

Raghunath Prasad Poddar

Vs

Commissioner of Income-Tax, Calcutta

Civil Appeals Nos. 1032 to 1040 of 1970

(K.S. Hegde, H.R. Khanna JJ)

25.04.1973

JUDGMENT

HEGDE J. -

These are appeals by special leave. They raise a common question of law, viz., whether on the facts and in the circumstances of these cases the amounts claimed by the appellants (assesseees) as their losses in transactions in gunny bags which were concluded by the transfer or delivery of pucca delivery orders were speculative losses under Explanation 2 to the proviso to section 24(1) of the Indian Income-tax Act, 1922 (to be hereinafter referred to as the Act).

For deciding the question of law formulated above, it will be sufficient if we set out the facts in Civil Appeal No. 1037 of 1970. At the hearing we were referred to the facts of that case only.

The assessee in Civil Appeal No. 1037 of 1970 is a company dealing, inter alia, in jute and jute goods. In the assessment years 1957-58, 1958-59, and 1960-61 (corresponding accounting periods being calendar years 1956, 1957 and 1959), the assessee claimed Rs. 35,578, Rs. 20,665 and Rs. 3,849 respectively, as losses in its business in the sale and purchase of gunny bags. The Income-tax Officer treated those losses as speculative losses. He held that the contracts in respect of the gunny bags said to have been sold were settled only by delivery of pucca delivery orders (in short P.D.Os.) and not by actual delivery of the goods covered by those documents. He accordingly refused to set off those losses towards the profits made by the assessee in its non-speculative business. The assessee appealed against those assessment orders. The Appellate Assistant Commissioner found that the assessee had purchased the P.D.Os. from various parties after paying the full price of the goods mentioned there in and transferred those P.D.Os. to his buyers after receiving the price fixed for the sale of those goods. The Appellate Assistant Commissioner opined that the transaction in question represented purchases and sales of jute goods. The Appellate Assistant Commissioner consequently held that the losses claimed by the assessee were losses from the ready business in jute goods. In pursuance of those findings he directed the Income-tax Officer to allow the losses claimed as business loss. The department appealed against the order of the Appellate Assistant Commissioner to the Income-tax Officer Appellate Tribunal. The Tribunal following the decision of the Calcutta High Court in *D. M. Wadhwa v. Commissioner of Income-tax*, allowed the appeals filed by the department. It held that the sales in question were "speculative" as contemplated by section 24 of the Act. Consequently, the losses in question cannot be set off towards the profits made in the assessee's non-speculative business. Similar orders were made by the Tribunal in the case of other assesseees. At the instance of the various assesseees, questions similar to the question formulated above were submitted to the High Court to ascertain its opinion. The High Court, following its decision in Income-tax Reference No. 88 of 1967 (*Nanalal N. Varma and Co. (P.) Ltd.*

v. Commissioner of Income-tax), answered those questions in favour of the department. We have now to see whether the Calcutta High Court's decision in Nanalal Varma's case, and the other decisions relied on in that case lay down the law correctly. If those cases were correctly decided, the appeals before us must fail. On behalf of the appellants, it was contended that Nanalal Varma's case, and the decisions relied on therein were not correctly decided. For the reason to be stated hereinafter, we agree with that contention of the assessee.

Section 24 of the Act deals with set off of losses in computing the aggregate income of an assessee. Sub-section (1) of section 24 reads :

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year :

Provided that in computing the profits and gains chargeable under the head 'profits and gains of business, profession or vocation', any loss sustained in speculative transaction which are in the nature of a business shall not be taken into account except to the extent of the amount of profits had gains, if any, in any other business consisting of speculative transactions . . ."

(The second proviso is not relevant for our present purpose).

Explanation 1 to that section says :

"Where the speculative transaction carried on are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate form any other business."

Explanation 2 is important for our present purpose. It says :

"A speculative transaction means a transaction in which a contract for purchase and sale of any commodity including stocked and shares is periodically or ultimately settled otherwise then by the actual delivery or transfer of the commodity or scrips."

The remaining part of that section is not relevant for our present purpose.

We have now to see whether, on the facts found by the Tribunal, it can be said that the transactions with which we are concerned can be said to have been "periodically or ultimately settled otherwise then by the actual delivery or transfer of the commodity".

