(1991) 03 P&H CK 0112

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 644 of 1984

State of Punjab and Others — APPELLANT

Vs

Pardeep Aggarbatti — RESPONDENT

Date of Decision : 27-03-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 32 Rule 3, Order 32 Rule 3(4), Order 32 Rule 3A, Order 32 Rule 4
Punjab General Sales Tax Act, 1948 — Section 5(1)

Citation : (1993) 1 ILR (P&H) 169

Hon'ble Judges : G.C. Mittal, Acting C.J.;H.S. Bedi, J

Bench : Division Bench

Advocate : O.P. Goyal,A.A.G. Punjab, for the Appellant;

Final Decision : Allowed

Judgement

H.S. Bedi, J.—This judgment will also dispose of Letters Patent Appeal Nos. 644 to 653 of 1984, 450 of 1988 and Civil Writ Petition No. 1388 of 1984, as the common questions of law are involved in these cases. The facts of the case are being taken from L.P.A. No. 644 of 11984.

2. The Respondent-firm is a registered dealer under the Punjab General Sales Tax Act, 1948 (hereinafter referred to as the ''Act'') for the sale of Dhoop and Aggarbatti. In the quarterly return filed by the Respondent for the assessment year 1973-74, the Respondent firm claimed that the sale of Dhoop and Aggarbatti be assessed to tax at the rate of 6 per cent. The assessing authority did not agree and levied sales tax at the rate of 10 per cent. The appeal filed by the Respondent firm against the order of assessment was allowed and the Assessing Authority was directed to calculate the sales-tax on the sales of Dhoop and Aggarbatti at the rate of 6 per cent instead of 10 per cent. The Joint Excise and Taxation Commissioner initiated suo moto revisional proceedings to examine the legality and propriety of the aforesaid order, and,-vide order dated 22nd May, 1979, he set aside the same and restored that of the Assessing Autho-rity,

thereby holding that Dhoop and Aggarbatti were liable to be assessed to sales-tax at the rate of 10 per cent. The revision petition filed by the Respondent-firm against the order of the Joint Excise and Taxation Commissioner dated 22nd May, 1979, was also admissed. The claims of the dealer before the learned Single Judge was that it was liable to be assessed sales-tax at the rate of 6 per cent and not at 10) per cent. This claim of the dealer was upheld. The state of Punjab has now come up in appeal against the order of the learned Single Judge.

3. The relevant portion of Section 5(1) of the Act as it exists today on the statute, is reproduced below:

5(1) Subject to the provisions of this Act, there shall be levied on the (taxable turnover of a dealer) a tax at such rates not exceeding (seven paise) in a rupee as the (State) Government may by (notification direct.

Explanation: The amount of tax shall be calculated to the nearest rupee fey ignoring fifty paise or less and counting more than fifty paise as one rupee) Provided that a tax at such rate, not exceeding (ten paise) in a rupee, as may be, so notified may ''be levied on the sale of goods as specified in Sched''ule ''A'' appended to this Act from such date as the Government may by notification direct. The State Government after giving by notification not less than (twenty days) notice of its intention so to do may by like notification add to or delete from this schedule, and thereupon this Schedule shall be deemed to have been amended accordingly.

It is pertinent to mention that in the proviso to Sub-section (1) of Section 5, quoted above, the word "Luxury" which was juxtaposed between the words ''of'' and ''goods'' was omitted with retrospective effect,-vide Punjab Act No. 11 of 1976 notified on 27th February, 1976 and was deemed to have always been omitted by the said amendment Act. Entry No. 16 in Schedule ''A'' before it substitution,-vide notification dated September 28, 1979 read as under:

Cosmetics, perfumery and toilet goods, excluding tooth paste, tooth powder kum kum and soap.

On substitution, Entry No. 16 was bifurcated upto two entries numbered as 16 and 16-A and these are reproduced below:

16. Cosmetics and toilet goods excluding tooth paste, tooth powder Kum Kum and soap.

16-A. Perfumery including Dhoop and Aggarbatti.

A reading of the two subsequent entries substituted by way of amendment would indicate that the word "perfumery" was removed from Entry No. 16 and introduced as Entry No. 16-A. in entry No. 16-A, as indicated above, it has been specifically provided that perfumery would include Dhoop and Aggarbatti. The learned single Judge relying on the interpretation of the word "perfumery" and also the judgment of this Court in Assessing Authority, Amritsar and Anr. v. Amir

Chand Om Parkash (1974) 33 S.T.C. 120, and Commissioner of Sales Tax Maharashtra State Bombay v. Gordhandas Tokersey (1983) 52 S.T.C. 381, allowed the writ petitions, as already mentioned above.

