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(1991) 03 GUJ CK 0031

In the Gujarat High Court

Case No : Sales Tax Reference No. 19 of 1980

Manekchowk and Ahmedabad Mfg. Co. Ltd. — APPELLANT

Vs

State of Gujarat — RESPONDENT

Date of Decision : 06-03-1991

Acts Referred:
Gujarat Sales Tax Act, 1969 — Section 45(6), 69(1)

Citation : (1991) 03 GUJ CK 0031

Hon'ble Judges : S.D. Shah, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : K.N. Raval, for the Appellant; K.M. Mehta, Government Pleader, for the Respondent

Judgement

S.D. Shah, J.—By this reference u/s 69(1) of the Gujarat Sales Tax Act, 1969, the Tribunal has referred the following question for our opinion :

"Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the sales of machinery of plant No. 2 and stock-in-trade in dispute were liable to tax under the Gujarat Sales Tax Act, 1969 ?"

2. The facts giving rise to the present reference, shortly stated, are as under :

(1) The appellant is a textile mill engaged in the business of manufacturing and selling cloth. It incurred heavy loss and according to it the activity of manufacturing was closed from 1st April 1968. At the instance of one of the creditors, under the liquidation proceedings which were commenced in the High Court of Gujarat, official liquidator was appointed. Later, on an application being made u/s 391 of the Companies Act between the appellant-company and its creditors a compromise scheme was sanctioned by the Gujarat High Court by its order, dated 8th April, 1970. Under the said scheme the plant and machinery of unit No. 2 of the appellant-company were to be sold out and also some stock-in-trade was to be sold out in order to enable the appellant to discharge its debts to the Union Bank of India and other creditors. Under the said scheme it was, inter

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alia, contemplated that the appellant-mill company will, with the prior consent in writing of the bank, sell the pledged stocks of 1076 bales of cloth and 75 bales of cotton and it shall also sell the remaining hypothecated and/or pledged stocks of raw materials and finished products as loose cotton, cotton yarn, etc., with the prior consent in writing of Union Bank of India. It was further stipulated that the sale proceeds will be deposited by the appellant-mill company with Union Bank of India. As regards plant and machineries of unit No. 2 of the mill company it was stipulated that the appellant mill company will with the prior consent in writing of Union Bank of India sell the plant and machineries of the unit No. 2 and shall deposit the sale proceeds thereof with the said bank. There was further provision in the said scheme that all transactions for sale of properties, whether movable or immovable, of the mill company shall be scrutinised and approved by the committee consisting of a representative of the mill company, the State Government, the bank and the Regional Provident Fund Commissioner.

(ii) Pursuant to the order passed by the Gujarat High Court on 8th April, 1970, sanctioning the scheme the appellant-mill company sold the machineries of unit No. 2 and also the stock-in-trade and realised an amount of Rs. 20,05,854 by way of sale.

(iii) While making the assessment for the period from 6th May, 1970 to 31st May, 1971, the question arose as to whether the said amount of sale proceeds realised by the appellant-mill company was liable to sales tax and the Sales Tax Officer held that this transaction was liable to sales tax and he also imposed penalty u/s 45(6) of the Gujarat Sales Tax Act, 1969.

(iv) Being aggrieved by the order of the Sales Tax Officer, the appellant preferred appeal before the Assistant Commissioner of Sales Tax and mainly contended that the sales of machineries and stock-in-trade were not liable to sales tax because (a) such sales were not the sales made in the course of business; and (b) the sales were made in pursuance of the scheme sanctioned by the High Court by its order, dated 8th April, 1970 and such sales were made under compulsion and not by free will, and therefore, they were not liable to tax. The Assistant Commissioner did not agree with the said submissions and held that the sales of machinery and stock-in-trade of unit No. 2 were liable to tax.

(v) On further appeal to the Tribunal, the Tribunal confirmed the order of the Assistant Commissioner holding that the sales of plant and machinery of unit No. 2 and of stock-in-trade and raw materials were liable to sales tax.

