
(1976) 02 BOM CK 0029

In the Bombay High Court

Case No : S.T.R. No. 13 of 1969 & Sales Tax Reference No. 13 of 1969

Commissioner of Sales Tax

APPELLANT

Vs

Paramount Industrial Stores

RESPONDENT

Date of Decision : 26-02-1976

Acts Referred:

Bombay Sales Tax Act, 1946 — Section 11A

Bombay Sales Tax Act, 1953 — Section 14, 14(3), 15, 15(1), 34(1)

Income Tax Act, 1922 — Section 34

Negotiable Instruments Act, 1881 (NI) — Section 25

Citation : (1976) 384 STC 555

Hon'ble Judges : M.H. Kania, J;D.P. Madon, J

Bench : Division Bench

Advocate : T.R. Andhyarujina, for the Appellant; R.V. Patel, for the Respondent

Judgement

Kania, J.—This is a reference u/s 34(1) of the Bombay Sales Tax Act, 1953 (hereinafter referred to as "the said Act"), made at the instance of the Commissioner of Sales tax. The facts giving rise to this reference are as follows :

2. The respondent-assesses were registered as a dealer under the Bombay Sales Tax Act, 1946, as well as under the said Act. In respect of the assessment periods from 1st April, 1950, to 31st March, 1951, and 1st April, 1951, to 31st March, 1952, respectively the assesseees were assessed by the Sales Tax Officer, A Ward, on 9th July, 1952. On 29th March, 1956, the assesseees were served by the Sales Tax Officer (I), Enforcement Branch, Bombay, with a notice u/s 15(1) of the said Act in form XIV stating, inter alia, that the Sales Tax Officer was satisfied that the assesseees' turnover in respect of sales and purchases amounting to Rs. 12,75,000 had escaped assessment for the period from 1st April, 1950, to 31st March, 1952, and directing the assesseees to attend in person or by a legal practitioner or by an agent authorised in writing at 11 a.m. on 19th April, 1956, at the place and address mentioned therein to show cause against being reassessed in respect of the escaped turnover in the aforesaid amount. The Sales Tax Officer by his letter dated 18th April, 1956, served on the assesseees

and purporting to be in continuation of the said notice requested the assesseees to attend his office on 24th April, 1956, at 11 a.m. instead of 19th April, 1956, in terms of the said notice. From the assessment order it is clear that this was done as the day on which the assesseees were required to attend, 19th April, 1956, happened to be a public holiday. From the said order it also appears that a separate notice, in form XIV, for the period from 1st April, 1951, to 31st March, 1952, was served on the assesseees on 14th July, 1956, requiring the assesseees to attend on 30th July, 1956. Separate proceedings have been taken pursuant to the notice served on 14th July, 1956, and we are not concerned with those proceedings or with the assessment relating to that period in this reference. The dispute in this reference relates only to the assessment period from 1st April, 1950, to 31st March, 1951. We propose to refer to this period as "the said period". On 21st February, 1957, a show cause notice in respect of the said period along with a letter was sent by the Sales Tax Officer to the assesseees wherein it is clarified that it was proposed to assess the assesseees after hearing in respect of the turnover escaping assessment and in respect of certain deductions wrongly allowed. According to the Sales Tax Officer, the hearing was held on 5th August, 1957. The assesseees, inter alia, contended that the aforesaid notice served on 29th March, 1956, which we propose to refer as "the said notice" was defective, as 19th April, 1956, was a public holiday. The Sales Tax Officer observed (hat as 19th April, 1956, was a public holiday, the case was fixed on 24th April, 1956, by his letter dated 18th April, 1956, and hence the notice was properly served. He rejected the contention of the assesseees that the said notice was defective merely because the date fixed originally was a public holiday. The Sales Tax Officer reassessed the assesseees in respect of escaped turnover of sales amounting to Rs. 3,69,244, but dropped the claim regarding deductions allegedly wrongly allowed. The assesseees preferred an appeal against the decision of the Sales Tax Officer but the same was dismissed by the Assistant Collector of Sales Tax, and a revision application preferred by the assesseees was dismissed by the Deputy Commissioner of Sales Tax. The assesseees then went by way of further revision to the Sales Tax Tribunal. The Tribunal took the view that the said notice was defective because 19th April, 1956, which was the date fixed for hearing in the said notice, was a public holiday and the assesseees had been wrongly asked by the Sales Tax Officer to appear before him on a holiday. The Tribunal held that the defect could not be cured after the expiry of a period of five years from the end of the assessment period on 31st March, 1951, and hence the action taken to correct the same by way of the letter dated 18th April, 1956, was clearly beyond limitation. The Tribunal held that a valid notice u/s 15 of the said Act is a condition precedent to the assumption of jurisdiction by the Sales Tax Officer u/s 15, this condition precedent was not complied with and, therefore, the Sales Tax Officer had no jurisdiction to proceed u/s 15 of the said Act. On the basis of these conclusions the Tribunal set aside the assessment order passed by the Sales Tax Officer and confirmed by the sales tax authorities as set out earlier.