4. Mr. O.P. Goyal, Learned Addl. Advocate-General, appearing for the Appellant State has contended that the judgment in Amir Chand''s case (supra) proceeded on a basis that no longer exists. In the aforesaid judgment, it was held that before charging the enhanced tax, two requirements were necessary as laid down in the proviso to Sub-section (1) of Section 5 of the Act; (1) that the item should be a Luxury good; (2) that it should be mentioned in the Schedule. The inference that was drawn by the Division Bench was that the Government was presumed to have entered only such goods in Schedule-A as were qualified to be called Luxury Items and as Dhoop and Aggarbatties were required for religious pujas or worship and were to be used by all whether rich or poor, they did not in any way qualify as Luxury Items. The judgment in Amir Chand''s case (supra) was, therefore, based on the word ''luxury'' which occured in the proviso to Sub-section (1) of Section 5 of the Act. As already stated above, the word ''luxury'' was deleted from the proviso to Sub-section (1) of Section 5 with retrospective effect and, as such, the judgment of the Division Bench is no longer applicable to the facts of the case. As a matter of fact the first of the two qualifications which were required to be fulfilled (as mentioned by the Division Bench) having become redundant, the only requirement subsisting now is that the item should be mentioned in the Schedule. As mentioned above, Entry No. 16-A specifically mentions ''perfumery'' as including Dhoop and Aggarbatties. Having held as above that the judgment of the learned Division Bench in Amir Chand''s case is distinguishable and no longer applicable.

5. In this connection, we are further of the opinion that even without the inclusive part of the definition in Entry 16-A, the word ''perfumary'' would include Dhoop and Aggarbatties. The ratio of the judgment in Commissioner of Sales Tax, U.P. v. Indian Herbs Research and supply Company (1970) 25 S.T.C. 151, is fully applicable to the facts of the entitled to the decree for specific performance. Dissatisfied with the decree of the trial Court, the Respondent preferred an appeal to this Court. The learned single Judge endorsed the findings of the trial Court that the default in complying with the agreement dated 4th June, 1979 had been committed by the Appellant-Defendant. On the question of the non-compliance with the provisions of Order 32, Rule 3, CPC the learned single Judge held that Col. Sukhdev Singh, though not formally appointed as the guardian, had conducted the cases for the Appellant effectively and fought the litigation to the best of his ability and with tenacity. It was held that the noncompliance with the aforesaid provisions of the CPC was an irregularity and, as such, was required to be ignored in terms of Order 32, Rule 3-A, CPC as no prejudice has been suffered by the Appellant. The learned Single Judge also held that the reasons recorded by the trial Court in denying the relief of specific performance were not germane. The learned single Judge allowed the appeal and decreed the suit. Against the decree of the learned single Judge, the present letters patent

appeal has been filed.

4. Mr. R.S. Bindra, learned senior Advocate for the Appellant has reiterated the various arguments raised before the learned single Judge. He has argued that on a reading of the evidence, it is clear that the default in execution of the sale-deed lay on the Respondent. We have examined this argument and perused the evidence on the record and find that the view taken by the trial Court as also by the learned single Judge on this point is correct and no interference is called for in an appeal under the letters patent.

5. Mr. Bindra then argued that the original contract stood novated in view of the agreement arrived at in the High Court on 4th February, 1980, and, thereafter in the Supreme Court on 2nd October, 1980. He has also pointed out that during the pendency of the present letters patent appeal yet another compromise had been arrived at between the parties. It appears that the hearing of this LPA first commenced before a Division Bench on January 14, 1987, and continued for a number of days. On January 16, 1987, the counsel for the Respondent had not concluded the arguments and the hearing was adjourned to January 28, 1987. On that day the parties took time to explore the possibility of a compromise and the compromise was, in fact, arrived at between the parties. A statement was recorded by Col. Sukhdev Singh agreeing to pay Rs. 2,25,000 to Shri C.B. Goel towards the full and final settlement of the dispute and this statement was duly endorsed by Shri V.K. Sharma, counsel for the Appellant Gurpreet Singh. On this statement having been made, the offer was accepted by Shri C.B. Goel when he made the following statement:

I accept the offer made by Col. Sukhdev Singh and Shri V.K. Sharma, counsel for the Appellant Gurpreet Singh.

On this the case was adjourned to March 17, 1987, on which date: payment of Rs. 2,25,000 was to be made. It appears however that during this interregnum the Respondent changed his mind and decided to resile from the agreement taking advantage of the fact that the compromise had not been recorded in terms of Order 23. Rule 3, Code of Civil Procedure, which required the compromise to be in writing and signed by the parties. As the compromise had fallen through, the learned Judges constituting the DB directed the matter to be listed for hearing before another Bench. The Appellant herein however approached the Supreme Court by way of Civil Appear No. 2035 of 1987 praying that the statements recorded constituted a valid compromise. The Supreme Court however dismissed the appeal holding that the compromise recorded before the High Court was not valid as it had not been recorded in terms of the mandatory provisions of Order 23, Rule 3, Code of Civil Procedure.

