

GAHC010105722016



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Revn.Pet./3/2016

PUTUL GOGOI,
S/O LT. DEBENDRA NATH GOGOI,
R/O AMGURI COLLEGE ROAD,
P.O. and P.S. AMGURI,
DIST. SIVASAGAR, ASSAM.

.....Petitioner

-VERSUS-

1.THE STATE OF ASSAM,
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
FINANCE TAXATION DEPARTMENT,
DISPUR, GUWAHATI-06,
KAMRUP M, ASSAM.

2:THE COMMISSIONER OF TAXES ASSAM,
"KAR BHAWAN" G.S. ROAD,
DISPUR, GUWAHATI-6,
KAMRUP M, ASSAM.

3:THE DEPUTY COMMISSIONER OF TAXES (APPEAL), JORHAT, ASSAM.

4:THE ASSISTANT COMMISSIONER OF TAXES, SIVASAGAR, ASSAM.

5:THE SUPERINTENDENT OF TAXES RECOVERY, SIVASAGAR,
DIST. SIVASAGAR, ASSAM.

6:THE ASSAM BOARD OF REVENUE, GUWAHATI,
P.O. and P.S. PANBAZAR, GUWAHATI-1.

.....Respondents

BEFORE
HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE SUMAN SHYAM

For the Petitioner : Mr. R.S. Mishra, Advocate.

For the respondents : Mr. B. Choudhury, Standing Counsel, Finance & Taxation
Department.
: Mr. H. Baruah, Advocate.

Date of Hearing : 30.05.2024.

Date of Judgment : 30.05.2024.

JUDGMENT & ORDER (ORAL)

[Vijay Bishnoi, CJ]

This Revision Petition is filed by the petitioner being aggrieved with the order dated 16.07.2015 passed by the Assam Board of Revenue, Guwahati in Case No.66STA/13 to 67STA/13, whereby the appeals filed by the petitioner against the order dated 29.07.2013 passed by the Deputy Commissioner of Taxes (Appeals), Jorhat/ respondent No.3, has been dismissed.

2. The brief facts of the case are that the petitioner was in business of trading of hardware goods, L.D. Oil, J.D. Oil, Thinner, Furnane Oil etc. under the name and style of M/s. P.G. Oil Traders which was a proprietorship concern. M/s. P.G. Oil Traders was registered under the provisions of the Assam General Sales Tax Act, 1993 (hereinafter referred to be "AGST Act, 1993").

3. As per the petitioner, the operation of the aforesaid M/s. P.G. Oil Traders was stopped sometime in the month of April, 2003 and the registration certificate issued to it under the AGST Act, 1993 had also been surrendered which was duly acknowledged by the office of the Assistant Commissioner of Taxes, Sivasagar, Assam/ respondent No.4.

4. It is the case of the petitioner that M/s. P.G. Oil Traders has submitted its returns for the assessment years 2002-2003 and 2003-2004 before the Assessing Authority as per the provisions of Assam General Sales Tax Rules, 1993. The assessments for the aforesaid years were finalised and the assessment orders were passed by the Assessing Officer for the assessment years 2002-2003 on 31.03.2008 and for the year 2003-2004 on 27.07.2008.

5. It is contended that the proprietor of the M/s. P.G. Oil Traders was not aware about the said assessment orders. However, he came to know about the same when certain proceedings were initiated against him for recovery of the alleged dues. On enquiry, the petitioner came to know that the assessments have been concluded for the aforesaid assessment years and proceedings were initiated for recovery of the due tax amount.

6. The petitioner had, therefore, obtained certified copies of the assessment orders of the aforesaid years in the year December, 2012 and had preferred an appeal before the Deputy Commissioner of Taxes (Appeals), Jorhat/respondent No.3. Along with the said appeal, the petitioner has also preferred stay application as well as condonation of delay application.

7. In those appeals, the date of hearing was fixed as 19.02.2013. However, the petitioner was asked to deposit 25% of the disputed tax. The petitioner had opposed the same and also prayed for waiver of requirement of

deposit of 25% of the disputed tax.