3. Arising from the aforesaid judgment and order of the Tribunal, the following questions have been referred to us for our determination :

"(1) Whether the Tribunal was justified in law in holding that the notice u/s 15 of the Bombay Sales Tax Act, 1953, dated 29th March, 1956, which was admittedly served on the respondents within the prescribed period was defective and bad in law merely because by reason of the said notice the Sales Tax Officer had asked the respondents to appear before him on 19th April, 1956, which was a holiday ?

(2) If the answer to question No. (1) is in the affirmative, whether the defect in the said notice has been cured or remedied by the letter of the Sales Tax Officer dated 18th April, 1956, whereby the respondents were requested by the Sales Tax Officer to attend his office on 24th April, 1956, instead of 19th April, 1956, in terms of the said notice dated 29th March, 1956 ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the proceedings initiated by the Sales Tax Officer in pursuance of the said notice dated 29th March, 1956, were bad in law ?"

4. Before proceeding to examine the contentions raised before us, it will not be out of place to set out some of the relevant provisions of the said Act. Section 15 of the said Act, as it stood at the relevant time, ran as follows :

"If in consequence of any information which has come into his possession the Collector is satisfied that any turnover in respect of sales or purchases of any goods chargeable to the tax has escaped assessment in any year or has been under-assessed or assessed at a lower rate or any deductions have been wrongly made therefrom, the Collector may, in any case where he has reason to believe that the dealer has concealed the particulars of such sales or purchases or has knowingly furnished incorrect returns, at any time within five years, and in any other case, at any time within three years, of the end of that year, serve on the dealer liable to pay the tax in respect of such turnover a notice containing all or any of the requirements which may be included in a notice under sub-section (3) of section 14 and may proceed to assess or reassess the amount of the tax due from such dealer and the provisions of this Act shall apply accordingly as if the notice were a notice served under that sub-section."

5. There were two provisos to this section, but we are not concerned with the same in this reference. It may further be mentioned that the functions of the Collector under the aforesaid provisions were performed by the Assistant Collector of Sales Tax as his delegate under the said Act. Section 14(3) of the said Act ran as follows :

"(3)(a) If the Collector is not satisfied without requiring the presence of a dealer who has furnished his returns or the production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein either to attend in person or to produce or to cause to be

produced any evidence on which such dealer may rely in support of such returns or such other evidence as may be specified in such notice.

(b) On the date specified in the notice or as soon afterwards as may be, the Collector shall after considering such evidence as the dealer may produce and such other evidence as the Collector may require on specified points, assess the amount of the tax due from the dealer."