3. On application being made to the Tribunal u/s 69(1) as stated hereinabove, the Tribunal has referred the question reproduced hereinabove for our opinion. The main question which we are called upon to decide is as to whether the transactions of sales effected by the appellant-mill company during the assessment period can be said to the "sales" under compulsion and/or in the absence of free will so as not to amount to "sale" within the meaning of the said term. Mr. K. N. Raval, learned advocate for applicant, submits that pursuant to

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the order passed by the High Court in proceedings u/s 391 of the Companies Act, compromise scheme was sanctioned and the plant and machinery of unit No. 2 and the stock-in-trade which were pledged with Union Bank of India were to be sold out. However, he submits that the scheme itself stipulated certain conditions, i.e. (i) that the sales would not be made by the appellant without consent of Union Bank of India, (ii) the said sales shall be scrutinised and approved by the committee consisting of representatives of the appellant-mill company, the State Government, the bank and the Regional Provident Fund Commissioner, and (iii) that the sale proceeds of the sales shall be deposited with Union Bank of India. He submits that because of these stipulations in the compromise which was sanctioned by the High Court the transactions of sale of machinery and stock-in-trade cannot be said to be the transactions of sale inasmuch as there was element of compulsion or at least the absence of free will. His second submission is that the said transactions of sale cannot be considered to have been made in the course of business, and as such, no tax can be levied on such sales.

4. Dealing with his second submission first from the facts found by the lower authorities we find that the appellant-company was not actually closed down from 1st April, 1968, but its manufacturing activity was merely suspended. In fact, the appellant-mill company had filed returns during the said period. The appellant-mill company had also not applied to the authorities to cancel its registration certificate on the ground of closure of business. As a matter of fact, the registration certificate continued until the mill company re-started its manufacturing activities again during October, 1970. Therefore, it cannot be said that the mill company was closed down. During the relevant period the sales tax returns were filed. The appellant-mill company was thus carrying on its business in the assessment period. In fact, after the scheme was sanctioned by the High Court, the appellant-mill company has started its unit and therefore we are of the opinion that it could not be said that the mill-company was not carrying on its business. We, therefore, do not agree with Mr. Raval that the transactions of sale of machinery and stock-in-trade cannot be considered to have been made in the course of business. We agree with the findings arrived at by the lower authorities. We find that the appellant-mill company was carrying on business and that transaction of sales have been made in the course of business.

5. Turning now to the first submission of Mr. Raval it is required to be decided as to whether the sales of machineries and stock-in-trade was under compulsion, i.e., in the absence of free will. Primarily, the fact which is required to be ascertained is as to whether there was decision of the appellant-mill company to deal with its assets. If it were with the volition of the appellant-company which is exhibited by the fact that the compromise scheme was presented before the High Court u/s 391 of the Companies Act, the element of willingness and/or free will can be said to be present in this case. The appellant and the creditors when they approached the court u/s 391 of the Companies Act for its sanction to the compromise scheme, it necessarily expressed its volition to sell and/or to dispose

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of its assets on such terms and conditions as stated in the compromise scheme. Close scrutiny of the compromise scheme leaves no room for doubt that it was the appellant who was to find out a willing purchaser at market price. The properties were not to be sold out at a predetermined price or at a fixed price, but in fact, the price was to be fixed by the appellant-mill company and such transaction of sale was subject to the consent of Union Bank of India. Therefore, the conduct of the appellant-mill company in filing application for compromise scheme u/s 391 of the Companies Act necessarily goes to establish that the appellant-mill company was a willing agent to dispose of its property to a willing buyer and it agreed to such terms and conditions which appear to have been incorporated with a view to safeguarding the interests of class of creditors. In fact, various stipulations referred to and relied upon by Mr. Raval do not impose any fetter on the power of appellant-mill company in selling its property nor did they impose any restriction on the power of the willing purchaser. In fact, the stipulations are to safeguard the interest of the creditors. Any of the stipulations in the compromise scheme cannot be said to compel the appellant-mill company to sell its property nor can it be said from said stipulations that there was absence of free will on the part of the appellant-mill company. In fact, the element of volition and/or free will on the part of appellant-mill company is fully exhibited by its conduct of applying to High Court u/s 391 of the Companies Act. The stipulations made in the compromise scheme cannot amount to compulsion and/or coercion in making the sales. It is required to be noted that under the scheme the appellant-mill company was at liberty to sell its property to anyone who may offer highest price. There was no restriction about the sale price. There was no restriction about the purchaser. Except the condition that such transactions are subject to the consent of Union Bank of India there was no other restriction on the power of appellant-mill company. Therefore, the compromise scheme sanctioned by the High Court does not, in anyway, militate against the transaction from being declared a free transaction of sale by the appellant-mill company to the purchasers. It is also required to be noted that the machineries, plant, etc. are sold by the appellant-mill company directly to the purchasers after obtaining permission of Union Bank of India. The appellant-mill company had, thus, willingly sold the machineries, plant, stock-in-trade and the raw material to the willing purchaser at the price which the willing purchaser was ready to offer. Said sales were, thus, the result of privity of contract between the appellant-mill company on one hand and the purchaser on the other hand. Such contracts were the outcome of meeting of minds of appellant-mill company on the one hand and the purchaser on the other hand, and there was no element of compulsion and/or coercion in such transaction.

