

(1968) 07 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 592 of 1965

Patel Laxmidas Karman

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 08-07-1968

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 38(4), 39

Citation : (1968) 22 STC 497

Hon'ble Judges : Mehta, J;B.J. Divan, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; G.M. Vidyarthi, Assistant Government Pleader and H.V. Chhatrapati, instructed by Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Divan, J.—The facts giving rise to this special civil application are as follows :-

The petitioner is a resident of Plasva village in Junagadh District. He is an agriculturist and owns agricultural lands bearing survey numbers situate on the outskirts of Plasva village. The petitioner is not an authorized dealer or a commission agent and, according to him, he has not carried out any regular business or trade of buying or selling any taxable commodity; and thus none of the provisions of the Bombay Sales Tax Act, 1959 (hereinafter referred to as the Act) applied to him. According to the petitioner, he has never been assessed to sales tax within the State of Gujarat and, therefore, he has no liability to pay any sales tax to the respondents, viz., the State of Gujarat, the Sales Tax Officer, Junagadh, and the Circle Officer for Sales Tax Recovery, Junagadh. According to the petitioner, he is a creditor of one Bhagwanji Tulsidas, who was the sole owner and proprietor of a concern known as Hari Oil Mills located at Khadia in Junagadh District. It is the contention of the petitioner that this Bhagwanji Tulsidas was indebted to the petitioner in the sum of Rs. 6,750 and since Bhagwanji Tulsidas was not able to pay the said amount, the said debtor agreed to mortgage Hari Oil Mills to the petitioner, and to the mortgage three other creditors of Bhagwanji

Tulsidas were joined as co-mortgagees. According to the petitioner, Bhagwanji Tulsidas executed a document signed by himself and under that document Bhagwanji mortgaged Hari Oil Mills in favour of the petitioner and three other creditors. Reserving his right to recover the amount due to the petitioner from the said Bhagwanji, the petitioner has contended that he has not agreed with the said Bhagwanji under the said mortgage document that he himself would discharge the arrears of sales tax due and payable by the said Bhagwanji. According to the petitioner, save and except the relationship of a creditor and debtor, the petitioner has no other business relationship as a partner or otherwise with the said Bhagwanji Tulsidas in the business of the said Hari Oil Mills at Khadia.

2. Bhagwanji Tulsidas, the mortgagor, was assessed to sales tax by the Sales Tax Authorities at Junagadh, regarding the sales and purchases made by him in connection with his business of Hari Oil Mills. Bhagwanji Tulsidas was heavily indebted and was not in a position to pay the debt due to his creditors or to discharge his liabilities to the Sales Tax Authorities in respect of the tax assessed against him. Bhagwanji Tulsidas, according to the petitioner, wrote to the Sales Tax Authorities, at the time when the arrears of sales tax were demanded from him, that the petitioner was his partner and the tax due and payable by Bhagwanji should be recovered from the petitioner. The Sales Tax Authorities knew that on their records there was nothing to show that the petitioner was a partner of Bhagwanji Tulsidas but still a notice was issued to the petitioner for the recovery of the sales tax dues and payable by Bhagwanji Tulsidas on the footing that the petitioner was a partner of Bhagwanji Tulsidas in the business of Hari Oil Mills. The petitioner replied to the said notice and contended that he was not a partner in the business of Hari Oil Mills and contended that Bhagwanji Tulsidas was the sole proprietor of the business of Hari Oil Mills. The petitioner in this connection relied upon the judgment of the learned Assistant Judge, Porbandar, at Junagadh, in Civil Appeal No. 114 of 1963, decided on 25th August, 1964, and in that appeal in his judgment the learned Judge has held that the petitioner was not a partner in the business of Hari Oil Mills as was contended by Bhagwanji Tulsidas. This finding given by the learned Assistant Judge was accepted by the Sales Tax Authorities and the notice of demand issued at that stage against the petitioner was withdrawn.

3. Thereafter on 1st February, 1965, the third respondent issued another notice u/s 154 of the Bombay Land Revenue Code, informing the petitioner that a sum of Rs. 6,952 was due and payable by the petitioner as arrears of sales tax and the petitioner was called upon to pay the said sum in the State Treasury within 7 days of the date of the service of the notice, failing which the said amount would be recovered as arrears of land revenue by attaching and selling his property by public auction. Another notice, dated 4th March, 1965, was issued by the third respondent reiterating the earlier demand for the payment of the said sum of Rs. 6,952 as arrears of sales tax. By his letter, dated 5th March, 1965, the petitioner objected against the aforesaid notice and contended that he was not liable to pay

the arrears of sales tax due and payable by Bhagwanji Tulsidas, and that the petitioner was merely a creditor of Bhagwanji Tulsidas and that he had not signed the alleged mortgage document and that the petitioner had not accepted the liability to pay the sales tax due and payable by Bhagwanji Tulsidas and that Bhagwanji Tulsidas was still in possession of Hari Oil Mills, that the notices issued against the petitioner were illegal and he contended that the Sales Tax Authorities should recover the arrears of sales tax from Bhagwanji Tulsidas himself.

