only upon insistence of compliance of the pre-requisites, they invoked the writ jurisdiction of this court.

29. In view of the above, the decision on which Mr. Borah, learned Counsel for the petitioner has placed reliance touching the merit of the case need not be referred to which the petitioner will be entitled to refer before the appellate authority, if they are of any help to the case of the petitioner.

30. In case of preferring any appeal by the petitioner before the appellate authority against the impugned orders of assessment, the appellate authority shall consider the prayer of the petitioner, if made, for condonation of delay, in accordance with law taking into consideration the fact that the petitioner was pursuing his remedy before this Court and in fact, some interim protection was also provided to the petitioner.

31. For the foregoing reasons, discussions and findings, the writ petition fails and accordingly, it is dismissed. The dismissal of the writ petition shall not stand on the way of the petitioner to approach the appellate forum, if so advised.

32. Writ petition is dismissed. There shall be no order as to costs.