6. It will be seen from the above narration of facts that the argument raised by Mr. Bindra has no force as the agreements arrived at on 4th February, 1980, and the subsequent one dated 2nd September, 1980, did not constitute a novation of the contract as these were proposed settlements between the parties in order to

settle the dispute and there was no intention of the parties to change or modify any part of the agreement dated 4th June, 1979. This reasoning is also to be applied with regard to the third settlement arrived at before the Letters Patent Bench on 28th January, 1987. The trial court and the learned single Judge have also held that the action of the parties in respect of the earlier two agreements (the third one had not yet come into existence) does not constitute a novation of the contract dated 4th June, 1979. We are in agreement with the trial Court as also with the learned single Judge on this score as well.

7. Mr. Bindra has additionally contended that the plaint in a suit for specific performance must conform to the pro formas set out in Form Nos. 47 and 48 of Appendix ''A'' to the Code of Civil Procedure, and it has to be specifically pleaded that the Plaintiff was ready and willing to perform his part of the contract. He has argued that these averments were lacking in the plaint. We have gone through the plaint and find that necessary averments have been made in the plaint and, as such, this argument too is misplaced.

8. The primary attack on behalf of the Appellant to the judgment of the learned single Judge however is that as Col. Sukhdev Singh, guardian of the minor Appellant, had not been appointed to act as such by complying with the procedure laid down under Order 32, rules 3 and 4, Code of Civil Procedure, the suit was therefore not competent and should have been dismissed on that short ground. This argument had been considered and accepted by the trial Court, but the learned single Judge, in appeal upset this finding holding that the Appellant was effectively represented in the suit by his father and guardian Col. Sukhdev Singh and the omission of the note to make a formal order of appointment of Col. Sukhdev Singh as guardian ad litem had not caused any prejudice to the minor and, as such, the suit was competent. The matter has to be examined in the light of the provisions of Order 32, rules 3 and 4 of the Code of Civil Procedure, which read as under:

(1) Where the Defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a person to be guardian or the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the Plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, (upon notice to the father or where there is no father, to the mother, or where there is no father or mother; to other natural guardian), of the minor, or, where there is (no father, mother or other natural guardian), to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with

notice under this sub-rule.

Sub-rule (3) of Rule 4 reads as under:

No person shall without his consent (in writing) be appointed guardian for the suit, but the Court may presume such consent to have been given unless it is expressly refused.

It will be seen from the provisions of Order 32-rule 3. Code of Civil Procedure, that the legislature has advisedly provided special protection for minors and persons of unsound mind as they being unable to look after their own interest, require special care. Rule 3 specifically provides that for the appointment of a guardian, an application has to be made and such application must be supported by an affidavit giving the details mentioned in Sub-rule (3). Sub-rule (4) of Rule 3 provides that no order shall be made on the application filed under Rule 3 unless a notice has been served on the guardian, if any, and where there is no such guardian, or the father or on mother or on various other persons mentioned in Sub-rule (4) of Rule 3. Sub-rule (3) of Rule 4 stipulates that no person is to be appointed guardian without his consent in providing (and the underlined portion which is an amendment made by the State of Punjab) provides that the Court may presume such consent unless it is expressly refused. The inflexible rule therefore is that it is incumbent on the Plaintiff suing a minor Defendant to file an application in Court for the appointment of a guardian and the subsequent steps that are to be taken are within the purview or province of the Court. We are of the view that if an application is not made as provided by Order 32, Rule 3 any guardian who may have acted for the minor, would not be clothed with the requisite authority to act as such. The consent that can be presumed is only if an application has been made, and notice issued to the proposed guardian.

9. Mr. Sarin, learned Senior Advocate, appearing for the Respondent has also placed reliance on the provisions of Rule 3-A of Order 32 of the Code of Civil Procedure, which reads as under:

(1) No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree. He has argued that the case was admirably fought right up to the Supreme Court by Col. Sukhdev Singh and all possible steps were taken by him to defend the interest of the minor. On this reasoning, he asserts that no prejudice has been suffered by the minor case. It has been held here that the word ''perfume'' has now acquired an extended meaning so as to include anything sweet from smoking incense to fragrance of flowers. The Hon''ble Supreme Court held further as under:

We are accordingly of the opinion that the word "perfume" in Item No. 37 of the Government notification should be construed in its ordinary sense, i.e. any substance natural or prepared which emits or is capable of emitting an agreeable odour either when burned or by the application of some foreign matter to induce any chemical reaction which results in fragrant odours being released from that substance. If we are right in taking this view dhoop and dhoopbattis manufactured by the Respondent fall within the category of "perfume" under item 37 of the Government notification and are liable to tax imposed therein Entry No. 37 mentioned above was in the following terms "scents and perfums (in English) and Itra tatha sugandhian (in Hindi)". It is, therefore, clear that Dhoop and Aggarbattis would now qualify to be assessed to tax at the enhanced rate of 10 per cent.

6. In view of the facts stated above, the letters patent appeals are allowed and the judgment of the learned Single Judge is set aside and it is held that the dealers would be liable to payment of sales-tax at the rate of 10 per cent. As a consequence of the letters patent appeal having been allowed, civil Writ Petition No. 821 of 1981 is dismissed, but with no order as to costs.