
Nowrangrai Rameswar and Another Vs Commissioner of Taxes and Others

Civil Rule No. 3409 of 1991

Court: Gauhati High Court

Date of Decision: May 19, 1995

Acts Referred:

Assam Sales Tax Act, 1947 " Section 31(1), 8#Central Sales Tax Act, 1956 " Section 15, 16(1), 7, 7(1), 9(2)#Income Tax Act, 1922 " Section 30

Citation: (1995) 2 GLR 256

Hon'ble Judges: J.N. Sharma, J

Bench: Single Bench

Advocate: A.K. Saraf, K.K. Gupta and R.K. Agarwala, for the Appellant; B.P. Todi, Government Advocate, for the Respondent

Judgement

J.N. Sarma, J.

The books of accounts of the Petitioner were seized by the Respondent No. 3 when the books were produced for

examination for the purpose of assessment. This was on 27.10.88. Thereafter, the seized books were verified by the authority and on 29.11.88

seized books of accounts were released after being satisfied that the Petitioner firm is not liable to registration u/s 7(1) of the Central Sales Tax

Act, 1956 as the Petitioner firm despatched jute to Calcutta on its own account. On 20.11.90 the Petitioner firm served with a notice dated

29.11.90 u/s 31(1) of Assam Sales Tax Act, 1947 directing the Petitioner to produce all the books of accounts for the year 1988-89 and 1989-90

on 6.12.90 in connection with verification of some particulars, i.e. Annexure - II to the writ application, That notice is quoted below:

To, M/s Nowrangroy Rameswar,

Nagaon,

Whereas in connection with verification of some particulars, you are required to produce all Books of A/cs, relating to your business for the year

1988-89 and 1989-90 upto date before the undersigned on 6.12.90 at 11 A.M in the office of the Asstt. Commissioner Taxes, Nagaon Zone,

Nagaon.

Please note that for non compliance of the notice action will be taken under the provisions of the Act.

Books of Accounts to be produced.,

1. Cash Book and Ledger.

2. Bills and Cashmemoes.

3. Purchase Vouchers.

4. Stock Accounts.

5. Returns submitted and copy of assessment order passed.

2. The Petitioner prayed for time and the case was refixed on 20.4.91. The case was further adjourned to 2.5.91 and lastly it was fixed on

17.5.91. On 17.5.91 the Petitioner filed an adjournment petition which was dated 16.5.91. On 30.5.91 this writ petition was filed by the Petitioner

challenging the notice dated 29.11.90. The writ petition was admitted by the High Court and the operation of the notice dated 29.11.90 was

stayed. The Asstt. Commissioner of Taxes was informed by the Petitioner verbally about the passing of the order by the Hon"ble High Court. The

Petitioner informed that the certified copy of the order has been applied and the same will be submitted immediately after receipt. On 1.6.91, the

prayer for adjournment was rejected and the proceeding was finalised, i.e. Annexure - VI to the writ application. That is quoted below;

ORDER

Dt. 29.5.91.

On the basis of informations available with me as well as on the basis of informations received from the case records, I am led to believe that the

dealer is liable to registered under Central Sales Tax Act 59 u/s 7(1) of the said Act as he has got sales of jute in course of Interstate Trade &

Commerce. But he was only registered under Assam Purchase Tax Act 67 and had paid upto date taxes regularly. But in the meantime it was

found from the case records that some hooks of accounts relating to the dealer was seized by the Supdt. of Taxes, Nagaon on 27.10.88 on the

ground that the dealer has got applied for registration u/s 7(1) of the Central Sales Tax Act/56 inspite of his liability to do so"" and thereafter the

seized books of accounts were also released by the officer on 29.11.88 stating inter alia that the books of accounts seized were released as he

does not attract liability u/s 7(1) of the said Act as he despatched jute to Calcutta in their own account only. So the question of law steps in to the

process.

Accordingly to avoid such ambiguity and to arrive at a definite conclusion as to the sale or otherwise of the purchases and to complete the suo-

moto proceedings of the case notice u/s 31(1) of the Assam Sales Tax Act 47 was served to the dealer. The dealer, on the other hand, instead of

producing accounts on the date fixed had gone on applying for time, for adjournment of the cases one after another. Ultimately having got no oilier

alternative I have finalised the suo-moto proceeding against the dealer.

