

(2004) 03 GAU CK 0037

In the Gauhati High Court

Case No : M.C. No. 551 of 2004 in Writ Petition (C) No. 3556 of 1999

V.S.T. Industries Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-03-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) 1 GLR 439 : (2004) 2 GLT 1291 : (2008) 16 VST 283

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

Bench : Single Bench

Advocate : P.K. Goswami and V.M. Thomas, for the Appellant; K.N. Choudhury and I. Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This Miscellaneous Application has been filed in a pending writ proceeding. The original writ petition being WP (C) No. 3556/1999 as it stood at the time of filing of the same was with the prayer for a declaration that the levy of luxury tax on tobacco items under the Assam Taxation (On Luxuries) Act, 1997 is ultra vires to the relevant constitutional provisions. In the even of holding that the respondent No. 1 i.e., the State of Assam is entitled to levy and collect the tax, to declare that the respondent is not entitled to levy and/or collect additional excise duty on the tobacco items so taxed. A further alternative prayer was also made in the event of holding that the respondent No. 1 is entitled to levy and collect the tax on tobacco products, to declare that the respondent is not entitled to proportionate shares of additional excise duty. An interim prayer was also made for staying the impugned notification dated 19.8.1997 fixing the rate of tax at 10% and also to restrain the respondents from enforcing the said Act and alternatively to restrain the respondents from levying and collecting additional excise duty and/or the proportionate share of additional excise duty under the provisions of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. This court while entertaining the writ

petition by its order dated 28.7.1999, issued notice of motion and notice on the interim prayer. Nothing happened thereafter till filing of two Miscellaneous Applications being Misc. Case No. 915/2001 and Misc. Case No. 916/2001. In Misc. Case No. 916/2001, a prayer for certain amendments to the writ petitions was made in view of the amendments brought to the Assam Taxation (On Luxuries) Act, 1997 by enacting the Assam Taxation (On Luxuries) (Amendment) Act, 2000 assailing the legality and validity of the Amendment Act of 2000. By incorporating various paragraphs in the writ petition by way of amendment, an amendment to the prayer made in the writ petition was also sought by way of addition of a prayer for a direction to the respondents to refund the tax already paid under the impugned Act and Amendment Act. The amendments were allowed and the petitioner was directed to file the amended writ petition within two weeks.

2. In the other Miscellaneous Application i.e. Misc. Case No. 915/2001, an interim order was passed on 2.8.2001 providing that no Luxury Tax would be recovered from the stock of luxuries despatched to different States in course of inter-State sale making it clear that by such interim order recovery of tax under the Central Sales Tax Act on such stocks had not been prevented, if such tax was payable under the said Act.

3. Strangely enough, the writ petition in which notice of motion was issued on 28.7.1999 was never listed till passing of the aforesaid interim order on 2.8.2001 except on 10.9.1999 and 29.9.1999. On both the occasions the matter was adjourned. The matter was never listed for admission hearing for long two years and was listed only on the basis of the aforesaid two Miscellaneous Applications. However, on two occasions i.e. 6.9.2001 and 15.3.2002, the matter was listed. While on 6.9.2001, the matter was directed to be listed before another Bench, on 15.3.2002 the matter was passed over on the prayer made. After passing of the aforesaid interim order on 2.8.2001 in Misc. Case No. 915/2001 and allowing the prayer for amendment by order dated 19.9.2001, the matter was never listed and remained at the notice stage. Although, while allowing the amendment by order dated 6.9.2001, the petitioner was directed to file consolidated writ petition within two weeks, neither the case records nor any official note of the Registry indicate filing of such amended and consolidated writ petition. Thus the matter has been pending even for Admission hearing from the date of filing of the writ petition on 26.7.1999. By now almost five years have passed.

4. The instant Miscellaneous Application being Misc. Case No. 551/ 2004 has been filed making an interim prayer for stay of the operation of a show cause notice No. 11335 dated 13.1.2004 issued to the writ petitioner by the Superintendent of Taxes, Guwahati, Unit-A, Circle -7 on the subject of "show cause for Evasion Taxes" and on reference to "seizure dated 18.12.2003". By the said show cause notice the petitioner was directed to appear in person before the said authority on 30.1.2004 to explain as to why their taxable turnover should not be determined as indicated in the show cause notice for the period from

1.7.1998 to 30.11.2003. The petitioner on receipt of the said show cause notice has approached this court by filing the Miscellaneous Application in the pending writ petition assailing the legality and validity of the said show cause notice. Incidentally it may be mentioned that although a prayer has been made in the application for stay of the said show cause notice purportedly issued by the respondent No. 4, there is no such respondent in the writ petition. The Authority, which has issued the show cause notice is the Superintendent of Taxes, Guwahati, Unit-A, Circle-7. No prayer has been made seeking any amendment to the writ petition by way of making a challenge to the said show cause notice.

