The State of Madras

Vs

Lateef Hamid & Co.

Civil Appeal No. 2186 of 1968

(K.S. Hegde, A.N. Grover JJ)

02.09.1971

JUDGMENT

HEGDE, J. -

1. This appeal by certificate arises from the decision of the High Court of Madras. It raises two questions for decision, viz. : (1) whether the High Court was right in its opinion that the Appellate Assistant Commissioner of Commercial Taxes was incompetent to enhance the assessment of the assessee, the respondent herein and (2) whether the High Court was justified in holding that the additional exemptions granted by the Tribunal was justified by the evidence on record.

2. There is no merit in the second contention. Therefore it will be convenient to dispose it of even before going to the facts of the case. The assessing officer as well as the Appellate Assistant Commissioner of Commercial Taxes disallowed the two exemptions asked for by the assessee on the ground that there was interpolation in the relative documents covering the turnover. The Tribunal reversed that finding of those authorities and allowed the exemptions asked for. It appears from the order of the Tribnunal that it proceeded on the baisis that there was no interpolation. This finding of the Tribunal is essentially a finding of fact and hence we will not be justified in interfering with that finding and more so as the High Court has declined to interfere with that finding.

3. This takes us to the real controversy in the appeal namely whether the Appellate Assistant Commissioner had power to enhance the assessment of the assessee. The assessee is a dealer in Hides and Skins at Madras. We are concerned herein with its assessment for the year 1958-59. That assessment was made on March 24, 1961. By his order, dated August 16, 1962, the Appellate Assistant Commissioner enhanced the assessment of the assessee while disposing of the appeal filed by the assessee. Until March 31, 1959, sales-tax was being levied on dealers in the State of Madras under the provisions of the Madras Sales Tax Act, 1939 (to be hereinafter referred to as the "1939 Act"). The assessee's turnover for the year 1958-59 stood charged with the liability to pay tax as leviable under the 1939 Act. The 1939 Act was repealed by the Madras General Sales Tax Act, 1959 (to be hereinafter referred to as the "1959 Act"). That Act came into force on April 1, 1959. As seen earlier the assessee was assessed after that Act came into force. The assessee filed its appeal under Section 31 of that Act and the Appellate Assistant Commissioner dealt with that appeal under that provision.

4. Aggrieved by that order, the assessee took up the matter in appeal to Tribunal. The Tribunal following the decision of the Madras High Court in Deputy Commissioner of Commercial Taxes, Madras Division v. Sri Swami and Company, (13 STC 468.) accepted the contention of the assessee. As against that decision, the State of Madras went up in revision to the High Court under Section 38

of the 1959 Act. That petition was dismissed. Hence this appeal.

5. The High Court has opined that under the 1939 Act, the appellate authority while exercising its appellate powers could not have enhanced the assessment of the assessee. That was an immunity or protection afforded to the assessee under the 1939 Act. Such an immunity or protection was a vested right of the assessee. The same having not been taken away either expressly or by necessary implication by the provisions of the 1959 Act, the Appellate Assistant Commissioner could not have enhanced the assessment. It further held that that immunity or protection of the assessee is protected by Section 66(1) of the 1959 Act as amended in 1963, which amendment was retrospective in its operation.

6. The turnover of the assessee during the year 1958-59, became charged with liability to pay sales-tax under the 1939 Act as and when the assessee effected sales and the total sales-tax liability of the assessee for that year became fixed under the same Act on March 31, 1959. Hence the charging section in the 1959 Act is not relevant for determining the liability of the assessee. Herein we have only to consider the effect of the change in the machinery provisions. Before enhancing the assessment the Appellate Assistant Commissioner had given opportunity to the assessee to show-cause against the proposed enhancement. The Appellate Assistant Commissioner rejected the contention of the assessee that he had no power to enhance the assessment as the power to enhance assessment conferred on him by Section 31 of the 1959 Act was inapplicable to the proceedings before him.