4. These contentions urged on behalf of the petitioner were not accepted by the Sales Tax Officer, Junagadh, the second respondent herein; and by his order, dated 15th April, 1965, the second respondent informed the petitioner that the petitioner's objections were overruled and the second respondent held by the said order that the petitioner had accepted the liability to pay the arrears of sales tax under the terms of the mortgage document and, therefore, the said amount would be recovered as arrears of land revenue from the petitioner. Thereafter another order was issued by the third respondent, dated 7th April, 1965, declaring that the petitioner was a creditor of Hari Oil Mills and had failed to pay the arrears of sales tax due and payable by the said Bhagwanji Tulsidas and it appeared that the petitioner was not ready to pay the said amount and, therefore, the said amount became recoverable by selling the petitioner's properties mentioned in the order. By the said order, the aforesaid properties were attached u/s 155 of the Bombay Land Revenue Code and it was directed that the said properties should be sold by public auction for recovering the said amount. A proclamation for the sale of the properties belonging to the petitioner was issued on 4th May, 1965, purporting to be a proclamation u/s 165 of the Bombay Land Revenue Code, and the proclamation was to the effect that the property would be sold by public auction on 9th June, 1965, for the recovery of the arrears of sales tax due and payable by Bhagwanji Tulsidas. The petitioner addressed a letter, dated 10th May, 1965, objecting against the order of attachment and the proclamation and contended that the said order of proclamation was wrong in law and that the petitioner was not liable to pay the amount of sales tax due and payable by Bhagwanji Tulsidas. The second respondent by his letter, dated 14th May, 1965, informed the petitioner that his objections were overruled reiterating the earlier stand which had been taken up by the Sales Tax Authorities. Thereafter the present petition under Article 226 of the Constitution of India was filed by the petitioner on 31st May, 1965, and on 4th June, 1965, Vakil, J., issued a rule in the matter and directed that the interim injunction in terms of para. 18(3) of the petition should be issued; and thereafter on 26th July, 1965, upon the learned Advocate for the petitioner giving an undertaking on behalf of the petitioner not to sell or dispose of or be a party to a sale or disposal of Hari Oil Mills at Khadia, including the machinery, plants, etc., lying therein, interim injunction in terms of para. 18(3) of the petition was confirmed.

5. The second respondent has filed his affidavit-in-reply and the contentions

which have been taken up are on the same lines as the contentions which were taken up in the course of the correspondence that had ensued between the petitioner and the Sales Tax Authorities. It has further been contended that after the mortgage was executed by Bhagwanji Tulsidas in favour of the petitioner and three others, an endorsement was made on the copy of the mortgage deed in possession of Bhagwanji Tulsidas stating that in consideration of the amount of Rs. 23,000, which Bhagwanji owed on the foot of the mortgage to the mortgagees and which he was unable to pay as per the terms of the mortgage deed, he was selling machinery of the mills to all the four mortgagees and according to the second respondent's affidavit, this endorsement regarding the sale of the machinery etc. of Hari Oil Mills for the sum of Rs. 23,000 was signed by all the four mortgagees and this document with the endorsement was produced before the Sales Tax Officer I, Junagadh, by Bhagwanji Tulsidas, and, according to the second respondent, the Sales Tax Authorities were justified in demanding the amount due from Bhagwanji Tulsidas as arrears of sales tax from the petitioner. According to the second respondent under the terms of the document of mortgage, the petitioner had agreed to make payment of Government dues out of the amount of Rs. 6,750 that was payable by him in consideration of the mortgage of Hari Oil Mills belonging to Bhagwanji Tulsidas.

6. These are the rival contentions taken up by the petitioner and the Sales Tax Authorities. Even if we were to proceed on the footing that though the petitioner himself has not signed the document of mortgage, still under the deed of mortgage, he had undertaken the liability to pay the sales tax dues of Bhagwanji Tulsidas to the Government, there was only a contractual liability which the petitioner undertook by terms of that document. There was no direct contract between the petitioner and the Government whereby the petitioner entered into any contract or agreement with the Government to discharge the sales tax liabilities of Bhagwanji Tulsidas.

7. We may point out that a similar case appears to have arisen before the Supreme Court in *Deputy Commercial Tax Officer, Madras v. Sukhraj Peerajee* [1968] 21 S.T.C 5 ; AIR 1968 S.C. 67). In that case, in para (6) at page 70 of the report, Ramaswami, J., delivering the judgment of the Supreme Court, observed :

"Even on the assumption that the respondent undertook to pay the arrears of sales tax due by the transferor, it does not follow that there is a liability created inter se between the State Government on the one hand and the transferee on the other hand. To put it differently, it is not open to the State Government to rely on the instrument inter vivos between the transferor and the transferee and to contend that there is any contractual obligation between the transferee and the State Government who is not a party to the instrument."

8. The same reasoning would apply to the present case as well and, therefore, the contention urged in the affidavit-in-reply filed by the second respondent, that because of the liability which has been set out in the deed of mortgage, the State

Government is entitled to recover the amount to the extent of Rs. 6,750 from the petitioner, owed to the State Government by Bhagwanji Tulsidas, cannot be accepted.

