
(1981) 02 BOM CK 0022
In the Bombay High Court
Case No : Sales Tax Reference No. 42 of 1977

Suresh Trading Company

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-02-1981

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 12A, 2, 22, 22(3), 22(5A)

Citation : (1981) 48 STC 207

Hon'ble Judges : Sujata V. Manohar, J; D.P. Madon, J

Bench : Division Bench

Judgement

Madon, J.—The applicants were at all relevant times registered as a dealer under the Bombay Sales Tax Act, 1959 (hereinafter for the sake of brevity referred to as "the said Act"). During the period 1st January, 1967, to 31st December, 1967, the applicants purchased dyes and chemicals of the aggregate value of Rs. 92,050.30 from Messrs. Sulekha Enterprises Corporation (hereinafter for the sake of brevity referred to as "Sulekha Enterprises"). It appears that these purchases were made on four different dates, and in respect of them Sulekha Enterprises issued to the applicants their bills dated (1) 9th February, 1967, in the sum of Rs. 28,225, (2) 17th February, 1967, in the sum of Rs. 29,205, (3) 15th May, 1967, in the sum of Rs. 12,870 and (4) 17th May, 1967, in the sum of Rs. 21,750.30. Sulekha Enterprises were also registered as a dealer under the said Act, and each of these bills contained a certificate that the registration certificate of Sulekha Enterprises was in force on the date of the sale of the goods to the applicants. Such certificates were signed by the proprietor of Sulekha Enterprises. Thereafter the applicants resold in the State of Maharashtra the said goods purchased by them from Sulekha Enterprises.

2. In their assessment for the said period 1st January, 1967, to 31st December, 1967, the applicants claimed to deduct from their turnover of sales the turnover of resales of the said goods purchased by them from Sulekha Enterprises. This deduction was claimed by the applicants u/s 10(1)(ii) of the said Act under which

the turnover of resales of goods purchased by a dealer from a registered dealer (that is, a dealer registered u/s 22 of the said Act) is to be excluded from his turnover of sale of goods specified in Schedule E to the said Act for the purpose of arriving at his taxable turnover, provided a certificate as provided in section 12A has been furnished. The certificate mentioned in section 12A is to be contained in the bill issued by the selling dealer and is to be in the form in which the certificates appear on the above-mentioned bills of Sulekha Enterprises. The Sales Tax Officer, however, disallowed the applicants' claim for deduction, and included the turnover of the said resales in the applicants' taxable turnover of sales on the ground that the registration certificate of Sulekha Enterprises was cancelled on 25th August, 1967, with effect from 1st January, 1967, and, therefore, at the dates when the applicants purchased the goods in question Sulekha Enterprises could not be said to be a registered dealer. In view of the disallowance of this claim for deduction, the amount of tax paid by the applicants prior to filing their quarterly return became less than eighty per cent of the amount of tax finally assessed on them, and accordingly the Sales Tax Officer levied a penalty in the sum of Rs. 1,700 upon the applicants under clause (c) of sub-section (2) of section 36 of the said Act, which provided that a dealer who has concealed the particulars of any transaction, or knowingly furnished inaccurate particulars of any transaction liable to tax, will be liable to pay a penalty in a sum not exceeding one and one-half times the amount of the tax. Explanation (1) to the said clause (c) further provides that where the amount of tax paid by the dealer for any year is found to be less than eighty per cent of the amount of tax assessed, he shall be deemed, for the purpose of the said clause (c), to have concealed the turnover, or knowingly furnished inaccurate turnover liable to tax, unless he proves to the satisfaction of the Commissioner of Sales Tax that the payment of a lesser amount of tax was not due to gross or wilful neglect on his part.

3. The applicants went in appeal to the Assistant Commissioner of Sales Tax against the said order of assessment. Their appeal was dismissed, and so far as the levy of penalty was concerned the Assistant Commissioner held that as the amount of tax paid by the applicants was less than eighty per cent of the amount of tax assessed, the levy of penalty was proper and justified. The applicants thereafter went in second appeal to the Maharashtra Sales Tax Tribunal. The Tribunal upheld the disallowance of the claim for deduction, but deleted the imposition of penalty.

4. At the instance of the applicants the Tribunal has stated this case and referred the question of law set out therein to this High Court. Both in the said question of law as also throughout its judgment the Tribunal has by mistake mentioned the date of cancellation of the registration certificate of Sulekha Enterprises as 25th May, 1967, instead of as 25th August, 1967. Both the learned counsel are agreed that this is an obvious typographical error on the part of the Tribunal and that in the question referred to us the correct date should be mentioned. The question of law referred to us, with the date of the cancellation of the registration

certificate of Sulekha Enterprises corrected as required, is as follows :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the sales tax authorities were justified in treating the purchases of the applicants made from Sulekha Enterprises as from an unregistered dealer on the ground that even though the registration certificate of Sulekha Enterprises was cancelled on 25th August, 1967, the cancellation thereof was operative with effect from 1st January, 1967, in so far as the purchases of the applicants effected from the said party prior to 25th August, 1967, were concerned ?"