7. We shall now examine the relevant provisions of the 1939 Act and the 1959 Act. We shall first take up the material provision is in the 1939 Act. Section 2(a-2) defines the expression "assessing authority" as meaning any person authorised by the State Government to make any assessment under the Act. The expression "Commercial Tax Officer" is defined in Section 2(a-3) as meaning any person appointed to be a Commercial Tax Officer under Section 2-B. The Deputy Commissioner is defined in Section 2(b-1) as meaning any person appointed to be a Deputy Commissioner of Commercial Taxes under Section 2-B. Section 2-B empowers the State Government to make appointments of as many Deputy Commissioners of Commercial Taxes and Commercial Tax Officers as they think fit for the purpose of performing the functions respectively conferred on them by or under the Act. The expression "Appellate Tribunal" is defined in Section 2(a-2) as meaning the Tribunal appointed under Section 2-A, which empowered the Government to appoint a Tribunal consisting of three members to exercise the functions conferred on the Appellate Tribunal by or under the Act. Section 11 provided for appeal by the assessee objecting to an assessment made on him under Section 9(2) within the prescribed period. Section 9 prescirbed the procedure to be followed by the assessing authority. Section 12(1) conferred certain special powers on the Commercial Tax Officer. It said that :

> "the Commercial Tax Officer may -
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> (i) suo motu, or
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> (ii) in cases in which an appeal does not lie to him under Section 11, on application,
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> call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit."

8. The application under Section 12(1)(ii) could have been made even by assessing authority. It may also be remembered that the Commercial Tax Officer was one of the authorities charged with the duty to see that no taxable turnover went untaxed. The power under Section 12(1) could have been exercised within three years from the date the assessee was served with assessment order. Power under Section 12(1)(ii) could have been exercised by the Commercial Tax Officer simultaneously with the exercise of his appellate powers under Section 11(1).

9. Section 12(2) conferred special powers on the Deputy Commissioner to call for and examine any order or proceeding recorded under the provisions of the Act satisfying himself as to the legality or propriety of that order or as to the regularity of such proceeding and may pass such order with respect thereto as he thinks fit. This power he could have exercised within four years from the date on which the assessment order was communicated to the assessee.

10. Section 12-A provided for an appeal by an assessee objecting to an order relating to his assessment passed by the Commercial Tax Officer whether on appeal under Section 11 or under Section 12, sub-section (1) or by the Deputy Commissioner under Section 12, sub-section (2) subject to certain conditions with which we are not concerned in this case. The assessee as well as the Deputy Commissioner were conferred with power to move the High Court under Section 12-B within the prescribed period against the order of the Appellate Tribunal on the ground that order either decided erroneously a question of law or it failed to decide the question of law arising for decision.

11. This takes us to the relevant provisions in the 1959 Act. Therein again "the assessing authority" is defined in Section 2(c) as meaning any person authorised by the Government or by any authority empowered by them to make assessment under the Act. Against the order of assessment made by the assessing authority an appeal by any person objecting to the assessment lies to the Appellate Assistant Commissioner appointed under Section 28, sub-section (3). Section 31 empowers the Appellate Assistant Commissioner to confirm, reduce, enhance or annual the assessment. The power to enhance the assessment was conferred on the Appellate Authority for the first time by the 1959 Act. Under this Act also the Deputy Commissioner's power to suo motu revise the order of assessment is retained, subject to certain conditions. Any person objecting to the order made by the Appellate Assistant Commissioner under Section 31(3) or against the order made by the Deputy Commissioner under Section 31(1) can appeal to the Appellate Tribunal. Under Section 38 the assessee or the Deputy Commissioner can take up a revision to the High Court either on the ground that the Tribunal has decided a question of law erroneously or it has failed to decide a question of law arising for decision.

12. In the matter of assessment, the purpose of the 1939 as well as the 1959 Act is identical. That purpose was and is to see that neither the assessee is over-assessed nor the State is deprived of the revenue to which it is entitled. Under the 1939 Act, an aggrieved assessee could first appeal to the Appellate Authority and then to Tribunal. Further he could on questions of law go up in revision to the High Court. To protect the interest of the State, special powers were conferred on the Commercial Tax Officer as well as the Deputy Commissioner of Commercial Taxes. If the Deputy Commissioner was not satisfied with the decision of the Tribunal on questions of law, he could have gone up in revision to the High Court. Under the 1959 Act, the procedure was simplified to some extent. The Appellate Assistant Commissioner who primarily took over the quasi-judicial functions of the Commercial Tax Officer was conferred with power not only to confirm, vary or annul the assessment but also the power to enhance the assessment. The power conferred on him under Section 31 of the 1959 Act combines to an extent both the appellate power as well as the special

