(1976) 09 GAU CK 0004

In the Gauhati High Court

Case No : Civil Rule No''s. 812 and 813 of 1972

The State of Assam and Others APPELLANT

Vs

Garodia Brothers and Another RESPONDENT

Date of Decision : 17-09-1976

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 256

Citation : (1978) 41 STC 402

Hon'ble Judges : M.C. Pathak, C.J;M. Sadanandaswamy, J

Bench : Division Bench

Advocate : J.C. Medhi, -General, A.M. Mazumdar, Government Advocate and B.M. Goswami, for the Appellant; J.P. Bhattacharjee and B.P. Saraf, for the Respondent

Final Decision : Dismissed

Judgement

M.C. Pathak, C.J.—By these applications under Article 226/227 of the Constitution of India, the petitioners, namely, (1) the State of Assam, (2) the Superintendent of Taxes, Dibrugarh and (3) the Assistant Commissioner of Taxes, Jorhat, have prayed for a writ of certiorari quashing the judgmentb and order dated 28th April, 1972, passed by the Assam Board of Revenue in Cases Nos. 69-70 STA/70.

2. The facts of these cases may be briefly stated as follows :

Opposite party No. 1, Garodia Brothers, took a contract from the Public Works Department for collection, breaking and supply of stones from the Dilli quarry. The Superintendent of Taxes, Dibrugarh, assessed tax on opposite party No. 1 for supply of gravels, boulders, etc., to the Public Works Department treating the transactions to be "sales". The periods involved are periods ending 30th September, 1968 and 31st March, 1969. Against these orders opposite party No. 1 preferred two appeals to the Assistant Commissioner of Taxes, Jorhat, contending, inter alia, that there were no sales but only execution of works contract. But the Assistant Commissioner of Taxes, .Jorhat, rejected the two appeals by his orders dated 27th June, 1970.

3. Thereafter opposite party No. 1 filed two appeals before the Board of Revenue u/s 31A of the Assam Sales Tax Act, 1947, hereinafter referred to as "the Act" and these two appeals were numbered as Cases Nos. 69-70 STA/70.

4. The Board of Revenue allowed the two appeals, set aside the appellate orders dated 27th June, 1970, passed by the Assistant Commissioner of Taxes, Jorhat, as well as the assessment orders dated 31st December, 1969, passed by the Superintendent of Taxes, Dibrugarh. Hence these writ petitions.

5. Mr. J.P. Bhattacharjee, the learned counsel for the opposite party No. 1, has raised a preliminary point as to the maintainability of the petitions under Article 226/227 of the Constitution of India in the instant cases.

6. Section 30(1) of the Act provides for appeal and it reads as follows :

30. Appeal.-(1) Any dealer objecting to an order of assessment or penalty passed under this Act may, within thirty days from the date of the service of such order, appeal to the prescribed authority, against such assessment or penalty :

Provided that no appeal shall be entertained by the said authority unless he is satisfied that the amount of tax assessed or the penalty levied, if not otherwise directed by him, has been paid :

Provided further that the authority before whom the appeal is filed may admit it after the expiration of thirty days, if such authority is satisfied that for reasons beyond the control of the appellant or for any other sufficient cause it could not be filed within time.

7. In the instant cases, the dealer filed appeals u/s 30 of the Act against the assessment orders dated 31st December, 1969, before the Assistant Commissioner of Taxes, Jorhat.

8. It may be noticed that right of appeal has been given to the dealer and not to any of the taxing authorities.

9. Section 31A(1) deals with appeal to the Board, which reads as follows:

31A. Appeal to the Board.-(1) Any dealer aggrieved by an order passed in appeal u/s 30 or passed in revision under Sub-section (1) of Section 31 may appeal to the Board within sixty days of the date on which such order is communicated to him.

10. Sub-section (4) of Section 31A reads as follows :

(4) The Board may, after giving the dealer an opportunity of being heard, pass such orders thereon as it thinks fit and shall communicate any such orders to the dealer and to the Commissioner.

11. Here also right of appeal has been granted to the aggrieved dealer and not to any taxing authority.

12. Section 32 deals with reference. Section 32(1) reads as follows :

Within sixty days from the date of service of any order u/s 31A, the dealer may, by petition in writing, require the Board to refer to the High Court any question of law arising out of such order of the Board or the Board may make such reference out of its own motion. Where the petition is made by a dealer, it shall be accompanied by a fee of one hundred rupees.

13. Under Sub-section (3) of Section 32, the Board may reject the application under Sub-section (1).

14. Sub-section (4) of Section 32 reads as follows:

Where the application under Sub-section (1) is rejected on the ground that no question of law arises and where no action is taken by the applicant under Sub-section (3), he may, within ninety days from the date of such rejection, apply to the High Court against the order rejecting the application and, if upon receipt of such an application, the High Court is not satisfied with the correctness of the decision, it may require the Board to state the case and refer it and, on receipt of any such requisition, the Board shall state and refer the case accordingly.

15. Sub-section (7) of Section 32 reads as follows :

The High Court upon the hearing of any such case shall decide the question of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send to the Board a copy of such judgment under the seal of the Court and signature of the Registrar and the Board shall, on receipt of the copy of judgment, order disposal of the case accordingly.