5. At the hearing of this reference Mr. Sheth, the learned counsel for the applicants, submitted that though under the said Act the registration certificate of a dealer could be cancelled with retrospective effect from an anterior date, such cancellation could not prejudice the rights which had accrued to third parties by reason of their dealings with such dealer before the date of the order of cancellation. On the other hand, the learned Advocate-General who appeared on behalf of the State submitted that if a statute gave to the authorities the power to cancel a registration certificate from an anterior date, all the consequences of such cancellation should be made to flow with effect from the date from which the order of cancellation was made operative and that these consequences should apply not only to the dealer whose registration certificate is cancelled, but to all third parties who had dealt with such dealers during the period from the operative date of the order up till the date of the cancellation of the order.

6. Before we deal with these rival contentions it will be convenient to set out at this stage what had happened with respect to the registration certificate of Sulekha Enterprises. One Srichand R. Asrani, as the proprietor of Sulekha Enterprises, had made an application for registration to the registering authority, C Ward, Bombay, on 6th August, 1966. On receipt of this application, the Sales Tax Officer deputed one E. Viegas, a Sales Tax Inspector, to the place of business of Sulekha Enterprises to verify the particulars furnished by them in their application for a registration certificate. The Sales Tax Inspector, after visiting the place twice, has made a detailed report, which is known in the terminology peculiar to sales tax department as a visit report. In the said visit report it is clearly mentioned that so far as office premises were concerned, Sulekha Enterprises had a table-space accommodation at the address mentioned in the application for registration. It is further mentioned in the said visit report that the said inspector had seen the leave and licence agreement granted to Sulekha Enterprises in respect of the said table-space accommodation, the books of account and vouchers, and had checked the date from which the said books of account and the said business had commenced. The said visit report further stated that it was apparent that Sulekha Enterprises were a bona fide dealer, but as they had a table-space accommodation the follow-up action might be informed to keep a check upon them. Thereafter on 29th August, 1966, one P. V.

Shah, the proprietor of Messrs. P. V. Shah and Company, to whom Sulekha Enterprises had sold goods, was summoned and examined. The books of account of the said P. V. Shah were also examined, and it was ascertained from him as also from his books of account and by verification of the bill issued to him by Sulekha Enterprises that the sales made by Sulekha Enterprises to him were in fact made and were genuine. Two days later, namely, on 1st September, 1966, the said Asrani was summoned and examined and correspondence addressed to him looked at to verify the address given by him in his application for registration. Thereafter a certificate of registration dated 2nd September, 1966, was issued to Sulekha Enterprises in which the business is shown as of reseller. It appears that Sulekha Enterprises filed their quarterly returns up to 31st December, 1966, and did not file any returns thereafter. A notice was issued to them on 8th April, 1967, to produce all their books of account from the commencement of the business. Thereafter Sulekha Enterprises made an application for cancellation of registration, which was received in the office of the registering authority on 21st July, 1967. In that application it was stated that the business of Sulekha Enterprises was closed with effect from 1st July, 1967. In the meantime another notice was issued to Sulekha Enterprises to show cause on or before 19th August, 1967, why their registration certificates, both under the said Act and the Central Sales Tax Act, 1956, should not be cancelled with effect from 1st January, 1967. As neither the said Asrani, the proprietor of Sulekha Enterprises, nor anyone else on behalf of Sulekha Enterprises appeared before the Sales Tax Officer, the Sales Tax Officer (IX). Enforcement Branch, Greater Bombay, by his order dated 25th August, 1967, held that the said business was discontinued with effect from 1st January, 1967, and cancelled the registration certificate granted to Sulekha Enterprises with effect from that date, namely, 1st January, 1967. Presumably their certificate under the Central Sales Tax Act, 1956, was also similarly cancelled.

7. In view of the cancellation on 25th August, 1967, of the registration certificate of Sulekha Enterprises with effect from 1st January, 1967, the question which arises for determination is whether the resales of goods in question made by the applicants can be said to be resales of goods purchased from a registered dealer so as to entitle the applicants to deduct the turnover of such resales from their turnover of sales, the goods having been purchased in February and May, 1967. Sub-section (1) of section 10 applies to turnover of sales of goods specified in Schedule E to the said Act. Admittedly, dyes and chemicals fell under the residuary entry 22 in the said Schedule E. There is also no dispute that each of the four bills in respect of these sales made by Sulekha Enterprises to the applicants contained a certificate as required by section 12A of the said Act; the only ground for disentitling the applicants to the deduction claimed by them being that by reason of a subsequent event, namely, the cancellation of the registration certificate some months after the dates of the sales to the applicants with effect from a date prior to the date of such sales, Sulekha Enterprises cannot be said to be a registered dealer. In order to test the validity of this