6. The first question which we propose to consider is, whether the said notice dated 29th March, 1956, was a valid notice or not. In connection with this question, certain facts have to be taken note of. By Resolution No. P. 13 dated 29th November, 1949, passed in the Political and Services Department of the then Government of Bombay it was, inter alia, provided that subject to provision being made for urgent work, all offices whether they dealt with cash transactions or not should be entirely closed on holidays notified under the Negotiable Instruments Act, 1881, This resolution was issued "By order of the Governor of Bombay" and was duly authenticated by Shri M. D. Bhat, the then Chief Secretary to the Government of Bombay. By a notification dated 3rd October, 1955, published in the Bombay Government Gazette, Extraordinary, Part I, dated 5th October, 1955, the said notification having been issued by the Political and Services Department, it was notified that u/s 25 of the Negotiable Instruments Act, 1881, read with the Notification of the Government of India, Home Department, No. 288/37 dated 1st April, 1938, the Government of Bombay was pleased to declare the days set out therein to be public holidays during the year 1956. One of these days declared to be public holidays was 19th April, 1956, being on account of Ramnavami.

7. It is in the light of the resolution and the notification set out above that the question has to be considered as to whether the said notice was a valid notice. It was urged by Mr. Andhyarujina, the learned counsel for the department, that merely because the date of hearing was fixed by the notice on 19th April, 1956, which was a public holiday, that did not in any manner invalidate the notice and this did not even amount to a defect in the said notice. It was pointed out by him that section 25 of the Negotiable Instruments Act under which the notification dated 3rd October, 1955, was issued did not in any manner prevent and prohibit public officers from working or performing their official duties on public holidays. It was urged by him that there was nothing in law or by way of a binding order which prevented the Sales Tax Officer from directing the assesseees to appear before him on 19th April, 1956, and it was perfectly open to the Sales Tax Officer to proceed with the hearing on that date irrespective of whether the assesseees appeared or not, and all that the assesseees could do was to apply, if they so thought fit, for an adjournment of the hearing which the Sales Tax Officer would have normally granted on account of that day being a holiday. Mr. Andhyarujina referred us, in support of this submission, to a statement in *Corpus Juris Secundum*, Vol. 40, section 6, at page 416, which runs as follows :

"In the absence of statutory prohibition, either express or reasonably implied,

official acts or business, such as the meeting or transaction of business by a public board, commission, municipality, or legal subdivision of the State, may validly take place on a holiday."

8. Mr. Andhyarujina also drew our attention to a similar statement appearing in the American Jurisprudence, Second Edition, Vol. 73, page 862.

9. In our view, it is hardly necessary or useful to refer to statements on the American law in connection with this question. The resolution dated 29th November, 1949, to which we have already referred, clearly provides that subject to provision being made for urgent work, all offices should be entirely closed on holidays notified under the Negotiable Instruments Act, 1881. This resolution was made "By order of the Governor of Bombay" and was duly authenticated with the result that it would undoubtedly be binding on the Sales Tax Officers. It is true that the resolution did provide that closure of the offices is subject to the provision being made for urgent work. But, there is nothing at all on the record, and there could not be anything, to show that there was any such provision made by reason of which the office of the Sales Tax Officer concerned was to be kept open on 19th April, 1956. In fact, there was no question of urgency at all. Although section 15 of the said Act provided for a period of five years for initiation of proceedings in case of concealment of the turnover by the dealer, in the present case, the said notice was served on the assessees on 29th March, 1956, and thereafter there was no urgency about the holding of a hearing to enable the assessees to show cause against the proposed reassessment. That the Sales Tax Officer himself did not consider the matter to be urgent is itself evident from the fact that by his letter dated 18th April, 1956, the date of hearing fixed by him was altered by him to 24th April, 1956. In these circumstances, in our view, under the resolution dated 29th November, 1949, the Sales Tax Officer was not entitled to call the assessees for the hearing on 19th April, 1956, the same having been declared as a public holiday. It is true, as Mr. Andhyarujina says, that it was open to the Sales Tax Officer to do his work at home or even in his office on 19th April, 1956, although it was a public holiday. But, in the present case, we are quite satisfied that he was not entitled to require the assessees to appear before him on that day. We are somewhat fortified in this connection by the definition of the term "holiday" contained in clause (24) of rule 9 of the Bombay Civil Services Rules, 1959. That rule defines "holiday" thus :

