(1976) 08 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : C.W.P. No. 300 of 1974

Yash Pal Garg and Co. APPELLANT

Vs

The Chief Conservator of Forests and Others RESPONDENT

Date of Decision : 19-08-1976

Acts Referred:

Constitution of India, 1950 — Article 226
Himachal Pradesh General Sales Tax Act, 1968 — Section 13, 2, 3, 4
Sales of Goods Act, 1930 — Section 18, 19, 2, 20, 21

Citation : (1977) ShimLC 44

Hon'ble Judges : C.R. Thakur, J

Bench : Single Bench

Advocate : Bhagirath Dass and M.G. Chitkara, for the Appellant; A.G., for the Respondent

Final Decision : Dismissed

Judgement

C.R. Thakur, J.—The Petitioner-firm, which has got its Head Office at Sarahan in District Sirmur are carrying on the business and trade of forest lessees. Respondent 1, i.e. the Chief Conservator of Forests, Himachal Pradesh, issued a notice, Annexure P. 1 on 5th August, 1974 for the auction of forest in Chopal Division, bearing lot No. 13/74-75, consisting of 594 trees, details of which are given in the notice, Annexure P. 1. This auction was to take place on 8th and 9th September, 1974. The Petitioner''s firm gave a successful bid for the aforementioned lot for a sum of Rs. 44,000/- One-fourth of the bid money was deposited by the Petitioner and thereafter an agreement was executed between the parties. Under Clause 29(a) of the lease deed, Annexure P. 3, it is provided as under:

29(a) : That in case the lessee is registered under Himachal Pradesh General Sales Tax Act, 1968 (Act No. 24 of 1969), he shall have to produce his registration certificate. The unregistered lessee shall have to pay sales tax as applicable on 18th/20th September, 1974 in Himachal Pradesh along with the instalment of sale price. It is evidently made clear that the lessee will have to pay the sales tax on thedue date of instalment, as provided above, irrespective of the fact whether the period, of any instalment is extended by the competent authority or not. In case of failure to do so, he will have to pay penalty at assessed by the Sales Tax Department.

Thereafter a demand notice, dated 8th October 1974 (Annexure P. 4) war received by the Petitioner from the Conservator of Forest, Himachal Pradesh (Respondent No. 3) requiring the Petitioner to pay the sales tax under the Himachal Pradesh General Sales Tax Act, 1968 (shortly called the Act) on the amount of bid of Rs. 44,000/- (royalty) for the lot auctioned in his favour. The royalty was to be paid in three equal instalments, the last being payable on 15th March, 1975 and the sales tax was to be paid in addition to the royalty. According to the Petitioner, prior to the receipt of notice, Annexure P. 4, a representation was sent by the Petitioner to Respondent No. 1 that levy of sales tax on the sale of trees was an illegal demand for the reasons set out in the representation. The sales tax could not be paid on standing trees. But, no reply to the representation was received. According to the Petitioner, the sales-tax is leviable only on the moveable property, whereas standing trees do not fall within the definition of moveable property, as such the demand was wholly illegal and runs counter to the provisions of Section 13 of the Act. Further, it was pleaded that no sales tax could be levied till the property in the goods passes and the question as to when in a particular case property in the goods passes is governed by Sections 18 - 23 of the Sale of Goods Act. At present the goods are not ascertained and in a deliverable state. The property in the goods does not pass to the purchaser till the lessee exploits the forests. This is more so because of the fact that when a particular lesses fails to carry out the terms of the contract within aparticular time then a fresh auction takes place. Further, it was pleaded that Respondents 1 and 3 are not dealers as defined in Section 2(e) of the Act, since they do not sell or purchase any goods which are actually delivered for the purposes of consumption in the State of Himachal Pradesh. Further, that neither the standing trees are goods nor it is a sale and thus Respondents 1 and 3 cannot be deemed to be dealer within the meaning of Section 2(e). It had been stated in the notice that, the Petitioner-firm''s lease is liable to be revoked if he does not pay the sales tax by 15th January, 1975, on the sum of Rs. 14,666/-, resulting in cancellation of the said lease and thereby exposing him to a considerable loss and damage. Hence by this petition, the Petitioner have prayed for quashing the impugned demand notice, Annexure P. 4, in so far as the payment of sales tax is concerned on the amount of Rs. 44,000/- and further prayed for restraining the Respondents from treating the Petitioner as defaulter for non-payment of sales tax.

