Supdt. of Taxes, Tezpur and Others

Vs

Bormahajan Tea Co., Ltd.

Civil Appeal Nos. 602 and 603 of 1974

(CJI M. H. Beg, P. N. Bhagwati, V. D. Tulzapurkar, P. N. Singhal, Jaswant Singh, Syed Fazal Ali, V. R. Krishna Iyer JJ)

(N. L. Untwalia, P. S. Kailasam JJ)

17.01.1978

JUDGMENT

KAILASAM, J. -

1. These appeals are preferred by the Superintendent of Taxes, Tezpur, by special leave against the judgment and order passed by the High Court of Assam and Nagaland at Gauhati in Civil Rules 1000 and 1001 of 1969.

2. The respondent is M/s. Bormahajan Tea Co. Ltd., who is assessee under the Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act, 1961. The Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act was passed in 1954. The validity of the Act was challenged by various parties before the Assam High Court and this Court. This Court on September 26, 1960 held that the Act was ultra vires of the Constitution as the previous sanction of the President was not taken as required under Article 304 of the Constitution. The present Act, The Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act, 1961 (hereinafter called as "the Act"), was passed by the Assam Legislature with the sanction of the President for the purpose of validating the tax that had been imposed under the 1954 Act. The Act received the assent of the President on April 6, 1961 and was published in the Assam Gazette on April 15, 1961 and was to be in force only up to March 31, 1962. The validity of this Act was also challenged and the High Court of Assam by its order dated August 1, 1963 held that this Act was also ultra vires. The State Government appealed to the Supreme Court against this judgment. While the appeal was pending before the Supreme Court two writ petitions filed by different assesses under Article 32 of the Constitution before the Supreme Court were disposed of on December 13, 1963 holding that the Act was valid. On an application made by the Government of Assam pending the appeal against the order dated August 1, 1963 of the Assam High Court the Supreme Court granted stay of the operation of the judgment of the High Court and on January 29, 1965 made the stay absolute subject to the condition that the assessment proceeding could continue but no levy should be made. On April 1, 1968 the Supreme Court reversed the judgment dated August 1, 1963 of the Assam High Court and held the present Act to be valid. Though the present Act was passed in 1961 as the matter was pending before the Courts the assessment proceedings could not be taken up till January 29, 1965 when the Supreme Court allowed the assessment proceedings to be continued.

3. The two appeals before us relate to the assessment quarter ending September 30, 1960 and December 31, 1960. In Civil Rule 1000 of 1969, Assam High Court, out of which Civil Appeal 602

of 1974 before this Court arises, the respondent company submitted the return on October 27, 1960 under Section 7(1) of the Act for the period ending September 30, 1960. The respondent submitted the return without paying tax on the return as required under Section 20(2) of the Act. In Civil Rule 1001 of 1969 in the Assam High Court, out of which Civil Appeal 603 of 1974 arises in this Court, the respondent submitted a return on February 14, 1961 for the quarter ending December 31, 1960 under Section 7(1) of the Act. The return under Section 7(1) has to be submitted under Section 7(3) within 30 days of the completion of the quarter in respect of which the returns are to be filed. In this return also no tax as required was paid prior to the submission of the return. It may be noted that while in Civil Appeal 602 of 1974 the return was filed within time but without payment of tax, in Civil Appeal 603 of 1974 the return was filed out of time and without payment of the tax.

4. Orders of assessments were passed in both the cases on June 19, 1969 in pursuance of the provisions of Section 9(4) of the Act. It is the common case that no notice either under Section 7(2) or Section 11 of the Act was served on the respondent for the submission of the return for the periods in question. In the High Court the respondent submitted that order of assessment made by the Revenue on June 19, 1969 is not valid in law on two grounds. Firstly, it was contended that as the return in Civil Rule 1000 of 1969 was filed without the necessary deposit of the tax the return within the meaning of Section 7(1) and no assessment proceedings can be taken on that. It was further submitted that as no notice as contemplated under Section 7(2) and Section 11 of the Act directing the assessee to show cause why assessment proceedings should not be initiated within 2 years from the date of the expiry of the return period was issued, no assessment proceedings could be validly initiated as it became time-barred under Section 7(2) of the Act. The plea on behalf of the Government was that the demand by the taxing officer under Section 9(3) of the Act is in pursuance of the return filed voluntarily by the assessee though without payment of the tax and out of time and that it can be taken as a return and assessment made under Section 9 of the Act. In this view the submission was that it is not necessary for the tax authorities to issue any notice under Section 7(2) within 2 years from the date on which the return ought to have been submitted. The High Court held that as under Section 7(1) the return must be submitted within a period of 30 days after the completion of the return quarter, the return submitted after the statutory period must be held to be non-est for the purpose of initiating assessment proceedings based thereon and as no action had been taken, either under Section 7(2) or Section 11 of the Act, in the present case, the assessment order dated June 19, 1969 is beyond the competence of the authorities. With regard to Civil Rule 1000 of 1969 the High Court came to the same conclusion on the ground that though the return was admittedly submitted within the prescribe time, the tax due on that return was not paid and as payment of tax before furnishing a return under Section 7(1) of the Act is mandatory, such failure would result in making the return non-est and therefore no further proceedings can be taken on such a defective return. In the result the High Court held that the return submitted in Civil Rule 1000 of 1969 although within the prescribed period is not a return within the meaning of Section 7(1) and that the return in Civil Rule 1001 of 1969 as it was beyond the prescribed period and without payment of tax cannot be treated as a return under Section 7(1) of the Act and as admittedly no proceedings were taken under Section 7(2) of the Act the tax authorities were not competent to proceed with the assessment.

