
(1985) 01 GUJ CK 0007
In the Gujarat High Court

Shantaben

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 04-01-1985

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 34
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 41 Rule 33
Gujarat Sales Tax Act, 1969 — Section 18, 43, 73, 73

Citation : (1985) 1 GLR 560

Hon'ble Judges : J.P. Desai, J

Bench : Single Bench

Judgement

J.P. Desai, J.—The original plaintiff Bai Shantaben who is the appellant in this appeal is the wife of one Dahyabhai Patel, partner of the firm of M/s. Narsibhai Rambhai Patel. The firm of M/s. Narsibhai Rambhai Patel was a dealer and was duly registered under the provisions of the Bombay Sales Tax Act, 1959, (hereinafter referred to as "the Bombay Act"). The assessment proceedings were started against the said firm by issuing a notice on 25th September, 1964 and during the pendency of those proceedings.

Dahyabilai Patel executed a sale-deed on 24-11-1966 in favour of his wife Shantaben and sold away the suit properties to her. The order of assessment was passed on 31-1-1967 and Rs. 26,149/- were found due from the said firm and an order was passed on 5-4-1972 to recover the dues by sale of the suit properties. The plaintiff Shantaben filed the present suit being Regular Civil Suit No, 725 of 1973 in the Court of the Civil Judge, Senior Division, Surat for a declaration that the suit properties were of her exclusive ownership and they were not liable to attachment or sale for Sales-tax dues of the firm of M/s. Narsibhai Rambhai Patel and for an injunction restraining the State and its officers from recovering the amount from the said properties. The defendants resisted the suit. The defendants raised several contentions, one of the contentions being that the transaction in favour of the plaintiff by her husband was a dishonest and colourable one entered into with intent to defraud the Government and,

therefore, the suit properties were liable to attachment and sale, for the dues of sales-tax of the firm of M/s. Narsibhaij Rambhai. The learned trial Judge held in favour of the plaintiff and passed a decree in favour of the plaintiff accordingly. The State of Gujarat-defendant No. 2 filed Regular Civil Appeal No. 167 of 1977. The learned Extra Assistant Judge who heard the appeal reached the conclusion that the transfer in favour of the plaintiff by her husband was hit by Section 73 of the Gujarat Sales Tax Act, 1969 and, therefore, the properties which were sold by Dahyabhai to the plaintiff during the pendency of the proceedings were liable to attachment and sale for recovery of sales-tax dues. The learned Assistant Judge accordingly allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff. He also directed the respondent to pay the costs of the appellant of both the Courts and bear her own. Being dissatisfied with the same, Bai Shantaben, the original plaintiff, filed the second appeal against the State of Gujarat.

2. When the appeal came up for hearing before me, arguments were advanced by the learned Advocates Shri S.N. Shelat for the appellant and the learned Assistant Government Pleader Mr. S.T. Mehta all throughout referring to the provisions of Gujarat Sales Tax Act, 1969. Looking to the provisions of Section 3(11), Section 18, Section 73 and Section 43 of the Gujarat Sales Tax Act, 1969, I took the view that the transfer effected by Dahyabhai in favour of his wife was hit by Section 73 of the Gujarat Act and accordingly I dictated the judgment on 21st December, 1984 dismissing the appeal. When I was going through the said judgment, it struck to me that probably the Gujarat Sales Tax Act, 1969 may not apply to the present case because, assessment proceedings were started by issuing a notice on 25th September, 1964; while the transfer was effected by Dahyabhai in favour of his wife in the year 1966 and even the assessment proceedings were over in the year 1967 while the Gujarat Sales Tax Act 1969 was brought on statute book with effect from 13-3-1970. It struck to me that the Bombay Sales Tax Act 1959 was in force during that period, and, therefore the provisions of the said Act would be applicable. Hence I went through the said Bombay Act and found that though there were similar provisions in the Act of 1959, there was difference in the language. Looking to the provisions in the Act of 1959 and the corresponding relevant provision of the Gujarat Act 1969 I was inclined to take the view that the transaction in question will not be hit by any of the provisions of 1959 and the appeal may have to be allowed. I brought this aspect to the notice of the learned Assistant Government Pleader Mr. S.T. Mehta and he also felt that possibly the transaction in question will not be hit by any of the provisions of the Bombay Act of 1959 which was in force at that time. Hence I did not sign that judgment and fixed the matter for re-hearing. I have, therefore, heard the learned Advocate Mr. S.N. Shelat as well as the learned Assistant Government Pleader Mr. S.T. Mehta in the light of the provisions of the Bombay Sales Tax Act 1959.

