

(1962) 04 BOM CK 0012

In the Bombay High Court

Case No : Sales Tax Reference No. 8 of 1961

Bherulal Maniklal Kothari

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 19-04-1962

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 2(6), 26(1), 34(1)
Trade Marks Act, 1940 — Section 30

Citation : (1962) 13 STC 703

Hon'ble Judges : Y.S. Tambe, J; V.S. Desai, J

Bench : Division Bench

Advocate : J.P. Pandit, for the Appellant; H.M. Seervai, Advocate-General, instructed by Little and Co., for the Respondent

Judgement

Tambe, J.—This is a reference u/s 34(1) of the Bombay Sales Tax Act, 1953. The facts giving rise to this reference in brief are : A partnership firm consisting of two partners Kundanlal Hansraj Sahani and Balkrishna Mathuradas Sahani, was doing business of bidi manufacture at Sholapur, and sale of bidis under the name and style "Kundanlal Hansraj". The bidis were sold under certain labels. It appears that the applicant Bherulal Maniklal Kothari had advanced moneys to the said partnership firm sometime, and over Rs. 32,000 had remained to be paid by the said partnership firm to the applicant. On 23rd October, 1955, the said partnership firm entered into an agreement with the applicant, wherein in satisfaction of the aforesaid loan of Rs. 32,000 and odd, the partnership sold the goodwill of its aforesaid business and the right to use its 10 bidi label marks. The partners further agreed that they would not in future use the 10 bidi label marks in their business, or do any business or start any work at Sholapur. Prior to the date of transfer, the Sales Tax Officer had assessed the partnership firm to sales tax for the period 1st April, 1953 to 31st March, 1954, and 1st April, 1954 to 31st March, 1955, by his orders dated 30th September, 1955, and 27th June, 1955, respectively. The tax liability found due from the partnership firm was Rs. 640-14-6 and Rs. 2,260-7-6 respectively, and for the period 1st April, 1955 to

30th September, 1955, the assessment was made by the Sales Tax Officer by his order dated 24th August, 1956, and sales tax amounting to Rs. 1,453-15-6 was imposed on the said partnership firm.

2. On 25th October, 1956, the Sales Tax Officer wrote a letter to the applicant informing him that "as the goodwill of the business of Shri Kundanlal Hansraj Sahani of Kundanlal Hansraj, bidi merchant, had been taken over by him, he was held to be a transferee of the said concern, and was therefore liable for all the dues remaining unpaid by Shri Kundanlal Hansraj, u/s 26(1) of the Bombay Sales Tax Act, 1953". The appeal filed by the applicant before the Assistant Collector of Sales Tax failed, so also the revision filed before the Additional Collector of Sales Tax. The applicant preferred a revision before the Sales Tax Tribunal, and before it, it was contended that the applicant was not liable to pay sales tax assessed on the said partnership firm because he was not transferee of the entire business. It was also contended that mere transfer of goodwill of the firm and right to use certain labels would not amount to the transfer of the entire business within the meaning of section 26(1) of the Act. The applicant thus being not a transferee of the entire business of the said partnership firm was not liable to be saddled with the tax liability of the said partnership firm. This contention failed before the Tribunal. The Tribunal however, modified the order of the Sales Tax Officer by substituting the following sentence for the last sentence in the order of the Sales Tax Officer reproduced above :

"Therefore the liability to pay all the dues payable in respect of the business and remaining unpaid at the time of the transfer."

3. On an application made by the applicant u/s 34(1), the Tribunal has drawn up a statement of the case and referred to us the following question :

"Whether on the facts and in the circumstances of the case the applicants are liable as transferees u/s 26(1) of the Bombay Sales Tax Act, 1953 ?"

4. Mr. Pandit, appearing for the applicant, contends that the Sales Tax Authorities as well as the Tribunal erred in holding that the transfer of goodwill of business along with the right to use labels or marks would by itself amount to transfer of the entire business of the said partnership firm. In the absence of any other evidence on record, the Sales Tax Authorities as well as the Tribunal were not justified in holding that the applicant was liable to pay tax liability of his transferor. He referred us to certain passages from Lindley and Desai on Partnership, explaining the import of the expression "goodwill". On the other hand, it is the contention of the learned Advocate-General appearing for the respondent, that the goodwill of the business as well as the right in trade mark under which the business is done, have no independent existence apart from the business itself. Goodwill as well as the right to use unregistered trade marks, namely, the 10 labels, have been transferred by the said partnership to the applicant, and that amounts to the transfer of the entire business of the said partnership firm to the applicant. The Sales Tax Authorities as well as the

Tribunal were perfectly justified in holding that the applicant was transferee of the entire business. In support of his contention he referred us to certain passages in *Anna Trego and William Wilson Smith v. George Stratford Hunt* [1896] A.C. 7, *Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Limited* [1901] A.C. 217, and Appeal No. 95 of 1951 decided by a Division Bench of this Court on 6th February, 1952.

