(1996) 06 GAU CK 0036

In the Gauhati High Court

Case No : Civil Rule No. 126 (SH) 1995

Vishwa Vimohan Jha APPELLANT

Vs

State of Maghalaya and Ors. RESPONDENT

Date of Decision : 12-06-1996

Acts Referred:
Constitution of India, 1950 — Article 226, 226, 366(29A)(b), 366(29A)(b)

Citation : (1996) 2 GLJ 320 : (1996) 2 GLT 570

Hon'ble Judges : D.N.Chowdhury, J

Bench : Single Bench

Advocate : S.P.Sharma , K.S.Kynjing, B.K.Deb Roy, Advocates appearing for Parties

Judgement

In this writ petition, the petitioner has challenged the endorsement of the Superintendent of Taxes of the Check Post Byrnihat, Meghalaya made on the petition submitted on behalf of the petitioner (Annexure III of the writ petition). From the petition it appears that a tourist taxi bearing No. ML 05 7156 carrying a consignment of Sri Vicky Mukhim, Assistant Manager of M/s Colour Calcutta Agent, Kachari Road, Shillong was detained by the Officer on duty on 28.11.94 at 8 PM due to non declaration of the said consignment at Byrnihat Check Gate. By the said letter Sri Mukhim requested the authority to allow this vehicle to move upto Shillong to enable him to pay the composition money imposed by 30.11.94. The said letter the Superintendent of Taxes make the following endorsement:

1. "The case may be considered provided that the permit of the vehicle along with the licence of the Driver is surrendered at this office as security. The composition money of Rs.23,930/ (Rupees twenty three thousand nine hundred thirty) only should be cleared within 5 (five) days from today, failing which the consignment may be auctioned at this check gate in the future.

Sd/ Superintendent of Taxes,

Taxation Checkgate, Byrnihat, Meghalaya."

The petitioner also challenged the letters of the Inspector of Taxes, Byrnihat addressed to the carriers, Shillong dated 10.4.95 and 26.4.95 whereby he communicated the decision of the Commissioner of Taxes to the carrier regarding consignment sent through Lorry No. ML05 2345 and ML05 2225 with a direction not to make delivery to the party concerned till clearance by the checkgate. It also impugned the letter of the Superintendent of Taxes, Byrnihat dated 27.4.95 addressed to the Manager, M/s Meghalaya Road Carrier (Pvt) Ltd. By that letter the carrier was advised not to give delivery of the consignment of 5 C/B of Photo Chemical of M/s Colour Calcutta, Kachari Road, Shillong till the following conditions are fulfilled :

1. The photostate copies of the Registration Certificate under (a) The Meghalaya Finance (Sales) Tax Act and (b) The Central Sales Tax Act duly attested by the Superintendent of Taxes/Inspector of Taxes, Government of Meghalaya are furnished in this office.

2. The Consignment Note No.597 dated 17.4.95 and the Invoice No.2595/ 96 dated 17.4.95 detained" are released by this office.

3. The delivery permit is to be duly allowed by the Superintendent of Taxes, Shillong Circle IV.

The petitioner further challenged the letter No.CAT.30/94/217 dated 28.4.95 issued by the Commissioner of Taxes to one Shri Dilip Kumar Roy, Assistant Manager, Colour Calcutta, Kachari Road, Shillong. By the aforesaid letter the Commissioner dealt with the petition dated 21.4.95, 24.4.95 and 27.4.95 submitted by the aforesaid Dilip Kumar Roy. The said Dilip Kumar Roy was informed by the Commissioner that the petitioner Sri W Jha had refused to accept the registration certificates under the Central Sales Tax Act, 1956 issued by the concerned Superintendent of Taxes in spite of the fact that the dealer is liable to pay the tax as per Meghalaya Finance (Sales Tax) Act. The Commissioner by the said letter sought information from Sri Dilip Roy as to whether he has accepted the certificates issued by the concerned Superintendent of Taxes if it is in the affirmative to produce the original before the Commissioner of Taxes during office working hours and also to furnish attested copies of the same before a decision on the matter is taken.