2. The first preliminary objection raised by the Respondents is that the Excise and Taxation Commissioner, Himachal Pradesh, who required the Forest Department to realise and deposit sales tax on trees, is a necessary party. Here, in the instant case, the agreement on the basis of which the trees are sold was

entered into between the Respondents and the Petitioner. The sales tax is also demanded from the Petitioner by the Forest Department itself and it may be a different thing that the demand on the Forest Department for realisation of the tax from the purchaser is made by the Excise and Taxation Commissioner, but thereby the Excise and Taxation Commissioner cannot be said to be a necessary party as it has not made any demand on the Petitioner for the payment of the sales tax.

3. The second preliminary objection raised is that the jurisdiction of the courts is excluded by arbitration Clause 32 of the agreement between the parties and that the extraordinary jurisdiction is not exercisable in disputes arising out of contractual obligations. Further, it has been argued that the Petitioner had agreed to pay sales tax and that now they had started contesting their liability to pay the tax inspite of the clear condition in the agreement regarding the sale of the trees. The learned Advocate General in basing his argument that the dispute is the one which is to be decided by reference to arbitration under the terms of Clause 32 of the agreement relied on Banchhanidhi Rath Vs. The State of Orissa and Others, and Shri Bal Krishan Vaid v. The State of Himachal Pradesh and Ors. 1975 (1) SLR 574. In both these authorities it has been held that contractual rights cannot be enforced by a writ. In the former case there was a contract of employment between the Appellant, who was appointed as a Headmaster of a private school and the employer. The Government gave recognition to the school in the year 1951. In January, 1958, the Government of Orissa addressed letters to secretaries of private High Schools stating that Government was contemplating to sanction full net deficit as grants-in-aid to a number of aided High Schools in the State. One of the conditions enumerated for such grants-in-aid was that the Managing Committee of the Schools concerned by resolution of the Committee should ask the Government to take over the management and control of the Schools. In March, 1958 the Government of Orissa framed Special Rules ''for Government Managed full deficit aided High Schools'', and it was provided that every School shall be under the control of the Inspector of Schools of the circle, who will be responsible for the maintenance of the institution on behalf of the Government and who will exercise all the powers in respect of the Government managed institution. It was also one of the conditions that the appointment would be made by the Inspector of Schools. Provisions were also made for transfer, leave and service conditions of the employees. On 6th April, 1962 the Secretary of the School in which the Appellant was employed made over the charge of management of the School to the Inspector of Schools, Cuttack Circle. The Appellant, the then Headmaster of the School, took over charge from the Secretary under the directions of the Inspector of Schools. On 14th May, 1669, the Director of Public Instructions wrote to the Inspector of Schools communicating the decision of the Government that teachers including the Headmasters of the ''taken over'' Schools who attained 58 years of age on 1st March 1969 should retire from service immediately. On 19th May, 1969 the Inspector of Schools wrote to the Appellant to hand over charge as he had

exceeded the age of 58 years. The Appellant challenged this order on the ground that the Inspector of Schools and others, i.e. the State of Orissa and Director of Public Instructions had no authority to superannuate the Appellant at the age of 58 years, inasmuch as there was no privity of contract between the Appellant and the Respondents. Further that it has been the uniform usage and implied term of the office of all teachers in private schools in Orissa that irrespective of age limit teachers will be in service as long as they are physically fit and mentally alert. It was in these circumstances that their Lordships of the Supreme Court held that the Appellant could not enforce a contract of employment in an application under Article 226 of the Constitution. The Appellant in the case, did not rely on any rule of the management of the institution that the Appellant would continue in service as long as the Appellant was physically fit and mentally alert. He alleged a custom to that effect in the petition and it was observed that custom of such a nature cannot be enforced under Article 226. Therefore, this authority has got no bearing oh the facts of the present case. The latter is a case in which the Petitioner held a mining lease under a contract with the Government and that lease was terminated. The Petitioner challenged the order of termination of contract and this Court held that an order terminating the contract not made in exercise of statutory power the remedy by way of a writ petition cannot be availed of. Farther that when the Government is a party to the contract and it exercises right by virtue of contract it is a matter tailing within the sphere of contract and, therefore, the facts of this authority are also distinguishable.