5. In the appeals before us Mr. Lal Narain Sinha, the learned Counsel for the appellant, submitted that the High Court was in error in holding that the return submitted by the respondent is non-est. The learned Counsel referred to Section 7(1) which requires that the return shall be furnished in such form and to such authorities as may be prescribed. The form is prescribed by Assam Taxation (On Goods Carried by Road or on Inland Waterways) Rules, 1961. Rule 6 prescribes that the return shall be furnished in Form 1 and Rule 7 requires that return shall be signed and verified by the

dealer or producer or his agent. Form 1 under the rules requires in Column E that the amount paid with the challan number and date should be noted. Section 20 prescribes the manner in which the tax shall be paid. Section 20(2) provides that before any producer or dealer furnishes the return required by sub-section (1) of Section 7, he shall in the prescribed manner pay into the Government Treasury the full amount of tax due from him under this Act on the basis of such return and shall furnish along with the returns a receipt from such Treasury in token of payment of such tax. Section 13 provides penalty for failure to pay tax. It was submitted by Mr. Lal Narain Sinha that a return is complete and valid when it is submitted in such form and to such authority as prescribed by the rules and the fact that there was any defect in the return such as non-payment of tax as required under Section 20(2) or delay in filing the return within the time prescribed under Section 7(3) the return will not become non-est. The consequence of filing a defective return is not to make the return non-est but to make the assessee liable to penalty under Section 13 or to other proceedings. So long as there is a return the learned Counsel submitted that it was not necessary for the tax authorities to proceed under Section 7(2) which is applicable to cases where no return has been submitted. In support of his contention that any defect in the return would not make the return non-est, the learned Counsel referred us to there decisions, Chandra Nath Bagchi v. Nabadwip Chandra Dutt (AIR 1931 Cal 476 : 35 CWN 9 : 131 IC 702), Nagendra Nath Dey v. Suresh Chandra Dey (AIR 1932 PC 165 : 59 IA 283 : ILR 60 Cal 1) and Gursahai Saigal v. CIT (48 ITR 1 : (1963) 3 SCR 893 : AIR 1963 SC 1062). In Chandra Nath Bagchi v. Nabadwip Chandra Dutt the judgment-debtor pleaded want of notice under Order 21, Rule 22 of the Civil Procedure Code, which requires that an opportunity should be given to the judgement-debtors against whom execution is taken out more than a year after the decree to show cause why execution should not proceed. It was admitted that no such notice was in fact given but as the judgment-debtor in that case was actively litigating objecting to the execution being taken against him, he cannot be permitted to plead failure of notice under Order 21, Rule 22. Chief Justice Rankin while accepting the requirement that a notice under Order 21, Rule 22, is necessary found that in the case before him the parties have been litigating actively with each other upon the question whether the execution should proceed and how it should proceed. In the circumstances the learned C.J. observed :

> It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely to dispute the execution of the decree when in point of fact they were busy disputing about it in all the courts for the best part of the last two years.
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> Relying on the above observation the learned Counsel submitted that the respondent who challenged the validity of the enactment and who took part in the litigation questioning the validity of the assessment for several years and who filed the return cannot now contend that the assessment is not valid having been filed beyond time or without payment of the tax.

6. In Nagendra Nath Dey v. Suresh Chandra Dey (supra), the judicial Committee held that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. Relying on this decision it was submitted that the return is not less a return though it was defective in that tax was not paid and was presented out of time.