6. The word "sale" properly connotes the transfer of the absolute or general property in a thing for a price in money. In order to constitute a sale it is necessary (i) that there should be an agreement between the parties for the purpose of transferring title to goods, which of course pre-supposed capacity to contract; (ii) that it must be supported by money consideration and (iii) that as a

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result of transaction, the property must actually pass in the goods. All these elements must be present.

7. From the above essentials it is clear that object of the contract of sale is the exchange of property for a money price. There must be transfer of property or an agreement to transfer it, from one party - the seller, to the other party - the buyer, in consideration of a money payment or a promise thereof by the buyer. All the elements of sale are present in the case before us. Submission, however, is that there is absence of consensuality inasmuch as sale is effected under the order of the court. Looking to the fact that the appellant-mill company approached the High Court for sanctioning compromise scheme on its own and after taking into consideration the various stipulations in the compromise scheme there is no manner of doubt that in the transactions in question all elements of sale were present, we are of the opinion that there was element of "free will" or "volition" on the part of the mill company from the beginning inasmuch as it applied for compromise scheme. Moreover, sanction of the court u/s 391 to the scheme merely superadded seal of the court to the compromise scheme. The desire to sell its plant, machineries and stock-in-trade was manifested by the conduct of applying to the court. Even thereafter, appellant-mill company did not lack the power to contract. It was to find out the willing purchaser. It was to fix the price. On finalisation thereof property in the goods was to pass to the purchaser. We are, therefore, of the opinion that total consensuality could be spelt out from the conduct of the parties, more particularly of the appellant-mill company.

8. In this connection, reference to the decision of Supreme Court in the case of Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others, , can be usefully made. The Constitution Bench of the Supreme Court in the said case was called upon to decide the question as to whether a compulsory sale is exigible to sales tax. Before the Supreme Court the sale was pursuant to control order issued under West Bengal Cement Control Act. The cement being controlled commodity its distribution was regulated by the said Act and the Cement Control Order, inter alia, provided that no sale or purchase of cement can be made except in accordance with conditions contained in the written order. The appellant before the Supreme Court was a licenced stockist of cement, and he was permitted to stock the cement in his godown and to supply to the persons in whose favour allotment orders were issued at the price stipulated and in accordance with the conditions of permit issued by the authorities. The appellant before the Supreme Court, accordingly, supplied the cement to allottees, from time to time. Such transactions of supply of cement to the allottees were sought to be assessed to sales tax and it was submitted before the Supreme Court that such transactions being compulsory sales were not exigible to sales tax.

