

(1970) 07 GUJ CK 0004

In the Gujarat High Court

Case No : Special Civil Application No. 541 of 1966

Jivanlal Maganlal Patel and Others

APPELLANT

Vs

Mangaldas Joshi and Another

RESPONDENT

Date of Decision : 02-07-1970

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 19, 19(4), 19(6), 30, 33

Citation : (1971) 12 GLR 187 : (1971) 27 STC 419

Hon'ble Judges : T.U. Mehta, J; P.N. Bhagwati, J

Bench : Division Bench

Advocate : H.M. Thakor and M.M. Thakor, for the Appellant; G.N. Desai, Government Pleader and H.V. Chatrapati, for the Respondent

Judgement

Mehta, J.—The short question which arises to be considered in this case is whether a transferee of a business who has incurred liability to pay the sales tax u/s 19(4) of the Bombay Sales Tax Act, 1959, is entitled to a notice of pending assessment proceedings against the transferor under the said Act.

2. The facts of this case are that the petitioners are partners of a firm running its business under the name of "Reliable Engineering Works". In the year 1961 there was one person named Mugadi Miya Kherati Miya, who was conducting his business under the name of "Azad Moulding Works". The said business was taken over on 1st November, 1961, by the then partners of the firm of the petitioners. The petitioners' firm, Reliable Engineering Works, was constituted at that time by four partners, two of whom were petitioners Nos. 1 and 2. Jivanlal Maganlal Patel and Maneklal Maganlal Patel, the other two being Ishwerlal Sankalchand Patel and Chandrakant Chimanlal Shah. It is not in dispute that after the Reliable Engineering Works took over the business of Azad Moulding Works, an application was made on behalf of the former to the sales tax department to treat it as the transferee of the latter and to issue sales tax certificate accordingly. This request was granted by the department. The case of the petitioner is that thereafter from 1st January, 1963, there was a reconstitution of

their firm as the above-said Ishwerlal Sankalchand and Chandrakant Chimanlal Shah retired. After their retirement, the firm was, according to the petitioners, run by the joint Hindu family of Maganlal Ambalal Patel, the father of the petitioners Nos. 1, 2 and 3. It is further pointed out by the petitioners that thereafter on 4th November, 1963, there was a partition in the family of Maganlal Ambalal Patel, as a result of which, the business under the name of Reliable Engineering Works was carried in partnership between the petitioners Nos. 1, 2 and 3 from 4th November, 1963. It is said that thereafter petitioner No. 4, Narandas Somnath Patel, was admitted to this partnership as from 25th October, 1965.

3. It is an admitted position that when the above referred transfer of the business of Azad Moulding Works took place On 1st November, 1961, proceedings for assessment of sales tax for the period running from 1st April, 1958, to 31st March, 1961, on the turnover of the business done by Azad Moulding Works were pending. However, no notices of these proceedings were given to the petitioners at any time after the transfer of the said business took place. It is found that these assessment proceedings were ultimately finalised ex parte on 9th May, 1962, but the petitioners knew nothing about the same.

4. It appears from the record of the case that demand notices in respect of the above-referred assessment of the tax on the turnover made by Azad Moulding Works were issued by the department on 12th August, 1964, and were served on the firm of the petitioners. These notices made a total demand of Rs. 2,498.27 for sales tax and Rs. 1,537.46 for penalty. The case of the petitioners is that they came to know about these tax dues on the Azad Moulding Works only when they received these notices. After receiving these notices the petitioners made representations raising objections to the same, but to no avail. It is not in dispute that ultimately the tax dues in question are sought to be recovered u/s 152 of the Land Revenue Code.

5. Now the contention of the petitioners is that since the demand notices in question were sent to them without any opportunity having been offered to them either to contest the assessment proceedings or to show that they are not liable as transferees of Azad Moulding Works, recovery under the said notices cannot be made by the department. The petitioners have, therefore, prayed for an appropriate writ for quashing the said recovery notices and other proceedings which are undertaken by the department pursuant to it.

