(1985) 04 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : L.P.A. No. 20 of 1976

State of Himachal Pradesh and Others — APPELLANT

Vs

Yash Pal Garg — RESPONDENT

Date of Decision : 11-04-1985

Acts Referred:
Himachal Pradesh General Sales Tax Act, 1968 — Section 13

Citation : (1985) 14 ILR HP 251 : (1987) 64 STC 89

Hon'ble Judges : V.P. Gupta, J;T.R. Handa, J

Bench : Division Bench

Advocate : M.S. Chandel, Assistant A.G, for the Appellant; K.D. Sood, for the Respondent

Final Decision : Allowed

Judgement

V.P. Gupta, J.—The respondent filed a writ petition (C.W.P. No. 300 of 1974) seeking relief for cancellation of a demand notice (annexure P-4) regarding payment of sales tax on the amount of Rs. 44,006 (lease money) and for restraining the appellants from recovering the tax. The learned single Judge by his judgment dated 19th August, 1976, allowed the writ petition and quashed the demand notice (annexure P-4).

2. Feeling aggrieved from the judgment of the learned single Judge, the respondents have filed this appeal.

3. Briefly, the facts are that the respondent-firm was carrying on the business and trade of forest lessees and in an auction held on 8th and 9th September, 1974, the respondent gave a successful bid for purchase of forest lot No. 13/74-75 for a sum of Rs. 44,000. 1/4th of the bid money was deposited by the respondent and an agreement of lease was executed between the parties. On 8th October, 1974, the respondent received a demand notice (annexure P-4) from the Conservator of Forests, Himachal Pradesh (appellant No. 3), under the Himachal Pradesh General Sales Tax Act, 1968 (hereinafter the Act), requiring

the payment of sales tax on the auction amount. The respondent had denied the liability to pay the tax. It was alleged that the demand was illegal and against the provisions of Section 13 of the Act. The goods sold to him were not ascertained and the property in the goo7ds did not pass to the purchaser till the forests were exploited. It was alleged that the appellants were not dealers and the standing trees were not goods. In short, the respondent challenged the demand notice and the authority of the appellants to claim the tax.

4. The appellants denied the various allegations of the respondent. The appellants also raised preliminary objections such as (a) the Excise and Taxation Commissioner, Himachal Pradesh, was a necessary party, (b) the dispute was liable to be decided by an arbitrator and the disputes between the parties were arising out of contractual obligations.

5. The learned single Judge found that the Excise and Taxation Commissioner, Himachal Pradesh, was not a necessary party, the writ jurisdiction of this Court was not excluded and the writ petition was maintainable. It further held that the levy of sales tax was in violation of the provisions of the Act and, therefore, the notice (annexure P-4) issued to the respondent was bad and liable to be quashed. The learned single Judge held that the appellants were not dealers as defined in Section 2(c) of the Act and therefore, Section 13 of the Act could not be invoked.

6. During the pendency of this appeal, the Act was amended by the Himachal Pradesh General Sales Tax (Seventh Amendment) Act, 1977 (hereinafter the Amendment Act), in which the term "business" was defined by inserting Clause (aa) in Section 2 and the definitions of the words "dealer" and "goods" were substituted. The word "timber" was also defined. Section 13 of the Act was also substituted and another Section 28A was inserted.

7. In view of these changes, an application for amendment of the writ petition was filed by the respondent (C.M.P. No. 734 of 1978) which was allowed vide orders dated 24th May, 1978. Paras 15(a) to 15(c) were added in the original writ petition, in which the respondent challenged the competency of the State Legislature to amend the Act with retrospective effect.

8. Reply was filed on behalf of the appellants alleging that the amendments could have retrospective effect and were valid.

9. We have heard the learned counsel for the parties.

10. The learned counsel for the appellants contends that in view of the Amendment Act, the respondent is liable to pay the sales tax because he is a "dealer" carrying on the "business" of "timber". The respondent has purchased the trees in an auction from the appellants.

11. The learned counsel for the respondent contends that the Amendment Act cannot be applied retrospectively and the appellants are not doing any "business" because the auction of forest trees is held only twice in an year. The appellants

are not "dealers". The respondent placed reliance upon Board of Revenue and Others Vs. A.M. Ansari and Others, and State of Gujarat Vs. Raipur Manufacturing Company Ltd.,

12. We have considered the contentions.

13. The sole point for determination is as to whether in view of the Amendment Act read with the Act, the respondent is liable to pay the sales tax or not. Every legislation is generally prospective unless there is a clear and unambiguous provision to the contrary. It is an admitted position that a State Legislature is empowered to give retrospective effect also.

14. The learned single Judge has held :

The forest department is not a ''dealer'' since it does not deliver the goods for the purpose of consumption in the Union Territory of Himachal Pradesh. There is no condition in the agreement which enjoins that the goods are delivered or sold to the petitioner for the purpose of consumption in the Union Territory of Himachal Pradesh. That being so the forest department or the Chief Conservator of Forests or the Conservator of Forests cannot be said to be dealers within the meaning of Section 2(c) of the Act.

15. Now, Section 2(c) of the Act prior to the Amedment Act reads as follows :

''dealer means any person including a department of Government who in the normal course of trade sells or purchases any goods that are actually delivered for the purpose of consumption in the State of Himachal Pradesh, irrespective of the fact that the main place of business of such person is outside the said territory and where the main place of business of any such person is not in the said State, dealer includes the local manager or agent of such person in Himachal Pradesh in respect of such business.