16. Going through the provisions of Section 32 also it is found that at the instance of the dealer or on its own motion the Board may refer any question of law arising out of its order to the High Court. Here also no taxing authority under the Act has been given the right of filing an application for reference unlike the provisions of Section 256(1) of the Income Tax Act, 1961. Thus we find that the original assessment order made by the Superintendent of Taxes may be appealed against by the dealer. If no appeal is filed by the dealer then that order is binding on both the dealer as well as the department.

17. Similarly, from the appellate order of the Assistant Commissioner of Taxes the dealer may prefer an appeal before the Assam Board of Revenue. But if he does not file any appeal that decision of the Assistant Commissioner of Taxes would be binding on the dealer as well as the department. The department also has not been given any right to make any application to refer any question of law arising out of the order of the Board. So the Board''s order is binding on the department.

18. At the instance of the dealer or on its own motion the Board may refer any question of law arising out of its order. But if neither the dealer requires the Board to refer to the High Court any question of law, nor the Board suo motu refers any question of law, the Board''s order remains binding on the dealer and the department in view of the scheme of the Assam Sales Tax Act, 1947.

19. Section 8 of the Act reads as follows :

8. Taxing authorities.-(1) The State Government may, for carrying out the purposes of this Act, appoint a Commissioner of Taxes and such other persons to assist him as it thinks fit.

(2) Persons appointed under Sub-section (1) shall exercise such powers as may be conferred and perform such duties as may be required, by or under this Act.

(3) All persons appointed under Sub-section (1) shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (Act XIV of 1860).

20. Taxing authorities have been prescribed under Rule 3(1) of the Assam Sales Tax Rules, 1947, which reads as follows :

3. (1) Taxing authorities.-There shall be the following taxing authorities to assist the Commissioner :-

(i) Deputy Commissioners of Taxes,

(ii) Assistant Commissioners of Taxes (Appeals),

(iii) Assistant Commissioners of Taxes,

(iv) Superintendents of Taxes,

(v) Inspectors of Taxes,

(vi)All Assam Investigation Officers,

(vii) Any other persons appointed as such by the State Government.

21. Thus it is found that the taxing authorities under the Act include the Commissioner, Deputy Commissioners of Taxes, Assistant Commissioners of Taxes (Appeals), Assistant Commissioners of Taxes, Superintendents of Taxes, Inspectors of Taxes, All Assam Investigation Officers and any other persons appointed as such by the State Government.

22. All the persons appointed as taxing authorities shall have such powers as may be conferred and perform such duties as may be required by or under this Act. That being the position, the Superintendent of Taxes and the Assistant Commissioner of Taxes in the instant cases are bound by the order of the Assam Board of Revenue and they are not entitled to challenge the order of the Board as has been done in the instant cases. All the powers under the Act are invested on the Commissioner of Taxes, who is empowered u/s 60 of the Act to delegate

subject to the restrictions and conditions prescribed by the Rules made under the Act any of his powers to any person appointed u/s 8 to assist him.

23. That being so, if the Commissioner or any other taxing authority prescribed under the rule is not entitled to challenge the order of the Board, it is doubtful whether the State of Assam as such can come and challenge the order of the Board passed under the Act. Considering the materials on record the Board has found as follows :

The appellant has contended that at no stage did the ownership in stones ever passed on from the Forest Department to him. He simply carried the specified quantity of stones from the quarry to wherever the P.W.D. wanted it and charged for carrying and stacking the stones. It is also seen that the appellant had no authority to quarry more quantity than asked for by the P.W.D. He also could not dispose it of to any other person. Thus it is clear that the appellant was not free to obtain as much quantity of stones from the Forest Department quarry as he liked and sell it to any and everybody according to his own sweet will. If the appellant acquired any title or ownership of the stones he should have been free to dispose of the same as he wished. But it is seen that this was not so. Hence we are inclined to accept the contention of the learned Advocate for the appellant that no sale was involved in the transaction and, as such, these transactions are not liable to assessment under the Assam Sales Tax Act, 1947. 24. Thus it is seen that the Board has categorically held that no sale was involved in the transactions carried on by opposite party No. 1 and, therefore, the provisions of the Assam Sales Tax Act, 1947, were not attracted to the transactions.

25. This finding of the Board is supported by the decision of the Supreme Court in Commissioner of Sales Tax M.P. Vs. Purshottam Premji, wherein the Supreme Court has observed as follows:

The fact that the railway had provided in the agreement that the assessee shall pay the royalty due to the State Government does not in any manner detract from the legal position that the railway was the owner of the quarry. It is merely an arrangement for the payment of a royalty.

In C.B. Gosain Vs. State of Orissa, this court ruled that for finding out whether a contract is one of work done and materials found or one for sale of goods depends on its essence. If not of its essence that a chattel should be produced and transferred as a chattel, then it may be a contract for work done and materials found and not a contract for sale of goods.

The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery and the property therein passes only under the contract relating thereto to the other party for price. Mere transfer of property in goods used in the performance of a contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged, not by an artificial rule that the accretion may be presumed to have become byb virtue of affixing to a chattel, part of that chattel, but from the intention of the parties to the contract: see Patnaik and Company Vs. State of Orissa,

26. Considering the materials on record the Board has found that there were no sales involved in the transactions in the instant cases and, therefore, no tax is leviable under the Assam Sales Tax Act, 1947.

27. In the result, we find that in any view of the matter there is no ground to interfere with the impugned order of the Board of Revenue in our writ jurisdiction.

28. The petitions are accordingly rejected. The rules are discharged. We, however, make no order as to costs.

M. Sadanandaswamy, J.

29. I agree