9. It was contended in the alternative on behalf of the respondents by the learned Assistant Government Pleader that u/s 39 of the Act it was open to the Sales Tax Authorities, at any time or from time to time, by notice in writing, to require any person from whom any amount of money was due, or might become due, to a dealer on whom notice has been served under sub-section (4) of section 38, or any person who holds or may subsequently hold money for or on account of such dealer, to pay to the Commissioner, either forthwith upon the money becoming due or being held or at or within the time specified in the notice, so much of the money as is sufficient to pay the amount due by the dealer in respect of the arrears of tax, penalty and sum forfeited under the Act, or the whole of the money when it is equal to or less than that amount. The Explanation to section 39 of the Act provides that for the purposes of section 39, the amount of money due to a dealer from, or money held for or on account of a dealer by any person, shall be calculated after deducting therefrom such claims, if any, lawfully subsisting, as may have fallen due for payment by such dealer to such person. Section 39 of the Act inter alia provides as follows :

"Where a person to whom a notice under this section is sent proves to the satisfaction of the Commissioner that the sum demanded or any part thereof is not due to the dealer, or that he does not hold any money for or on account of the dealer, then, nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, to the Commissioner.

Any amount of money which a person is required to pay to the Commissioner, or for which he is personally liable to the Commissioner under this section shall, if it remains unpaid, be recoverable as an arrear of land revenue."

10. Thus under the scheme of section 39, it is clear that by way of a special mode of recovery of sales tax dues of the dealer concerned, the Commissioner may proceed against a debtor of the assessee-dealer and recover towards the sales tax dues of the dealer any amount of money which is due or may become due to the dealer or recover any money held by the debtor or which the debtor may subsequently hold for or on account of the dealer concerned. The provision, whereby it is provided that on the debtor of the assessee satisfying the Commissioner that the sum demanded or any part thereof is not due to the dealer or that he does not hold any money for or on behalf of the dealer, such alleged debtor is not required to pay any sum of money or part thereof to the Commissioner, cannot be interpreted to mean that power has been conferred upon the Commissioner or the Sales Tax Authority to adjudicate upon the liability of the alleged debtor to the assessee or to the dealer concerned.

11. In *Kasturi and Sons (Private) Ltd. Vs. N. Salivateeswaran and Another*, , the

Supreme Court was dealing with section 17 of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955; and there in para. 9 of the judgment, Gajendragadkar, J. (as he then was), delivering the judgment of the Supreme Court, observed :

"It is well-known that, whenever the Legislature wants to confer upon any specified authority powers of a civil court in the matter of holding enquiries, specific provision is made in that behalf. If the Legislature had intended that the enquiry authorised u/s 17 should include within its compass the examination of the merits of the employee's claim against his employer and a decision on it, the Legislature would undoubtedly have made an appropriate provision conferring on the State Government or the specified authority the relevant powers essential for the purpose of effectively holding such an enquiry."

12. The same reasoning would apply to the instant case, viz., that if the Legislature had intended that the Commissioner when exercising powers u/s 39 should have the power of determining the merits of the contentions of the debtor regarding his liability to the assessed dealer, then the Legislature would have made a proper provision conferring upon the Commissioner the relevant powers essential for the purpose of effectively holding such an enquiry. At page 511 in para. 12 of the judgment, the Supreme Court has pointed out :

"Since there is no provision in the Act which confers on the specified authority the relevant and adequate powers to hold a formal enquiry, it would be difficult to accept the position that various questions which may arise between the working journalists and their employers were intended to be dealt with in a summary and an informal manner without conferring adequate powers on the specified authority in that behalf."

13. That being the case, since in the instant case the enquiry, which the Commissioner is authorised to hold u/s 39 is a summary enquiry, and that too in rather an informal manner, it is not open to the Commissioner to enter upon the determination of the liability as between the petitioner and Bhagwanji Tulsidas, the assessed dealer.

14. It is well-settled law that the provisions of a taxing statute must be construed strictly and in favour of the taxpayer wherever the provisions are capable of two possible interpretations. In the instant case, far from there being a possibility of two interpretations, the only possible interpretation which can be put is that no specific power having been conferred upon the Commissioner for determining the liability of the third person, the alleged debtor of the assessee, it is not open to the Commissioner to enter upon such an enquiry and decide for himself whether such liability is owed by the third person to the assessee or not. Once it is held that no such power has been conferred, as we hold in this case, it is clear that the action of the Sales Tax Authorities in entering upon the enquiry and determining the liability of the petitioner to pay the sales tax dues of Bhagwanji Tulsidas was without jurisdiction, and since that determination was

without jurisdiction, all consequential orders flowing therefrom, viz., the order of attachment, proclamation of sales etc., must all be set aside.

15. We, therefore, issue a writ of mandamus against the respondents directing them not to take any further steps for recovering the amount of sales tax dues of Bhagwanji Tulsidas from the petitioner in continuation of the notices and orders already issued by them in that behalf; and we further hold that the notices and orders issued in that behalf by the second respondent are invalid and of no legal effect, as having been issued without jurisdiction. We make the rule absolute. The respondents must pay the costs of this special civil application to the petitioner.

16. Rule made absolute.