3. The provisions of the Gujarat Sales Tax Act 1969 are not applicable in the present case, as stated by me earlier. But it will be proper to produce the

relevant sections of the said Act also so as to arrive at a proper interpretation of the provisions of the Act of 1959 which have a bearing on this question. Section 2(10) of the Gujarat Sales Tax Act, 1969 defines "dealer" which reads as follows:

2(10) dealer means any person who buys or sells goods in connection with his business; and includes Central Government, a State Government or any local authority and also any society, club or other association of persons which buys goods from or sells goods to its members or to other persons;

Exception-1: An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause :

Exception-11: A charitable, religious or educational institution, carrying on the activity of manufacturing, buying, selling or supplying goods, in performance of its functions for achieving its avowed objects, shall not be deemed to be a dealer within the meaning of this clause;

Exception-111 : An individual who sells exclusively any fish or any sea-food caught by him personally or by any member of his family on account of or on behalf of such individual, shall not be deemed to be a dealer within the meaning of this clause;

Section 25 of the said Act reads as follow:

25. Notwithstanding any contract to the contrary, where any firm is liable to pay tax under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment:

Provided that, where any such partner retires from the firm he shall intimate the date of his retirement to the Commissioner by a notice in that behalf in writing and he shall be liable to pay the tax and the penalty (if any) remaining unpaid at the time of his retirement and any tax due up to the date of retirement though unassessed at that date:

Provided further that where no such intimation is given within forty five days from the date of retirement the liability of the partner under the first proviso shall continue until the date on which such intimation is received by the Commissioner.

Section 43 of the Gujarat Act reads as follows:

43. Where in respect of any tax (including any penalty) due from a dealer under this Act or under any earlier law, any other person is liable for the payment thereof under any provisions of this Act or earlier law, all the relevant provisions of this Act, as the case may be, of the earlier law, shall in respect of such liability apply to such person also, as if he were the dealer himself,

Section 73 of the Gujarat Act reads as follows:

73. Where, during the pendency of any proceedings under this Act, any dealer

liable to pay tax creates a charge on, or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever of any of his property in favour of any other person with the intention of defrauding the Government revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the dealer as a result of the completion of the said proceeding:

Provided that such charge or transfer shall not be void if made for valuable consideration and without notice of such proceeding.

4. The above are the provisions of the Gujarat Sales Tax Act, 1969 which have a bearing on this question and which were taken into consideration while hearing the appeal on the earlier occasion. In the Bombay Sales Tax Act, 1959, "dealer" is defined in Section 2(11) which reads as follows:

2(11). "dealer" means any person who whether for commission, remuneration or otherwise carries on the business of) buying or selling goods in the State, and includes (the Central Government or any State Government) which carries on such business and also any society, club or other association of persons which buys goods from, or sells goods to, its members.

Section 18 of the Bombay Act reads as follows:

On and from 15-5-65 and onwards.

18. Notwithstanding any contract to the contrary, where any firm is liable to pay tax under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment:

Provided that, where any such partner retires from the firm, he shall intimate the date of his retirement to the Commissioner by a notice in that behalf in writing and he shall be liable to pay the tax and the penalty (if any) remaining unpaid at the time of his retirement, and any tax due up to the date of retirement though unassessed at that date.

Provided further where no such intimation is given within fifteen days from the date of retirement, the liability of the partner under the first proviso shall continue until the date on which such intimation is received by the Commissioner.

On and from 1-1-60 to 14-5-65.

18. Notwithstanding any contract to the contrary, where any firm is liable (i) pay tax under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment:

Provided that, where any such partner retires from the firm, he shall be liable to pay the tax and the penalty (if any) remaining unpaid at the time of his retirement, and any tax up to the date of retirement though unassessed at that date.