The Tribunal has found that when the assessees transferred the P.D.Os. to their buyers they had not actually delivered to the buyers the goods covered by the P.D.Os. That conclusion was not challenged. But, it was urged on behalf of the assessee that the Tribunal's finding by itself is not conclusive. They complain that the Tribunal has not gone into the question whether the last transferees of the P.D.Os. had taken actual delivery or not of the goods covered by the P.D.Os. It cannot be disputed that if any of the transaction were settled by actual delivery of the goods sold or transfer of that commodity, those transactions do not come within the scope of Explanation 2 to the proviso to section 24(1). In our judgment to effect a valid transfer of an commodity, it is not necessary that the transfer in question should be followed up by actual delivery of the goods to the transferee. Even if the goods are delved to the transferee's transferee, the first transfer also will be a

valid transfer. Therefore, we have to see whether in the case before us, the ultimate purchaser of the P.D.Os., has taken actual delivery of the goods sold. The Tribunal as well as the High Court were of opinion that if any transfer of the P.D.Os. is not followed up by actual delivery of the goods to the transferee, that transaction has to be considered as speculative. This is an erroneous conclusion.

According to the appellants, the transactions in juts or in jute gunny bags are usually conducted in Calcutta in the following manner :

Jute Mills sell in present or in future jute good to buyers and issue P.D.Os. in their favour. If the sales are in praesenti, the buyers if they so choose can take immediate delivery of the goods sold. If the delivery of the goods sold is to be given on a future date, the buyers can take delivery of those goods on the date specified. But, usually, the buyers of juts goods in Calcutta transfer the P.D.Os from one buyer to another and ultimately P.D.Os. in the generality of cases, are purchased by the shippers who take actual delivery of the goods sold. According to the appellants every transfer of a P.D.O. results in a sale though at the time the intermediate sales take place, the title to goods sold is defective for want of delivery of the goods. That title gets perfected as soon as the goods sold are actually delivered.

In support of the trade practice pleaded, Mr. Ashok Sen, learned counsel for the appellants, relied on the decision of this court in *Duni Chand Rataria v. Bhuwalka Brothers Ltd.* Therein Bhagwati J., speaking for the court, quoted with approval (at page 1078), the findings of the trial court as to the manner in which the goods in that case were transferred. The learned trial judge observed :

"Now visualize the long chain of contracts in which the defendant's contract is one of the connecting links. The defendant buys from its immediate seller and sell to its immediate buyer. As seller it is liable to give and as buyer it is entitled to take delivery. As seller it receives and as buyer it gives shipping instructions. Similar shipping instruction is given by each link until it reaches the mills. The mills deliver the goods alongside the steamer. Such delivery is in implement of the contract between the mills and their immediate buyer. But eo instanti it is also in implement of each of the chain contracts including the contract between the defendant and its immediate buyer and the contract between the defendant and its immediate seller.

Not only does the mill give and its immediate buyer take actual delivery but instant each middleman gives and take actual delivery. Simultaneously, the defendant takes actual delivery of possession of the jute goods to its immediate buyer. Prima facie, at the moment of the delivery alongside the steamer there is appropriation and the passing of the property in the goods and the giving and taking of actual delivery of possession thereof all along the chain at the same moment."

On the basis of that finding, this court held in that case :

"The mate's receipts or the delivery orders, as the case may be, represented the goods. The sellers handed over these documents to the buyers against cash payment, and the buyers obtained these documents in token of delivery of possession of the goods. They in turn passed these documents from hand to hand until they rested with the ultimate buyer who took physical or manual delivery of possession of those goods. The constructive delivery of possession which was obtained by the intermediate parties was thus translated into a physical or manual delivery of

possession in the ultimate analysis and in his turn giving actual delivery of possession of the goods in the narrow sense of physical or manual delivery thereof."

A similar view was expressed by this court in *Bayyana Bhimayya v. Government of Andhra Pradesh*. Therein Hidayatullah J. (as he then was), speaking for the court, observed :

"A delivery order is a document of title to goods (vide section 2(4) of the Sale of Goods Act), and the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. At the moment of delivery by the mills to the third parties, there were, in effect, two deliveries, one by the mills to the appellants, represented, in so far as the mills were concerned, by the appellants' agents, the third parties, and the other, by the appellants to the third parties as buyers from the appellants. These two deliveries might synchronise in point of time, but were separate, in point of fact and in the eye of law".