4. Clause 32 of the agreement, to which reference is made by the Petitioner, reads as under:

Except where otherwise provided in the agreement, if any question, difference or objection whatsoever shall arise in any way connected with or arising out of or touching this instrument or he meaning or operation of any part thereof or the rights, duties or liabilities of either party shall be referred for arbitration to any Deputy Commissioner in Himachal Pradesh to be appointed by the Chief Conservator of Forests, Himachal Pradesh or should be unable or unwilling to act, to such officer as the said Chief Conservator of Forests shall appoint as sole arbitrator. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he had expressed views on all or any of the matters in disputes or differences. The arbitrator unto whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Chief Conservator of Forests, Himachal Pradesh, at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. It is also a term of this contract that no person other than a person appointed by the Chief Conservator of Forest, should act as arbitrator and, if for any reason, that is not possible, the matter is not to be referred to arbitrator at all. The decision of the arbitrator appointed under this clause, shall be final and binding, and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any, awarded in such arbitration shall recoverable in respect of the matter so referred.

Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceedings under this clause.

Under Clause 29 of the agreement it is provided that the lessee shall be liable to pay such levies/taxes as may become legally payable under any Act, rules or requlations. It is further provided under Clause 29(a) that in case the lessee is registered under the Himachal Pradesh General Sales Tax Act, 1968, he shall have to produce his registration certificate. The unregistered lessee shall have to pay sales tax as applicable on 18th/20th September, 1974 in Himachal Pradesh along with the instalments, of sale price.

5. Now there is a dispute with regard to the liability of the sales tax. The Respondents have made a demand of sales tax from the Petitioner vide Annexure P. 4 to the petition. The Petitioners contend that the Respondents were recovering sales tax in violation of the provisions of the Act. Therefore, according to the Petitioners the question is whether the tax can be collected as regulated by law and not by contract. The levy and collection of tax has always been held to be a point of law rather than to be a point of contract. He also based this submission on Delhi Cloth and Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax, Indore, In para 10 of this authority it has been held:

So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller.

And further:

The levy and collection of tax is regulated by law and not by contract.

Therefore, the submission of the learned Counsel for the Respondents in view of these two aforesaid authorities does not appear to be correct that this is a dispute which is covered by Clause 32 of the agreement and it is a contractual liability and that this matter cannot be made a subject matter of a writ petition.

6. The learned Advocate General has further relied on Har Shankar and Ors. etc., etc. v. The Deputy Excise and Taxation Commissioner and Ors. etc., and he has particularly referred to para 21 of the judgment wherein it has been observed:

Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The Appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations.

He has also made a pointed reference to the following observations made in para 22:

The writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate aviodance of obligations voluntarily incurred.

It was a case with regard to liquor contracts and their Lordships held that where contractual obligations are sought to be impeached, vendees cannot subsequently apply under Article 226 of the Constitution for a writ to avoid enforcement against them of their obligations under the terms of the constract. In the instant case, according to the averment of the Petitioner the sales tax is being recovered in violation of Section 13 of the Act. Therefore, it is evident that it is the legal obligation on the part of the Forest Department, i.e. the Chief Conservator of Forests and Conservator of Forests not to charge tax in violation of Section 13 and as such it is not a contractual liability rather it is a question of levy and collection of the tax which as held by their Lordships of the Supreme Court as mentioned above is to be regulated in accordance with law and not by contract.

7. In The The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh, it has been held:

Where the act on of a public authority invested with statutory powers is challenged the writ petition is maintainable even if the right to relief arises out of an alleged breach of contract.

The Petitioner base their case on Section 13 of the Act whereby they say that the sales tax which is sought to be realised by the Respondents which is a public authority in violation of that provision the writ is the only proper remedy in such a case. A similar view has been taken by the Orissa High Court in Indian Aluminium Company Ltd. Vs. The Orissa State Electricity Board and Another, under para 14 it has been observed:

If a statutory body like State Electricity Board chooses to commit a breach of contract under the cloak of statutory authority can relief be refused on ground that in disputes involving breach of contract writ petition is not maintainable. No, High Court would not refer the Petitioner to Civil Court or require him to take to arbitration.

