M/s. Chandaji Kubaji & Co.

Vs

The State of Andhra Pradesh

Civil Appeal No. 420 of 1957

(S. K. Das, J. L. Kapur, M. Hidayatullah JJ)

29.04.1960

JUDGMENT

S. K. DAS, J. -

These two appeals, one with special leave from this Court and the other on a certificate granted by the High Court of Andhra, have been heard together and this judgment will govern them both.

The facts are similar and the short question for decision is whether the appellant, Messrs. Chandaji Kubaji and Company, Guntur, was entitled to apply under s. 12A(6)(a) of the Madras General Sales Tax Act, 1939, (Madras Act IX of 1939), as applied to Andhra, for a review of an order of the Appellate Tribunal made under sub-s. (4) of s. 12A of the said Act. The relevant facts are these. The appellant is a dealer in ghee, groundnut oil, chillies, etc., and was carrying on its business at Guntur. In Civil Appeal No. 420 of 1957, the Deputy Commercial Tax Officer, Guntur, assessed the appellant to sales tax for the year 1948-49 on a turnover of Rs. 28,69,151 and odd. The appellant having unsuccessfully appealed to the Commercial Tax Officer, Guntur, made a second appeal to the Sales Tax Appellate Tribunal, hereinafter called the Tribunal. Before the Tribunal the appellant contended inter alia that out of the total turnover a sum of Rs. 10,45,156 and odd related to commission purchase of commodities taxable at the stage of sale on behalf of principals resident outside the State of Andhra and was not therefore taxable by the respondent State. In respect of this plea the Tribunal said :

> "As regards the alleged commission agency business to the tune of Rs. 10,45,156-4-9 the appellants have neither advanced arguments nor placed before us any materials in support of the contention raised in this behalf".

In the result the Tribunal dismissed the appeal on May 30, 1953.

In Civil Appeal No. 142 of 1958 the appellant was assessed by the Deputy Commercial Tax Officer, Guntur, on a net turnover of Rs. 28,72,083 and odd for the year 1949-50. The appellant objected to the inclusion of a sum of Rs. 19,89,076 and odd on the ground that the goods relating thereto had been consigned to self and despatched to places outside the State and in fact were delivered outside the State. This plea was disallowed by the Sales Tax authorities, and the Tribunal said :

> "In the grounds of appeal it has been urged with regard to these sale transactions the ownership in the goods continued to vest in the appellant till the sale price was collected and the goods were delivered to the buyers at places outside the State. Beyond advancing a broad argument of this type no material has been placed before

> us or was placed before the assessing authority or the Commercial Tax Officer to support the appellant's version that the property in the goods passed to the buyer only at places outside the State".
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> "It is not denied that though contracts in writing were not entered into, these transactions were the result of correspondence between the appellant on the one hand as seller and various persons on the other as buyers. It is conceded that such correspondence exists but the appellants have not chosen to make this correspondence available either to us or to the officer below. When documents which would establish the nature of the transaction beyond doubt are available and have been withheld by the appellant, the normal result is that an inference adverse to his contention has to be drawn. We are accordingly of the opinion that in this case, the sales must be deemed to have taken place within this State and that they have been rightly included in the taxable turnover".

The appeal was disposed of on this finding on August 19, 1952.

In respect of both the aforesaid orders the appellant filed applications for review under s. 12A(6)(a) of the Act. That section, in so far as it is relevant for these appeals, reads :

> "12A(6)(a) - The Appellate Tribunal may, on the application either of the assessee or of the Deputy Commissioner, review any order passed by it under sub-section (4) on the basis of facts which were not before it when it passed the order :
>
> Provided that no such application shall be preferred more than once in respect of the same order".

The point taken on behalf of the appellant in Civil Appeal No. 420 of 1957 was that the accounts were in Gujrati language and as there was none on behalf of the appellant who could give instructions to the appellant's advocate either in Telugu or English when the appeal was heard by the Tribunal, the appellant could not place the materials before the Tribunal. In the other appeal, the point taken in support of the application for review was that the relevant correspondence was mixed up with other records and so it could not be placed before the Tribunal. The Tribunal rejected the applications for review on the ground that a failure to produce the necessary materials in support of a plea taken before it, due either to gross negligence or deliberate withholding, did not come within the reason of s. 12A(6)(a) as stated in the expression "on the basis of facts which were not before it when it passed the order". The appellant then moved the High Court in revision under s. 12B of the Act and contended that the view which the Tribunal took of s. 12A(6)(a) was not correct. The High Court drew a distinction between what it called basic facts and evidence in support thereof and said :

> "There is an essential distinction between a fact and the evidence to establish that fact".
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> "Section 12A(6)(a) in our view is not intended to give two opportunities to every assessee to establish his case before a Tribunal. It is really conceived in the interests

> of the assessee, who was not able to place some facts before the Tribunal at the first instance which would have made a difference in its decision".

