
(1976) 10 AHC CK 0048

In the Allahabad High Court

Case No : Sales Tax Reference No's. 815, 816, 817 and 818 of 1972

Raj Kumar Kotwaj

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 27-10-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
General Clauses Act, 1897 — Section 2, 3

Citation : (1977) 40 STC 141

Hon'ble Judges : R.M. Sahai, J; D.M. Chandrashekhar, J

Bench : Division Bench

Advocate : R.K. Gulati, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

D.M. Chandrashekhar, J.—At the instance of the assessee, the following questions of law have been referred to this court by the Additional Judge (Revisions), Sales Tax, Aligarh :

(1) Whether, in the facts and circumstances of the case, the learned Additional Judge (Revisions), Sales Tax, was competent to record a finding that the two firms constituted an "association of persons" and were not separate firms when the only dispute raised before him was whether the firm at Sirsaganj was an agent of the applicant-firm or not ?

(2) Whether there was any material on record to hold that the applicant-firm and the firm at Sirsaganj constituted an "association of persons" and were liable for a joint assessment ?

(3) Whether the learned Additional Judge (Revisions), Sales Tax, was right in holding that the two firms were "dealers" within the meaning of Section 2, Sub-clause (14), read with the definition of "person" under the General Clauses Act and were liable to joint assessment ?

(4) Whether the finding of the Assistant Commissioner (Judicial), Sales Tax, that the two firms were separate firms could be reversed in law by the Additional Judge (Revisions), Sales Tax, when no revision had been filed against that part of the finding by the State and the only dispute before the Additional Judge (Revisions) was that the firm at Sirsaganj was not acting as an agent of the applicant-firm ?

2. The material facts are briefly these : M/s. Raj Kumar Kotwaj of Shikohabad is a registered firm carrying on business of selling bricks, deshi ghee and empty tins. That firm consisted of three partners, namely, Raj Kumar, Kotwaj and Kastur Chand. Another firm by the same name carrying on business at Sirsaganj is also a registered firm. All the three partners of the former firm and one Murarilal were the partners of the latter firm. Murarilal was also carrying on business in deshi ghee, foodgrains and empty tins at Sirsaganj separately under the name and style of M/s. Har Bilas Murarilal.

3. The two firms, namely, M/s. Raj Kumar Kotwaj, Shikohabad, and M/s. Raj Kumar Kotwaj, Sirsaganj, had made to the Sales Tax Officer a common application in each of the years 1963-64 and 1964-65 for being registered as dealers. In those applications it was stated that the firm at Sirsaganj was a branch of the firm at Shikohabad. Both these firms had sent common quarterly returns in which the turnovers of both the firms were shown together.

4. During the course of a survey, the Sales Tax Officer (S.I.B.) seized some books of account of M/s. Har Bilas Murarilal. Murarilal admitted before the sales tax authorities that in addition to his separate business, his firm was purchasing ghee from M/s. Raj Kumar Kotwaj, Shikohabad.

5. The Sales Tax Officer assessed the firm, M/s. Raj Kumar Kotwaj of Shikohabad, under the U.P. Sales Tax Act and under the Central Sales Tax Act for the years 1963-64 and 1964-65. The assessments proceeded on the basis that the firms, M/s. Raj Kumar Kotwaj of Sirsaganj and M/s. Har Bilas Murarilal of Sirsaganj, were branches of M/s. Raj Kumar Kotwaj of Shikohabad.

6. Against the orders of assessment, the assessee, M/s. Raj Kumar Kotwaj, Shikohabad, filed appeals. The Assistant Commissioner (Judicial) disposed of those appeals by a common order. He held that the two firms, M/s. Raj Kumar Kotwaj of Shikohabad and M/s. Raj Kumar Kotwaj of Sirsaganj, were separate firms, which had been registered separately with the Registrar of Firms and the Income Tax authorities and that as the constitutions of these firms were also different they had to be assessed separately. He further held that M/s. Har Bilas Murarilal of Sirsaganj was a separate firm. In that view, the Assistant Commissioner (Judicial) remanded the cases to the Sales Tax Officer with a direction to ascertain the turnovers of these three firms separately and to find out if the firm, M/s. Raj Kumar Kotwaj of Shikohabad, had sold goods of the firms, M/s. Raj Kumar Kotwaj, Sirsaganj, and M/s. Har Bilas Murarilal, Sirsaganj, as the agent of those two firms and whether the firm M/s. Raj Kumar Kotwaj of

Shikohabad was liable to pay tax on the turnover of goods sold by it as the agent of the other two firms.