It was, however, found from records that the dealer is registered u/s 7(1) of the C.S.T. Act"56 as an importer. His application for registration does

not indicate anything as regards to his other places of business outside the State except Guwahati. There is no informations in respect of other

Agents etc. outside the State. Taxes were paid on jute so purchased within the State. While despatching outside the Slate being last purchaser with

the State under Assam Purchase Tax Act 67 such jute so despatched outside the State may also attract liability under C.S.T. Act 56. If these are

not despatched outside the State either on his own account or to his commission Agent. Particulars received in Check Gale declarations from the

case records shows clearly that he has got despatched outside the stale to others than his own account which can well be settled to be a sale in

course of Inter State Trade & Commerce. Since the dealer failed to produce accounts and did not avail himself of the opportunities" so offered

from time to time I have got no other alternative but to determine the sale in course of Interstate Trade & Commerce on the basis of entire

purchase of the jute, so despatched period wise outside the State adding 20% charges as freight and another 15% as profit and accordingly

determined the sales under C.S.T, Act" 56 during the period as follows:

Periods Sales Determined Purchase Prices

30.9.88 11, 11, 032/- Rs. 8,31,032/-

31.3.89 20, 70, 723/- Rs. 15,33,910/-

30.9.89 31, 72, 312/- Rs. 23,43,864/-

Superintendent of Taxes concerned is hereby directed to complete the assessment under C.S.T. Act"56 of the dealer for the above periods and to

issue demand notice at once after getting him registered under C.S.T. Act"56 u/s 7(1) of the Act.

While completing the assessments as above, he may however take recourse to the provisions of section 15(b) of the C.S.T. Act "56 to avoid

double taxation as jute being a declared item for special importance in course of Interstate Trade & Commerce.

3. The legality and validity of that order is also challenged in the writ application. By the impugned order dated 29.5.91 the Asstt. Commissioner of

Taxes directed that the Superintendent of taxes should complete assessment under the Central Sales Tax Act, 1956 for the period ending 30.9.88

and 30.9.89 and after getting, the Petitioner No. 1 registered u/s 7(1) of the Central Sales Tax Act.

4. The following points were raised by the Learned Counsel for the Petitioners Dr, A.K.Saraf.

i.) That the Superintendent of Taxes being the competent authority for the purpose of Section 7 of the Central Sales Tax Act having released the

books of account after coming to the conclusion that the Petitioner firm is not liable to registration u/s 7(1) of the Central Sales Tax Act, the

Assistant Commissioner of Taxes had no jurisdiction u/s 31(1) of the Assam Sales Tax Act in respect of the said matter and, as such, the

impugned order is without any authority of law and null & void.

ii) That the conditions precedent for the exercise of power u/s 31(1) of the Assam Sales Tax Act being non-existent in the instant case, the

Assistant Commissioner acted without jurisdiction in exercising powers u/s 31(1) of the Act as such, the impugned order dated 29.5.91 is illegal,

without jurisdiction and not tenable in law.

iii) That the Respondent No. 2, Assistant Commissioner of Taxes being not the competent authority u/s 9(2) of the Central Sales Tax Act, he had

no jurisdiction at all to pass the order dated 29.5.91 u/s 31(1) of the Assam Act directing the assessing authority to register the Petitioner No. 1

under the Central Sales Tax Act and the same is wholly illegal, without jurisdiction and not tenable in law.

iv) That the Assistant Commissioner of Taxes has imposed its own finding on that of the finding arrived at by the Superintendent of Taxes without

coming to the conclusion that the order passed by the Superintendent of Taxes on 29.11.88 was erroneous in so far as it was prejudicial to the

interest of Revenue and, as such, the impugned order dated 29.5.91 is illegal without jurisdiction and not tenable in law.

v) That the Assistant Commissioner of Taxes was not justified in ignoring the adjournment petition filed on 17.5.91 as well as his own order passed

adjourning the case fixed on 3.5.91 and re-fixing the same on 12.5.91 and subsequently passing the impugned order u/s 31(1) after rejecting the

petition dated 3.5.91, which was already allowed by him.

vi) That the impugned order having been passed after being aware of the order of this Hon'ble Court passed on 31.5.91 the impugned order dated

29.5.91 served on the Petitioner firm after 31.3.91 is illegal and without jurisdiction.