However, the Deputy Commissioner of Taxes (Appeals), Jorhat/respondent No.3, dismissed the appeals filed on behalf of the petitioner vide impugned order dated 29.07.2013 while holding that the Appellate Authority is conferred with the power under Section 79(5) of the Assam Value Added Tax Act, 2003 (hereinafter to be referred as "VAT Act, 2003") which requires proof of payment of at least 25% of the total disputed amount. It is also observed that as the petitioner is unable to produce proof of payment of 25% of the disputed amount in the form of Treasury Challan, the appeal filed by the petitioner cannot be admitted.

The order dated 29.07.2013 reads as under:

"ORDER

Dated Jorhat the 29th July, 2013

Sri Sidhartha Baruah, FCA, authorized representative of the appellant appeared and submitted a prayer petition for waiving of the 25% payment of the disputed tax to entertain the appeal memorandum. The authorized representative has cited that the appellant is facing acute shortage of fund as he has liquidated all profit earning business because of financial crisis.

The learned representative of the appellant has also prayed that the appellant be allowed to deposit 25% of the disputed amount in the form of Bank Guarantee. Carefully heard the contention of the learned authorized representative. The power of this appellate authorities is confined to the power conferred under section 79(5) which requires proof of payment of at least 25% of the total disputed amount. As the appellant is unable to produce proof of payment of 25% of the disputed amount in the form of Treasury Challan the appeal memorandum is not admitted.

Inform the appellant, the Assistant Commissioner of Taxes, Sivasagar accordingly."

8. Against the order dated 29.07.2013, the petitioner had preferred an

appeal before the Assam Board of Revenue, Guwahati. However, the Assam Board of Revenue has dismissed the said appeal vide impugned order dated 08.04.2014 while observing that deposit of 25% of the demand is a provision of law. The petitioner cannot have a claim for its waiver.

The aforesaid order dated 08.04.2014 reads as under:

“ORDER

This is an appeal against an order dated 29/07/2013 of the Deputy commissioner of Taxes (Appeals) Jorhat wherein he has rejected the prayer of the Appellant to waive 25% of the demanded tax for the admission of the appeal and on the failure of the appellant to deposit the same, has dismissed it.

Deposit of 25% of the demand is a provision of law. The Appellant cannot have a claim for its waiver. The appeal is hence dismissed.”

9. Being aggrieved with the same, the petitioner filed a writ petition, being WP(C) No.6769/2014, before this Court. The said writ petition was allowed and the order passed by the Assam Board of Revenue dated 08.04.2014 was set aside and the matter was remanded to the Assam Board of Revenue for disposal afresh after hearing the petitioner.

10. On remand, the Assam Board of Revenue has taken up the matter and has dismissed the appeals vide order dated 16.07.2015, which reads as under:

“This appeal had been received by Registered Post. Neither the appellant nor his counsel had appeared to present his case. As there is a provision in the Act for giving cognizance to appeals are received by post, the matter had been taken up for examination and had been disposed by an order dated 27/03/14. The appellant approached the Hon’ble High Court with the plea that the said order has been passed without affording him an opportunity of being heard. The Hon’ble High Court remanded the matter to the Board with the direction to dispose it after hearing the appellant.

The learned counsel for the appellant has been heard.

This is an appeal against an order of the Deputy Commissioner of Taxes

(Appeals), Jorhat dated 29.07.2013 wherein he had required the appellant to deposit 25% of the disputed amount and has refused to admit the appeal on his failure to do so. The appellant has assailed this order as he has assailed this order as he has claimed that the learned Deputy Commissioner had the authority to waive the same.

The requirement of law is for the deposit of 25% of the disputed demand. The learned Deputy Commissioner has the powers to waive it in his discretion if he feels that the case falls within certain parameters. It is not a matter of right. If the appellate authority has found the case to be unfit for such consideration the appellant cannot claim the same as a matter wherein his legitimate rights have been violated. Under the law the appellate authority has to record detailed reasons for allowing such a waiver.

In view of above, the appeal is unfit to be admitted and is dismissed.”

11. Assailing the impugned order dated 16.07.2015 passed by the Assam Board of Revenue as well as the order dated 29.07.2013 passed by the Deputy Commissioner of Taxes (Appeals), Jorhat/respondent No.3, Mr. R.S. Mishra, learned counsel for the petitioner has argued that the Assam Board of Revenue as well as the respondent No.3 has failed to take into consideration that the appeal filed by the petitioner before the respondent No.3 was required to be considered as per the provisions of Section 33 of the AGST Act, 1993 and not as per the provisions of Section 79 of the VAT Act, 2003. It is contended that proviso to Section 33(6) of the AGST Act provides that the Appellate Authority may, if it thinks fit for reasons to be recorded in writing and subject to furnishing of such security as such authority may deem fit, admit an appeal against any order with part payment or without any payment of the disputed amount of tax including penalty.

