(1991) 09 OHC CK 0018

In the Orissa High Court

Case No : S.J.C. No. 88 to 90 of 1982

Kandula Prabhakar Rao APPELLANT

Vs

State of Orissa RESPONDENT

Date of Decision : 19-09-1991

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 19(1)

Citation : (1992) 73 CLT 296 : (1992) 1 OLR 522 : (1993) 88 STC 322

Hon'ble Judges : S.K. Mohanty, J;A. Pasayat, J

Bench : Division Bench

Advocate : S.K. Padhi and S.S. Das, for the Appellant; The Standing Counsel (Commercial Taxes), for the Respondent

Judgement

A. Pasayat, J. 1. At the instance of the assessee, the following common question of law has been referred by the Orissa Sales Tax Tribunal (in short "the Tribunal") to this Court for adjudication in these three cases.

"Whether the Tribunal was correct in applying Section 19(1) of the Orissa Sales Tax Act, 1947, to the facts of the present cases ?"

2. The background facts are that the assessee was assessed to sales tax for the quarters ending December 31, 1974 and March 31, 1975 of the year 1974-75 and for the quarters ending June 30, 1975, September 30, 1975 and December 30, 1975 of the year 1975-76. The assessee was treated to be a transferee in terms of Section 19(1) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as "the Act"). Undisputed position is that one P. Lakhman Rao had started business sometime prior to commencement of the business by the assessee in the same premises where the assessee carried on business. The assessee. purchased some stock of goods from P. Lakhman Rao, who had started business in the same premises earlier but discontinued. According to the assessing officer, in view of the explanation appended to Section 19(1), the assessee was liable to pay tax from the date of commencement of business and the liability of Shri P. Lakhman Rao having already been determined under the Act, the same

continued so far as the assessee was concerned.

3. The stand of the assessee was that only some stock of goods were purchased and nothing else, and therefore, there was no transfer in entirety of the business, which is the prerequisite to attract liability u/s 19(1). This plea did not find favour with the assessing officer, and he levied tax on the transactions from the date of commencement of business. In appeal, the conclusion of the assessing officer so far as the liability from the date of commencement of business is concerned was upset. The assessments for quarters ending December 31, 1974, March 31, 1975 and June 30, 1975, were annulled, and there was reduction of assessment in respect of other two quarters. The matter was carried in second appeals before the Tribunal by the Revenue. The Tribunal recorded the following finding after making a reference to the relevant provision, i.e., Section 19(1).

".....In the instant case, the materials on record and discussed above clearly disclosed that the present respondent dealer carries on business in the same premises and in the same goods which has been rightly held by the learned Assistant Commissioner of Sales Tax. Admittedly, no materials are adduced on behalf of the respondent-dealer to come to any conclusion to the contrary.....".

It, therefore, reversed the findings of the first appellate authority and affirmed those of the assessing officer. The assessee sought for a reference by making an application u/s 24(1) of the Act. The Tribunal rejected the application by holding that no question of law arose out of the order passed by the Tribunal.

4. The assessee moved this Court by filing applications u/s 24(2) of the Act. This Court by order dated August 22, 1986, directed the question as indicated afore to be referred along with the statement of facts. Pursuant to that direction the Tribunal has submitted the statement of facts.

5. According to the learned counsel for the assessee, merely because a person purchases some stock and carries on business activities in goods similar to those which were dealt with by the previous occupant of the premises, liability u/s 19(1) is not attracted, even in spite of explanation appended thereto. Strong reliance is placed on a decision of this Court in State of Orissa v. Raja Stores [1987] 65 STC 82.

The learned counsel for the Revenue, however, submits that it would depend on the circumstances of each case, and heavy onus is placed on the assessee to prove that business was not entirely transferred, in view of clear language of Section 19(1) and explanation appended thereto.

6. The Legislature has placed a rebuttable presumption in the explanation to Section 19(1), and the onus is placed on the assessee to show that business was not entirely transferred in case he was carrying on business substantially in the same goods in the same premises. In our view the assessee has to show that there was no transfer of the entire business, although he carried on business

substantially in the same goods in the same premises. The initial burden is on the assessee to show that except the acquisition of stock and carrying 011 business activities in the same premises, no other advantage and/or attribute of business was acquired. If materials and/or evidence are placed in this regard by the assessee, the onus shifts to the department to prove that liability u/s 19(1) is attracted. This view was expressed by this Court in Raja Stores'' case [1987] 65 STC 82.

The expression "business" engulfs many aspects like goodwill, stock-in-trade, rights and liabilities. A business is a mercantile pursuit or a trading concern. When a business in entirety is transferred it implies transfer of the whole undertaking and enterprise. [See Re Rhagg Eastern v. Boyd (1938) Ch 828]. Therefore, the assessee has to show that there was no transfer of the goodwill, rights and liabilities, etc. In Raja Stores'' ease [1987] 65 STC 82 this Court found on the facts of that case that there was no material to show that there was transfer of liabilities, assets, furniture, goodwill, etc., and therefore, came to the conclusion that liability in terms of Section 19(1) was not attracted. In the case at hand, we find that the Assistant Commissioner has recorded a finding that there was no transfer of goodwill and other benefits in favour of the assessee. This finding of fact was not upset by the Tribunal. Therefore, on the facts of the case, we are of the view that the entire business was not transferred so as to attract liability u/s 19(1) of the Act, and the Tribunal was not justified in holding that the assessee was liable to pay tax from the date of commencement of its business.

The references are accordingly answered in favour of the assessee and against the Revenue. No costs.

S.K. Mohanty, J.

7. I agree.