5. I have heard Mr. P.K. Goswami, learned senior counsel for the petitioner assisted by the learned counsel Mr. V.M. Thomas and Mr. K.N. Choudhury, learned senior counsel assisted by the learned counsel Mr. I. Choudhury, appearing for the respondents.

6. The basic thrust of argument of Mr. Goswami is that the impugned notice could not have been issued under the same very Act which is presently under challenge in the writ petition. He further submitted that similar Acts pertaining to some other States and recovery of any amount thereunder are already under order of stay of different High Courts and Apex Court. Mr. Goswami asserted that the petitioner, in fact, is entitled to get an interim relief by way of stay of the operation, implementation and effect of the impugned Act and/or by way of restraining the respondents from recovery of the impugned Luxury Tax. Instead, the petitioner has been paying the tax under the provisions of the impugned Act and thereby has already paid about 80% of the tax now raised under the impugned notice. Referring to the assessment made at Annexure-B series annexed to the application by the Assessing Officer, Mr. Goswami submitted that such assessment was made as per the declaration made by the petitioner by their letter dated 18.9.1997 and the respondents accepted the said declaration as the basis of calculation and the payments thereof have also been made. However, without any explanation, the aforesaid show cause notice has been issued on the ground that the "basic price" was not included in the value of stock of luxuries which constitutes approximately 20-25% of the total value of stock of luxuries and thereby has increased the taxable turnover of the petitioner for the period from 1.7.1998 to 30.1.2003, although all assessment for the said period have already been made and finalised. Mr. Goswami submitted that such "basic price" cannot be included when no such price exist and is not indicated in any of the documents accompanying the goods in to the State since it is a case of stock transfer and not sale.

7. Mr. K.N. Choudhury, learned senior counsel appearing for the respondents made submissions on the basis of the affidavit-in-opposition filed in respect of the Miscellaneous Application. Apart from raising certain preliminary objections regarding maintainability of the Miscellaneous Application itself, Mr. Choudhury submitted that measure to be adopted for determination of "turn over of stock of luxuries" is to be done in terms of Section 2(m)(ii) read with Section 2(i) and 2

(1) of the Act. He submitted that on a conjoint reading of the said provision of the Act leave no manner of doubt that the writ petitioner has been tactfully evading tax in contravention of the said provisions. According to him the show cause notice dated 13.1.2004 has been issued on a genuine ground that "basic price" had not been included in the value of stock of luxuries. Mr. Choudhury also relied upon three decisions as reported in 1930 STC 202 (All Varshney General Cell v. State of U.P. 1930 STC 276 (Karn) Ghodawat Pan Machala Products v. State of Karnataka and 1930 STC 310 (Bom Ghodawat Pan Machala Products v. State of Maharastra and Ors. in support of his submission that similar Act imposing luxury tax on stocking has been upheld by various High Courts. He has also referred to the decisions as reported in Venkateshwara Theatre Vs. State of Andhra Pradesh and Others, 1976 SC 182 (A.B. Abdul Kadir v. State of Kerala); 1992 Supp II SCC 312 (H.B. Gandhi v. M. S. Gopinath) (1996) 2 SCC 122 (U.O.I. v. Metal Box) and (1997) 2 GLR 105 (U.O.I. v. Sudarshan Plywood). All these decisions have been pressed into service to bring home his argument about the Legislative competence of the State Legislature and presumption towards validity of the Act and that where hierarchy of appeals provided by the statute, it will be a sound discretion not to exercise extra-ordinary power of writ jurisdiction. In the case of Sudarshan Plywood (supra) a Division Bench of this court set aside the judgment of the learned Single Judge by which the show cause notice under the provisions of the Central Excise Rules, 1944 was interfered with.

