
(1974) 12 BOM CK 0002
In the Bombay High Court
Case No : Sales Tax Reference No. 11 of 1969

Commissioner of Sales Tax

APPELLANT

Vs

Regal Hotel

RESPONDENT

Date of Decision : 03-12-1974

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 26(1), 34(1)

Citation : (1975) 36 STC 123

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

Bench : Division Bench

Advocate : K.S. Cooper and S.N. Naik, for the Appellant; Y.P. Trivedi, Amin Shaikh and T.U. Khatri, for the Respondent

Judgement

Kania, J.—This is a reference at the instance of the Commissioner of Sales Tax u/s 34(1) of the Bombay Sales Tax Act, 1953 (hereinafter referred to as "the said Act").

2. The facts on which reference arises are as follows : Two persons D. C. Davierwalla and P. B. Boywalla, as the owners of the business of M/s. Regal Parsi Hotel, carried on this business in certain premises near Dhobi Talao which they had taken on lease. On 31st August, 1953, by an agreement in writing Davierwalla and Boywalla permitted one M. H. Bharucha to run the said hotel for a period of three years in the first instance with an option to Bharucha to renew the agreement for a further period of two years. Since several of the arguments in the matter turn on the construction of this agreement, we shall deal with the provisions of this agreement in some detail a little later. On 2nd September, 1968, the agreement came to an end and Davierwalla and Boywalla again started conducting the business of the said hotel in those premises. During the time that Bharucha was in the management of the said hotel, he incurred certain sales tax liabilities and he was assessed to pay sales tax in November, 1958. The sales tax department has contended that Davierwalla and Boywalla are liable to pay this amount as the transferees of the business under the provisions of section 26(1)

of the said Act. The contention of Davierwalla and Boywalla, the owners of the respondents, was that there was no transfer at all as contemplated u/s 26(1) of the said Act and they were, therefore, not liable to pay the dues of Bharucha. This contention has been accepted by the Tribunal. The question referred to us for our consideration is as follows :

"Whether, on a true and proper interpretation of section 26(1) of the Bombay Sales Tax Act, 1953, and the agreement dated 31st August, 1953, the Tribunal was justified in law in coming to the conclusion that the respondents were not the transferees as contemplated by section 26(1) of the Bombay Sales Tax Act, 1953 ?"

3. Section 26(1) of the said Act seeks to make the transferee liable for payment of the tax payable by the transferor. The provisions thereof expressly provide that this liability is incurred by the transferee when the ownership of the business of a transferor-dealer liable to pay the tax is entirely transferred to the transferee. It is, therefore, beyond dispute in this case before us, and it has in fact not been disputed, that in order to succeed the applicant must establish that Bharucha became the owner of the business of the said hotel and that the ownership of this business was entirely transferred by Bharucha to the respondents.

4. The first question which arises for our consideration is whether on a proper construction of the agreement dated 31st August, 1953, it could ever be said that Bharucha became the owner of the business of the Regal Parsi Hotel. It is common ground and the recitals in the agreement clearly show that Davierwalla and Boywalla were the owners of the said hotel at the time when this agreement was entered into. In the said agreement it is significant that these two persons have been referred to as "the owners" and Bharucha has been described as "the contractor". There is a recital showing that the owners were running the said business since several years past and were seized and possessed of all the furniture, fixtures, fittings, cooking and other pots and pans, sigdies, crockery, cutlery and other paraphernalia of an eating-house and restaurant. These articles have been described in the schedule annexed to the agreement. There is a recital showing that the owners were duly licensed by the municipality and the police as also the rationing and other authorities for running the said business and that the premises in which this business was carried on were rented by the owners. There is a further recital showing that the said Bharucha has approached the owners with a request to grant him a contract to run the said business which the owners had agreed to do. The important clauses of the said agreement are as follows :

"(1) "The owners" shall give to the contractor, a contract to run the said "Regal Parsi Hotel" at the said premises, for a period of 3 years certain, commencing from the 1st day of September, 1953, with an option to "the contractor" to continue the said contract for two further years, commencing from the expiration of the said period of 3 years certain."

5. The relevant portion of clause (3) is as follows :

"(3) The contractor shall pay each and every month to the owners monthly sum of Rs. 350 (Rupees three hundred and fifty only) as hire for the use of the said furniture, fixtures, fittings, cooking and other pots and pans, sigdies, crockery, cutlery and other paraphernalia of the said "Regal Parsi Hotel" more particularly maintained in the schedule hereunder written, and also as "the owners" fixed share in the profits of the said business (whether the business may or may not make profits)."