5. The provisions of Section 19(2) and 19(3) which are relevant for our purpose

read as follows:

19(2). Where a dealer, liable to pay tax under this Act, is a Hindu undivided family, and the joint family property is partitioned amongst the various members or groups of members, then each member or group of members shall be jointly and severally liable to pay the tax (including any penalty) due from the dealer under this Act or under any earlier law, upto the time of the partition, whether such tax (including any penalty) has been assessed before partition but has remained unpaid, or is assessed after partition.

19(3). Where a dealer, liable to pay tax under this: Act. is a firm, and the firm is dissolved, then every person who was a partner shall be jointly and severally liable to pay to the extent to which he is liable u/s 18, the tax (including any penalty) due from the firm under this Act or under any earlier law, upto the time of dissolution, whether such tax (including any penalty) has been assessed before such dissolution but has remained unpaid, or is assessed after dissolution.

6. Section 34 of the Bombay Act which has a bearing on the question which we have to decide, is as follows:

34. Where in respect of any tax (including any penalty) due from a dealer under this Act or under any earlier law, any other person is liable for the payment thereof u/s 19, all the relevant provisions of this Act or, as the case may be, of the earlier law, shall in respect of such liability to such person also as if he were the dealer himself.

Section 62A of the Bombay Act which has also a bearing on the question which we have to decide reads as follows:

62A. Where, during the pendency of any proceeding under this Act, any dealer liable to pay tax creates a charge on. or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever of, any of the assets of his business in favour of any other person with the intention of defrauding the revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the dealer as a result of the completion of the said proceeding:

Provided that, such charge or transfer shall not be void if made for valuable consideration and without notice of such proceeding.

7. But for Section 43 in the Gujarat Sales tax Act 1969, it was possible to take the view that the partner being not a dealer, any transaction entered by him during the pendency of the assessment proceedings, against the firm will not be hit by Section 73 of the Gujarat Act. But Section 43 of the said Act clearly shows that a partner of a firm who is liable to pay any tax due from a dealer firm is to be deemed to be a dealer for all the relevant sections of the said Act and that way, a partner is to be deemed to be a dealer for the purpose of Section 73 of the Gujarat Act. In view of this, the transaction by a partner will also be hit by Section 73 of the Gujarat Act. If the corresponding provisions in the Bombay Act

were the same as in the Gujarat Act, then it would have been possible to take the same view even with regard to the suit, transaction of 1966. Section 34 of the Bombay Act which is corresponding to Section 43 of the Gujarat Act shows that a person other than a dealer is to be deemed to be a dealer for the relevant provisions of the said Act provided he was liable u/s 19. It is pertinent to note that it is not provided in Section 34 of the Bombay Act as provided in sec, 43 of the Gujarat Act that any person liable to pay the dues shall be deemed to be a dealer. While considering who is to be deemed to be a dealer u/s 34 of the Bombay Act, we have to look to Section 19 of the said Act. The provisions of Section 19(3) and 19(4) which are reproduced above, show that the liability of a partner firm u/s 19 would arise only on dissolution of a firm. That liability will not arise when the firm is subsisting. The liability before the dissolution will come u/s 18 of the Act and that liability is not contemplated by Section 34 of the Act. In view of this, the partner of the firm who was the husband of the plaintiff cannot be deemed to be a dealer u/s 34 of the Bombay Act so as to attract the provisions of Section 19 or Section 62A of the Bombay Act. In Section 73 of the Gujarat Act, the transaction with regard to any property of the dealer or any person deemed to be a dealer is rendered void while Section 19(4) of the Bombay Act only speaks about the business of the firm and not any and every property of the partner of the dealer. Section 62A of the Bombay Act also speaks about the assets of the business of the dealer and not any and every property of the dealer. In view of this also, the transaction in favour of the plaintiff with regard to the property which had nothing to do with the business of the firm will not be hit by the provisions of Section 62 A of the Bombay Act.