7. Feeling aggrieved by the direction that the assessee-firm, M/s. Raj Kumar Kotwaj of Shikohabad, could be assessed to tax as the agent of the other two firms, it (the assessee, M/s. Raj Kumar Kotwaj of Shikohabad) filed revision petitions before the Additional Judge (Revisions), Sales Tax, Aligarh.

8. By his common order dated 3rd April, 1972, the Additional Judge (Revisions), Sales Tax, Aligarh, dismissed all the revision petitions, but gave a direction that the turnovers of M/s. Raj Kumar Kotwaj of Shikohabad and M/s. Raj Kumar Kotwaj of Sirsaganj should be assessed jointly as, in his opinion, the latter firm was an associate firm of the former firm and both the firms constituted one dealer. He also gave a direction that the turnover of M/s. Har Bilas Murarilal should not be taxed in the hands of the assessee, M/s. Raj Kumar Kotwaj, Shikohabad.

9. As stated earlier, the assessee moved the Additional Judge (Revisions), Sales Tax, to refer to this court the aforesaid questions of law.

10. Questions Nos. (1) and (4) relate to the competence of the revisional authority to give a finding that the two firms, namely, M/s. Raj Kumar Kotwaj, Shikohabad, and M/s. Raj Kumar Kotwaj, Sirsaganj, constituted an association of persons.

11. Shri R. K. Gulati, the learned counsel for the assessee, contended that when only the assessee went up in revision against the direction of the Assistant Commissioner (Judicial) to find out whether the firm at Shikohabad was acting as the agent of the other two firms and the revenue did not go up in revision against the order of the Assistant Commissioner (Judicial) who had held that the two firms, M/s. Raj Kumar Kotwaj of Shikohabad and M/s. Raj Kumar Kotwaj of Sirsaganj, were two separate firms, it was not competent for the Judge (Revisions) to decide a point which was not urged by the revision petitioner, namely, the assessee, and to make out a new case that the two firms, M/s. Raj Kumar Kotwaj of Shikohabad and M/s. Raj Kumar Kotwaj of Sirsaganj, constituted an association of persons.

12. Elaborating his contention, Shri Gulati argued that the revisional authority had to accept or reject the contentions of the revision petitioner and could not go into questions not urged by the parties and to give findings thereon at variance with the findings of the appellate authority or the assessing authority.

13. On the other hand, the learned standing counsel, appearing for the revenue, contended that once the records of a case were called for, even if it be at the instance of the assessee, the revising authority can examine the legality and propriety of an order of the appellate authority and the assessing authority and pass such order as it (the revising authority) thinks fit, and that such power of the revising authority to substitute its own findings for those of the authorities

below, can be exercised whether or not the revision petitioner or the respondent has canvassed the findings of the authorities below. The learned standing counsel also contended that in the present case since the order of the appellate authority had been made before Section 10 of the U. P. Sales Tax Act, 1948, was amended by the U. P. Sales Tax (Amendment) Act, 1970 (U. P. Act No. 3 of 1971), the revisional authority could also exercise suo motu powers to correct any errors of the authorities below.

14. To appreciate the rival contentions of the learned counsel, it is necessary to set out the relevant portion of Section 10 as it stood before, and as it stands after the amendment by the U. P. Sales Tax (Amendment) Act, 1971 :

Before amendment After amendment Section 10(3)(i) Section 10(2) The Revising Authority or The Revising Authority or any Additional Revising Authority an Additional Revising may, for the purposes of Authority, on an application satisfying itself as to the of the Commissioner of Sales legality or propriety of any order Tax aggrieved by any order made by any appellate or assessing made by an assessing or authority under this Act, in its appellate authority, discretion, call for or on the or of any other person application of the Commissioner aggrieved by an order Sales Tax or the person aggrieved, and examine, either on its the record of such order own motion made by an appellate and pass such order as it authority, not being of an order may think fit: Provided that mentioned in Section 10-A, may, no such application shall be in its discretion, for the entertained in any case where purpose of satisfying itself as an appeal lay against the order to the legality or propriety but was not preferred. of such order, call for and examine the relevant record and, after giving the parties a reasonable opportunity of being heard and after making such further inquiry, if any, as it deems necessary, -(a) confirm, cancel or vary such order, or (b) set aside the order and direct the assessing or appellate authority, as the case may be, to pass a fresh order after such further inquiry as may be specified. 15. Under the amended Section 10, the revising authority has no suo motu power of revision. Following the decision of the Supreme Court in Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another, , a Division Bench of this Court held in Commissioner of Sales Tax v. Sri Krishna Ram Chandra 1975 U.P.T.C. 85 that the amendment of Section 10 of the Act did not operate retrospectively and did not take away the power of the revising authority to revise suo motu an appellate order made prior to 1st October, 1970, on which date the U. P. Sales Tax (Amendment) Act of 1970 came into force. Since the common order of the Assistant Commissioner (Judicial) was made on 22nd September, 1969, i. e., prior to the substitution of Section 10 of the Act by the present section, the Judge (Revisions) could suo motu revise the common order of the Assistant Commissioner (Judicial).