6. Clauses (6), (8), (12), (15) and (16) of the said agreement are as follows :

"(6) During the subsistence of this contract, "the contractor" shall not do any act or omission whereby "the owners" rights and/or interest in the said eating-house and restaurant are, may, or can be affected or prejudiced in any manner whatsoever. "The contractor" hereby fully and effectually indemnifies "the owners" against any loss or damage which "the owners" may incur or suffer by reason of any act or omission, or conduct on the part of the contractor.

(8) "The contractor" shall during the subsistence of this contract pay all Income Tax and sales tax, licence fees and other charges which he may be liable for and/or called upon to pay to the Income Tax and/or sales tax, licensing and other public and/or local authorities. "The contractor" shall fully and effectually indemnify "the owners" from and against all claims and demands in respect of any Income Tax and/or sales tax, licence fees and other charges levied by Government or other public and/or local authorities which "the contractor" may be liable or called upon to pay and/or discharge.

(12) "The contractor" shall under no circumstances have any right to assign, transfer, deal with or dispose of any of his rights and/or benefits under this agreement to any person or persons whomsoever without the previous consent in writing of "the owners".

(15) "The contractor" shall engage the entire staff of the said "Regal Parsi Hotel" as from the date commencement of this contract, and shall regularly and punctually pay and discharge their salaries, wages and emoluments as from the said date. He may, however, in his discretion discharge any of the said employees if he may so think fit in the interest of his business.

(16) "The contractor" shall likewise take over all monthly customers of "the owners" and shall supply them with meals as from the date of the commencement of this contract at the same rates and shall maintain the same quality of food in respect of all such customers of "the owners" as they are now doing. "The contractor" may, however, after due intimation make reasonable increase in the rates of meals supplied to the customers having regard to the market and prices of commodities and other extra expenses which he may have to incur."

7. The submission of Mr. Cooper, the learned counsel for the applicant, is that for

the purposes of the said Act, business must be considered to be commercial business activity and is distinct and different from the premises where the business is carried on or the assets with which it is carried on. It is his submission that once the agreement was entered into and Bharucha started conducting the business in the said hotel premises, it was the business of Bharucha completely and he was the owner of the same. Mr. Cooper relied upon the decision of the Calcutta High Court in *Major Soap Co. Ltd. v. Assistant Commissioner of Commercial Taxes* [1952] 3 S.T.C. 444. In that case, the petitioner-company acquired and took over as a going concern the business of a proprietary concern including the stock-in-trade, machinery, furniture and goodwill but neither the assets nor the liabilities of the proprietor. It was held that although a portion of the assets and the liabilities were excluded from the scope of the transfer, the petitioner was a transferee within the meaning of section 17 of the Bengal Finance (Sales Tax) Act, 1941. In the first place, u/s 17 of that Act, as it stood at the relevant time, the transferee became liable for tax when the ownership of the business of a registered dealer was transferred to him. There were no words in that section showing that the transfer must be entire as in the case of the section before us. In fact, the said section of the said Bengal Act has been amended as from 17th January, 1952, and after amendment it reads in the same manner as the provision before us, viz., restricting the liability of the transferee to cases when the ownership of the business of a registered dealer is entirely transferred. It was sought to be contended on the basis of this decision that a business is different from the assets with which it is carried on. We are afraid that this decision does not help Mr. Cooper in this contention. All that it lays down is that even though the assets and liabilities of the proprietor, such as book debts due to the proprietor (transferor) or cash at the bank and also all his liabilities were not transferred, yet the transfer can amount to transfer of the ownership of the business. That case nowhere lays that the transfer of a business like that of an eating-house, which is carried on with certain utensils and articles, and in certain premises, and normally has a goodwill, can be made without a transfer of any of the assets or the goodwill.

8. Reliance was next placed by Mr. Cooper on the decision of the Supreme Court in *State of Andhra Pradesh Vs. Abdul Bakhi and Bros.*, , where it has been observed that the expression "business", though extensively used, is a word of indefinite import. In taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings either actually continued or contemplated to be continued with a profit-motive, and not for sport or pleasure. This decision really is not of any help to Mr. Cooper at all. What was decided there was that to be a dealer within the meaning of section 2(e) of the Hyderabad General Sales Tax Act, 1950, a person need not follow the activity of buying, selling and supplying the same commodity, and a person who consumes a commodity bought by him in the course of his trade, or use in manufacturing another commodity for sale,