6. The contention which is raised on behalf of the petitioners by their learned Advocate, attacking the validity of the notice, is twofold, namely : (1) This demand for the recovery of the sales tax dues from M/s. Azad Moulding Works is illegal in view of the fact that prior to the issuance of the demand notice, none of the petitioners was given any opportunity to appear before the assessing authorities for the purpose of resisting the assessment or for the purpose of showing that the petitioners would not be liable as transferees of the original dealer Azad Moulding Works. (2) The next contention was that the above-

referred history of the transfer of business from Azad Moulding Works to the Reliable Engineering Works and the change in the constitution of the firm "Reliable Engineering Works" at different times, show that the petitioners are transferees of original transferees and hence they would not be liable for the tax dues of the original transferor M/s. Azad Moulding Works. So far as the second contention is concerned, we find that it is not necessary to go into the merits of the same as, in our opinion, this petition can be disposed of on the first contention which is raised on behalf of the petitioners.

7. Before touching the relevant pleas raised by both the parties with regard to the validity of the impugned notice, it would be necessary to refer to some of the relevant provisions of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the Act"). One thing which is clear is that the business of Azad Moulding Works was taken over by the Reliable Engineering Works on 1st November, 1961, i.e. after the provisions of the Act came into force on the appointed day, which is the first day of January, 1960. Therefore, the contentions raised by both the parties have got to be resolved by reference to the provisions of the Sales Tax Act of 1959 and not the Sales Tax Act of 1953.

8. So far as the controversial points are concerned, the relevant sections of the Act are sections 19(4), 33 and 34. Section 19 of the Act makes special provisions regarding liability to pay tax in cases where a dealer dies and his business is carried on by others, or where a dealer being a Hindu undivided family partitions its properties, or where a dealer being a firm is dissolved or where a dealer liable to pay tax transfers his business in whole or in part. So far as the facts of this case are concerned, the relevant provisions are contained only in sub-section (4) which stipulates the cases of transfer of business of a dealer. This sub-section (4) is as under :

"19. (4) Where a dealer, liable to pay tax under this Act, transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding shall jointly and severally be liable to pay the tax (including any penalty) due from the dealer under this Act or under any earlier law, upto the time of such transfer, disposal or change, whether such tax (including any penalty) has been assessed before such transfer, disposal or change but has remained unpaid, or is assessed thereafter."

9. On a plain reading of this sub-section (4) it becomes evident that when a dealer, who has been liable to pay tax under the provisions of the Act, transfers his business then such a dealer, i.e., the transferor becomes jointly and severally liable to pay the tax due along with the transferee who takes over the business from him, and this liability remains attached to the transferor and the transferee irrespective of the fact whether the tax in question has been assessed before the date of the transfer or after the date of the transfer.

10. Section 33 of the Act relates to the actual assessment of taxes and provides how the Commissioner should proceed for the purpose of the said assessment. At this stage, we do not think it necessary to refer to the provisions of this section. This section is followed by section 34, which is intimately connected with the above-referred section 19 of the Act.

11. Since the solution of the controversial points depends much upon the construction of section 34, it would be necessary to quote this section, which is in the following terms :

"34. Where in respect of any tax (including any penalty) due from a dealer under this Act or under any earlier law, any other person is liable for the payment thereof u/s 19, all the relevant provisions of this Act or, as the case may be, of the earlier law, shall in respect of such liability apply to such person also as if he were the dealer himself."

12. It is evident from the provisions of this section that it covers the cases of all those persons, who are liable for the payment of tax of a dealer by virtue of the provisions contained in section 19 of the Act. The section further says that in the case of such a person, all the relevant provisions of the Act shall apply, as if he were the "dealer" himself.

13. Now the contention which is raised on behalf of the petitioners is that even if it is believed that they are the transferees of the business of Azad Moulding Works, and as such, liable for the amount of tax in question under sub-section (4) of section 19 of the Act, they, by virtue of the above-quoted section 34 of the Act, are entitled to be given the same treatment which is required to be given to a "dealer" for the purpose of assessment, because section 34 of the Act specifically provides that "all the relevant provisions" of the Act apply to the case of a transferee covered by section 19(4) "as if he were the dealer" himself. It was pointed out that according to sub-section (3) of section 33, if the Commissioner is not satisfied that the returns furnished for any period of assessment are correct and complete, he shall, if necessary, call upon the dealer to remain present and to produce required documents and other evidence to complete the assessment. According to the petitioners, the Commissioner has acted under this sub-section (3) of section 33 in this case but has not given any notice to their firm under that sub-section before completing the assessment and, therefore, the said assessment is not binding on them.