In the view which the High Court took of s. 12A(6)(a), it held that the applications for review were rightly rejected.

In the two appeals before us the argument has been that the Tribunal as also the High Court took an erroneous view of the true scope and effect of s. 12A(6)(a) of the Act. Our attention has been drawn to a subsequent Full Bench decision of the same High Court in The State of Andhra v. Sri Arisetty Sriramulu (A.I.R. 1957 Andhra Pradesh 130) and it has been submitted that the view expressed therein is the correct view. In that decision, it was held that the word "facts" in s. 12A(6)(a) may be taken to have been used in the sense in which it is used in the law of evidence, that is to say, as including the factum probandum or the principal fact to be proved and the factum probans or the evidentiary facts from which the principal fact follows immediately or by inference; facts may be either "facts in issue" which are the principal matters in dispute or relevant facts which are evidentiary and which directly or by inference, prove or disprove the "facts in issue".

In the view which we have taken of these two appeals, it is not necessary to discuss at great length the divergent views taken in the High Court of Andhra as to the true scope and effect of s. 12A(6)(a) of the Act. A Division Bench expressed the view that "facts" in the sub-section meant basic facts, that is, facts necessary to sustain a claim, and drew a distinction between such facts and the evidence required to establish them; it further expressed the view that under s. 12A(6)(a) the Tribunal may review its order if any of the basic facts were not present before it when it passed the order, but the sub-section was not meant to give a second opportunity to a party to produce fresh evidence. The Full Bench took a wider view of the sub-section and said that facts referred to in the sub-section might be "facts in issue" or "evidentiary facts". We think that in an appropriate case evidentiary facts may be so interlinked with the facts in issue that they may also fall within the purview of the sub-section. The Full Bench, however, went a step further and said that even if relevant evidentiary facts were intentionally or deliberately withheld or suppressed, the party guilty of such suppression or withholding would still be entitled to ask for a review under s. 12A(6)(a). We say this with great respect, but this is precisely what the section does not permit. The Full Bench said :

> "The language of section 12A(6)(a) is so wide and general that it might possibly lead to inconvenient results in that it might enable an assessee to get a further chance of hearing before the Appellate Tribunal on the strength of the evidence which he negligently or designedly failed to produce at the first hearing. As the language used in section 12A(6)(a) is clear and unequivocal and, in our opinion, capable only of one interpretation, we are bound to give effect to it in spite of the possibility of any inconvenience resulting therefrom. The inconvenience, if any, is not to the assessee for whose benefit the provision is intended. In any case, the remedy is with the Legislature".

It is, we think, doing great violence to language to say that an intentional or deliberate withholding or suppression of evidence in support of a plea or contention or a basic fact urged before the Tribunal, is comprehended within the expression "facts which were not before it (Tribunal) when it passed the order". To so construe the section is to put a premium on deliberate negligence and fraud and amounts to allowing a party to profit from its own wrong. We do not think that such a construction follows from the language used, which is more consistent with the view that the provision in s. 12A(6)(a) permits a review when through some oversight, mistake or error the

necessary, facts, basic or evidentiary, were not present before the Court when it passed the order sought to be reviewed. It is entirely wrong to think that the sub-section permits a party to play hide and seek with a judicial Tribunal; that is to say to raise a fact in issue or evidentiary fact as a plea in support of a claim and at the same time deliberately withhold the evidence in support thereof. Such a situation cannot be said to be one within the meaning of the expression "facts not present before the Tribunal".

In the appeals before us there was intentional withholding or suppression of evidence. In the case, the materials were not produced on the plea that they were written in Gujrati and nobody was available to instruct counsel in English or Telugu and in the other, on an equally specious plea that the correspondence was mixed up with other records for about two years. These two appeals can be disposed of on this short ground that the appellant was not entitled to ask for review under s. 12A(6)(a) by reason of his own deliberate negligence and intentional withholding of evidence.

We see no merit in these appeals and dismiss them with costs.

Appeals dismissed.

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