12. It is contended that in the present case, the respondent No.3, without even considering the request of the petitioner, has straightway dismissed the appeal while observing that the petitioner has failed to furnish proof of payment of at least 25% of the total disputed amount, as mandated under Section 79(5)

of the VAT Act, 2003. It is contended that the Assam Board of Revenue, at the first instance, dismissed the appeal filed on behalf of the petitioner on the ground that the petitioner has not deposited the 25% of the disputed amount and therefore, the appeals are liable to be dismissed and even after remanding the matter by this Court vide order dated 06.01.2015, has dismissed the appeal while observing that the Deputy Commissioner has the power to waive it in his discretion if he feels that the case falls within certain parameters.

13. Learned counsel for the petitioner has submitted that the Assam Board of Revenue has not taken into consideration that the respondent No.3 while dismissing the appeal filed by the petitioner has not even considered the request of the petitioner for waiver of the condition of pre-deposit of 25% of tax amount. It is contended that the order of the Assam Board of Revenue is contrary to the facts of the case and therefore, is liable to be set aside.

14. Learned counsel for the petitioner has submitted that it is settled position of law that the right of appeal is a vested and substantive right and it cannot be taken away without an express provision in the law of this effect either expressly or by necessary intendment.

15. It is contended that the dispute in relation to the assessment orders relates to the period, i.e. prior to introduction of the VAT Act, 2003, therefore, the appeal filed by the petitioner before the respondent No.3 was required to be considered by taking into consideration the provisions of Section 33 of the AGST Act, 1993 instead of the provisions of VAT Act, 2003.

16. In support of the above submissions, learned counsel for the petitioner has placed reliance on the decisions of the Hon'ble Supreme Court rendered in the cases of (i) **Messrs. Hoosein Kasam Dada (India) Ltd. Vs. The State of**

Madhya Pradesh & Ors., reported in **AIR 1953 SC 221**; (ii) **Garikapati Veeraya Vs. N. Subbiah Choudhury & Ors.**, reported in **AIR 1957 SC 540** and (iii) **ECGC Limited Vs. Mokul Shriram EPCJV**, reported in **AIR OnLine 2022 SC 430**.

17. Learned counsel for the respondents has opposed the revision petition.

18. Heard the learned counsel appearing for the parties and perused the material available on record.

19. It is not in dispute that the tax demand raised against the petitioner is related to the assessment years 2002-2003 and 2003-2004 and the assessment orders in relation to the aforesaid assessment years were passed in the year 2008, i.e. on 31.03.2008 and 27.07.2008, respectively. In such circumstances, question arises for determination is whether appeal filed by the petitioner being aggrieved with the said assessment orders is required to be considered as per the provisions under AGST Act, 1993 or VAT Act, 2003.

The said question has already been answered by the Division Bench of the Hon'ble Supreme Court in **Messrs. Hoosein Kasam Dada (India) Ltd.** (supra). The said judgment was later on affirmed by a Constitution Bench of the Hon'ble Supreme Court in **Garikapati Veeraya** (supra).

In **Messrs. Hoosein Kasam Dada** (supra), the Hon'ble Supreme Court has held as under:

“(8) The above decisions quite firmly establish and our decisions in Janardan Reddy v. The State, AIR 1951 SC 124 (O) and in Ganpat Rai v. Agarwal Chamber of Commerce Ltd., AIR 1952 SC 409 (P), uphold the principle that a right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court. In the language of Jenkins C. J.,

in Nana vs. Sheku (B) (supra) to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication.