7. In Gursahai Saigal. CIT (supra), the Supreme Court was construing Section 18 A(6) and (8) of

the Indian Income-tax Act, 1922. Sub-section (6) provided that when the tax paid on the basis of his own estimate is less than 80 per cent of the tax determined on the basis of the regular assessment simple interest at the rate of 6 per cent per annum from the first day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty percent. According to the sub-section interest has to be calculated from first January in the financial year in which the tax mentioned was paid and such calculation has to be made on the short-fall between the amount paid and 80 per cent of the tax which was found payable on the regular assessment. According to sub-section (8) where on making the regular assessment Income-tax Officer finds that no payment of tax has been made in accordance with the provisions of this section, interest calculated in the manner laid town in sub-section (6) shall be added to the tax as determined on the basis of regular assessment. The assessee's contention was that since he had not paid any tax at all it is not possible to calculate interest in the manner laid town in sub-section (6). The plea was that in a case in which no tax had been paid at all, sub-section (6) will have no application as there is no short-fall between 80 per cent of the tax payable on regular assessment and the amount actually paid. The Court rejected the plea and held that sub-section (6) should be read according to the provisions of which interest has to be calculated as provided in sub-section (8), in a manner which makes it workable and thereby prevent the clear intention of sub-section (8) being defeated. The Court further held that the intention was that interest should be charged from first January of the financial year in which the tax ought to have been paid and those who paid the tax but a smaller amount and those who did not pay tax at all would then be put in the same position substantially. On the strength of this decision it was submitted that the respondent who had not paid the tax cannot take advantage of his omission and say that the assessment proceedings cannot be proceeded with on the return submitted.

8. On a reading of Section 7(1) and Section 20(2) of the Act it cannot be said that the submission of the learned Counsel for the appellant that it is not necessary that the tax should be paid before valid return is submitted is without substance. On the facts of the case we feel we are not called upon to decide this question. Certain enactments, as pointed out by the High Court, provide that the return submitted will not be valid unless it is accompanied by Treasury Receipt showing payment of tax (vide sub-section (6) of Section 19 of the Assam Agricultural Income-tax Act, 1939). Section 16 of the Assam Sales-Tax Act, 1947 provides that no return submitted under this section shall be valid unless it is accompanied by a Treasury Receipt showing payment of the tax due. Section 7(1) of the Act merely requires that the return should be furnished in such form and to such authority as may be prescribed. The returns were admittedly submitted to the authorities. Though the form requires mentioning of the particulars of the Treasury challan for the payment of the tax, it was submitted that the return furnished without payment of the tax cannot be said to be return at all. It was further pleaded that the failure to pay the tax as required under Section 20(2) will not make the return non-est. We refrain from deciding this question.

9. Mr. A. K. Sen, the learned Counsel for the respondent, submitted that this Court should not allow the plea put forward on behalf of the appellant that the return was a valid one as it was admitted that the assessment did not proceed on the return submitted. He referred to the judgment of the High Court wherein it is stated : "It is also the admitted position in both these cases, the Superintendent of Taxes treated the returns filed as invalid ones." It was submitted that the tax authorities cannot now be allowed to change their front and submit that they proceeded to assess on the basis of the returns furnished by the respondent. It is common ground that no notice under Section 7(2) of the Act within 2 years of the expiry of the return period was issued to the respondent. This Court, by a majority in Supdt. of Taxes, Dhubri v. Onkarmal Nathmal Trust ((1975) Supp SCR 365, 375 : (1976) 1 SCC 766, 776 (para 18) : 1976 SCC (Tax) 73), has held that before proceedings could be

taken under Section 9(4) it is mandatory that notice under Section 7(2) will have to be issued. Therefore, the only approach that is available to the State and which has been taken by the learned Counsel, is that the assessment proceedings are valid as the return is not non-est. The question that arises for consideration is whether we should allow this plea to be taken by the State when it admitted before the High Court that the assessment was not based on the return. It has to be seen that the ground that was urged by the respondent was that the returns were non-est which was accepted by the High Court. We do not think we will be justified in these appeals under Article 136 of the constitution to permit the State to contend that it can proceed on the basis that the returns were valid, especially when the plea before the High Court was that the returns were invalid. This Court has repeatedly held that the exercise of power under Article 136 is discretionary. (vide Trivedi v. Nagrashna ((1961) 1 SCR 113, 117 : AIR 1960 SC 1292 : (1962) 2 Lab LJ 236)). In State of Gujarat v. Gujarat Revenue Tribunal ((1976) 3 SCR 565, 576 : (1977) 1 SCC 46, 57 (para 21), this Court held that even though there may be substance in the argument put forward on behalf of the appellant the Court taking the totality of the circumstances may decline to interfere in an appeal filed by special leave of Court under Article 136 of the Constitution.

10. In the result the appeals are dismissed. No order as to costs.

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