contention it now becomes necessary to consider the relevant provisions of the said Act and the Rules made thereunder. Clause (25) of section 2 of the said Act defines the expression "registered dealer" as meaning "a dealer registered u/s 22". u/s 3 every dealer whose turnover either of all sales or of purchases made during any year commencing on 1st April exceeds the relevant limit specified in sub-section (4) of that section is to be liable to pay tax under the said Act with effect from the date when his turnover had exceeded the specified limit. Under sub-section (3) of that section such dealer's liability to pay tax continues until his registration is duly cancelled. Section 22 casts a duty upon every dealer who is liable to pay tax u/s 3 not to carry on business as a dealer, unless he possesses a valid certificate of registration. For this purpose, the dealer is to apply in the prescribed manner to the prescribed authority. The manner which is prescribed by rule 7 of the Bombay Sales Tax Rules, 1959 (hereinafter for the sake of brevity referred to as "the said Rules"), is by making an application to the registering authority. Under clause (h) of rule 2 the registering authority is the Sales Tax Officer having jurisdiction over the local area in which any place or places of business of a dealer are situate. u/s 22(3) if the prescribed authority, that is, the registering authority, is satisfied after such inquiry as it deems fit that an application for registration is in order, it is to register the applicant and to issue to him a certificate of registration in the prescribed form. Rule 9 of the said Rules requires that every registered dealer is to display conspicuously at each place of his business the certificate of registration or a copy thereof. u/s 63(1)(a) whoever carries on business as a dealer without being registered in contravention of section 22 commits an offence which is punishable with simple imprisonment for a term which may extend to six months, or with fine which is not to be less than Rs. 500, except for reasons to be recorded in writing, or with both.

8. Under entry 54 in List II of the Seventh Schedule to the Constitution of India taxes on the sale or purchase of goods other than newspapers and other than on sale or purchase of goods taking place in the course of inter-State trade or commerce are matters which pertain exclusively to the domain of the State Legislatures. For administrative convenience, however, the taxes which the State of Maharashtra has levied on the sales and purchases of goods are not in respect of every sale or purchase made within the State but in respect of sales or purchases made by a dealer who is inter alia defined by clause (11) of section 2 as meaning any person who carries on the business of buying or selling goods in the State. Further, it is not every sale or purchase made by each and every dealer that is taxed under the said Act. To tax small dealers whose annual turnover may be negligible would cost the State far more than it would bring in by way of revenue, and accordingly section 3(4) has prescribed the limits of turnover which is not taxable and exceeding which limits makes a dealer liable to pay the tax and to get himself registered and then continue to be so liable as long as his registration certificate is not cancelled. It is, however, not purely for the purposes of making it convenient for the State to assess and collect tax that

registration is provided in the case of dealers whose turnover exceeds the prescribed limit. To tax every sale and every purchase made by a dealer within the State would be to increase the price of goods manufactured or produced or sold in the State to a limit which would make them unattractive and unable to stand competition with goods manufactured, produced or sold in other States. Intermediate sales are, therefore, exempted, and some goods are taxed at the first stage by levy of a sales tax and some at the last stage by levy of a general sales tax. Some goods, namely, the goods mentioned in Schedule E to the said Act, are subject, however, to tax at both stages. In the case of the sales made by the applicants general sales tax was payable by them irrespective of the fact whether the goods had been purchased by them from a registered dealer or not and such tax has in fact been paid by them. The controversy centres round the levy of sales tax upon these resales. The manner of exempting intermediate sales or first sales or last sales in the said Act is by the introduction of a system of grant of declarations and issue of certificates by the seller or the purchaser, as the case may be, and by providing for the obtaining of licences, authorizations, recognitions and permits by a registered dealer. Registration also entitles a dealer who is liable to pay tax to collect or recover the amount of such tax from the person to whom he sells the goods. For him to collect such tax if he were not registered, even though he would be liable to pay tax himself, would be an offence u/s 63 of the said Act. Registration further enables a dealer, when his seller has recovered from him tax on the sales made to him, to set-off, either wholly or partly, in certain cases the amount of tax so recovered against his tax liability. Sales by a registered dealer to other registered dealers are also in a large number of cases exempt from payment of sales tax. A registered dealer when he sells goods to another registered dealer or if his turnover has exceeded Rs. 60,000 in the previous year when he sells to any other person in the current year any goods exceeding three rupees in value in any one transaction is bound u/s 47 to issue to the purchaser a bill or cash memorandum in the manner specified in the said section. At the same time when a registered dealer sells to another registered dealer and the bill which he issues to his purchaser contains a certificate to the effect that his registration certificate is in force at the date of such sale of goods, the purchasing dealer becomes entitled to make a resale of these goods without being liable to pay sales tax thereon if these goods fall in any of the classes of goods described in Schedule E to the said Act. This then would be an inducement to those desirous of purchasing such goods for resale to purchase them from a registered dealer. It is only a registered dealer, who can, if he satisfies the conditions in that behalf, obtain a licence, authorization, recognition or permit under the said Act, which would entitle him in different circumstances to make either tax-free purchases or tax-free sales. It is by reason of these advantages which accrue from the possession of a registration certificate that the legislature has required that before issuing a registration certificate the registering authority should satisfy itself that the application for registration is in order. In the present case it was to satisfy himself that the application for registration made by Sulekha Enterprises was in order and that Sulekha

Enterprises were a bona fide dealer that the Sales Tax Officer, C Ward, who was the registering authority in the case of Sulekha Enterprises, caused the various inquiries, which we have seen, to be made as also examined the said P. V. Shah and the said Asrani as also examined the documents which he had called upon them to produce. As observed by a Division Bench of this High Court, sitting at Nagpur, in Santumal v. Assistant Commissioner of Sales Tax (Appeals), Eastern Division, Ranges I & II. Nagpur [1963] 14 S.T.C. 287 : "For the purpose of claiming exemption these certificates (that is, certificate of registration as dealers) are vital documents because on the basis of these certificates being granted by the department to a dealer that dealer is empowered to grant certain declarations which declarations in their turn would entitle persons selling goods to the registered dealer to claim exemption from sales tax."