8. The discussion made above will go to show that the transaction in favour of the plaintiff was not hit by any of the provisions of the Bombay Sales; Tax Act, 1959 which was in force at the relevant time. In view of this, the properties of the plaintiff which were sought to be attached and sold for the recovery of sales-tax dues of the firm are not liable for attachment of sale of the same. I may mention here that even while framing substantial questions of law by this Court while admitting the second appeal, a reference is made to section 73 of the Gujarat Act 1969. But now as discussed above, the Gujarat Sales Tax Act 1969 is not applicable but the Bombay Sales Tax Act 1959 is applicable and that the relevant section of the said Act is Section 62A hence we have to "read Section 62A of the Bombay Sales Tax Act 1959" for "section 73 of the Gujarat Sales Tax Act. 1959" in the substantial question of law formulated by this Court at the time of admitting this appeal. It is obvious that this question is required to be answered in favour of the plaintiff-appellant for the reasons stated above.

9. Before parting with this case, I may mention here that the suit was filed against as many as four defendants. It is not understood why the Union of India was made a defendant in the present case. The Union of India had no concern with this matter. The Mamlatdar, Sales-Tax Recovery, the Mamlatdar, Songadh and Talati-cum-Mantri of Devalpada were also made defendants in the suit. The learned trial Judge decreed the suit against all the defendants. The learned Trial

Judge also did not consider as to how the Union of India was liable and how decree can be passed against the Union of India. I may also further mention that the decree was passed against all the five defendants, while the appeal was filed only by one of the defendants and the other four defendants were not parties to Regular Civil Appeal No. 167 of 1977. It is not understood why the other defendants were not made parties to this appeal. When no appeal was filed on behalf of the other defendants, the result may be that the decree against them may stand and complications may arise. They ought to have been made parties to the appeal either as appellants or respondents when they were defendants in the Trial Court. Particularly when decree was passed against them. The learned Assistant Judge, however, has allowed the appeal and dismissed the suit of the plaintiff, with the result that the suit is dismissed against all the defendants, though not specifically indicated in the judgment of the learned Assistant Judge. No objection also seems to have been raised before the learned Assistant Judge, so far as this aspect is concerned.

10. The learned Assistant Judge had the jurisdiction to set aside the decree even against the other defendants who had not appealed or were not made parties to the appeal, under the Order 41, Rule 33 C.P.C. because while allowing the appeal and dismissing the suit against the State of Gujarat, the decree against the other defendants cannot be allowed to stand. We have, therefore, to read the decision of the learned Assistant Judge as one in exercise of the powers under Order 41, Rule 33 C.P.C., though not specifically indicated anywhere in the judgment. It is surprising that it did not strike to anyone in the appellate Court that even though there were other defendants against whom a decree was passed by the trial Court, they were not parties to this appeal. This is a glaring omission to which attention of anyone would be drawn. I hope that proper care will be taken in future by all concerned to see that such a mistake does not occur in future.

11. The result of the aforesaid discussion is that the learned Assistant Judge committed an error in allowing the appeal of the State of Gujarat and dismissing the suit of the plaintiff. The suit of the plaintiff is required to be decreed in view of my conclusion that the transaction in favour of the plaintiff is not hit by any of the provisions of the Bombay Sales Tax Act 1959. The trial Court as stated in the beginning, and decreed the suit against the defendants but no decree could be passed against the Union, of India as the said Bombay Act has nothing to do with the Sales-tax recovery. The decree could be passed only against the State of Gujarat, Gandhinagar and also the officers namely the defendants Nos. 3, 4 and 5. I may mention here that even the Mamlatdar and Talati, defendants Nos. 3, 4 and 5 are not necessary parties to the suit because any injunction against the State of Gujarat will be sufficient to restrain the officers of the State. When they are made parties to the suit the decree is required to be passed against them also. The judgment and decree passed by the Trial Court are, therefore, modified to the extent that the injunction shall operate only against the defendants Nos. 2 to 5 and not against the defendant No. 1 i.e. Union of India. Subject to this modification, the judgment and decree passed by the Trial Court are hereby

confirmed.

12. The plaintiff-appellant succeeds rather on a technical ground and, therefore, I think It is just and proper to leave the parties to bear their own cost throughout.