"Holiday means -

(a) a holiday prescribed or notified by or u/s 25 of the Negotiable Instruments Act, 1881; and

(b) in relation to any particular office, a day on which such office is ordered by Government, or by a duly constituted authority, by notification in the Gazette or otherwise, to be closed for the transaction of Government business without reserve or qualification."

10. This definition also shows that on the days declared to be public holidays, the

Government offices should remain closed.

11. Having already held that the Sales Tax Officer was not entitled to require the assessee to appear before him on 19th April, 1956, the question which we have to consider next is, whether having done so by the said notice constituted a defect in the said notice. In this connection, it was urged by Mr. Andhyarujina that u/s 15 of the said Act all that is required is that the notice should be issued within the prescribed time and it must contain all or any of the requirements which may be included in a notice under sub-section (3) of section 14 of the said Act. It was not disputed by Mr. Andhyarujina that under sub-section (3) of section 14 a notice must require the dealer concerned to attend on a date and at a place specified therein. He agreed that for a notice u/s 15 of the said Act to be a valid notice such notice must contain the date on which the dealer was required to attend and the place at which he was required to attend. But, it was submitted by him that once some date and some place was specified in the notice, the validity of the notice would not be affected, although the date or the place might happen to be an impossible one on which it could not have been physically possible to hold a hearing. For example, it was submitted by him that even if the date contained in the notice was a date which had already passed and there was no other indication that any other date of hearing was intended, yet the validity of the notice would not be affected by this. We find ourselves totally unable to accept this argument. It is conceded by Mr. Andhyarujina, and it is beyond dispute, that in order to be a valid notice u/s 15 of the said Act the date on which the assessee was required to attend must be stated. In such a case, to hold that once the date is stated in the notice, however meaningless it might be, the requirement regarding the stating of the date has been complied with would, in our opinion, reduce this requirement to a mere idle and meaningless formality. Let us take a case where an assessee is served with a notice u/s 15 of the said Act and the date on which he is required to attend is given in the notice as 1st January, 1880, or let us say, 35th January, 1976, and there is no other indication as to what is the correct date on which he is required to attend. Such a notice would convey no information whatsoever to the assessee concerned as to the date on which his attendance is required and, in our view, such a notice cannot be treated on a better or higher footing than a notice which does not contain a date of hearing at all.

12. The next question to which we must come is, what is the effect of such a defect in a notice u/s 15 of the said Act. In this connection, reference can usefully be made to the decision of a Division Bench of this Court in Commissioner of Income Tax, Bombay City I Vs. Ramsukh Motilal, Bombay, . The question there related to a notice u/s 34 of the Indian Income Tax Act, 1922. That section, it is common ground, is in pari materia with section 15 of the said Act, and section 22(2) of the Indian Income Tax Act, 1922, is in pari materia with section 14(3) of the said Act. It was held by Chagla. C.J., and Tendolkar, J., that if a notice u/s 34 of the Indian Income Tax Act, 1922, embodies any of the requirements u/s 22(2), it must at the same time permit the assessee to comply

with that requirement within a period which is not less than thirty days. If, therefore, a notice u/s 34 gave only six days to the assessee to make a return under that section, the notice is clearly illegal and such illegality cannot be waived by the assessee. It was further held that whereas it will be perfectly true to say that section 22(2) is a procedural section and the failure to give notice or a defect in a notice is a procedural defect, in the case of section 34 it is not a procedural defect but is a failure to comply with a condition precedent to the assumption of jurisdiction. The Division Bench, in terms, observed as follows :

"..... As we have already pointed out, the very scheme of that section is that the Income Tax Officer has no jurisdiction to assess u/s 34 without giving the notice referred to in that section."