9. As mentioned earlier, a registered dealer's liability to pay tax under the said Act continues until his registration certificate is cancelled. If, however, such dealer's liability continues till that date, so also would the advantages which accrue to him by reason of his registration as also those which would accrue to others by reason of their dealing with him. A question may arise as to what would happen if a person who is not under a liability to get himself registered by reason of his turnover not exceeding in any one year the prescribed limit mentioned in section 3 applies and gets himself registered as a dealer. Such a situation has been dealt with by sub-section (5A) of section 22 under which such a dealer becomes liable to pay tax on his sales or purchases made from the date on which his registration took effect until its cancellation notwithstanding that he may not be liable to pay tax u/s 3. In other words, for all purposes such a dealer is treated as a registered dealer until his registration is cancelled.

10. The statutory provision relating to the cancellation of a registration certificate is sub-section (6) of section 22 of the said Act, which, at the material time, provided as follows :

"22. Registration. - (6) Where -

(a) any business, in respect of which a certificate of registration has been issued under this section has been discontinued, or

(b) neither the turnover of sales nor the turnover of purchases of a registered dealer has during any year exceeded the relevant limit specified in sub-section (4) of section 3,

and the dealer applies in the prescribed manner for cancellation of his registration, the prescribed authority shall cancel the registration with effect from such date as it may fix in accordance with the rules :

11. Provided that, where the Commissioner is satisfied that any business in respect of which a certificate has been issued under this section has been discontinued and the dealer has failed to apply as aforesaid for cancellation of registration, the Commissioner may, after giving the dealer a reasonable

opportunity of being heard, cancel the registration with effect from such date as he may fix to be the date from which the business has been discontinued :

Provided further that, the cancellation of a certificate of registration on an application of the dealer or otherwise, shall not affect the liability of the dealer to pay the tax (including any penalty) due for any period prior to the date of cancellation whether such tax (including any penalty) is assessed before the date of cancellation but remains unpaid, or is assessed thereafter."

12. This sub-section was amended with effect from 1st September, 1969, by Maharashtra Act No. 40 of 1969, the amendment being that the words "or transferred or disposed of" were inserted after the word "discontinued" where it occurs for the first time in the first proviso, and the words "or transferred or disposed of, as the case may be" were inserted after the word "discontinued" where it occurs for the second time in the said proviso.

13. Now, what is pertinent to note about sub-section (6) is that it entitles a dealer to apply for cancellation of his registration certificate. It does not cast any obligation upon him to do so. If, however, the sales tax authorities feel that by reason of certain events that have happened his certificate should not continue, they have a right to cancel such certificate. During the period with which we are concerned, the only circumstance which entitled the sales tax authorities to cancel a registration certificate on their own was where the "dealer's business was discontinued. After 1st September, 1969, the sales tax authorities also became entitled to cancel a registration certificate where a dealer had transferred or disposed of his business. In this connection, it is pertinent to note that u/s 28 of the said Act a dealer whose certificate is cancelled either on his own application or by the sales tax authorities under the first proviso to section 22(6), has forthwith to present any licence, authorization, recognition or permit held by him to the prescribed authority for cancellation. Failure to do so is an offence under clause (b) of section 63(1). It is also pertinent to note that it is not an offence to continue to carry on business without applying for cancellation of the registration certificate when a dealer's turnover has fallen below the prescribed limit, or to do stray business here and there after a dealer has discontinued his business. What is, however, required from such a dealer is that u/s 30 he has within the prescribed time to inform the prescribed authority that he has discontinued his business. Under rule 18 of the said Rules such information is to be given in writing to the registering authority within sixty days from the date of discontinuance of the business. Failure, without sufficient cause, to give such information is an offence under clause (g) of section 63(1). However, as mentioned earlier, not applying for cancellation of registration or doing business again on the strength of the registration certificate after discontinuing business have not been made offences, and no obligation is cast upon a dealer in such circumstances to apply for cancellation of the registration. The underlying purpose appears to be that when once a dealer has given information to the prescribed authority of his having discontinued his business

and if he does not apply to the registering authority for cancellation of his registration certificate, the registering authority will take steps for cancelling the registration under the first proviso to section 22(6). Even where a dealer himself applies for cancellation of his registration certificate on the ground mentioned in section 22(6), he has not to enclose with his application his certificate of registration for cancellation. Under sub-rule (4) of rule 10 of the said Rules where the registration of a dealer is cancelled either on his application or under the first proviso to section 22(6), the dealer is to surrender the certificate of registration and the copies thereof, if any, granted to him, to the registering authority within fifteen days from the date of receipt by him of the order cancelling the registration. This provision stands out in sharp contrast to the provision in section 28(1), to which we have already adverted, where the licence, recognition, authorization or permit are, in a case where registration is cancelled, to be presented forthwith for cancellation. The registration certificate is required to be presented for cancellation within fifteen days from the date of communication to the dealer, of the order of cancellation of registration even though under clause (a) of rule 10(3) where registration is cancelled on the ground that the business has been discontinued or transferred or otherwise disposed of, the date of such discontinuance, transfer or disposal is to be the date of cancellation of the registration. The same position prevails where the registration is cancelled under the first proviso to section 22(6).