14. The learned Government Pleader who appeared for the State admitted that notices contemplated by section 33(3) of the Act have not been given to the petitioners or their firm before completing the assessments but he contended that there is no provision in the Bombay Sales Tax Act of 1959, or the Rules framed thereunder going to show that a transferee who becomes liable to pay the tax u/s 19(4) of the Act, should be given a notice of the assessment which is pending. It was pointed out by the learned Government Pleader that the assessment which is contemplated by section 33 of the Act is qua the business

which is transferred and not qua a particular dealer who owns that business. In this view of the matter, it was contended, even if the business in question is transferred to some other person, that person would not be entitled to any notice under any of the provisions of section 33 of the Act.

15. So far as section 34 of the Act is concerned, the learned Government Pleader contended that the provisions of this section would not help the petitioners because the expression "tax due" used in section 34 does not carry the same meaning as could be given to it in section 19 of the Act. According to the learned Government Pleader, the expression "tax due", as used in section 34, means "tax payable" as a result of quantification and, therefore, if section 34 treats the transferee as a "dealer" himself, it should be construed as treating him as such only so far as the provisions of the Act regarding recovery of the tax are concerned. In this connection, the contention of the learned Government Pleader was that the words "tax due", as found in section 19 of the Act, are used in the sense of "tax liability" which is not quantified. In his view, therefore, the provisions contained in section 34 of the Act would not apply in cases where there is a pending assessment and if that be so, the transferee, who becomes liable to pay tax u/s 19(4) of the Act, would not be entitled to any notice of assessment under any of the provisions of section 33.

16. We find that though it is true that the Bombay Sales Tax Act of 1959 or the Rules framed thereunder do not contain any specific provision for giving any notice to the transferee of a running business, who becomes liable u/s 19(4) of the Act, the provisions contained in section 34 provide sufficient guidance on this point. As will be clear from the discussion which follows, we are of the opinion that on a true construction of the provisions of section 34, the transferee, who becomes liable u/s 19(4) of the Act, himself becomes a "dealer" and, therefore, he is entitled to notices, which are contemplated by sub-section (3) of section 33 of the Act. We shall, therefore, straightaway go to the provisions of section 34. We have already quoted above the whole of section 34. On a plain reading of that section, we find that it is not possible to agree with the learned Government Pleader that the expression "tax due", which is used in this section, carries any meaning different from that which can be given to this expression as found in section 19(4) of the Act. As a matter of fact, section 34 cannot be read without section 19(4) of the Act because it is apparent from the plain reading of section 34 that it is enacted to deal with all those persons who become liable u/s 19 either on account of death of the original dealer or on account of the partition of a joint Hindu family, which is treated as a "dealer", or on account of the dissolution of the firm, which is treated as a "dealer" or on account of the assignment of the business of the said dealer. In other words, section 34 is nothing but the counterpart of section 19 of the Act and, therefore, the expression "tax due" which is found used in section 34, cannot be construed as carrying any meaning other than the one which can be given to it while construing the provisions of section 19(4) of the Act. Now if a reference is made to section 19(4) of the Act, it will be found that it clearly contemplates the

liability to pay tax even in cases wherein the assessment in question is made after the date of the transfer. In other words, even if the amount of sales tax, which a transferor-dealer is liable to pay under the provisions of the Act, is not quantified, the transferee becomes liable to pay the said tax. It is, therefore, clear that sub-section (4) speaks of a "tax due" from the transferor-dealer even if the said tax is not quantified. We have, therefore, no doubt in our mind that even if the amount of sales tax is not quantified as a result of a pending assessment, the liability to pay that tax is considered as "tax due" by sub-section (4) of section 19 of the Act. Since we are of the opinion that the same meaning must be attributed to this expression as found used in section 34, we do not find ourselves in agreement with the learned Government Pleader when he says that the expression "tax due" which is found used in section 34, contemplates only a quantified tax. If this is so, it cannot also be held that the provisions of the Act, which are sought to be applied to the case of a transferee-dealer by virtue of section 34 of the Act, would be only those provisions which are with regard to the recovery of the tax. In our opinion, section 34 contemplates the application of all the relevant provisions of the Act to the case of a transferee-dealer, who becomes liable under the provisions of section 19(4) of the Act to pay the tax, as if he were the "dealer" himself.