Explanations.-(1) A co-operative society or a club or any association which sells or supplies goods to its members or purchases goods specified in Schedule ''C'', is a dealer within the meaning of this clause.

(2) A factor, a broker, a commission agent, a dealer''s agent, an auctioneer or any other mercantile agent by whatever name called and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling, supplying or purchasing goods and. who has, in the customary course of business, authority to sell goods belonging to principals or to purchase goods on their behalf is a dealer.

(3) For the purpose of this clause ''Government'' will include the Central Government or the Government of any other State or Union Territory.

16. By the Amendment Act the definition of "dealer" is changed.

17. Section 2 of the Amendment Act reads as follows :

2. In Section 2 of the Himachal Pradesh General Sales Tax Act, 1968 (hereinafter

called the principal Act), the following amendments shall be and shall always be deemed to have been made, namely :-

(a) after Clause (a), the following new Clause (aa) shall be inserted :-

''(aa) "business" includes,-

(i) any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce, or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern ; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern ;

(b) for Clause (c), the following Clause (c) shall be substituted, namely :-

''(c) "dealer" means any person who carries on (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods, directly or indirectly, for cash, or for deferred payment, or for commission, remuneration or other valuable consideration and includes :-

(i) a local authority, a body corporate, a company, a co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business ;

(ii) a factor, broker, commission agent, a dealer''s agent or any other mercantile agent, by whatever name called and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not; and

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.

Explanations.-(1)....

(2) A Government which whether or not in the course of business, buys, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall, except in relation to any sale, supply or distribution of surplus, unserviceable or old stores or materials or waste products or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purpose of this Act.

(3) For the purpose of this clause "Government" shall include the Central Government or the Government of any other State or Union Territory ;''

(c) for Clause (e), the following Clause (e) shall be substituted :-

''(e) "goods" means every kind of movable claims, stocks, shares or securities and includes growing crops, grass, trees and things attached to or fastened to anything permanently attached to the earth but which under the contract of sale are agreed to be severed and includes any class of goods ; and

(d) after Clause (1) the following Clause (11) shall be inserted :-

''(11) "timber" includes trees when they have fallen, or have been felled on agreed to be felled and all wood whether cut up or fashioned or hollowed out for any purpose or not ;''.

18. The word "business" is now defined by the Amendment Act. It is mentioned by the Amendment Act that the amendment shall be and shall always be deemed to have been made. In other words, a retrospective effect to the Amendment Act has been given.

19. The respondent was a successful highest bidder at the time of the auction of lot No. 13/74-75 of the forest trees in Chopal Division. The auction was held at the instance of appellant No. 3 on behalf of the State of Himachal Pradesh. It is an admitted position that the forest department of Himachal Pradesh, auctions various lots of forest trees every year. Generally these auctions are held twice in a year. The appellants are covered by the definition of a "dealer" as defined in Section 2(c) of the Amendment Act. The trees auctioned to the respondent are "goods" u/s 2(c) of the Amendment Act. Hence there is a sale of goods by the appellants to the respondent. The appellants have been selling trees of the forests and this trade or adventure is covered within the definition of the word "business" as defined in Section 2(a) of the Amendment Act.

20. The respondent is admittedly a "dealer" carrying on timber business.

21. The learned counsel for the respondent contends that the appellants were not carrying on the business regularly. In Board of Revenue and Others Vs. A.M. Ansari and Others, the Supreme Court interpreted the various provisions of the Andhra Pradesh General Sales Tax Act, 1957. In the Andhra Pradesh Act, the term "dealer" is defined in similar terms as in the principal Act, but "business" is defined in the following words :

''business'' includes-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom ; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

22. Further in Board of Revenue and Others Vs. A.M. Ansari and Others, reliance was placed upon State of Gujarat Vs. Raipur Manufacturing Company Ltd., for

interpreating the word "business". State of Gujarat Vs. Raipur Manufacturing Company Ltd., was under the Bombay Sales Tax Act and in the Bombay Sales Tax Act the word "business" was not defined. In these circumstances, it is observed that to find out as to whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit-motive. It was further observed that when a subsidiary product is turned out in the factory of the assessee regularly and continuously and it is being sold from time to time, an intention to carry on business in such product may be reasonably attributed to the assessee. In this situation the learned Judges in Board of Revenue and Others Vs. A.M. Ansari and Others, held that the auctions of the forest produce by the Government of Andhra Pradesh are admittedly carried on only annually and not at frequent intervals. Thus the important element of frequency being lacking in the instant cases, it cannot be held that the said Government was carrying on the business of sale of forest produce.

23. Both these judgments are distinguishable because the word "business" was not defined in the judgment of State of Gujarat Vs. Raipur Manufacturing Company Ltd., and in the judgment of Board of Revenue and Others Vs. A.M. Ansari and Others, the word "dealer" was defined in a different manner.

24. In the present case by the Amendment Act the definition of the word "dealer" specifically states that the business of such dealer may be regular or otherwise. Hence in view of the definition under the Act as is incorporated by the Amendment Act, the appellants will be considered to be "dealers" because they had been admittedly auctioning the forest produce twice in every year and were carrying on this business regularly or otherwise.

25. In these circumstances, the notice demanding sales tax from the respondent is valid and the same is not liable to be quashed. It cannot be held that the respondent is not liable to pay the sales tax.

26. No other point was urged before us.

27. As a result of the above discussion, the judgment of the learned single Judge is set aside and the present appeal is accepted. The writ petition filed on behalf of the respondent is dismissed. The parties are left to bear their own costs.