16. Shri Gulati complained that the assessee was taken by surprise and had no opportunity to meet the finding held against it (the assessee), namely, that the two firms constituted an association of persons. Shri Gulati submitted that

neither the assessee nor the revenue contended that these two firms constituted an association of persons and that in those circumstances before giving a finding on a point not urged by either of the parties, the Judge (Revisions) should have given notice to the assessee as to what he [the Judge (Revisions)] proposed to hold so that the assessee might have had an opportunity to show why these two firms should not be treated as constituting an association of persons. In other words, the contention of Shri Gulati was that the procedure adopted by the Judge (Revisions) was in violation of the principles of natural justice.

17. On the other hand, the learned standing counsel maintained that once the parties to the revision proceedings were given notice of the hearing of the revision petition, there was no obligation on the Judge (Revisions) to give further notice to the parties as to what order he proposed to make in exercise of his revisional jurisdiction or in what manner he proposed to vary the order of the appellate authority. The learned standing counsel further contended that, at any rate, there was no enhancement of the tax in revision and that hence there was no need to give any further notice to the assessee that the revisional authority proposed to hold that these two firms constituted an association of persons.

18. When the revisional authority feels that the order under revision has to be varied on a point not urged by either of the parties, it is desirable that the revisional authority should indicate to the parties what it proposes to do, so that they (the parties) may have an opportunity of putting forth their respective contentions on that point.

19. But, in these references, it is not possible to gather from the statement of the case what transpired at the hearing of the revision petitions before the Judge (Revisions). Moreover, in these references, the question as to whether the proceedings before the Judge (Revisions) suffered from violation of the rules of natural justice for want of notice to the parties as to what the revisional authority proposed to decide is not one of the questions referred to us. Hence we are not called upon to express any opinion on that question in these references.

20. Section 10(3)(i), as it stood prior to 1st October, 1970, empowered the revisional authority to pass such order as it might think fit. The words "pass such order as it may think fit" also occur in Section 115 of the CPC and in Sections providing for revision under many enactments.

21. In *Pattammal Vs. Krishnaswami Iyer*, it was held that when a case is already before the High Court and the necessary parties are also before it, it has ample powers to entertain questions which may be raised by the respondent and deal with those questions also if it thinks fit. That was also the view taken in *Jia Lal v. Mohan Lal* AIR 1960 J. & K. 22.

22. In *Rati Ram Vs. Niader Mal*, Braund, J., said that once the High Court is seized of the revision, then it becomes its duty to cast its eyes not merely on one part of the proceedings but the whole of them and that what come under the review of the High Court are the proceedings as a whole from start to finish and

the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole.

23. In *Kalepu Pala Subrahmanyam Vs. Tiguti Venkata Peddiraju and Others*, , the Subordinate Judge had rejected the plaint in regard to some items in regard to which he was of the view that the suit was barred by time and permitted the plaintiff to proceed with the suit in regard to other items only. In the revision petition filed by the plaintiff, the High Court held that as the matter had been brought to its notice in proceedings u/s 115, C. P. C, it could direct the rejection of the entire plaint and not merely in part as had been done by the court below.