Therefore, in these circumstances when the Petitioner have pleaded that the tax is being recovered in violation of Section 13 of the Act it is purely a statutory obligation and even if it may have arisen out of a contract the Petitioner cannot be deprived of their right to invoke the extraordinary power of this Court under Article 226 of the Constitution.

8. The submission made by the Petitioner is that the property in the goods does not pass till the goods are ascertained and are in a deliverable state and in this connection he has referred me to Clause 12 of the agreement, annexure P. 3. This clause is as under:

That the lessee shall secure felling of marked trees in a manner that serial numbers and hammer marks remain intact and undue damage to standing crop and regeneration is avoided. Cutting of creepers, lopping and roping shall be the responsibility of the Lessee.

What he contends is that unless the property is in a deliverable state, i.e. the trees were cut the title in the property did not pass to the Petitioner because so long as the trees are not cut they are not ascertainable and they are not goods so as to levy sales tax. The learned Counsel for the Petitioner has also relied on the provisions of Sections 18 - 24 of the Sales of Goods Act and has also referred to Badri Prasad Vs. The State of Madhya Pradesh and Another, . In this case teak trees of more than 12 inches girth standing in the forest had been sold to the Appellant for Rs. 17,000. The contractor deposited the money. The contract was entered into on December 27, 1950. On January 22, 195l, the Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951) came into force. The Appellant started the work under the contract in March, 1951. On March 31, 1951 a notification was issued vesting the estates in the State and the State Government prohibited the Appellant from cutting timber in exercise of the rights under the contract. When the State Government refused to permit the Appellant to cut the timber he filed a suit for declaration. One of the points raised in that suit was that even if the forest and the trees vested in the State under the Act the standing timber having been sold to the Appellant did not vest in the State under the Act. It was held as under:

There is no force in the contention of the learned Counsel that under the contract the Plaintiff had become owner of trees as goods. It is true that trees which are agreed to be severed before sale or under the contract of sale are "goods" for the purposes of the Sale of Goods Act. But before they cease to be "proprietary "right or interest in of proprietary rights within the meaning of Secions 3 and 4(a)of the Act they must be felled under the contract. It will be noticed that under Clause I of the contract the Plaintiff was entitled to cut teak trees of more than 12 inches girth. It had to be ascertained which trees fell within that description. Till this was ascertained, they were not "ascertained goods" within Section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees, after cutting had to be 3 inches high. In other words, the contract was not to sell the whole of the trees. In these circumstances property in the cut timber would only pass to the Plaintiff under the contract at the earliest when trees are felled. But before that happened the trees had vested in the State.

But, in my opinion, this authority has got no bearing on the facts of the present case inasmuch as here in the instant case the number of the trees is ascertained as would be apparent from Annexure A to the agreement, Annexure P. 3. This document gives the details of the trees of various categories and the kind of the trees i.e. Cheel and the number is 594. Therefore, it is wrong to say that the goods were unascertained whereas in the case referred to above the teak trees of more than 12 inches girth had been sold which was quite a vague term and in that eventuality the goods had to be ascertained. Further, in this case the trees have been marked with numbers in order to fully ascertain the number of the trees of various categories. The submission of the Petitioner does not appear to be correct that unless the trees were cut the property in the goods did not pass to the purchaser. A reference to Clause 13 of the agreement would show that the property in the goods had passed. Under Clause 13(1) it is provided that the lessee agrees to accept measurements and classification of trees specified in Annexure A and the calculations of volume by the Forest Officer. The Lessor does not hold himself responsible for the soundness or otherwise of any trees. In my opinion, the authority Badri Prasad (supra) it distinguishable because in that case the trees were not ascertained after they were cut. But, in the instant case there is no such difficulty. The trees have already been numbered and classified and the number is given in Annexure A to the agreement. Therefore, there is no vagueness or uncertainty with regard to the class and the kind of the trees. Therefore, the property in the goods has passsed irrespective of the fact that it had not been cut and there is a provision that the cutting shall be done in such a manner that the hammer mark and the number are not destroyed. This provision, in my opinion, is only in order to ascertain after the trees have been cut whether the contractor had cut only those trees which had been sold or he had illicity cut trees which were not sold to him and that object can be achieved only by seeing the stumps which bear the hammer mark and the number. It is also wrong to say that the property was not in a deliverable stage because the trees had been sold and before the Petitioner entered into agreement they had fully satisfied themselves with regard to the condition, etc. of the trees and if they had satisfied themselves before the agreement was written then it is wrong to say that the property was not in a deliverable state. The learned Counsel for the Petitioner referred to Clause 7 of the agreement but, in my opinion, this clause does not assist the Petitioner rather it goes in favour of the Respondents when it says that the trees marked for felling will remain at the risk of the lessee from after a fortnight of the date of communication of acceptance of the proposal by the lessor. Therefore, after a fortnight of the date of communication the trees if they were not cut were to remain there in the forest at the risk of lessee himself which further clarifies the position that the property in the goods had passed and under the terms of the contract he had to cut the trees within the specified period beyond which it was to remain there at their own risk. Further, reference has also been invited to Clause 18 of Annexure I where it is provided that the lessee shall not be permitted to export any timber by road from the forest without the payment of instalment of the price payable subject to a minimum of 1/4th at a time of the amount due during the year. The submission made by the learned Counsel for the Petitioner is that till the money had been paid the property in the goods cannot pass. This also does not appear to be correct because the amount had to be paid in three equal instalments and it was only a charge on the property, otherwise the property in the goods had passed as soon as toe agreement had been executed, the trees had been numbered and a communication of the acceptance of the proposal of the lessor had been made. It was only in order to realise the amount that the Petitioner were not permitted to export the timber by road from the forest otherwise for all intents and purposes the Petitioner had become the owner and the property in the goods had passed.