17. It is in the context of this view that we now proceed to consider whether the provisions as regards the assessment of taxes, which are contained in sub-section (3) of section 33, would apply to the petitioners' firm. As said above, section 33 provides for the assessment of taxes. Sub-section (1) thereof provides for the assessment for each year during which the dealer is liable to pay tax. Sub-section (2) says that if the Commissioner is satisfied that the returns furnished in respect of any period are correct and complete, he shall assess the amount of the tax due from the dealer on the basis of such returns filed by him. Speaking of this case, we are not concerned with the provisions of sub-section (2). Sub-section (3) provides for the contingency where the Commissioner is not satisfied that the returns furnished in respect of any period by a dealer are correct and complete. In such cases if the Commissioner thinks it necessary to require the presence of the dealer or the production of further evidence, he is authorised to serve a notice on the dealer in the prescribed manner requiring him to attend and to produce evidence in support of his returns. It is this sub-section which is relevant for the purpose of this case because it is an admitted fact that the returns filed by the Azad Moulding Works were not found by the Commissioner as correct and complete and, therefore, necessary notices were addressed to the Azad Moulding Works but not to the Reliable Engineering Works, which had become the transferee liable to pay tax u/s 19(4) of the Act. Since we are of the opinion that all the relevant provisions of the Act would apply to the transferee, who has become liable to pay the tax u/s 19(4) of the Act, as if he is the "dealer" himself, we hold that the notices which are contemplated by sub-section (3) of section 33 were required to be served on the petitioners before completing the assessment for the simple reason that the firm of the petitioner was a dealer and

was entitled to be treated as such. Had any such notice been served to the Reliable Engineering Works, the petitioners would have been able to put forward their contention as to whether they should be treated as transferee or not. They would also have been able to show that the quantification of the tax liability should be done in a particular manner. But since no such notices have been served, we are of the opinion that the quantification of the tax liability which has been arrived at, would not bind the petitioners. In that view of the matter, the recovery notice and the consequent actions taken thereupon should be held as illegal.

18. The learned Government Pleader contended that if section 34 of the Act is construed as above, it would create many difficulties for the department. As an instance, he pointed out that it would be difficult for the department to know whether the business of a particular dealer is transferred, and if so, when. It was pointed out that in the absence of such a knowledge, it would not be possible to give any notice to the transferee-dealer. Considering the scheme of the Act, as it appears through its various provisions, we do not find any substance in this contention. If a reference is made to section 30 of the Act, it becomes clear that a dealer liable to pay sales tax under the Act is required to give information to the prescribed authority of the department regarding the changes in business including the transfer of that business within the prescribed time. If he fails in doing this, he becomes liable to penalty u/s 63(1)(g) of the Act. Similarly u/s 19(6) even the transferee of the business is required to apply for registration within 30 days unless he already holds a certificate of registration. Thus the Act contains ample provisions to enable the department to know about a transfer of a running business. Under the circumstances, the department can at once issue necessary notices to the transferee-dealer as contemplated by section 33 of the Act.

19. We also do not find any substance in the contention of the learned Government Pleader that the assessment contemplated by section 33 is qua business and not qua the owner thereof. It is of course true that assessment of sales tax is made on the turnover to the business but the owner of the business who is liable to pay the tax is always interested in the quantification of the tax resulting from assessment and that being so, it is difficult to comprehend how the owner of such a business would be unconcerned with the said assessment.

20. We, therefore, declare that the impugned recovery notices and the consequential action taken by the department are illegal. We, therefore, issue a writ of mandamus quashing the impugned notice of recovery as well as the attachment and other consequential actions taken by the department pursuant to the said notices. Rule is made absolute without any order as to costs.

21. Rule made absolute.