14. The learned Advocate-General, however, submitted that the words "and the dealer has failed to apply as aforesaid for cancellation of registration" occurring in the first proviso to section 22(6) of the said Act showed that a dealer was under an obligation to apply for cancellation if he had discontinued his business. We are unable to accept this submission. As we have seen, what has been made obligatory is for the dealer to give information to the registering authority that he has discontinued his business. What has been made penal is his failure to give such information. Nowhere in the said Act or in the said Rules has it been made obligatory for him to apply for cancellation of his registration nor is his failure to do so made penal. A look at section 63, which is the penal section, shows that wherever obligations are cast upon a dealer or a person by the said Act, the failure to carry out such obligations is made an offence. In this particular case no such offence has been created.

15. What now falls to be determined are the consequences where a registration certificate is cancelled with retrospective effect, that is, as from an anterior date - whether such cancellation operates to invalidate certificates which have been issued by the concerned dealer during the intervening period, and exposes those who had dealt with such a dealer to a liability which the law had not cast upon them at the time of the transaction in question. According to the learned Advocate-General, the power of the cancelling authority to "cancel the registration with effect from such date as he may fix to be the date from which the business has been discontinued" would imply that as from the date so fixed the registration certificate had ceased to exist and that the dealer had ceased to

be a registered dealer and, therefore, all parties who had dealt with such a dealer from and after such date were dealing with an unregistered dealer. This submission of the learned Advocate-General amounts to asking the court to imagine certain facts to have existed when in fact they did not exist. It is undoubtedly open to a legislature to provide that though something does not exist or is not there, it shall be presumed or it shall be deemed that that thing existed or is deemed to be there. This is a well-known legislative device known as a legal fiction, but then the proper way of enacting a legal fiction is by a deeming provision. Neither section 22(6) of the said Act nor any other provision in the said Act contains any deeming provision to the effect that a registered dealer whose certificate of registration is cancelled from an anterior date shall be deemed to be an unregistered dealer with effect from such date, and what is more important is that neither section 22(6) nor any other provision of the said Act contains a deeming provision to the effect that all transactions entered into by such a dealer between the date from which the cancellation of his certificate of registration is made to operate and the date of the actual cancellation of his registration shall be deemed to be transactions entered into by an unregistered dealer. It may be useful in this connection to look at the second proviso to sub-section (7) of section 34 of the Maharashtra Sales Tax Act, 1979, which was passed on 25th June, 1979, but has not yet been brought into force. The substantive part of the said sub-section (7) is in terms similar to section 22(6) of the said Act with which we are concerned. The first proviso thereto confers power upon the Commissioner of Sales Tax in terms similar to the amended first proviso to section 22(6) to cancel a certificate of registration with effect from the date of discontinuance, transfer or disposal, as the case may be, but which date is not to be earlier than five years from the date of the order of cancellation. The second proviso to the said sub-section (7) runs as follows :

"Provided further that, for the purposes of this Act, such dealer shall not be deemed to be a registered dealer under this Act with effect from the date of cancellation so fixed."

16. We are not opining, for we are not called upon to do so, as to whether this proviso will affect the rights of third parties, since that matter will fall for consideration as and when it arises, but at least this proviso is a deeming provision under which a registered dealer whose registration certificate is cancelled with effect from an anterior date, is not to be deemed to be a registered dealer.

17. The learned Advocate-General, however, stated that it was not his case that section 22(6) of the said Act created any legal fiction. He stated that all that he was relying on was the power given to the sales tax authorities to cancel the registration with effect from such date as they might fix to be the date from which the business had been discontinued and that, therefore, he relied upon all consequences which would flow from the fixation of such date, but in doing so what the learned Advocate-General was doing was to ask the court to presume

or to imagine that a registration certificate which was valid and in force on the date when he had entered into a transaction of sale had become non-existent on that date by reason of an order of cancellation passed subsequently and was, therefore, not in existence on such date. This is tantamount to saying that the section contains a legal fiction, while at the same time maintaining that it does not contain any legal fiction. In support of his submission the learned Advocate-General relied upon the decision of a Division Bench of this High Court in *Collector of Sales Tax, Bombay State v. Parimal Brothers* [1962] 13 S.T.C. 647. That case dealt with sub-section (1) of section 26 of the Bombay Sales Tax Act, 1953, under which where the ownership of the business of a dealer liable to pay the tax is entirely transferred, the transferor and the transferee became jointly and severally liable to pay any tax, including penalty, remaining unpaid at the time of the transfer. We fail to see how this decision in any way assists the respondents. While referring to this sub-section the court observed at page 651 :

"In our view, sub-section (1) of section 26 enacts a legal fiction. A transferee of a business is made liable to pay tax in respect of the transferred business as if he is the dealer liable to pay tax."

