
(1989) 08 BOM CK 0053

In the Bombay High Court

Case No : Appeal No. 788 of 1988 in Writ Petition No. 1313 of 1982

Narayan D. Shetty

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 19-08-1989

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 38, 55, 62

Citation : (1990) 77 STC 361

Hon'ble Judges : T.D. Sugla, J;S.P. Bharucha, J

Bench : Division Bench

Judgement

Sugla, J.—This is an appeal against the judgment and order dated July 14, 1986, passed by the learned single Judge dismissing the petition filed by the petitioner under article 226 of the Constitution. The assessee runs a restaurant in the name of M/s. Bharat Jyoti Ice-cream and Bhelpuri Centre at Kailash Darshan, near Nana Chowk, Bombay 400 007. The sales tax authorities conducted a raid in its business premises and seized certain books and documents covering the period from April 1, 1971 to March 31, 1972 and April 1, 1972 to December 31, 1972. Show cause notices were issued and explanation obtained. Eventually the sales tax officer rejected the assessee's books of accounts, completed the assessment by estimating the turnover at a figure much higher than disclosed and levied heavy penalties. The assessee's appeals to the Assistant Commissioner Sales Tax Tribunal were also dismissed. The Tribunal's order is dated July 15, 1977.

On September 7, 1978, the Supreme Court delivered a judgment in the case of Northern India Caterers (India) Ltd. Governor of Delhi reported in [1978] 42 STC 386. On the basis of the above judgment, the assessee filed two separate applications for rectification before the Sales Tax Tribunal u/s 62 of the Bombay Sales Tax Act, 1959. It was claimed that in the restaurant run by it eatables were merely served and, therefore, the ratio laid down by the Supreme Court in the aforesaid decision was fully applicable. The orders passed by the Tribunal in second appeals, it was urged, could not stand and were required to be vacated.

An affidavit was filed claiming, inter alia, that in the restaurant run by the assessee bhelpuri and ice-cream were served and the customers were not permitted to purchase and take such articles outside the premises. Even unconsumed portion of the food, it was stated, was not allowed to be taken out. Additional affidavit was sought to be tendered at the time of hearing so as to bring the claim of the assessee squarely within the ratio of the Supreme Court decision. The applications were dismissed by the Tribunal holding that it was not permissible for the Tribunal in the proceedings for rectification to reopen the controversy and to ascertain whether the assessee merely served bhelpuri and ice-cream in the restaurant and/or also sold them to be taken out of the restaurant. The Tribunal declined to take the affidavits on record in the rectification proceedings.

The assessee had also filed reference applications before the Tribunal arising out of the Tribunal's judgment and order dated July 15, 1977, in second appeals with request to refer stated questions to the High Court. Reference applications were also rejected by the Tribunal by its order dated March 24, 1982.

Thereafter, the assessee filed the present petition challenging the assessment orders and subsequent decisions in appeals there against. This petition filed by the appellant-assessee, as earlier stated, was dismissed by the learned single Judge of this Court. The learned Judge held that in the facts of the case, the Tribunal had discretion to admit or not to admit fresh evidence in the shape of affidavits. The discretion was properly exercised by the Tribunal and, therefore, the petition could not be allowed. Hence this appeal.

2. Shri Shah, the learned counsel for the assessee, stated that under regulation 17 of the Bombay Sales Tax Tribunal Regulations, 1960, the Tribunal had discretion to admit fresh evidence and make such an enquiry as it considered appropriate. The assessee was making the claim on the basis of a Supreme Court decision, which was binding on all courts in India under article 141 of the Constitution of India. According to him, this was an appropriate case in which the Tribunal should have exercised its discretion in favour of admitting fresh evidence. His second submission was that on the basis of the above Supreme Court decision, the restaurant which was only serving and not selling eatables was not liable to sales tax at all. Therefore, neither the Sales Tax Officer nor the Assistant Commissioner of Sales Tax nor the Tribunal had jurisdiction to make the assessment. He, thus, contended that there was absolute lack of jurisdiction which could and should have been considered by this Court in its writ jurisdiction.

3. I am afraid that Shri Shah's submissions are without any merit. It requires to be borne in mind that the rectification applications are made u/s 62 of the Sales Tax Act before the Tribunal. This section reads thus :

"62. (1) The Commissioner may at any time within two years from the date of any order passed by him, on his own motion, rectify any mistake apparent from the record, and shall within a like period rectify any such mistake which had been

brought to his notice by any person affected by such order :

Provided that, no such rectification shall be made if it has the effect of enhancing the tax or reducing the amount of a refund, unless the Commissioner has given notice in writing to such person of his intention to do so and has allowed such person a reasonable opportunity of being heard.

(2) The provisions of sub-section (1) shall apply to the rectification of a mistake by the Tribunal or an appellate authority u/s 55 as they apply to the rectification of a mistake by the Commissioner.

(3) Where any such rectification has the effect of reducing the amount of the tax or penalty or the amount of forfeiture, the Commissioner shall in the prescribed manner, refund any amount due to such person.

(4) Where any such rectification has the effect of enhancing the amount of the tax penalty or the amount of forfeiture or reducing the amount of the refund, the Commissioner shall recover the amount due from such person in the manner provided for in section 38."

It is evident that the Commissioner or the Tribunal will have jurisdiction u/s 62 only if the alleged mistake was a mistake apparent on the face of record. If the fact whether there was any mistake or not is to be found on investigation of further facts, it could not be held that there was a mistake apparent on the face of record. We were taken through the judgments of the Assistant Commissioner and the Tribunal in appeals. It was seen that there was no issue raised nor any finding given as regards the fact whether the assessee was only serving eatables in restaurant premises or whether he was also selling it to be taken outside the premise. Naturally, therefore, this aspect of the matter required investigation. The Supreme Court decision would apply only if after investigation a finding was arrived at to the effect that the assessee was only serving and not selling eatables in the restaurant as was the finding in the case before the Supreme Court. In this view of the matter, rectification applications were certainly not maintainable u/s 62 of the Bombay Sales Tax Act.

4. As regards regulation 17 of the Bombay Sales Tax Tribunal Regulations, 1960, it is true the Sales Tax Tribunal has a discretion to admit fresh evidence in appropriate cases. That discretion is to be exercised in the proceedings in appeal, revision application or reference. In the present case the applications filed were rectification applications u/s 62 of the Act, which applications would lie, as stated by us in the earlier paragraph, only if there was a mistake apparent on the face of record. Discretion to admit fresh evidence is not relevant to notification proceedings. But in the circumstances, it cannot be held that the Tribunal exercised its jurisdiction wrongly.

5. Coming to the alternative submission of Shri Shah, namely, that there was absolute lack of jurisdiction as the assessee was not liable to sales tax at all, we are of the view that this submission of Shri Shah is fallacious. There will be merit

in the assessee's submission about lack of jurisdiction, only if there is a finding that the assessee was not liable to sales tax as it was only serving and not selling eatables in the restaurant. As stated by us earlier, there is no such finding given by the Sales Tax Officer, Appellate Assistant Commissioner or the Tribunal. In any view of the matter we are in agreement with the learned single Judges that no interference with the Tribunal's order was called for in this case.

Accordingly, the appeal is dismissed. No order as to costs.

6. Appeal dismissed.