

(1964) 11 GUJ CK 0018
In the Gujarat High Court

Case No : Special Civil Application No. 271 of 1963

M. Dadubhai and Co.

APPELLANT

Vs

C.C. Trivedi

RESPONDENT

Date of Decision : 27-11-1964

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 14, 21, 21(1), 21(2), 21(2A)
Constitution of India, 1950 — Article 226

Citation : AIR 1966 Guj 84 : (1966) 17 STC 59

Hon'ble Judges : P.N. Bhagwati, J; J.M. Shelat, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; J.M. Thakore, Advocate-General, B.R. Sompura, Assistant Government Pleader and M.G. Doshit, Additional Government Pleader, for the Respondent

Judgement

Bhagwati, J.—This petition under Article 226 of the Constitution challenges two orders of assessment made against the petitioners on 25th January, 1963. One in respect of the period 1st April, 1964, to 31st March, 1955, and the other in respect of the period 1st April, 1955, to 31st March, 1956. Most of the questions arising in this petition are concluded by two decisions given by us during this and the last sessions and only one question really survives for consideration. But in order to understand and appreciate that question, it is necessary to state briefly a few facts giving rise to the petition.

2. The petitioners at all material times carried on business as coal merchants and burning contractors in Ahmedabad. The petitioners were dealers registered under the Bombay Sales Tax Act, 1953, and held a certificate of registration under the provisions of that Act. During the period with which we are concerned in this petition, there were restrictions on purchase of coal and no textile mill or other industrial concern could purchase coal without obtaining priority from the Coal Controller. The modus operandi which was therefore followed was that after the textile mills and industrial concerns, to which for the sake of convenience we shall briefly refer as the purchasers, obtained priority from the Coal Controller,

they used to employ the petitioners to contact the collieries on their behalf for ascertaining whether the requisite supply of coal desired by them was available with the collieries and to procure the same. The petitioners accordingly used to contact the collieries on behalf of the purchasers and to make the necessary arrangements for obtaining the requisite quantity of coal required by the purchasers from the collieries. The collieries used to send coal directly to purchasers but the bills used to be made out in the name of the petitioners who, in their turn, used to make out their own bills in the name of the purchasers after adding their commission as well as sales tax. The petitioners used to add sales tax to the amounts of the bills as the legal position was rather uncertain and it was not possible to say with any definiteness or certainty that sales tax would not be payable by the petitioners on transactions of this kind. The petitioners thus recovered in respect of these transactions amounts by way of sales tax from the purchasers. The question whether sales tax was payable by dealers who transacted business in this manner was ultimately taken to the Supreme Court and the Supreme Court in *State Court in State of Bombay v. Ratilal Vadilal & Bros.* ([1961] 12 S.T.C. 18(Bom)), held that such dealers did not carry on business of selling coal but the position was merely that of agents arranging sale to disclosed purchasers, though guaranteeing payment to the colliery on behalf of their principals and they were therefore not liable to pay sales tax in respect of the transactions entered into by them on behalf of the purchasers. In view of this decision of the Supreme Court the petitioners contended in the course of their assessment to sales tax for the assessment periods 1st April, 1954, to 31st March, 1955, and 1st April, 1955, to 31st March, 1956, that no sales tax was payable by them on the transactions effected by them on behalf of the purchasers. The Sales Tax Officer bound as he was by the decision of the Supreme Court, accepted this position but he intimated to the petitioners that he proposed to forfeit the amounts collected by the petitioners from the purchasers by way of sales tax, since no sales tax was payable by the petitioners on those transactions. The petitioners contended that the Sales Tax Officer was not entitled to forfeit these amounts, but the Sales Tax Officer negated the contention of the petitioners and by two orders dated 25th January, 1963, one in respect of the period 1st April, 1954, to 31st March, 1955, and the other in respect of the period 1st April, 1955, to 31st March, 1956, he forfeited the respective sums of Rs. 6,422.25 and Rs. 5,105.19 collected by the petitioners from the purchasers in respect of those assessment periods. This forfeiture was made by the Sales Tax Officer u/s 21(4) of the Bombay Sales Tax Act, 1953. The Sales Tax Officer also imposed a penalty on the petitioners u/s 39A of the Act in respect of certain purchases of coal effected by them but we are not concerned in this petition with the imposition of that penalty inasmuch as, though the imposition of that penalty has been challenged in the petition, we are told that subsequent to the filing of the petition the revenue authorities have remitted that penalty. The only dispute which therefore survives in the petition is with regard to the forfeiture of the two sums of Rs. 6,422.25 and Rs. 5,105.19 and it is this forfeiture which has been challenged by the petitioners in the present petition.