13. This decision was approved by the Supreme Court in *Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others*, , where it has been held that the notice prescribed by section 34 of the Income Tax Act, 1922, for the purpose of initiating reassessment proceedings is not a mere procedural requirement : the service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made u/s 34. If no notice is issued or if the notice issued is shown to be invalid then the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. In *Kulkarni v. Tribhovandas Bhimji Zaveri* [1956] 7 S.T.C. 385, it has been held by a Division Bench of this Court that the notice required u/s 11A of the Bombay Sales Tax Act, 1946, or u/s 15 of the said Act is a condition precedent to the exercise of the jurisdiction by the Sales Tax Officer and if the notice is defective the condition precedent is not complied with and the Sales Tax Officer has no jurisdiction to assess.

14. We may at this stage also consider some of the decisions regarding the validity of notices issued u/s 34 of the Indian Income Tax Act, 1922, or section 15 of the said Act. In *Nyalchand Malukchand Dagli Vs. Commissioner of Income Tax, Gujarat*, , it has been held by the Gujarat High Court that a notice u/s 34(1) of the Indian Income Tax Act, 1922, to be valid, must specify with clearness and particularity the assessment year for which the assessment is sought to be reopened and where a notice of reassessment consisting of two parts, i.e., a notice u/s 34(1)(a) and another u/s 22(2), contained a discrepancy with regard to the assessment year, the notice was not valid and reassessment proceedings could not be taken on the basis of the notice. In *B. K. GOOYEE Vs. COMMISSIONER OF Income Tax, WEST BENGAL.*, , it has been held by the Calcutta High Court that a notice u/s 34 of the Indian Income Tax Act, 1922, which does not contain the signature of the Income Tax Officer, who issues it, is invalid and, all proceedings taken in pursuance of such a notice are invalid.

15. In the light of these decisions it appears to us that the said notice served on 29th March, 1956, on the assessee was clearly defective and no reassessment proceedings taken pursuant to that notice could be regarded as valid in law.

16. It was, however, submitted by Mr. Andhyarujina that the said notice must be regarded as valid as it did not in any manner mislead the assessee, nor were the assessee prejudiced, because they were, in fact, heard before the order of reassessment was made. In support of this contention, Mr. Andhyarujina relied upon the decision of the Supreme Court in *Balchand Vs. Income Tax Officer, Sagar*, . In that case, after the appellant had been assessed to tax u/s 23(3) of the Income Tax Act, 1922, for the assessment years 1945-46 and 1946-47, the Income Tax Officer issued a notice u/s 34 on 24th June, 1959. Although in the preamble to the said notice it was stated that the Income Tax Officer had reason to believe that the appellant's income assessable to Income Tax for the assessment years 1946-47 and 1945-46 had escaped assessment, in the body of the notice it was clearly stated as to the year regarding which the appellant was required to file a return and reassessment was intended to be made. It was held that the negligence in drawing up of the preamble to the notice did not affect the validity of the notice, for the appellant was clearly informed thereby that he had to file a return of the income assessable for the year ending 31st March, 1946. This decision does not advance the contention of Mr. Andhyarujina in any manner. The decision clearly shows that although there was some discrepancy in the preamble, on a fair reading of the notice it clearly specified the year to which the notice related and hence the notice could not be said to be in any manner defective or misleading at all. In the case before us, however, as we have already pointed out, the date fixed for hearing in the notice was one on which the Government offices were closed and no hearing could possibly have been held with the result that the assessee who received the notice were left completely uninformed as to the date on which their attendance was required.