2. In this writ petition, petitioner submitted inter alia that the Assam Finance (Sales Tax) Act, 1956 as adopted in Meghalaya as Meghalaya Finance (Sales Tax) Act is not applicable so far the business of the petitioner is concerned. Mr. BK Deb Roy submitted that the petitioner run a photo colour lab and undertakes the job of developing photographs belonging to customers. He submitted that so far the business of the petitioner is concerned is does not come within the purview of Meghalaya Finance (Sales Tax) Act, 1956 and as such the purported action initiated by the respondents are without jurisdiction. Mr. Deb Roy at the first instance sought to impress upon me that the photography and other cameras and enlargers lenses, films and plastic papers with which the petitioner deals

with are not exigible to tax as the same are not taxable items under the law. However, he relented from the aforesaid contention when confronted with item No.l 1 of the Meghalaya Finance (Sales Tax) Act, 1956. Under the Act taxable goods "means such goods as are specified in the Schedule attached to the Act and item No. 11 of the Schedule covers photographic and other cameras and enlargers, lenses, films and plates and other parts. The argument of Mr. Deb Roy was further supplemented by Shri SP Sharma, learned counsel for the petitioner. According to Mr. Sharma, the petitioner runs a photo colour lab and undertakes the job of developing photographs belonging to customers, hence the copy right of the photographs always belongs to customers and it does not have any marketable value. Mr. Sharma also challenges the action of the respondents to recover composition money from the petitioner as disclosed by the endorsement of the Superintendent of Taxes, Taxation checkgate dated 29.11.94. Mr. Sharma submits that coercing Sri Vicky Mukhim letter dated 29.11.94 was extracted from Sri Mukhim and as such that letter of Shri Vicky Mukhim is not binding on Sri Vicky Mukhim or to the petitioner. Mr. Sharma '' further submits that the attempt to realise composition money from the petitioner is illegal and without jurisdiction and as such an appropriate writ be issued quashing the direction contained in the endorsement of the Superintendent as per Annexure III. Mr. Sharma also submits that since the Act in question is not applicable to the petitioner so much so he does .not indulge in the sale, the impugned actions of respondents are illegal without jurisdiction and liable to be quashed. He submitted that the endorsement of the Sales Tax Officer Incharge of the Checkpost has seriously affected the fundamental right of the petitioner to carry on his occupation, trade and business and as such violative of the Article 19 (1) (g) of the Constitution of India,1950. Mr. Sharma strenuously submits that the negatives of the film are returned to the owner (customers) the films those are developed has no value to others and as such those photographs have no commercial value. According to the learned counsel all the elements of a sale under the Act is absent as such question of sale by the petitioner does not arise. Mr. Sharma in support of his argument has referred" the following decisions :

1. Rajo Bhairabendro Narayan Bhup vs. Superintendent of Taxes, Dhubri, AIR 1957 Assam 179; 2. Matadin vs. Commissioner of Sales Tax, (1965) 16 STC 869; 3. Senairam Doonger Mai vs. State of Assam, AIR 1962 Assam 98; 4. Jai Narayan vs. Assistant STC, (1957) 8 STC 795. 5. Sanjee Coke Mfg Com vs. Bharat Coking Coal Co Ltd, AIR 1983 SC 239; 6. State of Bombay vs. United Motors (India) Ltd, (1953) 4 STC 133 (SC) : AIR 1963 SC 252; State of Madras vs. Gannon Dunkerelay and Company, AIR 1958 SC 560 : (1958) 9 STC 353 (SC) and 7. M/s Studio Sen & Sen vs. State of Tripura, 1989 (2) GLJ 49.

3. Mr. Kynjing, learned counsel on behalf of the respondents 1, 2 and 3 submitted that whether the petitioner indulging sale of photographic articles within the meaning of Meghalaya Finance (Sales Tax) Act, 1956 is out and out a question of fact which cannot be examined by this Court under Article 226 of the Constitution of India,1950. He seriously disputes the contention of the petitioner

that no sale takes place in the business of the petitioner. He submits that the writ petition is premature and instead of approaching this Court, the writ petitioner could have approached the appropriate authority by way of representation and raise all the issues of facts and law which could have been decided by the authority of first instance by considering the materials on record. Mr. Kynjing submits that the State of Meghalaya set up a check post at Byrnihat under section 33 A of the Meghalaya Finance (Sales Tax) Act, 1956 to prevent evasion of taxes payable under the Meghalaya Finance (Sales Tax) Act, 1956. Mr. Kynjing took me to the affidavitinopposition and referred and relied the factual statement of facts made by the department. According to respondents photo paper is taxable in Meghalaya under section 3 of the Act. The supply of paper by the firm for developing and printing photographs of customers fall under the definition of business as per clause (i) of subsection l(b) of section 2 of Meghalaya Finance (Sales Tax) Act, The execution of the works by the petitioner for the customers is purely a works contract and in this instant case the transfer of photo paper is a sale. According to the department photo paper is goods involved in execution of the works contract which is taxable in Meghalaya. According to the respondents the petitioner carries goods in Meghalaya and in respect of such business he is deemed to be a dealer for the purpose of Meghalaya Sales Tax Act as amended. The respondents also state that the petitioner is carrying on business of taxable goods, but refused to register himself as a dealer which is in . total contravention of the Meghalaya Finance (Sales Tax) Act, 1956. Mr. Kynjing also submits that after the Constitution (Forty sixth Amendment) Act, 1982 and the Meghalaya Finance (Sales Tax) (Amendment) Act, 1985 the decision of the Supreme Court in State of Madras vs. Dunkerly and Co, AIR 1958 SC 560 : (1958) 9 STC 353 will not be applicable in the interpretation of a law. The object of new definition introduced by the Forty sixth Amendment is to enlarge the scope of tax on sale or purchase of goods wherever it occurs in the Constitution to include the transfer, delivery or supply of goods (whether as goods or in some other form). Mr. Kynjing further submits that relief under Article 226 of the Constitution is an equitable relief and the petitioner who has violated the law is not entitled to invoke the equitable jurisdiction and on that count alone, the writ petition is liable to be dismissed.