3. Mr. Kaji, learned Advocate appearing on behalf of the petitioners, urged three contentions against the validity of the forfeiture and they were as follows :

(i) On a true construction of the various provisions of section 21 and particularly the words "by way of tax" occurring in sub-sections (1), (2) and (4), it was clear that the section was intended to deal only with collection of tax by a dealer which was lawfully leviable under the Act and since in the present case there were no sales effected by the petitioners and no sales tax was therefore lawfully leviable under the Act, sub-section (4) could not operate so as to entitle the State to forfeit any amount collected by the petitioners from the purchasers by way of tax in respect of transactions which were not sales and on which tax was accordingly not payable by the petitioners.

(ii) Section 21(4) did not fall directly within the subject of legislation set out in entry 54 of List II of the Seventh Schedule to the Constitution under which the Act was made nor could it be justified even as an incidental or ancillary provision permitted under that entry and it was therefore beyond the legislative competence of the State Legislature and consequently ultra vires and void;

(iii) Section 21(4) on its true construction was applicable only to a case where a registered dealer collected any amount by way of tax in respect of a sale and the amount so collected by him was in excess of the amount actually payable by him as tax on such sale under the Act. Since in the present case, though the amounts in question were collected by the petitioners by way of tax, they were not collected in respect of sales effected by the petitioners but were collected in respect of transactions which were not sales. Section 21(4) was not attracted and could not be availed of by the State for the purpose of forfeiting those amounts.

4. The validity of all these contentions was disputed by the learned Advocate-General on behalf of the revenue. The learned Advocate-General contended that section 21(4) was within the ancillary or incidental power of legislation which the State Legislature possessed under entry 54 of List II of the Seventh Schedule to the Constitution and was, therefore, within the legislative competence of the State Legislature. On the question of construction, he submitted that section 21(4) applied whenever a registered dealer collected any amount by way of tax in excess of the amount payable by him under the Act and if on assessment of the amount payable by him on his turnover under the Act it was found that the aggregate amount collected by him by way of tax was more than the amount assessed to be payable by him, the State Government was entitled to forfeit the excess u/s 21(4). He thus sought to uphold the validity of the forfeiture of the sums of Rs. 6,422.25 and Rs. 5,105.19.

5. Now so far as the first two contentions urged on behalf of the petitioners are concerned, they are concluded by two decisions given by us, one in Messrs Kantilal Babulal & Bros. v. H. C. Patel and Others, Special Civil Application No. 641 of 1962 decided on 2nd December, 1963, (Since reported at [1965] 16

S.T.C. 973(SC) and the other in Ramgopal and Sons Vs. Sales Tax Officer, Surat and Another, and in accordance with these decisions those contention must be decided against the petitioners. The only contention which, therefore, survives for consideration is the third contention and that raises a question of construction of section 21(4).

6. In order to appreciate the arguments that have been urged before us on this question of construction, it is necessary to refer to some of the provisions of section 21. Section 21 as it stood at the material time consisted of six sub-sections, but sub-sections (2A), (3) and (5) are not material and we need not, therefore, make any reference to them. Sub-sections (1), (2) and (4) of section 21 ran as follows :-

"21. Prohibition against collection of tax in certain cases. - (1) No person shall collect any amount by way of sales tax or general sales tax in respect of sales of any goods which are declared, from time to time, u/s 7 as sales on which such tax is not payable.

(2) No person selling any goods shall collect from the purchaser any amount by way of the tax unless such person is a registered dealer and is liable to pay the tax in respect of such sale :

Provided that this sub-section shall not apply in cases where a person is required to collect such amount of the tax separately in order to comply with the conditions and restrictions imposed on him under the provisions of any law for the time being in force.

* * * (4) If any person collects any amount by way of the tax in contravention of the provisions of sub-section (1) or (2) or if any registered dealer collects any amount by way of the tax in excess of the amount payable by him, the amounts so collected shall, without prejudice to any prosecution that may be instituted against such person or dealer for any offence under this Act, be forfeited to the State Government and such person or dealer, as the case may be, shall, within the prescribed period, pay such amount into a Government treasury and in default of such payment, the amount shall be recovered as an arrear of land revenue.

