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(1968) 02 CAL CK 0002

Calcutta High Court

Case No: Civil Rule No. 204 (W) of 1965

Biswa Sen		APPELLANT
	Vs	
Commissioner of Commercial Taxes		RESPONDENT

Date of Decision: Feb. 16, 1968

Acts Referred:

- Bengal Finance (Sales Tax) Act, 1941 - Section 14(1), 20, 20(3)
- Bengal Finance (Sales Tax) Rules, 1941 - Rule 2(2)
- Constitution of India, 1950 - Article 141, 226, 265

Citation: (1969) 1 ILR (Cal) 502

Hon'ble Judges: D. Basu, J

Bench: Single Bench

Advocate: Rajat Basu, for the Appellant; Jyotish Chandra Pal and Mahadeb Ghosh, for the Respondent

Final Decision: Allowed

Judgement

D. Basu, J.

This Rule is directed against the orders of assessment dated March 9, 1959 (annEx. A to the petition) and February 8, 1960 (annEx. D) and the corresponding notices of demand (annexs. B and E), assessing sales tax for the periods May 1, 1955 to September 4, 1955 and September 4, 1955 to March 31, 1956, respectively. The Petitioner not only wants these orders and notices to be cancelled but also asks for an order in the nature of mandamus directing the Respondents to refund the sums of Rs. 300 and Rs. 3,576-7-0 already realised from the Petitioner on the basis of the impugned Orders.

2. The Petitioner''s case is that the aforesaid assessments have been illegally made on the receipts of the Petitioner from indivisible structural contracts which are not taxable as ''sale''. In respect of the first period, the Petitioner had made an advance

payment of Rs. 300 and when the balance was demanded from him, he requested Respondent No. 3 to postpone the demand till the decision of the Supreme Court in a pending case relating to liability to sales tax on building contracts (annEx. C). Notwithstanding this, Respondent No. 2 made the similar order of assessment relating to the next period. In 1960, the Petitioner again made a request to postpone the recovery but on March 14, 1963, Respondent No. 3 demanded the assessed amount (annEx. G). When the Petitioner referred to the Supreme Court decision which had in the meantime been pronounced, Respondent No. 2 started a proceeding u/s 14(1) of the Bengal (Finance) Sales Tax Act, 1941 (hereinafter referred to as "the Act") to ascertain whether the assessment of the Petitioner was liable to be reopened in view of the decision of the Supreme Court, State of West Bengal v. Dakshineswar (1957) 8 S.T.C. 478. judgment referred to in (1967) 19 S.T.C. 224 (226). The Petitioner appeared before Respondent No. 2 in that proceeding and produced his books of account, but on January 28, 1964, Respondent No. 2 passed an order saying that the Petitioner had failed to satisfy him that the impugned assessment had been made in respect of indivisible structural contracts.

3. Against the said order, the Petitioner moved the Assistant Commissioner, but he advised him to seek redress u/s 20 of the Act. The Petitioner accordingly applied u/s 20(3) to the Additional Commissioner, but the application was rejected on the ground that the Petitioner should have appealed against the order of assessment (annEx. J). The Respondent having resorted to certificate proceedings to enforce the impugned demands by issuing the notices at annEx. K, dated December 14, 1964, the Petitioner obtained this Rule on March 9, 1965, stating that he could not apply earlier owing to serious illness.

4. The Petitioner"s case is that the contracts in respect of the tax have been assessed are indivisible works contract which are not liable to sales tax in view of the decision of the Supreme. Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , and that the provisions of the Bengal Act which make them liable are unconstitutional. The Petitioner is, therefore, entitled to resist the demand and also to claim refund of sums already recovered in pursuance of the impugned demands.

5. The contracts in question were entered into by the Petitioner with the State of West Bengal, which is Respondent No. 6 in the instant case. The terms of the contracts were, therefore, known to the Respondents ab initio. A copy of such agreement has been furnished at annEx. U to the application for amendment filed by the Petitioner on June 12, 1967. It is evident from this that Respondent No. 6 invited tenders for the "construction of additional accommodation in the N.C.C. buildings" at an estimated lump sum payment of Rs. 17,500. The items of work were detailed in the invitation for tender and against each item a consolidated rate was specified and term No. 1 of the offer clearly stated--

Unless mentioned explicitly otherwise, rate per unit for each of the undernoted items of work to be quoted inclusive of all necessary materials.

6. It is obvious that this was an indivisible works contract at a lump sum and that there was no separate contract for the sale of materials used in the contract. What is more curious, term 6 of the offer stated--

All the rates to be inclusive of sales tax.

7. It is difficult to understand what the draftsman of this offer meant by these words. The literal meaning would be that the sum paid to the contractor under the contract would be immune from sales tax as it really was under the law. If that be the meaning of this term, the assessment and demand of sales tax under this contract have been not only unlawful but also improper from the moral standpoint.

8. Be that as it may, no sales tax can be imposed upon such a contract for the execution of works, as has been held by a series of decisions of the Supreme Court which have been analysed by me elaborately in my recent judgment in the case of Indo-Impex Ltd. v. Commercial Tax Officer C.R. 1428(W) of 1964. In view of that analysis, the reasonings need not be reiterated in the instant case and the reasonings given in that judgment may be treated as a part of the instant judgment.