would be regarded as a dealer. The question as to whether there could be a transfer of ownership of a business like the one before us, without there being transfer of any of the assets or the goodwill was never before the court, and these observations, in our view, do not in any way lay down that in such a case there can be a transfer of the ownership of the business without transfer of the ownership of any of the assets with which it is carried on or of its goodwill. In fact, even in the aforesaid decision of the Calcutta High Court relied on by Mr. Cooper, it is significant that it has been observed that everything that is comprised in the connotation of a business had been assigned to the petitioner and the words "etcetera" brought in, any other thing in relation to the business that may not have been specifically mentioned, excluding of course anything that was expressly excluded from the operation or scope of the transfer, and it was in that context that it was held that although there was no transfer of the assets and liabilities of the transferor, there was yet a transfer of the ownership of the business.

9. Reliance was next placed by Mr. Cooper on the decision of the Madras High Court in *Tools and Machineries Ltd. v. State of Madras* [1956] 7 S.T.C. 740. In that case, it was held that where a dealer sold his entire stock-in-trade, but continued to be in business and retained in his hands certain assets of the business which would be included in the words "whole of the business" used in rule 5(1)(h) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, there could be no sale of the "business as a whole" within the meaning of that rule. In fact, this decision, in our view, goes against the argument of Mr. Cooper. It was held in that case that there was a sale no doubt by the dealer of its entire stock-in-trade, but there was "no sale of his business as a whole", because (1) the seller continued to be in business and (2) it was retaining in its hands certain of the assets of the business which would be included in the "whole of the business". This decision, in our view, shows that normally speaking there cannot be a transfer of the business without there being a transfer of any of the assets with which the business is carried on or of its goodwill.

10. Coming to the agreement itself. In our view, the clauses of the agreement, to which we have referred, clearly show that there was no transfer of the ownership of anything at all under this agreement to Bharucha. There is no doubt that the business of Regal Parsi Hotel belonged to the owners, Davierwall and Boywalla, prior to the entering into of this agreement. Under the agreement what is given to Bharucha is merely a contract to run this business for a limited period. As the provisions of clause (3) of the said agreement show the monthly sum of Rs. 350 payable by Bharucha to the owners includes the fixed share of profits of the business which has to go to the owners. The tenancy of the premises in which the business is carried on remained all along with the owners, who continued to pay the rent to the landlord. A duty is imposed by clause (5) on Bharucha that Bharucha would take good care of the furniture, fixtures and other paraphernalia with which the business was carried on. Clause (6), which we have already set out above, shows that care has been taken to preserve the owners' rights and

interests in the eating-house and the restaurant and Bharucha is not to do anything to prejudice the same. If any loss or damage is caused to the owners' rights and interests in the business, the clause provides that Bharucha shall indemnify them against the same. Similarly, there is an indemnity by Bharucha against any action, claim or demand which may be made against the owners by the municipal authorities, the police or the Government, rationing and other authorities or by any person or persons. No right is given to Bharucha even during the period when the conduct of the business was entrusted to him to assign, transfer, deal with or dispose off any of his rights or benefits under the agreement. There is a liability imposed on Bharucha to engage the entire staff of the said Regal Parsi Hotel as from the date of the agreement and to regularly and punctually pay and discharge their salaries, wages and emoluments as from the said date, although, of course, he is given a right to discharge any of the employees in his discretion in the interest of the business. There is a further liability imposed on Bharucha to take over all monthly customers of the owners and to supply them with meals at the same rates and maintain the same quality of food with a limited right given to increase the rates in case the conditions set out in clause (16) are satisfied. In these circumstances, in our view, it cannot be said that Bharucha became the owner of the business of the said hotel at all. In fact, the entire tenor and terms of the agreement clearly show that there was no transfer of the ownership of the said business or anything at all to Bharucha under the said agreement. As Bharucha never became the owner of the business of Regal Parsi Hotel, there could be no question of the retransfer of the ownership of that business to the owners. Even assuming that certain rights of ownership were transferred to Bharucha under this agreement, which, according to us, is not correct, there is no provision in the agreement for retransfer of the same. In fact, the agreement only creates certain rights which fall far short of the ownership in Bharucha for a limited duration. On the expiry of the agreement there is no question of any retransfer of any rights at all, but there is a mere cessation of the limited rights, which were given to Bharucha. Hence, in our view, the provisions of section 26(1) of the said Act did not come into play at all.

11. In the result, we answer the question referred to us in the affirmative. The applicant must pay to the respondent the costs of this reference.

12. Reference answered in the affirmative.