(9) Sri Ganapathy Aiyar urges that the language of S.22(1) as amended clearly makes the section retrospective. The new proviso, it is pointed out, peremptorily requires the authority not to admit the appeal unless it be accompanied by a satisfactory proof of the payment of the tax in respect of which the appeal is preferred and this duty the authority must discharge at the time the appeal is actually preferred before him. The argument is that after the amendment the authority has no option in the matter and he has no jurisdiction to admit any appeal unless the assessed tax be deposited. It follows, therefore, by necessary implication, according to the learned Advocate, that the amended provision applies to an appeal from an assessment order made before the date of amendment as well as to any appeal from an order made after that date. A similar argument was urged before the Calcutta Special Bench in Sardar Ali v. Dolimuddin (E) (Supra), namely, that after the amendment the Court had no authority to entertain an appeal without a certificate from the Single Judge. Rankin C.J., repelled this argument with the remark at p.643:

‘Unless the contrary can be shown, the provision which takes away jurisdiction is itself subject to the implied saving of the litigants’ right.’ In our view the above observation is apposite and applies to the case before us. The true implication of the above observation as of the decisions in the other cases referred to above is that the pre-existing right of appeal is not destroyed by the amendment if the amendment is not made retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. As the old law continues to exist for the purpose of supporting the pre-existing right of appeal that old law must govern the exercise and enforcement of that right of appeal and there can then be no question of the amended provision preventing the exercise of that right. The argument that the authority has no option or jurisdiction to admit the appeal unless, it be accompanied by the deposit of the assessed tax as required by the amended proviso to S.22(1) of the Act overlooks the fact of existence of the old law for the purpose of supporting the pre-existing right and really amounts to begging the question. The new proviso is wholly inapplicable in such a situation and the jurisdiction of the authority has to be exercised under the old law which so continues to exist. The argument of Sri Ganapathy Aiyar on this point, therefore, cannot be accepted.

(10) The learned Advocate urges that the requirement as to the deposit of the amount of the assessed costs does not affect the right of appeal itself which still remains intact, but only introduces a new matter of procedure. He contends that this case is quite different from the case of *Sardar Ali v. Dolimuddin (E)* (supra), for in this case it is entirely in the power of the appellant to deposit the tax if he chooses to do so whereas it was not within the power of the appellant in that case to secure a certificate from the learned Single Judge who disposed of the second appeal. In the first place the onerous condition may in a given case prevent the exercise of the right of appeal for the assessee may not be in a position to find the necessary money in time further this argument cannot prevail in view of the decision of the Calcutta High Court in *Nagendra Nath v. Mon Mohan Singha (N)* (supra). No cogent argument has been adduced before us to show that that decision is not correct. There can be no doubt that the new requirement “touches” the substantive right of appeal vested in the appellant. Nor can it be overlooked that such a requirement is calculated to interfere with or fetter, if not to impair or imperil, the substantive right. The right that the amended section gives is certainly less than the right which was available before. A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. Indeed the new requirement cannot be said merely to regulate the exercise of the appellant’s pre-existing right but in truth whittles down the right itself and cannot be regarded as a mere rule of procedure.

(11) Finally, Sri Ganapathy Aiyar faintly urges that until actual assessment there can be no ‘lis’ and, therefore, no right of appeal can accrue before that event. There are two answers to this plea. Whenever there is a proposition by one party and an opposition to that proposition by another a ‘lis’ arises. It may be conceded, though not deciding it, that when the assessee files his return a ‘lis’ may not immediately arise, for under S.11(1) the authority may accept the return as correct and complete. But if the authority is not satisfied as to the correctness of the return and calls for evidence, surely a controversy arises involving a proposition by the assessee and an opposition by the State. The circumstance that the authority who raises the dispute is himself the judge can make no difference, for the authority raises the dispute in the interest of the State and in so acting only represents the State. It will appear from the dates given above that in this case the ‘lis’ in the sense explained above arose before the date of amendment of the section. Further, even if the ‘lis’ is to be taken as arising only on the date of assessment, there was a possibility of such a ‘lis’ arising as soon as proceedings started with the filing of the return or, at any rate, when the authority called for evidence and started the hearing and the right of appeal must be taken to have been in existence even at those dates. For the purposes of the accrual of the right of appeal the critical and relevant date is

the date of intimation of the proceedings and not the decision itself.

(12) For all the reasons given above, we are of the opinion that the appellant's appeal should not have been rejected on the ground that it was not accompanied by satisfactory proof of the payment of the assessed tax. As the appellant did not admit that any amount was due by it, it was under the section as it stood previously entitled to file its appeal without depositing any sum of money. We, therefore, allow this appeal and direct that the appeal be admitted by the Commissioner and be decided in accordance with law. The appellant is entitled to the costs of this appeal and we order accordingly.

