

(1970) 03 AHC CK 0013
In the Allahabad High Court
Case No : S.T.R. No. 259 of 1966

Ram Kumar and Co.

APPELLANT

Vs

The Commissioner of S.T., U.P.

RESPONDENT

Date of Decision : 02-03-1970

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 2

Citation : AIR 1970 All 650 : (1971) 27 STC 13

Hon'ble Judges : Satish Chandra, J;R.L. Gulati, J;J.S. Trivedi, J

Bench : Full Bench

Advocate : S.N. Agarwal, for the Appellant; Standing Counsel, for the Respondent

Judgement

Satish Chandra, J.—A Bench of this Court being of the opinion that in view of the observations of the Supreme Court in *State of Punjab and Another Vs. Bajaj Electricals Ltd.*, the decision of this Court in *Nestles" Products (India) Ltd. Vs. Commissioner of Sales Tax*, requires reconsideration, referred this Reference to a larger Bench. That is how the matter has come before us. 2. The Judge (Revisions) Sales Tax, U. P. Lucknow, referred the following three questions of law for the opinion of this Court u/s 11 (1), XL P. Sales Tax Act:--

"1. Whether under the circumstances of this case the applicant can be treated to be carrying on business activity within U. P. so as to be classified as the dealer for the purposes of assessment?

2. Whether under the circumstances of this case the applicant can be treated to be an importer against whom an assessment can be passed?

3. Whether under the circumstances of this case the Sales Tax Officer at Barabanki who had been so directed as having jurisdiction was vested with the jurisdiction to pass the assessment?"

3. For deciding the first question, the relevant facts are: the assessee carries on the business of buying and selling cotton yarn at Calcutta. It received orders

from certain U. P. dealers, and, in execution thereof it despatched cotton yarn to them. The railway receipts were prepared in the name of self. They were endorsed to the assessee's Bankers at Calcutta. The Bankers at Calcutta then realised the sale price from the purchasers within U. P. on endorsement and delivery of the receipt, through its branches in U. P. This modus operandi was accepted by the assessing authorities. But, they, including the Judge (Revisions), held that the assessee was carrying on the business of selling goods within U. P. and was a "dealer" as defined by the U. P. Sales Tax Act, and as such liable to tax.

4. Section 2 (c), U. P. Sales Tax Act, defines the word "dealer" to mean any person who carries on the business of buying or selling goods within Uttar Pradesh.

5. The learned Standing Counsel supported the view taken by the Judge (Revisions) by the decision of this Court in Nestles' Products (India) Ltd. Vs. Commissioner of Sales Tax, . In my opinion, that case is, on facts, distinguishable. In that case, the assessee had its office at Calcutta. It had no office in Uttar Pradesh, It entered into contracts of sale of condensed milk and powdered milk with customers residing in Uttar Pradesh. It sent goods by train. The railway receipts were prepared in the name of the assessee as consignor and consignee both. At the destinations, the goods were taken delivery of either by the assessee's representatives in Uttar Pradesh, who then sold them by going from door to door, or by the customers through a Bank against payment. The assessee sent the railway receipts to its Bankers in U. P., after endorsing them in their favour and they delivered them to the customers, after receiving payments from them and endorsing them in their favour. On these facts, it was found that in so far as the goods were delivered to the assessee's representatives in Uttar Pradesh, the sale by the representatives of the assessee by going from door to door, would be sale of goods by the assessee itself. In relation to the delivery made to customers through a Bank against payment, it was held that the bankers acted as an agent of the assessee. Hence, this activity of the bankers was a part of the business activity of the assessee. This would mean that he was carrying on the business of selling in Uttar Pradesh so as to be a "dealer". In the present case, the distinguishing feature is that the assessee or his representative did not take delivery of the goods from the railway. The customers directly took delivery from the railway. The assessee or its representatives did not sell the goods within Uttar Pradesh, after they had arrived in Uttar Pradesh.