18. In the present reference, as we have pointed out, no legal fiction at all has been enacted. Assuming for the sake of argument that a legal fiction is enacted in section 22(6) or that by reason of the power given to the prescribed authority to cancel a certificate of registration from an anterior date, the consequences canvassed for by the respondents flow, though not expressly mentioned in the section, which also would amount to creation of a legal fiction, it is now well-settled that where a statute creates a legal fiction the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. The classic passage which lays this down is that of James, L.J., in *Ex parte Walton*; *In re Levy* (1881) L.R. 17 Ch. D. 746., which was approved by the House of Lords in *Arthur Hill v. East and West India Dock Company* (1884) L.R. 9 App. Cas. 448 and by our Supreme Court in *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, *In Ex parte Walton*; *In re Levy* (1881) L.R. 17 Ch. D. 746 James, L.J., said :

"When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

19. In that case the trustees in bankruptcy applied for leave to disclaim a lease. The bankrupt less prior to its bankruptcy had granted an underlease of property demised to him to a third party. On the application of the trustees the Registrar gave leave to disclaim without any condition. The result was that by reason of the disclaimer of the lease the underlease would also come to an end. The underlease appealed to the Court of Appeal, and the court held that a disclaimer by a trustee in bankruptcy of a lease or other onerous property of the bankrupt operated as a surrender only so far as was necessary to relieve the bankrupt and

his property and the trustee from liability, and did not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed. Assuming that the cancellation of a registration certificate with retrospective effect casts consequences so far as the dealer whose registration is cancelled, does it also affect the rights of third parties or cast obligations and liabilities upon them to which they were not subject at the date of the transaction in question or expose them to liabilities to which they were not subject at the date of the transaction ? To so hold would be to say that by reason of the cancellation of the registration certificate of a selling dealer with effect from an anterior date, the certificate given by him u/s 12A that he was a registered dealer and that his registration was in force on the date of the sale of goods to another registered dealer was a false certificate, when factually it was wholly true. It would also mean that the purchasing dealer had made use of a false certificate in order to claim a deduction u/s 10(1)(ii). It would also mean that where such purchasing dealer had shown in his books of account such purchases as having been made from a registered dealer, he had kept false accounts. Under clauses (d), (f), (i) and (k) of sub-section (1) of section 63 where a person who not being a registered dealer falsely represents that he is or was a registered dealer at the time when he sells or buys any goods, or gives a certificate u/s 12A which he knows or has reason to believe to be false, or fails to keep a true account of the value of goods bought or sold by him as required by section 48, or knowingly produces incorrect accounts, registers or documents, or knowingly furnishes incorrect information commits an offence. We were informed that when a registration certificate is cancelled with retrospective effect, notice to show cause why a prosecution u/s 63 should not be launched is issued not only against the dealer whose registration certificate is cancelled but also against those who have purchased goods from him. The learned Advocate-General also stated that in some cases such notices have been issued and prosecutions launched. In the very reference before us the taxing authorities had imposed a penalty upon the applicants on the ground that they had concealed their turnover and knowingly furnished inaccurate turnover liable to pay tax by reason of the fact that the amount of tax paid by them prior to assessment had fallen short of eighty per cent of the amount of tax assessed, because the deductions claimed by them were disallowed. In our opinion, such liabilities cannot be allowed to be imposed without there being an express provision to that effect in the statute, for to do so would be to make illegal retrospectively what was perfectly legal when done. It would be to create an offence retrospectively as also to make it penal and provide penal consequences for an act which was neither penal nor had any penal consequences attached to it when it was done. It was argued by the learned Advocate-General that it was the duty of the applicants, as it was the duty of all persons who are registered dealers, to find out whether a set of facts existed at the time when a transaction of sale or purchase was entered into, which would justify the authorities in cancelling the registration certificate with retrospective effect. We are unable to accept such a submission. When one dealer deals with another, it is too much to expect that he should find out

whether the other's business is continuing or whether he has discontinued it and has entered into some stray transactions thereafter. No selling dealer would permit himself to be put through such an investigatory inquisition into all his business affairs by someone who desires to purchase goods from him. This argument of the learned Advocate-General also overlooks the fact that in modern commercial world business transactions do not take place only across the counter or face to face, but the greater part of modern commercial activity is carried on through the medium of correspondence.