power the Commercial Tax Officer had under Sections 11 and 12 (1) of the 1939 Act. Hence the changes effected by the 1959 Act in the machinery provisions do not tough the substance of the matter. Even as regards the time within which the enhancement of assessment can be made the change excepting in exceptional cases is in favour of the assesses. The Commercial Tax Officer could have exercised his special powers under Section 12(1) of the 1939 Act within three years from the date the assessment order was served on the assessee. Under the 1959 Act, he can enhance the assessment only during the pendency of the appeal and not thereafter. Herein we are not concerned with the special powers of the Deputy Commissioner nor with the powers of the Tribunal or the High Court. In our opinion there is no basis for saying that the provisions of the 1959 Act relating to the determination of the assessment are more onerous than those in the 1939 Act. The 1959 Act in our opinion merely simplified the procedure without touching the substance of the right of the parties. No benefit that was available to an assessee as regards the procedure was taken away by the 1959 Act, if we ignore the remote possibility of an appeal pending before an Appellate Assistant Commissioner for more than three years and that authority failing to exercise his power to enhance the tax within that period. The assessee before us cannot even have the benefit of such a contingency because the order of assessment in this case was made on March 24, 1961 and the appellate order was passed on August 16, 1962. In this case it cannot be said that any vested right of the assessee had been in fact affected by the 1959 Act.

13. Now we shall go to Section 61 of the 1959 Act on the basis of which the Tribunal and the High Court have upheld the contention of the assessee. Section 61(1) to the extent material for our purpose reads :

> "61(1). (i) The Madras General Sales Tax Act, 1939 (Madras Act IX of 1939), (hereinafter in this section referred to as the said Act), is hereby repealed.
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> (ii) The repeal of the said Act by clause (i) shall not affect -
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> (a) anything done or any offence committed, or any fine or penalty incurred or any proceedings begun before the commencement of this Act; or
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> (b) the previous operation of the said Act or anything duly done or suffered thereunder; or
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> (c) any right, privilege, obligation or liability acquired, accrued or incurred under the said Act; or
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> (d) any fine, penalty, forfeiture or punishment incurred in respect of any offence, committed against the said Act; or
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> (e) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation liability, fine, penalty, forfeiture or punishment as aforesaid;
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> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such fine, penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.
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> (iii) Subject to the provisions of clause (ii), anything done or any action taken including any appointment made, notification, notice or order issued, rule, form or regulation framed, certificate, licence or permit granted, under the said Act shall be

deemed to have been done or taken under the corresponding provision of this Act and shall continue in force accordingly, unless and until, superseded by anything done or any action taken under this Act.

(2) Notwithstanding anything contained in sub-section (1) any application, appeal, revision or other proceeding made or preferred to any officer or authority under the said Act and pending at the commencement of this Act, shall after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceeding under this Act if it had been in force on the date on which any application, appeal, revision or other proceeding was made or preferred."

14. The rules framed under the 1939 Act (the Madras General Sales Tax Rules, 1939) provide for the appointment of Assistant Commercial Tax Officers and the Deputy Commercial Tax Officers. By his order, dated September 15, 1939, in exercise of the powers conferred on him by clause (a) of Section 2 and sub-sections (1) and (2) of Section 14 of the 1939 Act, the Governor of Madras authorised the Assistant Commercial Tax Officers to exercise the powers of the assessing authority in the case of dealers whose turnover does not exceed Rs. 20,000/- and Deputy Commercial Tax Officers to exercise the powers of an assessing authority in the case of dealers whose turnover exceeds Rs. 20,000/-. It is not necessary to refer to the exceptional cases for which provision is made in the provisos to clause (1) of that order. Rule 13(1) of the Rules prescribed that subject to the provisions of Section 11, any person aggrieved by any original order of an assessing authority may appeal to the Commercial Tax Officer of the District. The proviso to that section permits the Board of Revenue to transfer an appeal pending before a Commercial Tax Officer to another Commercial Tax Officer for reasons to be recorded in writing. But the usual appellate authority is the Commercial Tax Officer of the District. Hence the Commercial Tax Officer had both the powers of the appellate authority as well as the special powers conferred on him under Section 12(1) of the 1939 Act. By the exercise of those two powers, he could have confirmed, altered, amended or enhanced the assessment made. The power conferred on the appellate authority under the 1959 Act is not wider than that the Commercial Tax Officer had under the 1939 Act. Hence the 1959 Act does not adversely affect in any manner the right of appeal an assessee had under the 1939 Act. If one probes into the grievance of the assessee before us, it would be obvious that it is wholly imaginary. No assessee has an vested right in the procedure prescribed under the 1939 Act. So long as the new procedure laid down in the 1959 Act does not interfere with any of his vested rights, an assessee has no right to claim that his case must be dealt with under the provisions of the repealed Act. It is well settled that the new procedure prescribed by law governs all pending cases. As been earlier, the assessee filed its appeal under Section 31 of the 1959 Act and not under Section 11 of the 1939 Act. But that is a minor aspect. What is of the essence is that his right of appeal under the 1959 Act does not take away any in any manner any of his vested rights under the 1939 Act.

