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(1951) 02 CAL CK 0044

In the Calcutta High Court

Case No : Matter No. 80 of 1950

Staynor and Co. APPELLANT

Vs

Commercial Tax Officer RESPONDENT

Date of Decision : 27-02-1951

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : 55 CWN 583

Hon'ble Judges : Bose, J

Bench : Single Bench

Advocate : Sukumar Mitra, for the Appellant;S.M. Bose, Advocate-General and A.K. Sen, Junior Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Bose, J.—This is an application under Article 226 of the Constitution for Writs in the nature of Mandamus, Certiorari and Prohibition for an order cancelling the Requisition of the Respondent, dated the 2nd August. 1950, which called upon the petitioners to resubmit return for quarters ending- June. September and December, 1949, and March and June, 1950, along with treasury challans and threatened to impose penalty u/s 11(1) of the Bengal Sales Tax Act in default of compliance within 30 days and also for quashing of the said proceedings of assessment. The petitioners have been carrying on the business of auctioneers in co-partnership under the name and style of Staynor & Co. since 1st March, 1943. it is alleged in the petition that the predecessor in interest of the petitioners got the firm of Staynor & Co. registered as a ''dealer" under the Bengal Finance Sales Tax Act. 1941, under a misapprehension as to their correct status, and the petitioners also submitted returns under the impression that they were liable to tax as dealer and assessments have been made on them up to the quarter ending 31st March. 1946. In respect of succeeding quarters up to 30th June. 1950, returns have been submitted but no assessments have yet been made.

2. It is further Stated in the petition that the petitioners'' business consists in

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auctioning furniture and miscellaneous goods belonging to the Government of India and private parties in consideration of commission on sales, and so it is not a dealer.

3. On the 30th May. 1950. the petitioners applied to the Commissioner of Commercial Taxes, u/s 18 of the Act for determination of certain questions and in particular the question whether the petitioners'' firm is a dealer or not. The petitioners also applied to the Commissioners for stay of pending proceedings for assessment and the Stay was actually granted by the Commissioner. But by reason of the promulgation of Ordinance X of 1950, on the 30th July, 1950, which repealed section 18 of the Act the said proceedings of the petitioners pending before the Commissioner were discharged in terms of the provision of the Ordinance on the 7th August, 1950.

4. In the meantime on the 2nd August. 1950, the Respondent Commercial Tax Officer called upon the petitioners to submit returns for quarter ending June. September and December, 1949, and March and June, 1950, along with the Treasury Challan and threatened to impose penalty u/s 11(1) of the Act in default of compliance within 30 days.

5. The petitioners thereupon moved this Court on the 1st September, 1950. and obtained a Rule Nisi. It is this Rule which has now come up for hearing before me.

6. It is contended that an auctioneer is not a dealer, within the meaning of section 2 (c) of the Bengal Sales Tax Act and it is argued with reference to sections 2 (g) (h) and (i) and sections 3, 4, 5, 7, 10,(3), 11 and 13 of the Act and the Forms in the Appendix and with reference to Rules 5 (ii) and (iii), 14 (ii), 49 and 51 of the Bengal Sales Tax Rules that unless the person selling the goods is The owner of the goods he cannot be considered as a dealer within the meaning of the Act. It is submitted that this idea pervades the entire scheme of the Act. An auctioneer is not the owner but he simply auctions other people''s goods. I cannot accept this contention. An auctioneer has dominion and possession of the goods. It is the stroke of his hammer that completes the sale and transfers property or ownership in the goods to the bidder who purchases the goods. He is the person who is actually engaged in the business of selling" the goods. The Sales Tax is on the transaction of sale and not on the goods. It is because of the sale that the tax is imposed. It is therefore immaterial whether the auctioneer is the owner of the goods or not. I have no hesitation in coming to the conclusion that the petitioners are dealers within the meaning of section 2 (c) (i) of the Act.

7. It was contended that the petitioners had no remedy open under the Act after the '' repeal of section 18 of the Act and this application is therefore properly made. I am unable to accede to this contention. The effect of repeal of Section 18 has been to enlarge the power of the Commercial Tax Officer under Rule 71 of the Sales Tax Rules and he is competent to deal with the question of a person being a dealer or not when an application for registration as a dealer is made

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before him.

8. The petitioners'' case however stands on a different footing. They are already registered as a dealer. The petitioners purchased the business in May, 1943, and new Registration Certificate was issued to them on 22nd May, 1943, u/s 17 of the Act. They have not taken any steps to have the registration cancelled. So long as they are registered they are liable to pay the tax.

9. It is submitted by the learned Advocate-General that there is no allegation of demand of justice and its refusal in the petition and this is fatal to the maintainability of the application for mandamus and reliance is placed on the case reported in Surendra Nath Das and Others Vs. The State of West Bengal, (Harries. C. J. & Banerjee, J.). This decision is binding on me and I accept the contention. In the result the petition fails and the rule must be discharged with costs.

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