* * *"

7. Now it is clear as a matter of plain grammatical construction that sub-section (1) of section 21 prohibited every person whether a registered dealer or an unregistered dealer from collecting any amount by way of tax in respect of sales of goods declared tax-free u/s 7. If any person collected any amount by way of tax in respect of sales of any such goods in contravention of sub-section (1) of section 21, he rendered himself liable to punishment under clause (d) of sub-section (1) of section 36 and the amount collected was also liable to be forfeited under sub-section (4) of section 21. It would be seen that sub-section (1) of section 21 in terms clear and explicit applied only to collection of amount by way

of tax in respect of sales of goods and did not extend to collection of amount by way of tax in respect of transactions other than sales. Sub-section (2) of section 21 imposed another prohibition by providing that no person selling any goods shall collect from the purchaser any amount by way of tax unless such person is a registered dealer and is liable to pay tax in respect of such sale. This prohibition also by its very terms was confined to collection of amount by way of tax in respect of sales of goods and did not extend to collection of amount by way of tax in respect of transactions other than sales. Though enacted in one sub-section, the prohibition in effect and substance consisted of two parts. One part prohibited an unregistered dealer from collecting any amount by way of tax from the purchaser and the reason obviously was that since, being an unregistered dealer, he would not be liable to pay any tax on the sale, he should not be entitled to recover any amount by way of tax from the purchaser. The other part prohibited a registered dealer from collecting any amount by way of tax from the purchaser in cases where he was not liable to pay any tax in respect of such sale. The prohibition in both its parts thus reflected the legislative policy that no one selling any goods should be allowed to recover from the purchaser any amount by way of tax when no tax was in fact payable by him in respect of the sale. If notwithstanding this prohibition an unregistered dealer collected any amount by way of tax from the purchaser or a registered dealer collected any amount by way of tax from the purchaser in respect of a sale on which he was not liable to pay tax and contravened the provisions of sub-section (2) of section 21, he rendered himself liable to punishment under clause (d) of sub-section (1) of section 36 and the amount collected also became liable to be forfeited under sub-section (4) of section 21. Now the transactions in respect of which the amounts in question were collected by the petitioners were admittedly not sales of goods and neither the prohibition enacted in sub-section (1) nor the prohibition enacted in sub-section (2) of section 21 could, therefore, be invoked by the revenue. The revenue, however, relied on that part of sub-section (4) of section 21 which provided that if any registered dealer collected any amount by way of tax in excess of the amount payable by him, the amount so collected should be forfeited to the Government and contended that since the amounts collected by the petitioners by way of tax were in respect of transactions which were not sales and were, therefore, not payable as tax, they represented the excess of the amount collected by the petitioners by way of tax over the amount payable by them as tax under the Act and were, therefore, liable to be forfeited to the Government under sub-section (4) of section 21. This contention was combated on behalf of the petitioners and the argument urged in order to escape the consequences of this provision was formulated in the following manner.

8. It was contended on behalf of the petitioners that sub-section (4) of section 21 was enacted in order to provide for a situation which was not dealt with by sub-section (2) of section 21. Sub-section (2) of section 21 applied to cases where a registered dealer collected an amount by way of tax in respect of a sale on which no tax was payable by him at all. But there might be cases where a

registered dealer might be liable to pay a certain amount as tax in respect of a sale and he might recover from the purchaser an amount by way of tax in excess of such amount. Such cases would not be covered by sub-section (2) of section 21 and a registered dealer would be able to misuse the provisions of the Act and the Legislature, therefore, it was argued, enacted sub-section (4) of section 21 with a view to roping in such cases. This was the only object and purpose of the enactment of sub-section (4) of section 21 and these were the only kind of cases sought to be dealt with by that provision. Sub-sections (2) and (4) of section 21 were, according to this argument, complementary to each other in that, while sub-section (2) dealt with a case where a registered dealer collected an amount by way of tax in respect of a sale on which no tax was payable by him at all, sub-section (4) applied where a registered dealer liable to pay tax on a sale collected an amount by way of tax in excess of the amount of tax actually payable by him on the sale. Both the sub-sections applied in relation to sale; if the sale was one on which no tax was payable, sub-section (2) applied to prohibit a registered dealer from collecting any amount by way of tax in respect of such sale, but if the sale was one in which tax was payable, sub-section (4) was attracted and it precluded a registered dealer from collecting an amount by way of tax in excess of the amount of tax actually payable by him on the sale. This was the construction contended for on behalf of the petitioners and if this construction is well-founded, it is obvious that the petitioners would be able to steer clear of sub-section (4) of section 21 since the transactions in respect of which the amounts in question were collected by the petitioners by way of tax were admittedly not sales and sub-section (4) of section 21 would not, therefore, on this construction be attracted.