15. In view of what we have said hereinbefore, it is not necessary for us to consider the meaning of the words "any right, privilege.... accrued.... under the Act" in Section 61(1)(ii)(c). We repeat that no right of the assessee was infringed by the provisions of the 1959 Act. In this view, it is not necessary to examine the scope of Section 61(2) of the 1959 Act about which there was considerable argument before us.

16. The decision under appeal is based on the earlier two decisions of that High Court, i.e., in Deputy Commissioner of Commercial Taxes, Madras Division v. Sri Swami and Co. (supra), and Deputy Commissioner of Commercial Taxes, Madras Division v. M. Balasundaram and Co. (14

STC 996 (HC)) Hence it is necessary to examine the correctness of those decisions. In Swami and Co's case (supra) the assessee was assessed by the Deputy Commercial Tax Officer for its turnover for the year 1955-56 under the 1939 Act. The order of assessment was passed on December 15, 1956. The assessee filed an appeal before the Commercial Tax Officer on February 15, 1957. During the pendency of the appeal, the 1959 Act came into force on April 1, 1959. Thereafter the appeal was transferred to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner reduced the turnover of the assessee to certain extent. Not being satisfied with the order of the Appellate Assistant Commissioner, the assessee preferred a further appeal to the Appellate Tribunal. In the course of the hearing of the appeal by the Tribunal, the State representative filed a petition seeking enhancement of the turnover of the assessee to certain grounds. The Tribunal rejected that plea holding that the assessee had a vested right to have his appeal disposed of under the provisions of the 1939 Act. It may be noted that under the 1939 Act, only an assessee could have appealed to the Tribunal against the order of the Appellate Assistant Commissioner but under the 1959 Act both the assessee as well as the Deputy Commissioner can appeal against his order. Aggrieved by the order of the Tribunal, the Deputy Commissioner took up the matter in revision to the High Court. The High Court allowed the revision petition. It held that the Tribunal went wrong in holding that the petition filed by the State representative for enhancement of the assessment was not maintainable. In the course of its judgment the High Court observed :

> "The immunity or protection which the assessee had under the 1939 Act so as to save the assessment made by the Deputy Commercial Tax Officer, the primary assessing authority, from being enhanced by the exercise of the appellate power by the Commercial Tax Officer, is a vested right, which cannot be interfered with or in any way impaired having regard to the specific provisions of Section 61(1) of the Madras Act I of 1959. The order of the Appellate Assistant Commissioner only reduced the turnover to the benefit of the assessee, and it is clear that there was no violation of the vested right of the assessee by reason of the said order. The order of the Appellate Assistant Commissioner was passed after the coming into force of the 1959 Act and on that date the assessee had no vested right to prevent an enhancement of his assessment by the future appellate authority, namely the Tribunal. The Tribunal entertained an appeal at the instance of the assessee only under the new Act as the order appealed against was one passed after the coming into force of the new Act, and by a Tribunal which functioned under the new Act. It is impossible for the assessee to maintain the position that any order of the Appellate Tribunal enhancing the assessment made by the Appellate Assistant Commissioner would amount to deprivation of their vested rights or violation of the provisions of the Section 61(1) of the 1959 Act."