9. In Carl Still v. State of Bihar AIR 1964 S.C. 1615, it was clearly laid down that if any statute sought to make the income of a contractor upon such a contract liable to sales tax, the statute would itself be unconstitutional and should be struck down, the reason being that a State Legislature under its power under Entry 54 of List II of Schedule VII to the Constitution has no jurisdiction to levy sales tax upon a transaction which did not constitute a ''sale'', as held in Dunkerley''s case Supra.

10. By its decision in Dakshineswar''s case Supra, delivered on February 17, 1960, the Supreme Court accordingly upheld the decision of this Court in State of West Bengal v. Dakshineswar that Rule 2(2) of the Rules made under the Bengal Act which laid down the principle of taxation in respect of works contracts was unconstitutional and void. It follows that the impugned assessment, based on the said Rule, must be equally unconstitutional.

11. On behalf of the Respondents, however, the Petitioner''s'' claim has been resisted on two grounds:

I So far as the claim for refund is concerned, it is contended on behalf of the Respondents that relief under Article 226 should not be granted where the petition is brought more than three years from the date when the mistake of law became known to the Petitioner, as has been laid down in State of Kerala v. Aluminium Industries (1965) 16 S.T.C. 689 (692).

The Petitioner has not in his petition alleged from which date the untenability of the tax became known to him. If it be dated from the Supreme Court decision in

Dunkerley''s case Supra, the petition is clearly beyond three years from that time. At any rate, if the Petitioner had brought a suit for refund, a triable issue as to limitation could in these circumstances be raised by the Defendants. In such a situation refund cannot be directed in a proceeding for mandamus, as has been held in State of Madhya Pradesh Vs. Bhailal Bhai and Others, .

II. The same view cannot be taken as regards the invalidity of the claim of the Respondents in so far as it is yet to be recovered and in respect of which the impugned demand notices have been issued.

12. It is abundantly clear that the provisions of the Bengal Act and the Rules thereunder having been declared unconstitutional, the entire assessment and its collection has become without the authority of law. On behalf of the Respondents, strong reliance has been placed on the Supreme Court decision in State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada, , where it has been held that without setting aside the order of assessment by appeal or revision, a claim for refund is not maintainable. It is to be noted, however, that in that case the claim for refund had been laid by a statutory application before the assessing authority himself. It was, accordingly, held that the Statute did not confer upon him any power to review or revise his own order and, therefore, he could entertain an application for refund only after the order of assessment was removed out of the way of the applicant by appeal or revision to the competent authority. This reasoning has no application where the Petitioner approaches the High Court under Article 226 which has not only the jurisdiction but a duty to give relief against unconstitutionality: Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, and Bengal Immunity Company v. State of Bihar AIR 1955 S.C. 303. It cannot be overlooked that the bar imposed by Article 265 of the Constitution is not only against ''the levy'' but also against the ''collection'' of a tax which is not authorised by law. The demand notices and the certificate proceedings in execution thereof by means of which the Respondents seek to ''collect'' the levy from the Petitioner have lost their authority of law. Hence, as has been held by a Division Bench of this Court in Dinesh v. Board of Revenue (1967) 19 S.T.C. 224, the Petitioners are entitled to resist the demand. No question of limitation, laches or the like arises in such a case because the collection is yet to be made and that is what the Petitioner seeks to resist by virtue of Article 265.

13. On behalf of the Respondents it has been urged that the Petitioner should have objected as soon as the decision of the Supreme Court in Dunkerley''s case Supra was reported in 1958 but, on the other hand, he made certain payments even after the pronouncement of this decision. This, in fact, is a plea of estoppel. It is to be noted, however, that from the time when the disputed unrealised amounts were demanded, the Petitioner had pleaded that the transactions were not taxable (vide letter at p. 23 of the petition). Hence, it cannot be urged that the Respondents have been induced to change their position by reason of the inaction of the Petitioner.

Apart from that it was not only the duty of the Petitioner to plead the law in his favour, but it was also the duty of the statutory assessing authorities to abide by the law declared by the Supreme Court in Dunkerley''s case Supra. It has already been held by the Supreme Court that though Article 141 is addressed to Courts and is confined to the law declared by the Supreme Court, on general principle, the inferior Tribunals are equally bound to follow the decisions of the High Court which is the supreme Judicial Tribunal of the State, for otherwise there would be chaos in the judicial system of the country. The principle would apply with equal force as regards the decisions of the supreme Tribunal of the land and if the inferior Tribunals can afford to ignore the law declared by the Supreme Court, there would be installed in this land, in place of the Rule of Law, a rule by administrative fiat. If, therefore, it was the duty of the assessing authority to decide according to the law laid down by the Supreme Court in Dunkerley''s case, no plea of estoppel or acquiescence can be raised by the Respondents to uphold the validity of the demands which they seek now" to enforce against the Petitioner: vide Moon Mills v. Meher AIR 1967 S.C. 1450. Above all, recovery of the disputed amount, is barred by Article 265 of the Constitution--Dinesh v. Board of Revenue Supra--as against which there cannot be any estoppel.

14. In the result, therefore, the Rule is made absolute in part and the Respondents are restrained from recovering any further money from the Petitioner in pursuance of the impugned orders of assessment and the notices of demand. The claim for refund is refused. There will be no order as to costs.

15. In view of the foregoing judgment the Petitioner will be allowed to withdraw the sum deposited in pursuance of the order of this Court dated March 9, 1965.