8. I have considered the submissions made by the learned counsels for the parties and have also perused the materials available on records. As noticed above the writ petition is yet to be admitted and has been pending for the last about five years without there being any steps for early hearing of the matter. It has also been noticed that after the prayer for amendment was allowed and an interim order was passed, no steps have been taken to file the amended writ petition. Although in the Miscellaneous Application, an averment has been made that the amended writ petition was filed on 3.10.2001, there is no endorsement to that effect and in fact nothing could be produced as a token of evidence. When the same was pointed out on 27.2.2004, when the Miscellaneous Application was first taken up for hearing, the learned counsel appearing for the petitioner undertook to file the consolidated writ petition and accordingly the same was filed on 2.3.2004. As indicated above, the petitioner has prayed for a direction to the respondent No. 4 to stay the operation of the show cause notice dated 13.1.2004 and also to stay the recovery of Luxury Tax. There is no respondent No. 4 in the writ petition. It is the Superintendent of Tax, Guwahati, Unit-A, Circle 7 who has issued the notice to the petitioner. The petitioner has also not chosen to annex the copies of the letters dated 18.12.2003 and 24.12.2003 as mentioned in paragraph 8 of the Miscellaneous Application, in reference to which the petitioner submitted his letter dated 5.1.2004. This letter coupled with the impugned show cause notice reflect that the impugned notice was preceded by departmental inspection and seizure dated 16.12.2003 and 18.12.2003 respectively about which there is no mention in the Miscellaneous Application.

The petitioner in response to the impugned show cause notice dated 13.1.2004 made a request to the Superintendent of Tax to grant extension of time and to fix the Directorate of personal hearing on 20.2.2004, which was duly allowed. Thereafter once again by letter dated 16.2.2004 the petitioner prayed for further extension of time. Thus the petitioner after submitting to the jurisdiction of the said authority and praying for extension of time for appearance approached this court by filing the instant application. This position could be gathered from the affidavit-in-opposition filed by the respondents, which, however, was never disclosed by the writ petitioner.

9. The petitioner has filed the Miscellaneous Application in the pending writ petition only for the purpose of obtaining an interim order by way of stay of the impugned show cause notice without, however, making any prayer for amendment of the writ petition as was done on the earlier occasion by filing Misc. Case No. 916/2001. Such an application has been filed on the strength of the pending writ petition which is yet to be admitted. The basic ground towards urging for entertaining such an application is that since the writ petition is pending disposal and the very Act invoking the provisions of which the impugned show cause notice has been issued is under challenge in the writ proceeding, the said show cause notice could not have been issued. It has also been urged that similar Acts are under order of stay of the different courts. Referring to the tax order dated 2.1.1995 passed in SLP No. 21476/94 by which the Apex Court had provide not to make any recovery till decision of the Impugned Ordinance involved in the proceeding, it was argued that although the petitioner is entitled to a complete stay of the Act and on any recovery, the petitioner has been paying the Luxury Tax on the basis of assessment orders for the years 1997-2003. However, nothing has been disclosed as to what is the Ordinance involved in the proceeding before the Apex Court and as to whether the provisions thereof are in parimateria with the provisions of the Assam Act. There is also no explanation as to why similar prayer has not been made and/or obtained in the writ proceeding which is pending for the last about five years. It is also not made known as to whether the proceedings initiated before the Apex Court during 1994-95 has come to an end or not.

10. The instant Miscellaneous Application has been filed taking recourse to the pending writ proceeding in which the Assam Act of 1997 along with the amendment Act of 2000 is under challenge. Till now, no stay order has been granted on the provisions of the said Act and thus the petitioner is bound to pay Luxury Tax in terms of the provisions of the said Act. Merely because, the said Act is under challenge, the petitioner cannot say that no proceeding and/or action under the provisions of the said Act could be initiated against it. The petitioner ought to have responded positively to the impugned show cause notice and made their position clear before the authority which has issued the show cause notice. It is at the interlocutory stage of the show cause proceeding which was preceded by inspection and seizure, the instant application has been filed without the said proceeding having attained any finality. The very action of the

authority issuing the show cause notice has been challenged on some independent grounds, virtually amounting to a separate proceeding. As indicted above there has been no endeavour on the part of the petitioner to bring the writ proceeding to its logical conclusion and the same has been kept pending for the last about five years at the motion stage. The petitioner remained totally oblivious of the said proceeding except on two occasions i.e. the present one and at the time of the interim order obtained by filing Misc. Case No. 915/ 2001. In the miscellaneous application, a bold statement has been made that the respondents have not responded to the writ proceeding by filing any affidavit-in-opposition totally unmindful of the fact that it is the petitioner who is at fault by not complying with the order dated 19.9.2001 passed in Misc. Case No. 916/2001 by which while allowing the amendments, a direction was issued to file the amended writ petition within two weeks. The amended writ petition has been filed on 2.3.2004 after nearly about three years of the order of amendment as against the stipulated time limit of two weeks and yet the delay has been attributed to the respondents as regards non-filing of any affidavit-in-opposition.