5. I have heard Dr. A.K. Sanaf, learned Advocate for the Petitioners and Dr. Todi, Learned Govt. Advocate for the Respondent. The particular

question which arises for decision in this case is the power of the Commissioner of Taxes u/s 31(1) of the Assam Sales Tax Act, 1947. Section

31(1) of the Assam Sales Tax Act is quoted below:

31. Revision by Commissioner - (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers

that any order passed therein by any person appointed u/s 8 to assist him, is erroneous in so far as it is prejudicial to the interests of the revenue, he

may, after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such

orders thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment and directing a fresh assessment.

6. The impugned order of revision was exercised by the authority taking hold of Section 9(2) of the Central Sales Tax Act. Let us have a look at

Section 9(2) of the Central Sales Tax Act. Section 9(2) is quoted below:

Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect

and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, re-

assess, collect and enforce payment of tax, including any penalty, payable by a dealer under this Act as if the tax or penalty payable by such a

dealer under this Act is a tax or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of

the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns,

provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying

on business on the transferee of, or successor to, such business, transfer of liability of any firm of Hindu undivided family to pay tax in the event of

the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, (refunds, rebates,

penalties)(charging or payment of interest,) compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply

accordingly:

Provided that if in any State or part thereof there is no general sales tax law in force the Central Government may, by rules made in this behalf

make necessary provision for all or any of the matters specified in this sub-section.

7. Dr. Saraf, Learned Advocate for the Petitioner submits that in exercise of the power u/s 31(1) it cannot take cue from the Central Sales Tax

Act. It can instruct the authority to take action in respect of the matters mentioned there i.e. (i) to assess (ii) to re-assess and (iii) to collect and

enforce payment of tax including any penalty, He submits that the procedure of registration is provided by Section 7 of the Central Sales Tax Act

and in Section 31(1) read with Section 9(2) of the Central Sales Tax Act, the authority is not entitled to pass an order for the registration of the

dealer.

8. The next submission of Dr. Saraf is that while going through the impugned order it will be seen that he relied on personal information and the

other materials which was not before the assessing authority in passing the impugned order u/s 31(1). Dr. Saraf submits that the authority does not

have that power and it can only consider the materials which were before the assessing authority and it cannot consider any other fresh materials. In

this connection Shri Saraf places reliance on the following decision:

i) (1975) 35 S.T.C. 571 Khemka & Co. Agencies Pvt. Ltd. v. State of Maharashtra wherein the question which came for consideration was that

whether penalty can be imposed by the State Sales Tax Authority by taking cue of Central Sales Tax as unamended and the Supreme Court in this

connection pointed out inter-alia as follows:

(a) The State sales tax authorities are thus created agents of the Government of India. The second important part in Section 9(2) of the Central Act

is that the State authorities shall assess, reassess, collect and enforce payment of tax including any penalty payable by the dealer under the Central

Act as if the tax or penalty payable by such a dealer under the Central Act is a tax or penalty payable under the general sales tax of the State. This

part of the section sets out the scope of work of the State agencies. The words "assess, reassess, collect and enforce payment of tax including any

penalty payable by dealer under this Act" mean that the tax as well as penalty is payable only under the Central Act.

(b) In other words, the genus is assessment; reassessment, collection and enforcement of payment. The genus is applicable in regard to the

procedure for assessment, reassessment, collection and enforcement of payment. The genus is from whom to collect and against whom to enforce.

(c) These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to

dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self-contained code which by charging

section creates liability for tax and which by other sections creates a liability for penalty and imposes penalty. Section 9(2) of the Central Act

creates the State authorities as agencies to carry out the assessment, reassessment, collection and enforcement of tax and penalty payable by a

dealer under the Act.

9. After this decision, Section 9(2) was amended and the word penalty was inserted therein. This will show that the power u/s 9(2) can be

exercised by the State authority in respect of those matters specifically mentioned therein and not in respect of other matters, Registration is not a

matter mentioned in Section 9(2) of the Central Sales Tax Act and in that view of the matter in exercise of the power u/s 31(1) of the Assam Sales

Tax Act, 1947, the Asstt. Commissioner of Taxes prima facie cannot be deemed to have the power to give order for registration u/s 7(1) of the

Central Sales Tax Act.