9. But unfortunately for the petitioners there are several difficulties in the way of acceptance of this argument. In the first place this argument involves the addition of words in sub-section (4) of section 21 which are not there. The way in which the petitioners want us to construe sub-section (4) of section 21 is that if any registered dealer collects an amount by way of tax in respect of any sale in excess of the amount payable by him on such sale, the amount so collected shall be forfeited to the Government. But the words "in respect of any sale" and "on such sale" are not to be found in sub-section (4) of section 21. It is rather significant that in sub-sections (1) and (2) of section 21 the Legislature has used specific language confining the applicability of these sub-sections to amounts collected by way of tax in respect of sales, but when we come to sub-section (4) of section 21, we find that the Legislature has departed from the language used by it in sub-sections (1) and (2) of section 21 and has used language sufficiently wide to take within its broad sweep not only amounts collected by way of tax in respect of sales but also amounts collected by way of tax in respect of transactions which are not sales. Moreover, if we examine the language of sub-section (4) of section 21 a little more closely, it will be apparent that it is not capable of any other interpretation. On a plain grammatical construction what sub-section (4) of section 21 was intended to strike at was collection of any

amount by way of tax by a registered dealer in excess of the amount payable by him under the Act. Now the amount payable by a registered dealer under the Act would be the amount of tax levied on the turnover of sales of the registered dealer as provided in sections 6, 7A, 8 and 9 and since u/s 14 the amount of tax due from a registered dealer was required to be assessed separately for each year during which he was liable to pay tax, the turnover of sales on which tax would be leviable under sections 6, 7A, 8 and 9 would have to be ascertained for each year during which the registered dealer was liable to pay tax and the amount of tax levied on such turnover of sales would also be payable by him for each year. The amount of tax chargeable on each sale was not payable by the registered dealer as and when the sale was effected, but it was the amount of tax levied on the turnover of sales of the registered dealer for each year taken as a whole that was payable by the registered dealer under the Act. The amount payable by a registered dealer contemplated by sub-section (4) of section 21 must, therefore, mean not the amount of tax chargeable on each sale effected by him but the amount of tax payable by him for each year on his turnover of sales during such year. It would not, therefore, be correct to say that sub-section (4) of section 21 was intended to be applicable to excess collection by way of tax made by a registered dealer in respect of each distinct and separate transaction. What sub-section (4) of section 21 was intended to strike at was collection by a registered dealer of an amount by way of tax in excess of the amount of tax payable by him for the year in question on his turnover of sales. The object was that a registered dealer should not be entitled to collect by way of tax any amount in excess of the amount of tax actually payable by him for any particular year, a year being the unit of time laid down by the Act for the purpose of assessment of the amount of tax due from a registered dealer. If, therefore, a registered dealer collected any amount by way of tax whether in respect of transactions which were sales or in respect of transactions which were not sales and qua sales, whether in respect of taxable sales or in respect of non-taxable sales and the aggregate amount collected by way of tax was in excess of the amount of tax actually payable by him on his turnover of sales for the year in question, such excess was liable to be forfeited to the Government under sub-section (4) of section 21. It may be that a registered dealer might have collected a lesser amount by way of tax in respect of certain sales and a larger amount by way of tax in respect of certain other sales but what was to be seen for the purpose of determining the applicability of sub-section (4) of section 21 was : what was the aggregate amount collected by the registered dealer by way of tax ? Did it exceed the amount of tax payable by the registered dealer on his turnover of sales during the particular year ? If it did, the excess would be liable to be forfeited. If it did not, there would be no question of forfeiture for there would be no excess to forfeit. If this be the correct construction of the words used in sub-section (4) of section 21, as we think it is, we do not see why an amount collected by a registered dealer by way of tax in respect of a transaction which was not a sale should not form part of the computation in determining the applicability of sub-section (4) of section 21. The object of the various sub-

sections of section 21 being to prevent an abuse of the provisions of the Act by prohibition dealers from collecting any amount by way of tax which they were not liable in their turn to pay to the State as tax, there is no reason why sub-section (4) of section 21 should be construed in such a narrow and constructed manner that a registered dealer who collected an amount by way of tax in respect of a transaction which was not a sale and who was, therefore, not liable to pay any tax on the transaction to the State should be outside the scope and ambit of the penal provision contained in sub-section (4) of section 21 and should be allowed to retain the amount collected by him. If we accept the construction contended for on behalf of the petitioners, we would be stultifying the provision enacted in sub-section (4) of section 21 and refusing to give full effect to the intention of the Legislature. The language used by the Legislature in sub-section (4) of section 21 being clear and unambiguous, we must give to it its plain and natural meaning and hold that it covered in its width and amplitude not only amounts collected by way of tax by a registered dealer in respect of sales, but also amounts collected by way of tax by a registered dealer in respect of transactions which were not sales. Since in the present case the petitioners were admittedly registered dealers and the transactions in respect of which the amounts were collected by the petitioners by way of tax were transactions in the course of business, the amounts collected by the petitioners were rightly forfeited by the Sales Tax Officer under sub-section (4) of section 21.

10. The petition, therefore, fails and will be dismissed with costs.

11. Petition dismissed.