11. In the affidavit-in-opposition filed on behalf of the respondents, it has been stated that the act in question was enacted by the State Legislature in terms of Entry 62 of List II of the Seventh Schedule of the Constitution of India. It has also been stated that although the writ petitioner has been paying tax in terms of the "subject", however, the "measure" of the same is in total contravention of the provisions of Section 2(m)(ii) of the Act. The authorities within their competent and jurisdiction called for the records and other relevant informations to verify the components of transfer price of the petitioner on the basis of which they have been paying Luxury Tax and on verification it was found that they were not adopting the correct method of calculation of valuation of stock luxuries which naturally had all along resulted in under payment of taxes. Thus when the evasion of tax was detected, the show cause notice preceded by the aforementioned exercises was issued. According to the respondents, the petitioner is liable to pay tax under the Act on the landed cost of the product which as per provision of Section 2(m)(ii) of the Act shall include basic price, excise duty, freight and insurance. According to the respondents, the point of taxation under the Act of 1997 is neither importation nor sale on purchase. The same is in fact, "stocking" of goods and the scheme of the Act itself goes to show without any doubt whatsoever that it is single point tax, the incidence of which is the first point of stocking. It is the stand of the respondents that the petitioner has resorted to unfair means by way of evading taxes by not including the basic price on the calculation of valuation of stocks of luxuries and such non-inclusion of basic price has resulted in approximately 30% to 40% under-pricing causing loss of revenue to the State.

12. If the impugned show cause notice has been issued on the grounds specified therein, no fault could be attributed to the authority which issued the show cause notice. Whether the show cause notice was founded on any legal premises is a jurisdictional issue, which can even be urged by the petitioner in response to the

show cause notice, and such issues also can be adjudicated by the authority which has issued the notice. The said authority is a statutory functionary constituted under the Act and he must be allowed to decide the matter. It will be a sound and wise discretion not to entertain the miscellaneous application granting the interim relief prayed for which may or may not be finally granted in the writ petition. If any authority is required to such a proposition, one may refer to the decisions of the Apex Court as reported in T.N. Godavarman Thirumulpad Vs. Union of India (UOI) and Others, and (2004) AIR SCW 416 (Special Director v. Mohd. Ghulam Ghouse). In the case of Mohd. Ghulam, the Apex Court observed in paragraph 45 of the judgment as follows :

"This court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted."

13. Mr. Goswami, learned senior counsel appearing for the petitioner submitted that it is not an all pervasive rule of prudence in exercising writ jurisdiction not to interfere with any proceeding at threshold of show cause notice. In support of his such contention he referred to two decisions of the Apex Court as reported in AIR 1961 SC 372 (Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., In these two cases the Apex Court observed that a writ of certiorari and prohibition against issue of notice can be issued, if it is established that the authority acted without jurisdiction. From the materials on record, it cannot be said that the Superintendent of Tax issued the show cause notice to the petitioner without any jurisdiction. It is also not the pleaded case of the petitioner. Even in the aforesaid cases, the Apex Court held that the burden lies on the petitioner to establish the case of lack of jurisdiction or that the impugned notice is not authorised by any Rule. Needless to say that ratio of any decision must be understood in the background of the facts of that case. A case is only an authority for what it actually decides and not what logically follows from it.

14. In the instant case the petitioner has rushed to the court making a challenge to the impugned show cause notice invoking the writ jurisdiction of this court in a pending writ proceeding without answering the same and without, specifying anything as to how the authority which has issued the show cause notice has so done without any jurisdiction. The only plea raised in the miscellaneous application is that the Act itself being under challenge in the writ petition, the show cause notice ought not to have been issued unmindful of the fact that the writ petition itself is yet to be admitted and that there has been no endeavour on the part of the petitioner for early disposal of the writ petition. By filing the miscellaneous application, the petitioner has only prayed for stay of the show cause notice, without, however, formally assailing the legality and validity of the same. Thus, the pending writ petition has been made the basis for invoking the jurisdiction of the court only for the purpose of making and granting of interim prayer. Be that as it may and without expressing any opinion on the merit of the case on which the learned counsel for the parties extensively argued. I am of the considered opinion that the miscellaneous application is not maintainable and liable to be dismissed. Accordingly, same is dismissed.

15. In view of the dismissal of the miscellaneous application, the petitioner shall now respond to the show cause notice issued to them urging the grounds as may be available to them without any further delay and thereafter the matter should be brought to its logical end by the concerned authority in accordance with law.

16. The miscellaneous application shall stand dismissed.