17. These observations appear to us to be somewhat incongruous. As seen earlier under the 1939 Act, the Revenue could not have appealed either against the order of the assessing authority or against that of the appellate authority. If the non-existence of the right of appeal on the part of the Department is considered as an immunity or protection and if that immunity or protection is considered as a vested right, the assessee will have that right both at the stage of the appeal to the Appellate Assistant Commissioner as well as at the stage of the appeal to the Tribunal. It is difficult to follow how the High Court was able to make dichotomy as between the powers of the Appellate Assistant Commissioner as well as at the stage of the appeal to the Tribunal. It is difficult to follow how the High Court was able to make dichotomy as between the powers of the Appellate Assistant Commissioner and that of the Tribunal in that regard. If the newly constituted Tribunal were clothed

with wider and larger powers as opined by the High Court, the same would be the case with the Appellate Assistant Commissioner. In our opinion, the true test to be applied to the case was whether in fact any vested right of the assessee had been taken away under the 1959 Act because of the enlargement of the powers of the first appellate authority or that of the Tribunal. As seen earlier, no real right of the assessee was infringed by the 1959 Act because of the enlargement of the powers of those authorities.

18. This takes us to the decision in Balasundaram and Co.'s case (supra). This case was decided by the same bench which decided Swami and Co.'s case (supra). Therein the assessee was assessed to sales-tax under the 1939 Act. During the pendency of its appeal to the Commercial Tax Officer, the 1959 Act came into force. Its appeal was transferred to the Appellate Assistant Commissioner who enhanced the assessment. But on a further appeal, the Tribunal came to the conclusion that the Appellate Assistant Commissioner had no jurisdiction to enhance the assessment. As against that order, the Deputy Commissioner of Commercial Taxes went up in revision to the High Court. The High Court held that the assessee had a vested right at the time when the 1959 Act, came into force to prevent the Commercial Tax Officer from enhancing the assessment in the course of the appeal preferred by him. However, there was always the peril of the Commercial Tax Officer, who was also the revising authority, revising the assessment to his prejudice in exercise of his revisional power, but that peril effectively disappeared when under the 1959 Act, the revisional power was conferred upon the Deputy Commissioner of Commercial Taxes and not upon the Appellate Assistant Commissioner. Therefore the interference by the Appellate Assistant Commissioner with the assessment order passed by the Deputy Commercial Tax Officer to the prejudice of the assessee in the purported exercise of his appellate power, was clearly violative of the assessee's vested rights. In our opinion this decision proceeded on a wrong basis. The question before the High Court was whether there was a vested right in the assessee not to have his assessment enhanced, under the 1939 Act and whether that vested right had been in any manner infringed by the 1959 Act. As seen earlier he had no such vested right under the 1939 Act. The fact that a different procedure is prescribed under the 1959 Act for enhancing the assessment cannot be said to be an infringement of a vested right. No one can have a vested right in a mere procedure. We are of opinion that Balasundaram's case (supra), was wrongly decided and some of the observations in Swami and Co's case (supra) are not correct though the decision in that case is not open to question.

19. Mr. S. T. Desai, learned counsel for the Revenue placed strong reliance on the decision of a Division Bench of the Kerala High Court in Velukutty v. Kerala Sales Tax Appellate Tribunal, Trivendrum and Others. (20 STC 28 (HC).) Therein, interpreting a provision similar to Section 61(2) of the Act, the High Court came to the conclusion that the clause "be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceeding under this Act, if it had been in force on the date on which any application, appeal, revision or other proceeding was made or preferred" conferred power on the appellate authority to enhance assessment. The correctness of this conclusion was contested by Mr. Shankar Das, learned counsel for the assessee. According to him that clause merely provided for transference of the appeals pending before the authorities under the 1939 Act, to the authorities under the 1959 Act, without enlarging their powers. In view of our conclusion that no vested right of the assessee had been interfered with, it is not necessary for us to go into this controversy.

20. For the reasons mentioned above, this appeal is allowed, orders of the High Court as well as that of the Tribunal are set aside and the case is remitted to the Tribunal for disposal according to law. In the circumstances of the case we direct the parties to bear their own costs both in this Court as well

as in the High Court.

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