Mr. Sharma, learned counsel for the department, contended that the property in goods represented by a P.D.O. cannot be said to pass until the actual delivery takes place, in view of section 18 of the Sale of Goods Act. Hence, according to him, when the assessee sold the P.D.Os. to their buyers, the property in goods did not pass. In support of that contention, he relied on the decision of this court in *Jute and Gunny Brokers Ltd. v. Union of India*. That was a case of acquisition of property under rule 75A read with rule 119 of the Defence of India Rules, 1939. Therein, the Government served an order of requisition on the mills which was in possession of the goods sought to be acquired. The validity of that order was challenged by the purchaser of the goods through a P.D.O. He claimed that he was the owner of those goods and as no notice of acquisition had been served on him, the order acquiring the property was invalid. This court upheld the validity of the order of acquisition. It held that as the goods were in the possession of the mills at the time the acquisition order was served, the title in those goods had not passed to the holder of the P.D.O. The rule laid down in that decision has no relevance for deciding the question of law that arises for decision in these cases. Herein, we are concerned with the question whether the assessee has transferred the commodity covered by the P.D.Os. to their buyers. For answering that question, we have to see whether the goods supported to have been sold under the P.D.Os. were actually delivered to the last buyer of those P.D.Os. This position in law is made clear by the decision of this court in *State of Andhra Pradesh v. Kolla Sree Ramamurthy*. It was a case arising under the Madras General Sales Tax Act, 1939. Therein the respondent was a dealer in gunny bags. He purchased gunnies from the mills on terms of a written contract which was on a printed form. The mills after receiving the part of the purchase price issued "delivery orders" directing the delivery of the goods as per the contract. Instead of taking delivery himself, the respondent endorsed the delivery orders to another person for consideration and those delivery orders passed through several hands before the ultimate holder of the delivery orders presented it to the mills and obtained delivery of the gunnies from the mills. At the date of the contract for purchase, the goods which were the subject-matter of the purchase were not appropriated to the contract so that there was no completed sale since no property in the goods sold passed. There was only an agreement of sale. The Sales Tax Officer assessed the respondent and collected sales tax on the said transactions. The question was whether the transactions were or were not "sales of goods" within section 3 of the Madras General Sales Tax Act, 1939, so as to enable the turnover represented by those sales to be brought to tax under the Act, or were mere sales or transfers of delivery orders : and further what was the effect of the property in the goods passing to the ultimate endorsee of the delivery orders. The court held that the principle laid down in *Butterworth v. Kingsway Motors Ltd.*, which was the basis of the decision of this court in *Bayyana*

Bhimayya's case, would equally apply to the facts of that case. This court upheld the levy of sales tax on the ground that though the title to the goods sold did not pass when the delivery order passed from one intermediate dealer to another intermediate dealer yet those transactions became sales of goods as soon as the goods were actually delivered to the last buyer of the "delivery order" on the principle of feeding back the title. The court held that the title acquired by the last purchaser went to feed the previous defective titles obtained by the previous buyers. Consequently, every transfer of the "delivery orders" became a "sale" within the meaning of section 3 of the Madras General Sales Tax Act, 1939.

Neither the Income-tax Officer nor the Appellate Assistant Commissioner and nor even the Tribunal has gone into the questions, firstly, as to what was the trade practice at the relevant time and whether the last buyers of the P.D.Os. have taken actual delivery of the goods covered by those P.D.Os. They concentrated their attention solely on the question whether the assessee had given delivery of the goods covered by the P.D.Os. to their transferees. That was not the relevant issue. The crucial question of fact to be decided was whether the last buyers of the P.D.Os. had taken actual delivery of the goods covered by the P.D.Os. Mr. Sen relying on the decision of this court in Duni Chand Rataria's case urged that we should accept the trade practice pleaded by him and straight away allow the appeals. But, no such trade practice appears to have been put forward before the authorities under the Act. That apart, the transactions effected by the assessee cannot be considered as valid "transfer of the commodity" within the meaning of Explanation 2 to the proviso to section 24(1) of the Act until the actual delivery of the commodity in question takes place. Under the circumstances, it is not possible to answer the question referred to the High Court. All that we can do is either to call for a supplementary statement from the Tribunal or to remand these cases to the Tribunal for a fresh hearing. As seen earlier, the authorities under the Act have completely misdirected themselves as to the questions of fact to be decided. Hence, there is need for a fresh enquiry. Therefore it will be in the interest of the parties to remand the cases to the Tribunal for a fresh enquiry on the lines suggested earlier. We order accordingly. The Tribunal may take additional evidence on the questions mentioned earlier. The parties may be given reasonable opportunity to adduce additional evidence, both documentary as well as oral. The Tribunal may also take into consideration the bye-laws of the East India Jute and Hessian Exchange Ltd., Calcutta, which bye-laws, we were told, were in force during the calendar year 1959. We are sure the Tribunal will deal with these cases expeditiously as they are very old cases.

In the result we allow these appeals, vacate the answers given by the High Court and remand the cases to the Tribunal for disposal according to law. The costs in this court as well as in the High Court will be costs in the cause.

Appeals allowed. Cases remanded.

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