6. The observation that the Bank in so far as it collected the price of the goods for the assessee would be its agent and as such the assessee would be carrying on the business of selling in U. P. seems contrary to the decision of the Supreme Court in State of Punjab and Another Vs. Bajaj Electricals Ltd., . In that case, the assessee carried on business at Bombay and had a branch office at New Delhi. It received certain orders from the Government of Punjab and other semi-Government bodies in the State of Punjab. It despatched goods from Delhi by rail

or by public motor transport. The railway or other receipts were prepared in the name of the assessee and presented to the purchasers duly endorsed in their favour, to secure realization of the price of the goods. On these facts, the Supreme Court held that the assessee did not carry on a trade in Punjab. It held that the assessee had no shop or office within the State of Punjab. The facts that the assessee supplied goods within the State of Punjab and received price of the goods within the State of Punjab, were ancillary activities of the assessee, which did not amount to carrying on trade within the State of Punjab. This principle is applicable to the facts of our case. Here also, the assessee had supplied goods to customers, and, collected the price in U. P. The orders were received directly at Calcutta. They were executed at Calcutta. The assessee had no shop or office or representative in Uttar Pradesh. In the circumstances, the facts that the goods were supplied and price collected in U. P. would be an ancillary activity of the assessee and would not amount to carrying on the business of selling within Uttar Pradesh.

7. The fact that the assessee entrusted the documents to the Bank for encashment would not necessarily make the Bank an agent of the assessee. The bank would be the assessee's agent only if the assessee paid the bank its charges or commission. But if the U. P. customers paid the bank charges (which is not unusual), the bank would in law be the customers' agent. There is no finding here that the assessee paid the bank's charges.

8. Further even if the Bank is held to be the assessee's agent, it would not automatically make the bank an agent for carrying on the business of the assessee. It has been found that the assessee firm was granted an overdraft by the bank at Calcutta on the assessee's risk and on the condition that if the money was not collected from the U. P. dealers the bank will debit the money in their account. This would suggest that if the customer did not honour the railway receipt by retiring it on payment, the bank would debit the assessee's account. The bank does not undertake to take delivery of the goods from the railway, if the customers do not retire the documents, and sell them on behalf of the assessee, in order to realise and pay the assessee the price.

9. The bank could not be treated as a business agent of the assessee. The Bank, if at all, would be an agent for the ancillary activity of transmitting the documents to the customers and crediting the assessee with the proceeds, if the customers willingly paid. The assessee could not be held to be carrying on business in U. P. on the basis of this activity of the bank.

10. Learned counsel for the assessee relied on the decision of the Supreme Court in Commr. of Sales Tax, U. P. v. D. C. Dhimani and Brothers Ltd. (1970) 25 STC 12 (SC). That case, in our opinion, is not helpful. There, the assessee carried on the work of fabricating wagons and coaches at Izatnagar in Uttar Pradesh. They were then supplied to the railway administration within the State of Uttar Pradesh. The Supreme Court held that the assessee was carrying on the work of manufacturing wagons and coaches in Uttar Pradesh and this manufacturing

would not make him a "dealer" because he did not carry on the business of selling goods in Uttar Pradesh. It was also held that a single or stray instance of selling will not be carrying on the business of selling. Here, it is not disputed that the assessee carries on the business of buying and selling cotton yarn. He is not a manufacturer. This case is, therefore, not applicable.

11. I would answer the first question in the negative, in favour of the assessee and against the Department. In view of the answer to the first question, the other questions are merely of academic importance, and would leave them unanswered. The assessee would be entitled to his costs, which are assessed at Rs. 200. The fee of the learned counsel for the Department is assessed at the same figure.

Trivedi, J.

12. I agree that the first question should be answered in favour of the assessee and against the Department. I also agree that the remaining two questions need not be answered.

13. I would like to add that carrying on business of selling goods in the State of Uttar Pradesh implies active promotion of trade by the dealer or his agent. The bank will not be the agent of the dealer for the purpose of business even though it may be an agent for the purpose of realising the purchase money. Mere transport of goods through the railway or some other transport agency will not amount to carrying on business in the State a dealer who attracts business by advertisement in a newspaper of the State also cannot be said to be carrying on the business of selling in the State. There should be an element of personal activity by the dealer or his agent for the sales in the State before the dealer can be said to be carrying on the business of selling in the State.