24. In *Ghanshyamdas Chhotalal Vs. Sales Tax Officer and Others*, , the facts were these : A firm had got itself registered as a dealer under the C. P. and Berar Sales Tax Act, 1947, as amended by the M. P. Sales Tax (Amendment) Act. In the course of the assessment for the period 17th February, 1950, to 30th November, 1951, it was claimed that the firm had been dissolved on 13th September, 1949, and that one of the partners had taken over the business of the firm and had carried it on and, subsequently, transferred it on 28th February, 1951, to the writ petitioner. The Sales Tax Officer held that there was no dissolution of the firm and assessed the firm to tax. In the appeal preferred by the firm, the Assistant Commissioner of Sales Tax held that the firm had been dissolved, but that the writ petitioner was liable to tax as the successor of the business. The writ petitioner, instead of going up in second appeal, filed a revision petition before the Commissioner, who disagreed with the finding of the Assistant Commissioner that the firm had been dissolved and dismissed the revision petition. In the writ petition it was contended that the revisional powers of the Commissioner were restricted to only those matters which the revision petitioner wanted to be revised. Repelling that contention, a Division Bench of the Madhya Pradesh High Court held that u/s 22-A of that Act the powers of revision are wide, that the Commissioner could exercise revisional powers of his own motion or on an application made by a dealer and could, subject to the provisions of the Act, pass such order as he thought fit and that nowhere in that section was it stated that where a dealer applies for revision of an order made by any authority subordinate to the Commissioner, he should exercise revisional powers only in regard to the matters specifically raised by the party. Their Lordships added that when the Commissioner took up a matter in revision, whether suo motu or on an application by a dealer, then he (the Commissioner) was entitled to consider the whole case. In the light of the aforesaid rulings, it is clear that once a matter comes up before the revisional authority, whether suo motu or on a revision petition filed by an assessee, it is entitled to consider the legality or propriety of any finding by the assessing authority or the appellate authority, that the revisional authority can substitute its own finding for that of the authorities below and that its power is not restricted to merely affirming or setting aside the order under revision.

25. Amended Section 10(2) also empowers the revisional authority not only to

confirm or cancel, but also to vary an order of the assessing authority or the appellate authority. The power to vary an order would, in our opinion, include the power to substitute a finding in such order.

26. Thus, we are unable to accept the contention of Shri Gulati that the Judge (Revisions) could not, in the revision petition filed by the assessee, alter the findings of the assessing authority and the appellate authority as to the relationship between the two firms and hold that the two firms constituted an association of persons and had to be assessed together as a dealer. ,

27. Questions Nos. (2) and (3) can conveniently be dealt with together. Clause (c) of Section 2 of the Act defines "dealer" as any person or association of persons carrying on the business of buying or selling goods in Uttar Pradesh. As observed by the Supreme Court in *M.M. Ipoh and Others Vs. Commissioner of Income Tax, Madras*, , while construing the expression "association of persons" occurring in the Income Tax Act, that expression (association of persons) is of most comprehensive import. Under Clause (42) of Section 3 of the General Clauses Act, "person" includes any company, association or body of individuals, whether incorporated or not. Therefore, an "association of persons" may have as its members companies or firms or associations or bodies of individuals. Hence, there is no legal impediment for treating the two firms, though registered under the Partnership Act, as constituting an "association of persons", if the tests for regarding so are satisfied. However, Shri R. K. Gulati, the learned counsel for the assessee, contended that mere co-ownership, common management and sharing of profits would not constitute an association of persons. Support for this contention was sought to be derived from the following decisions.

28. In *Commissioner of Agricultural Income Tax, Hyderabad Vs. Raja Ratan Gopal*, , the facts were these : On the death of a Raja, the then Ruler of Hyderabad State issued a Firman declaring the four nephews of the Raja to be his heirs, each being entitled to one-fourth share in the estate. The estate was under the superintendence of the Government for some years. During that period each heir was given one-fourth share in the income of the estate. The question before the Supreme Court was whether the heirs could be assessed as an association of individuals under the Hyderabad Agricultural Income Tax Act, 1950. The Supreme Court held that the four nephews of the Raja did not form a unit for the promotion of any joint enterprise to earn income, profit or gains, that the collection of the entire income from the estate by one of the sharers or even by a common employee, would not make that income an income of joint venture and that each of the sharers got his income as an individual and not as an association of individuals.

29. *State of madras Vs. VR. M. SM. Karuppan Chettiar and Others*, was also a case of heirs who inherited certain agricultural lands, held them as tenants-in-common and got them cultivated under a common management and a common account was maintained showing their individual shares of income. The Madras High Court held that those heirs did not constitute an association of

individuals as defined u/s 3(3) of the Madras Agricultural Income Tax Act.

30. B.T.R. Punja and Others Vs. Commissioner of Agricultural Income Tax, Mysore and Another, , was also a case of legatees holding certain agricultural lands as tenants-in-common. One of the legatees was appointed as manager to manage the lands. The Mysore High Court held that the legatees did not constitute an association of individuals as defined in Section 2(l)(p) of the Mysore Agricultural Income Tax Act.

31. In the aforesaid cases, agricultural lands were inherited by heirs or legatees who shared the income derived from those lands and there was no combination of persons formed to promote a joint venture or business.