17. Mr. Andhyarujina next referred to the decision of a Division Bench of this Court in *Satramdas Laxmandas v. Collector of Sales Tax* [1960] 11 S.T.C. 529 , where the question related to a regular assessment u/s 14 of the said Act. It has been held in this case that where from the terms of the notice there could be no doubt that it was intended to be issued by the Collector in exercise of the powers conferred by section 14(3) of the said Act, the failure to strike out from the printed form words which were inappropriate [referring to sub-sections (6) and (7) of section 14] did not affect the validity of the notice. This decision is again of no assistance in the case before us. In the first place, the question there was regarding a regular assessment where, unlike a case of reassessment u/s 15 of the said Act the service of a valid notice on the assessee was not a condition precedent to the initiation of proceedings. Moreover, the only defect in the notice alleged there was the failure to strike out certain inappropriate words from a printed form, whereas, in the present case, in effect, no date of hearing has been stated at all. Reference was also made by Mr. Andhyarujina to the decision of the Supreme Court in *The State of Orissa and Another Vs. Chakobhai Ghelabhai and Company*, . This decision too is not useful in consideration of the case before us, because it does not pertain to a case of reassessment where the issue of a valid notice is a condition precedent. Moreover, the defect alleged was the failure to

score out certain unnecessary words in the notice issued in form No. VI of the Orissa Sales Tax Rules.

18. Reliance was next placed by Mr. Andhyarujina on the decision of a single Judge of the Madras High Court in *In re D. H. Satyam* AIR 1949 Mad. 2, where it has been held that although rule (1) of the Criminal Rules of Practice (Madras) states that no judicial work should be transacted on a Sunday it does not mean that the court has no jurisdiction to acquit an accused on a Sunday and release him from custody. We fail to see how this decision can be relied on by the department in the present case. As pointed out in the very short order passed by the learned Judge, the rule in question itself provided for cases of absolute urgency and hence it was not as if there was a total bar to the doing of any work on a Sunday. Where an accused was to be acquitted and released it could reasonably be looked upon as a matter of absolute urgency. Apart from this, the question arose in a criminal revision, so that it was in the discretion of the court whether to interfere or not, and it would have been somewhat surprising had a view been taken that merely because of non-compliance with a certain rule the accused, who was rightly acquitted, should be sent back to jail.

19. We have now to consider as to whether even if the said notice was defective or bad in law, it could be said that the said defect was cured by the letter dated 18th April, 1956, issued by the Sales Tax Officer, fixing the date of hearing on 24th April, 1956. In connection with this question, it may be pointed out that it has been clearly held by a Division Bench of this Court in *Commissioner of Income Tax, Bombay City I Vs. Ramsukh Motilal, Bombay*, , referred to earlier, that if a notice u/s 34 of the Income Tax Act, 1922, gave only six days to the assessee to make a return under that section, the notice is clearly illegal and such illegality cannot be waived by the assessee. In connection with this question, it has been observed by the Division Bench as follows :

".... It is well-settled that no consent can confer jurisdiction upon a court if the court has no jurisdiction, and if we take the view that the Income Tax Officer can have jurisdiction only provided he complies with the conditions laid down in section 34, then no consent by the assessee or no waiver on his part can confer jurisdiction upon the Income Tax Officer."

20. It may be pointed out that in that case the assessee had actually made a return pursuant to the invalid notice u/s 34 and it was yet held that reassessment proceedings pursuant to the said notice were invalid. This decision shows that even if an invalid notice u/s 15 of the said Act or section 34 of the Income Tax Act, 1922, is complied with by the assessee, yet the defect cannot be said to have been waived and the proceedings taken pursuant to such a notice would be invalid. In view of this, it must follow that the defect in the said notice could not be cured by reason of the subsequent letter dated 18th April, 1956. Quite apart from this, and what is even more important, is that the letter dated 18th April, 1956, was admittedly written and served on the assessee after the period of five years prescribed u/s 15 of the said Act in the case of concealed

income had already expired, and hence such an attempted correction could have no legal effect.

21. In the result, the questions referred to us are answered as follows :

(1) In the affirmative.

(2) In the negative.

(3) In the affirmative.

The applicant to pay the costs of this reference fixed at Rs. 250.

22. Reference answered accordingly.