20. The fact of the cancellation of a registration certificate with retrospective effect came up for consideration before the Punjab High Court in *A.D.M. Stores v. Commissioner of Sales Tax, Delhi* [1966] 18 S.T.C. 305 This was a case under the Bengal Finance (Sales Tax) Act, 1941, as extended to the Union Territory of Delhi. u/s 7(6) of that Act when any business, in respect of which a certificate has been granted to a dealer on an application made, has been discontinued or transferred, or a dealer has ceased to be liable to pay tax under that Act, the Commissioner of Sales Tax is to cancel the registration. Under rule 12 of the Delhi Sales Tax Rules, 1951, the cancellation of the registration certificate is to come into effect from such date as may be specified in the order of cancellation made by the Sales Tax Officer. In that case the assessee's claim for deduction was disallowed on the ground that the registration certificate of the dealer to whom they had sold the goods had been cancelled with retrospective effect. A question had been raised before the court as to the jurisdiction of the sales tax authorities to direct cancellation of a registration certificate with retrospective effect. The court, however, did not find it necessary to decide that question. It proceeded upon the basis that the sales tax authorities had such a power. The court held that the selling dealer was not a party to the order of cancellation of registration and the fact that the purchasing dealer may for any reason ignore the proceedings and may allow an ex parte order of cancellation of his registration certificate with retrospective effect to be passed against him cannot result in penalising the innocent selling dealer in the absence of evidence of his having been a party to any fraud, deception or misrepresentation. This is an authority directly in point. It is nowhere alleged on the record that the applicants were in any way a party to any fraud, deception or misrepresentation, or that the sales to the applicants by Sulekha Enterprises were not genuine. The learned Advocate-General frankly stated that the genuineness of the sales by Sulekha Enterprises to the applicants was not disputed. The Calcutta High Court has also consistently taken the view that the subsequent cancellation of a registration certificate cannot affect the rights of third parties (see *Shri Anil Kumar Dutta v. Additional Member, Board of Revenue, West Bengal* [1967] 20 S.T.C. 528 *Phanindra Nath Manna and Company v. Commercial Tax Officer* [1974] 33 S.T.C. 292. *Jugal Kishore Radhakishan v. Additional Member, Board of Revenue* [1978] 41 S.T.C. 250 and *Commercial Tax Officer, Jorasanko Charge v. Jasodalal Ghosal Private Ltd.* [1979] 44 S.T.C. 31. Though in these cases it is not clear whether the registration certificate was cancelled with retrospective effect or not, the

principle upon which the Calcutta High Court has proceeded is the same principle as was applied by the Punjab High Court in *A.D.M. Stores v. Commissioner of Sales Tax, Delhi* [1966] 18 S.T.C. 305. The Punjab and Haryana High Court in *Devinder Kumar Kewal Kumar v. State* [1972] 30 S.T.C. 352. had also taken the same view with respect to the Punjab General Sales Tax Act, 1948, though in that case also it is not clear on the facts whether the certificate of registration was cancelled with retrospective effect.

21. We may also look at the matter from another angle. The effect of disallowing the deductions claimed by the applicants is in substance to tax a transaction which was otherwise not taxable. u/s 10(1)(ii) of the said Act once goods had been purchased by a registered dealer from another registered dealer who had issued to the purchasing dealer a certificate u/s 12A, the purchasing dealer became entitled to resell these goods without becoming liable to pay any sales tax in respect of his resales, provided the goods were such as were described in one of the entries in Schedule E to the said Act. The condition precedent, therefore, for becoming entitled to make a tax-free resale was the purchase of goods which were resold from a registered dealer and the obtaining from such registered dealer of a certificate u/s 12A. This condition having been fulfilled, the right of the purchasing dealer to make a tax-free sale accrued to him. Thereafter to hold that by reason of something that had happened subsequent to the date of the purchase, namely, by reason of the cancellation of the selling dealer's certificate of registration with retrospective effect, the tax-free resales became liable to sales tax, would be tantamount to levying tax on these resales with retrospective effect. As mentioned earlier, the taxing power of the State extends to levying taxes on sales and purchases of goods taking place in the State, other than newspapers. In *The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta*, the Supreme Court observed :

"Now under all sales tax laws including the statute with which we are concerned, the moment a dealer makes either purchases or sales which are subject to taxation, the obligation to pay the tax arises and taxability is attracted. Although that liability cannot be enforced till the quantification is effected by assessment proceedings, the liability for payment of tax is independent of the assessment."

22. This position was reiterated by the Supreme Court in *State of Madhya Pradesh and Others Vs. Shyama Charan Shukla*, . In *Ramkrishan Kulwantrai v. Commissioner of Sales Tax* [1979] 44 S.T.C. 117 this High Court pointed out that under the said Act, tax is not imposed upon a dealer's total turnover of sales of goods but only upon that part of the turnover which is arrived at after deducting from the total turnover the turnover in respect of certain sales or resales with respect to which the dealer is entitled to a deduction and that as the rates set out in the different schedules to the said Act are different for different types or classes of goods, in order to arrive at the amount of tax payable by a dealer each taxable transaction of sale has to be looked at in order to ascertain the rate at which the tax is attracted to it. The transactions of resales effected by the