R.L. Gulati, J.

14. I agree with brother Satish Chandra, J, that question No. 1 should be answered in favour of the asses-see and the remaining two questions need not be answered but I wish to add a few words by way of elucidation.

15. The statement of the case as originally submitted by the Revising Authority, opens thus;

"The applicant is a concern having its head office at Calcutta dealing in yarn. The applicant used to import yarn in his own name and received delivery thereof at Barabanki whereafter this yarn so received was effected sale....."

Similar observations were found at two places in the revisional order. When the matter came up for hearing before a Bench consisting of myself and Hon. Pathak, J. we called for a supplementary statement of the case as, in our opinion, the Judge (Revisions) had merely expressed its conclusion without setting out the primary facts. The supplementary statement of the case has since been received and it discloses the modus operandi of the assessee's business. According to

that modus operandi the assessee whose principal place of business is Calcutta merely despatches goods to dealers in Uttar Pradesh in execution of the orders received from them. The railway receipts are made out in the assessee's name. The railway receipts are endorsed in favour of the assessee's bankers at Calcutta which deliver them through their branches to the assessee's constituents in U. P. on payment of the price of the goods. It has not been found that the delivery of the goods at any of the destinations in U. P. is taken either by the assessee directly or through its agents or by the banks. On these facts the question arises as to whether the assessee can be said to be carrying on business of selling goods in U. P. so as to be a dealer within the meaning of Section 2 (c) of the U. P. Sales Tax Act. I agree that on these facts the assessee cannot be held to be a dealer in U. P.

16. The case of Nestles' Products (India) Ltd. Vs. Commissioner of Sales Tax, can be distinguished only on the ground that sometimes the representatives of the assessee in that case took delivery of the goods in Uttar Pradesh and they sold the goods by going from door to door. That modus operandi would certainly make the assessee a dealer in Uttar Pradesh but the fact that in the present case the assessee delivered the railway receipts to its bankers at Calcutta while in the case of Nestles' Products, the documents were sent to banks in U. P., would afford no ground of distinction because in either case the banks agency would be limited to the collection of the price of the goods from the customers. There is nothing to show that on the failure of the customers to retire the documents, the banks would take the delivery of the goods on behalf of the assessee and would proceed to sell them. Such a course of conduct is against the established practice of the banking system as it prevails in our country. If the documents are not retired by the customers, the banks merely return them to the owner. Indeed, in the instant case it has been found that the assessee's banks had allowed to the assessee an overdraft facility against the railway receipts negotiated through it on the condition that if the documents were not honoured by the assessee's constituents in U. P. the amount advanced to the assessee shall be debited to its accounts. That is the only function which the assessee's banks performed in the conduct of the assessee's business. I am further of the opinion that the payment of the bank commission by the assessee or its customers is of no consequence. That is a matter of contract between the parties. Even if the bank commission is paid by the assessee, the bank cannot be said to be the agent of the assessee through whom it carries on the business of selling goods in U. P. As has been pointed out by the Supreme Court in State of Punjab and Another Vs. Bajaj Electricals Ltd., the negotiation of documents through a bank is an ancillary activity to secure the realisation of the price of the goods from the purchasers. I am, therefore, of the opinion that the decision in the case of Nestles' Products is erroneous in so far as it seeks to hold the assessee in that case to be dealer in U. P. on the ground that the railway receipts in respect of the goods despatched to U. P. dealers were negotiated through bankers in U. P.,

BY THE COURT

17. The first question is answered in the negative, in favour of the assessee and against the Department. In view of the answer to the first question, the other questions are merely of academic importance, and they are returned unanswered. The assessee would be entitled to his costs, which are assessed at Rs. 200. The fee of the learned Counsel for the Department is also assessed at the same figure.