The Supreme Court held in the State of Madras vs. Gannon Dunkerly and Company (Madras) Ltd (supra) that a works contract was an indivisible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales tax. With a view to over come the effect of the said decision, the Parliament amended Article 366 of the Constitution by introducing subclause (b) of clause (29A). Subclause (b) of clause (29A) states that ''tax on the sale of purchase of goods'' includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It includes also a tax on transfer property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It refers to 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. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per subclause (a) to (f) of clause (29A), the latter part of clause (29A) says that ''such transfer, delivery of 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. Hence, a transfer of property in goods under subclause (b) of clause (29 A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and purchase of those goods by the person to whom such transfer is made. In Builders'' Association of India vs. Union of India, (1989) 2 SCC 645, the Supreme Court considered the decision of State of Madras vs. Gannon Dunkerly and Co (Madras) Ltd. the relevant portion of paragraph 36 is quoted below:

"... Even after decision of this Court in the State of Madras vs. Gannon Dunkerly & Co. (Madras) Ltd, it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services sales tax was leviable on the goods which , were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and service. After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was livable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above. It could not have been the contention of the revenue prior to the 46th Amendment that when the goods and material had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building the assessment of sales tax could be made ignoring the restrictions and conditions incorporated in Article 286 of the Constitution. If that was the position can the States contend after the 46th Amendment under which by a legal fiction the transfer of property in goods involved in a works contract was made liable to payment of sales tax that they are not governed by Article 286 while levying sales tax on sale of goods involved in a works contract ? They can not do so. When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation hi giving full effect to it. If the power to tax a sale hi an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which is deemed to be a sale under Article 366 (29A) of the Constitution should also be subject to the same restrictions and conditions ...."

The Meghalaya Sales Tax Amendment Act, 1985 by section 2 of the said Act inserted a new clause in 18 which is extracted below : "(IB) ''Business'' includes

(i) any trade, commerce or manufacture of execution of works contract or any adventure or concern in the nature of trade, commerce manufacture, execution of works contract or adventure or concern is carried on with the motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, execution of works contract or adventure or concern; or

(ii) any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, execution of works contract, adventure or concern..." The 46th Amendment of the Constitution read with the amended provision of the Meghalaya Sale Tax Act makes it possible for the State to levy sales tax on the price of goods and materials used in the works contract as if there was a sale of such goods and materials. The decisions referred by the learned counsel for the petitioner are not applicable in the instant case and the point raised in this case is squarely covered by the Supreme Court in Builders'' Association of India (supra). The decision of this Court in M/s Studio Sen & Sen (supra) is no longer applicable in the present situation in view of the passing of the 46th Amendment of the Constitution and the Meghalaya Sales Tax Amendment Act, 1985. The activities of the petitioner fall within the definition of business as envisaged in section 2 (IB) of the Act and accordingly the respondents ! 9 and 3 as well as its officers acted within its jurisdiction in issuing the impugned notices as contained m Annexure III, X, XI, XII and XV of the writ petition.

4. The Legislature has entrusted the taxing authority to administer and enforce the law and making a decision of the facts and circumstances of the case judicial review can not be used for a review of a decision on merit. ''Judicial review'' as observed by Lord Brightman in Chief Constable of North Wales Police vs. Evans, (1982) (2) All ER 141 (154)" as the words imply is not an appeal from a decision but a review of the manner in which the decision was made?" Judicial review therfore is not an annual on merit

On careful consideration of the factual situation I do not find any infirmity in the decision making process of any of the respondents. The respondents have not in any way exceeded its bounds in exercising of its power requiring interference from this Court. The writ petition is accordingly dismissed.

There will be no order as to costs.

Rule is discharged accordingly.