applicants were to be deducted from the total turnover of sales of the applicants by reason of the certificates u/s 12A issued to them by Sulekha Enterprises. To retrospectively nullify the fulfilment of the condition precedent which had entitled the applicants to make tax-free resales was in substance to levy retrospectively tax upon a transaction which was not otherwise taxable. This is sought to be done not by reason of any express provision in the said Act but by intendments and implications flowing from the power conferred upon the prescribed authority to cancel a dealer's certificate of registration with retrospective effect. The said Act does not contain any provisions which can give it retrospective operation. It is now well-settled that a tax or a liability cannot be imposed without express words to that effect. In the case of *The Sales Tax Officer, Navgaon, and Another Vs. Timber and Fuel Corporation*, the assessee, a registered dealer under the Madhya Pradesh General Sales Tax Act, 1958, was a forest contractor and had purchased in auction large quantity of timber from the forest department during the relevant period. Under that Act only first sales of timber could be taxed. The assessee had effected sales of timber in Madhya Pradesh amounting to rupees one lakh. During that period the forest department was considered as a dealer, and as the law then stood, the sales of timber by the forest department to the assessee were first sales and were not exempt from tax, but subsequently the Madhya Pradesh Government issued a notification retrospectively exempting the forest department from paying sales tax in respect of sales effected by it during the relevant period. The sales of timber made by the assessee were then sought to be taxed on the basis of theirs being first sales. The Supreme Court held that when the taxable events took place the assessee was not liable to be taxed and that its liability had to be determined as on those dates, and it not being liable on those dates, the fact that the forest department was retrospectively exempted from paying tax from an earlier date could not make the assessee liable to pay tax which he was otherwise not liable to pay. The Supreme Court further held that the Government had no power to levy tax either prospectively or retrospectively and that its power was merely to exempt one or more dealers from paying tax and that such power could not be used directly or indirectly to levy retrospectively tax on someone else. In the reference before us the power of the prescribed authority is to cancel the dealer's certificate of registration from the date it fixes as the date of discontinuance of his business. This may have consequences for the dealer whose certificate is cancelled, but this power of cancellation with retrospective effect cannot be used to levy tax retrospectively on someone else. The learned Advocate-General in support of his contentions relied upon a decision of the Supreme Court in *Tata Iron and Steel Co. Ltd. Vs. State of Bihar*, In that case what was challenged was the retrospective levy of tax under the Bihar Sales Tax Act, 1947, by an amendment made in that Act. It was contended on behalf of the appellants that the retrospective levy destroyed the character of the sales tax as an indirect tax to be passed on to the consumer, and made it a direct tax. This contention was negatived, the court holding that though from the point of view of the economic theories sales tax may be an indirect tax on the consumer, in law it need not be so. Relying upon this authority

the learned Advocate-General submitted that it was open to the legislature to levy tax with retrospective effect. The question whether tax could be levied with retrospective effect or not is not one which, however, arises before us. No one disputes the power of a competent legislature to levy a tax retrospectively. What is, however, contended is that the said Act does not contain any provision which authorises the assessing authorities to assess as taxable a transaction which was not taxable when entered into. The learned Advocate-General also relied upon another decision of the Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, . In that case a challenge to the constitutionality of section 7(2) of the Finance Act, 1951, on the ground that it imposed an excise duty on tobacco retrospectively before the date of its enactment and was, therefore, beyond the legislative competence of Parliament under entry 84 in List I of the Seventh Schedule to the Constitution of India was negatived. We once again fail to see how this decision is relevant to the point which we have to decide. No provision of the said Act has been challenged before us as being unconstitutional, a question which this Court sitting in tax reference would be incompetent to decide. What is contended is that the said Act contains no provision to justify the taxing authorities in assessing the transactions of resales of the applicants, for in seeking to do so they are taxing them retrospectively without there being any legal warrant for it in the said Act.

23. The last authority relied upon by the learned Advocate-General was a decision of the Orissa High Court in Nowranglal Agawala v. State of Orissa [1965] 16 S.T.C. 271. In that case the assessee claimed to deduct the turnover of certain sales made by him to registered dealers for resale in Orissa against declarations given by the purchasers that the goods were purchased for being resold in Orissa. The Sales Tax Officer refused to allow such deductions, holding that the declarations given were false. An extreme contention appears to have been advanced by the assessee in that case that once he produced a declaration he was not bound to do anything else and was entitled to a deduction and that the department could not go behind the declaration to ascertain whether the declaration was genuine or not. It was the contention of the department that the so-called registered dealers who had given these declarations were fictitious persons and they were entitled to say that they were fictitious persons by going behind the registration certificates. Now, if these purchasers were in fact fictitious persons, then the purchases were not made by them but were made by third parties who were not registered, and these fictitious persons were put up merely to lend their names and give false certificates. In such a case the transaction would not be genuine. We fail to see how this authority is relevant for our purposes, because, as mentioned earlier, it has not at any time been the department's case that any of the transactions of sale by Sulekha Enterprises to the applicants were not genuine and, as stated earlier, the learned Advocate-General himself stated that the genuineness of these transactions was not in doubt and was not disputed.

24. For the reasons set out above, we answer the question submitted to us in the

negative, that is, in favour of the applicants and against the respondents.

25. Considering the length of time which the hearing of this reference has taken, in our opinion, a fair order for costs would be that the respondents should pay to the applicants Rs. 750 by way of costs.

The applicants will be entitled to a refund of the fee of Rs. 100 paid by them.

26. Reference answered in the negative.