5. The answer to the question referred to us, in our opinion, would turn on the determination of the question whether transfer of a goodwill of a business along with the right to use certain unregistered trade marks in the business would by itself tantamount to transfer of the entire business. It is not in dispute that to hold the transferee of a business liable to pay tax payable by the transferor at the date of the transfer, it must be established that the transfer of a business owned by a dealer was in its entirety. A dealer has been defined in sub-section (6) of section 2 of the Act, and it means "any person who carries on the business of selling goods in the State of Bombay". It has therefore to be seen whether transfer of goodwill and right to use certain trade marks used by him in the matter of selling the goods would by itself tantamount to selling of the entire business. Goodwill has been defined by Lord Macnaghten first in *Anna Trego and William Wilson Smith v. George Stratford Hunt* [1896] A.C. 7 and in *Commissioners of Inland Revenue v. Muller & Co.'s Margarine Limited* [1901] A.C. 217 : "It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money." (Vide *Anna Trego and William Wilson Smith v. George Stratford Hunt* [1896] A.C. 7 . In *Commissioners of Inland Revenue v. Muller & Co.'s Margarine Limited*), the matter is put up thus : "What is goodwill ? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again." These observations have been cited with approval by their Lordships of the Supreme Court in *S.C. Cambatta and Co. Private Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, . It would thus be seen that the goodwill is a totality of advantage attached to a business. It necessarily follows that goodwill cannot be equated with the business itself. Similar appears to be the position in respect of a right in trade mark also. In Appeal No. 95 of 1951, decided on 6th February, 1952, the learned Chief Justice, delivering the judgment of the Court, observed :

"In India, as in England, an unregistered trade mark was not transferable, and therefore the view was taken in England that a trade mark could not be assigned or transferred in gross. In India by the Trade Marks Act of 1940 a trade mark

became transferable or assignable without the goodwill or the business being assigned. In England, although statutes dealing with trade marks were passed earlier, it was only in 1938 that the Trade Marks Act made the trade mark transferable or assignable without the business or goodwill being assigned at the same time."

6. It is the argument of the learned Advocate-General that even though after the passing of the Trade Marks Act, 1940, a trade mark could be transferred without the business itself being transferred, there are certain limitations placed in that respect in section 30 of the Trade Marks Act. Those conditions not having been fulfilled in this case the position is that the law prevailing prior to the passing of the Act as regards the transfer of the trade mark would equally be applicable to the facts of the present case. Assuming it to be so, the observations on which reliance is placed by the learned Advocate-General themselves show that a right in a trade mark, by itself, cannot be equated with the business. It may be that the law does not permit transfer of a trade mark apart from the business. But that cannot mean that if a certain trader transfers the trade mark without mentioning that he was transferring his business, it would amount to the transfer of the business itself. It is indeed true that in the instant case, it is not that the goodwill alone has been transferred or that the trade marks alone are transferred; but both the goodwill and the trade marks have been transferred. But even then, both these things taken together cannot amount to the entire business of a trader, and the transfer of these two things, namely, goodwill and the trade marks, by themselves, without there being any other evidence, would not amount to the transfer of the entire business.

7. In the case before us, no evidence has been tendered to show that there was any other factor in the agreement between the said partnership and the applicant which would lead to an inference that the entire business had been transferred. The judgment of the Sales Tax Tribunal would show that one of the contentions raised on behalf of the applicant before it was that the stock-in-trade, furniture and physical assets of the business had not been transferred by the said partnership to the applicant. Dealing with this contention, the Tribunal observed :

"With regard to stock and furniture and any other physical assets, there is no doubt no mention thereof in the agreement, but there is at the same time no evidence to show that at the time when the agreement was entered into by the parties there existed any stock, furniture or other physical assets belonging to the business; nor is there anything to show that there was any other kind of assets comprised in the said business which was not transferred."

8. It is on this ground that the contention raised on behalf of the applicant was repelled by the Tribunal, With respect, we find it difficult to agree with this line of reasoning. It is to be noticed that the applicant is sought to be held liable u/s 26(1) not for his own liability to pay tax, but for the liability of his transferor to pay sales tax in respect of the business turnover of the said transferor. It was,

therefore, incumbent on the revenue to establish beyond doubt that the requirements of sub-section (1) of section 26 were established, and one of the requirements, as already stated, which had to be established, was that the person sought to be held liable was the transferee of the entire business owned by a dealer. A dealer has been defined as a person carrying on business of selling goods in the State of Maharashtra. A person carrying on the business of selling goods would naturally be in possession of goods which he sells in course of business. A party desirous of establishing something which is contrary to the normal state of affairs of a business would naturally be expected to establish those facts. The Tribunal, therefore, in our view, was not justified in inferring that there were no other assets except goodwill and the rights in unregistered trade marks. The learned Advocate-General argued that the fact that there is no stock-in-trade would not be sufficient to hold that the business did not exist. There may be business at a given point of time though there be no stock-in-trade. For instance, he stated that for doing certain business, a permit is required from the Government. The permit has expired but the Government has not renewed it, or that the Government had not granted the permit. In such a contingency, a person cannot possess stock-in-trade, though he intends to carry on his business. Assuming that a business could exist without it having any stock-in-trade, at a given point of time, in our view, that would not be a normal state of affairs. On the other hand, the normal state of affairs of a business that is having a goodwill would be a business having stock-in-trade and which is a running business. In our opinion, therefore, the mere fact that a person doing business has sold the goodwill of his business and the right in trade marks would by itself be not sufficient to hold that the entire business of the trader has been transferred to the person to whom goodwill and right to use the trade marks has been transferred.

9. In the result, therefore, the question referred to us will be answered in the negative. The respondent shall pay the costs of the applicant. Deposits made by the applicant, if any, be refunded to him.

10. Reference answered in the negative.