9. Sale has been defined under 2(j) of the Act as meaning any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge. Therefore, this deferred payment in the form of installments is also a sale as is evident form the explanation to this Clause (j) of Section 2. So, even if the money had not been paid in full and there was a condition that contractor shall not be permitted to remove it by road unless he paid the amount will nonetheless be a sale and it is wrong to say that till the payment of the full price was made the property in the goods had not passed or that it was not a sale.

10. Now the further point is whether the Conservator of Forests or for the matter of that the Forest Department is a dealer. ''Dealer'' has been defined u/s 2(c) of the Act meaning any person including a department of Government who in the normal course of trade sells or purchases any goods that are actually delivered for the purpose of consumption in the Union territory of Himachal Pradesh, irrespective of the fact that the main place of business of such person is outside the said territory and where the main place of business of any such person is not in the said territory, dealer includes the local manager or agent of such person in Himachal Pradesh in respect of such business. Therefore, from this definition it is quite apparent that the Forest Department is not a dealer since it does not deliver the goods for the purpose of consumption in the Union territory of Himachal Pradesh. There is no condition in the agreement which enjoins that the goods are delivered or sold to the Petitioner for purpose of consumption in the Union territory of Himachal Pradesh. That being so, the Forest Department or the Chief Conservator of Forests or the Conservator of Forests cannot be said to be dealers within the meaning of Section 2(c) of the Act. Section 13 states that no dealer, who is not liable to pay tax under this Act, shall collect any amount by way of tax under this Act, nor shall a dealer liable to pay tax under this Act make any such collection, except in accordance with the provisions of this Act. Further, this section says that if any dealer, who is not liable to pay tax under this Act, collects any amount purporting to be by way of tax under this Act, such dealer shall pay over to the State Government, within such time and in such manner as may be prescribed, the amount so collected. Therefore, it would appear that the Forest Department not being a dealer has no right to collect any amount by way of tax under this Act. Therefore, that being the case the submission made by the Petitioner appears to be correct that the Forest Department has got no right to collect this tax from the Petitioner, because if the forest department is not a dealer then it is not liable to pay any tax and if that is so it is also prohibited from charging any tax from the purchaser, especially when the goods are sold not for consumption within the Union territory. In these circumstance, it being a pure question of levy and collection of tax, Clause 32 of the agreement which relates to the reference of the disputes to arbitration will not govern the case because it is a question of levy of tax which cannot be a matter which may be

decided by the arbitrator. The Forest Department is not a dealer within the meaning of Section 2(c) of the Act as the goods sold are not meant to be consumed within the Union territory of Himachal Pradesh, rather the same is being taken to Yamunanagar in Haryana and it is not denied by the learned Advocate-General.

11. In these circumstances the levy is in violation of Section 13 of the Act and, therefore, notice issued by the Respondents to the Petitioner is bad and is liable to be quashed. Consequently, the notice Annexure P. 4 is hereby quashed.