9. It is to be noted that the transaction before the Supreme Court was a statutory transaction of sale. In cases of the so-called statutory transactions, whether in law they amount to sale or not, would depend upon whether the

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liberty of contract in relation to fundamentals of the transaction is completely excluded by the provisions of the statute. So long as mutual assent, express or implied, is not totally excluded the transaction will amount to sale. The Constitution Bench of the Supreme Court in this case found that the limitations on the normal rights of the dealers and consumers to supply and to obtain the goods, the obligations imposed on the parties and the penalties prescribed by the Control Order did not militate against the position that eventually the parties must be deemed to have completed the transaction under an agreement by which one party bound itself to supply the stated quantity of goods to the other at a price not higher than the notified price and the other party consented to accept the goods on the terms and conditions mentioned in the permit. In order to determine whether there was any agreement or consensuality between the parties regard must be had to their conduct at or about the time when the goods changed hands. From the conduct of the parties even in such transactions the court inferred free consent in the following words :

"When the allottee presents his permit to the dealer, he signifies his willingness to obtain the commodity from the dealer on the terms stated in the permit. His conduct reflects his consent. And when, upon the presentation of the permit, the dealer acts upon it, he impliedly agrees to supply the commodity to the allottee on the terms by which he has voluntarily bound himself to trade in the commodity. His conduct too reflects his consent. Thus, though, both parties are bound to comply with the legal requirements governing the transaction, they agree as between themselves to enter into the transaction on statutory terms, one agreeing to supply the commodity to the other on those terms, and the other agreeing to accept it from him on the very terms. It is, therefore, not correct to say that the transactions between the appellant and the allottees are not consensual."

From the above discussion it becomes clear that even in cases of statutory transactions of sale, so long as mutual assent, express or implied, is not totally excluded, the transaction will amount to sale. So long as there was freedom to bargain in some areas the transaction could amount to sale.

10. In the context of these findings, the court observed as under :

"Offer and acceptance need not always be in an elementary form, nor indeed does the Law of Contract or of Sale of Goods require that consent to a contract must be express. It is common place that offer and acceptance can be spelt out from the conduct of the parties which covers not only their acts but omissions as well. Indeed, on occasions, silence can be more eloquent than eloquence itself. Just as correspondence between the parties can constitute or disclose an offer and acceptance, so can their conduct. This is, because, law does not require offer and acceptance to conform to any set pattern or formula."

The court further found that the decision to sell must be volitional. Such volition carries with it the willingness to deal in the property. The purchaser also must

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not be under any legal compulsion to acquire the property. Even in the context of Control Order the court found that the consumer who is under no legal compulsion to acquire or possess cement, decides as a matter of his volition to obtain it on the terms of the permit or the order of allotment issued in his favour. That brings the two parties together, one of whom is willing to supply the essential commodity and the other to receive it. In the case before us, the appellant-mill company wanted to sell its properties, and in fact, it has approached the court along with its creditors for sanctioning its compromise scheme. The volition or desire to sell the property was thus manifested by the conduct of the appellant. Under various terms and conditions of the compromise scheme the appellant was free to find out the purchaser and the purchaser was free to quote the price he could quote. It was for the appellant to accept the said price. Even in the selection of purchaser also there was no restriction on the power of the appellant. As regards fixation of sale price also there was no restriction on the power of appellant. It, therefore, becomes clear that, in fact, the transactions of sale were the transactions where two parties met together and where the appellant-mill company was willing to sell and the purchasers were willing to purchase. The conduct of the appellant reflected its consent. We are of the opinion that from the conduct of the appellant it could not be said that the appellant was, in anyway, compelled to sell its property. We, in fact, find that even in a case where the supplier was to act under the terms and conditions of control and where the consumers were to purchase only from the supplier under the control order, the Supreme Court found that the transactions effected to the allottees of cement cannot be said to be the sale under compulsion. In fact, in the case before us the element of compulsion is not to be found at any stage of transactions, and in fact, there is willingness on the part of appellant-mill company from the very first stage when it approached the court for sanctioning its compromise scheme u/s 391 of the Companies Act, and the terms and conditions of the scheme have in no way hampered the power of the appellant-mill company nor have put any restriction on the power of appellant-mill company which can be said to militate against the element of free will in the transaction of sale.

11. We are of the opinion that the transactions of sale of machineries and plant of unit No. 2 and stock-in-trade were liable to tax under Gujarat Sales Tax Act, 1969. We, therefore, answer the question in affirmative, i.e., in favour of department and against the assessee. There shall be no order as to costs.

12. Reference answered in the affirmative.

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