Appeal allowed."

(Emphasis supplied)

20. While affirming the said view, the Constitution Bench of the Hon'ble Supreme Court in para No.23 of the decision rendered in **Garikapati Veeraya** (supra) laid down certain principles which is reproduced hereinunder:

"(23) From the decisions cited above the following principle clearly emerge:-

- (i) That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*
- (ii) The right of appeal is not a mere matter of procedure but is a substantive right.*
- (iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.*
- (iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.*
- (v) The vested right of appeal can be taken away only by a subsequent enactment, if it so proves expressly or by necessary intendment and not otherwise."*

21 . The Hon'ble Supreme Court in a recent decision rendered in ***ECGC Limited Vs. Mokul Shriram EPC JV*** (supra), has relied upon the aforesaid decisions.

In view of the above position of law, we have no hesitation in holding that the appeals filed by the petitioner against the impugned assessment orders are required to be considered under Section 33 of the AGST Act, 1993 instead of Section 79 of the VAT Act, 2003 because *lis* arose in the matter with filing of returns by the petitioner, i.e. in the year 2002-2004, which is admittedly prior to coming into force of the VAT Act, 2003.

22. It may be apposite to quote the provisions of Section 33(6) of the provisions of Section 33(6) of the AGST Act, 1993 which reads as under:

“Appeal to Appellate Authority and Tribunal

33. (1)

(6) No appeal under sub-section (1) or sub-section (2) against an order of assessment of tax with or without penalty or against an order imposing penalty shall lie unless such appeal is accompanied by satisfactory proof of the payment of tax including penalty, if any, which is admitted to be due or twenty percent of the amount of tax including penalty, if any, which has been assessed or levied whichever is higher:

Provided that the appellate authority or Tribunal may, if it thinks fit for reasons to be recorded in writing and subject to furnishing of such security as such authority may deem fit, admit an appeal against such order with part payment or without any payment of the disputed amount of tax including penalty, if any, required under this sub-section with a view to mitigate undue hardship which is likely to be caused to the dealer or person if the payment of such disputed amount is insisted on.”

23. As per the above provisions, no appeal against the order of the assessment of tax shall lie unless such appeal is accompanied by a statutory proof of payment of tax including penalty, if any, or 20% of the amount of tax including penalty. However, a discretion was given to the Appellate Authority to waive the condition of said pre-deposit or to order for part payment of the

deposit of tax by recording reasons in writing with a view to mitigate undue hardship which is likely to be caused to an assessee.

24. Perusal of the order dated 29.07.2013 passed by the respondent No.3, it is clear that the request made by the petitioner for waiver of the condition of pre-deposit of 25% of disputed amount was not even considered and even the prayer of the petitioner to deposit the 25% of the disputed amount in the form of Bank Guarantee has also been rejected. It is also to be noticed that the Assam Board of Revenue, without considering the said fact, has passed the impugned order dated 16.07.2015 while assuming that the Appellate Authority has considered the request of the petitioner for waiver of the condition of pre-deposit of 25% of the disputed tax and rejected the same when found the case to be unfit for such consideration.

From the above, it is clear that the Assam Board of Revenue has not applied its mind while passing the impugned order dated 16.07.2015.

25. In view of above discussion, the instant revision petition is allowed. Consequently, the order dated 29.07.2013 passed by the respondent No.3 and the order dated 16.07.2015 passed by the Assam Board of Revenue are set aside. The matter is remanded back to the Appellate Authority to consider and decide the appeal/appeals filed by the petitioner as per the provisions of Section 33 of the AGST Act, 1993. The Appellate Authority shall also consider the request of the petitioner for waiver of the condition of pre-deposit of 25% of the disputed amount as per the proviso to Section 33(6) of the AGST Act, 1993 after providing due opportunity of hearing to the petitioner.

26. The dispute regarding taxes is related to the assessment years 2002-2003 and 2003-2004, we direct the Appellate Authority to decide the appeals

filed by the petitioner expeditiously, preferably, within a period of 6(six) months from the date of production of a certified copy of this order.

27. Send back the LCR.

JUDGE

CHIEF JUSTICE

Comparing Assistant