32. In Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, , the Supreme Court reviewed several decisions on the question as to what constitutes an "association of persons" and said thus at page 551 :

Therefore, an association of persons must be one in which two or more persons joint in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one, the object of which is to produce income, profits or gains.

33. The Supreme Court approved the test laid down by Costello, J., in B. N. ELIAS AND OTHERS, IN RE., , that there must be a combination of persons formed for the promotion of a joint enterprise.

34. In Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras, , the facts were these: A Mohammedan, who was carrying on the business of manufacture and sale of beedies, died interstate, leaving as his heirs, his widow, his four children by her and a son by his predeceased wife. That son filed a suit for partition. Pending that suit, two receivers were appointed and they carried on the business. Following its earlier decision in Indira Balkrishna's case³, the Supreme Court held that the co-heirs did form an association of persons within the meaning of Section 3 of the Income Tax Act, 1922, since the business was carried on after the death of the father, as one unit by the consent of all the co-heirs.

35. Bearing in mind the aforesaid elucidation of the concept of "association of persons" by the Supreme Court in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, , we shall examine questions Nos. (2) and (3) referred to us. Shri Gulati argued that there was no relevant material on the basis of which the Judge (Revisions) could come to a conclusion that M/s Raj Kumar Kotwaj, Shikohabad, and the firm M/s Raj Kumar Kotwaj, Sirsaganj, constituted an association of persons.

36. On the other hand, the learned standing counsel for the department contended that the following circumstances constituted the materials for the finding of the Judge (Revisions) that these two firms constituted an association of

persons :

(i) Both the firms made joint applications in the assessment years 1963-64 and 1964-65 for being registered as "dealer". One firm was stated as the branch of the other firm.

(ii) Both the firms submitted common returns of turnover showing the turnovers of both the firms for these two assessment years.

37. The learned standing counsel maintained that unless there was a common business of these two firms, there was absolutely no reason why they should have made a common application for registration of the firms and filed common returns. These circumstances, according to the learned standing counsel, were very material and the Judge (Revisions) could base thereon his finding that they constituted an association of persons.

38. However, Shri Gulati submitted that it was under a mistake that these two firms had sent common applications for registration of the firms as dealers and had submitted common returns of turnovers and that the mere fact that such common applications and returns were sent could not be material because, in those applications, the existence of the two firms were shown separately and that, in the returns also, the turnovers of the two firms were shown separately.

39. In answering question No. (2), what we have to consider is whether there was any relevant material at all or whether there was total absence of material for the Judge (Revisions) holding that these two firms constituted an association of persons. If there was some material to form the basis of such finding, the sufficiency of such material is not a matter which this court can examine.

40. We are unable to accept the contention of Shri Gulati that these two circumstances, namely, that the two firms had made common applications for being registered as dealers and had sent common returns, are not relevant materials for determining whether there was any joint business venture of these two firms so as to constitute an association of persons. Hence, our answer to question No. (2) is that there was material on record to hold that the two firms constituted an association of persons,

41. Shri Gulati was not able to point out anything in the term "person" as defined under Sub-section (14) of Section 2 of the U.P. General Clauses Act, which would preclude the two firms being regarded as an association of persons.

42. In the light of the foregoing discussion, our answers to the questions referred to us are in favour of the revenue and against the assessee and are as follows :

(1) On the facts and in the circumstances of the case, the Additional Judge (Revisions), Sales Tax, was competent to hold that the two firms constituted an association of persons even though that question was not raised by the assessee in revision.

(2) There was material on record for the Additional Judge (Revisions) in holding

that the assessee-firm and the firm at Sirsaganj bearing the same name constituted an association of persons and were liable for a joint assessment.

(3) There is nothing in Sub-section (14) of Section 2 of the U.P. General Clauses Act, which came in the way of the Additional Judge (Revisions), Sales Tax, holding that the aforesaid two firms constituted an association of persons and, consequently, were a dealer as defined in Section 2(c) of the U.P. Sales Tax Act and that the two firms were liable to be assessed jointly.

(4) The finding of the Assistant Commissioner (Judicial) that the two firms were separate firms and had to be assessed separately, could be reversed by the Additional Judge (Revisions), Sales Tax, even though the revenue had not filed any revision against the order of the Assistant Commissioner (Judicial) and the assessee had merely challenged the direction of the Assistant Commissioner (Judicial) to the Sales Tax Officer to ascertain whether or not the firm of Shikohabad was liable to pay tax on the turnovers of goods sold by it as the agent of the firm at Sirsaganj.

43. In the circumstances of the case, we make no order as to costs in these references.