10. The next contention of Dr. Saraf is against an order passed by the Superintendent of Taxes regarding registration. No revision lies u/s 31(1) of

the Assam Sales Tax Act, 1947 and in that connection Dr. Saraf submits that appeal or revision is the creature of the statute and when the statute

does not make any provision either for appeal or for revision, the authority cannot exercise that power and for cannot delegate that power, He

submits that against the order either allowing the registration or rejecting the prayer for registration, no appeal or revision is provided and as such

Asstt. Commissioner of Taxes should not have exercised the suo-moto power of revision u/s 31(1) of the Assam Sales tax Act, 1947 and in that

connection he places reliance on (1979) 44 S.T.C. 331 Subhash Chander and Co. v. The State of Punjab and Anr. wherein the Punjab and

Haryana High Court pointed out as follows:

The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an

appeal. We fail to understand as why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the

absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for

example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his

appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order

relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income - tax

Act, 1922. The proviso to that section provided that....no appeal shall lie against an order under Sub-section (1) of Section 16 unless the tax had

been paid."" Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no

difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an

accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement

for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of

legislation, and we can discern no contravention of Article 14 in it.

11. Dr. Saraf further points out in the Judgment the Learned Asstt. Commissioner of Taxes relied on the information available with him as well as

the information received from the records. Dr. Saraf submits that this is not permissible even if it is held that the Asstt. Commissioner of Taxes had

the power of revision it is the fundamental principle of law that in exercising the power of revision, the authority is bound to consider only those

materials and/or those records which were available before the subordinate authority. If cannot, consider fresh materials or other things which were

not before the subordinate authority. Dr. Saraf in support of this contention placed reliance in a number of decisions but it is not necessary to cite

these decisions in the instant case inasmuch as that proposition of law is well established,

12. Next contention of Dr. Saraf is that going to the extreme even if it is held that the Asstt. Commissioner of Taxes had all the powers in spite of it,

it should not have passed the order in exercise of revisional powers fixing the quantum of sold property and give direction to the authority to assess

the tax on the basis of the quantum determined by him. Dr. Saraf submits that this power is of the assessing authority and that power cannot be

exercised by the revisional authority even if all the power rests with the Asstt. Commissioner of Taxes and he submits that part of the order is

absolutely without jurisdiction.

13. Next submission of Dr. Saraf is that before this order was passed by the authority, the further proceeding was stayed by the High Court and in

that view of the matter, the order passed by the authority is nullity in the eye of law. The position of a Stay order passed by the Higher Court has

been settled by the decision of the Supreme Court in *Mulraj Vs. Murti Raghonathji Maharaj*, wherein the Supreme Court has pointed out that any

order of stay does not take away the jurisdiction of the court. All that it does is to prohibit the court from proceeding further and the court unless it

knows of the order it cannot be expected to carry it out, Therefore; till the order comes to the knowledge of the court its jurisdiction to carry on

execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing court

not to proceed further or the stay till further orders. The Supreme Court further points out that in the interest of justice even if the court in the

ignorance of the stay order proceeds with the matter subsequently when it comes to the notice of the court, it should do away with that order. In

the instant case it is not necessary to consider that aspect of the matter inasmuch as I am going to quash this order on other grounds but I am

referring that aspect of the matter as it does not appear to be proper for an authority to proceed with the matter even when it is brought to the

notice of that order, which has been passed by the High Court. This is what appears to be done in the instant case. The authority in spite of the

knowledge of the stay order of this, court proceeded with the matter and passed an order against the Petitioner. Dr. Saraf also draws my attention

to Annexure-II the notice. He submits that this notice cannot be issued by the authority without first determining that the, assessment is erroneous.

The precondition to issue this notice is that the authority must be satisfied that the order of assessment is erroneous. No materials whatsoever have

been placed before this Court to show before issuing this notice i.e. Annexure-II, the authority was satisfied with prerequisite and in that view of

the matter, I am of the view that this notice should not have been issued by the authority u/s 31(1) of Assam Sales Tax Act, 1947.

14. Dr. Todi, Learned Advocate for the Respondents submits that the registration u/s 7(1) of the Central Sales Tax Act is nothing but a proceeding

in connection with the assessment of taxes and as such registration must be deemed to be a part and parcel of the proceeding of the assessment

and in that view of the matter he submits that the authority can exercise the power u/s 31(1) by passing the order of registration by taking cue from

Section 9(2) from Sales Tax Act. This submission of Dr. Todi cannot, be accepted in view of the law as amended and stated above. Dr. Todi in

support of this submission relied on two decisions but those two decisions are not relevant for the purpose of this case.

15. After hearing learned Counsel of both the parties and on perusal of the materials on record I allow this writ application and quash the notice

dated 29.11.90 Annexure II and order dated 24.5.91, Annexure - IV to the writ application. I leave the parties to bear their own costs.