Commissioner of Sales Tax, U. P.

Vs

M/s. Bishamber Singh Layaq Ram

Civil Appeal No. 717 of 1973

(P. N. Bhagwati, A. P. Sen, E. S. Venkataramiah JJ)

26.08.1980

JUDGMENT

SEN, J. –

1. This is an appeal from a judgment of the Allahabad High Court dated October 27, 1972 which was given upon a reference of certain questions of law made to the High Court by the Additional Judge (Revisions), Sales Tax, Meerut in compliance with its directions under sub-section (4) of Section 11 of the U. P. Sales Tax Act, 1948 calling for a statement of the case. The two questions referred were as follows :

> 1. Whether there is no material in support of best judgment assessment?
>
> 2. Whether on the facts and in the circumstances of this case the assessee acted in respect of the estimated purchase turnover of Rs. 3,80,000 as a dealer so as to be liable to purchase tax?

2. The Commissioner of Sales Tax submitted that the first question should be answered in the negative and the second in the affirmative. The High Court decided in favour of the assessee and against the Commissioner, holding that submission of the assessee was right and answered both the questions to the contrary. From this decision the appellant, the Commissioner of Sales Tax, has appealed.

3. The reference arose out of assessment for the assessment year 167-68 of Messrs. Bishamber Singh Layaq Ram which carries on business in jaggery, amchur, khandsari etc. on its own account and as kutcha arhatiya in jaggery, foodgrains etc. at Shahpur in the district of Muzaffarnagar, and is registered as a dealer under Section 8-A of the Act (hereinafter referred to as 'the assessee').

4. The material facts may be stated as follows : During the assessment year in question, the sales Tax Officer, Muzaffarnager by his order dated December 27, 1968 rejected the account books of the assessee open the basis of some discrepancies found during the four surveys carried out at his shop and made a best judgment assessment under sub-Section (3) of Section 7 of the Act, determining the taxable turnover of purchase effected by it as a kutcha arhatiya at Rs. 5, 30,000 and the tax payable thereon at Rs. 25,450. On appeal the Assistant Commissioner (Judicial), Sales Tax, Muzaffarnager by his order dated August 11, 1969 reduced the taxable turnover of purchases by Rs. 1,50,000 and the tax by Rs. 7,500.

5. There were two cross-revisions by the Commissioner of Sales Tax and by the assessee, both of

which were allowed by the Additional Judge (Revisions), Sales Tax, Meerut who by his order dated February 10, 1970 while negativing the plea of the assessee that he was not a dealer, however, felt that on the material on record, the table turnover of the assessee could not reasonably be determined at Rs. 3,80,000. He accordingly set aside the orders of the Assistant Commissioner (Judicial) and of the Sales Tax Officer and directed that there should be a fresh best judgment assessment.

6. Upon reference, the High Court on question No. 2, as to the liability of the assessee to tax on transactions effected by it as kutcha arhatiya held that the assessee was not a dealer, observing :

> If the assessee is a kutcha arhatiya then he is not liable to sales tax, The charge in the definition of the would 'dealer' in 1961 upon which the Judge (Revisions) has relied does not change the situation. A person can be liable to tax as a dealer only if he after as an agent having the authority to pass title in the goods sold. A kutcha arhatiya merely brings together the seller and the purchaser and helps in settling the price and weighting the goods etc. The fact that he some ties advances money to cultivators who bring their produce for sales or sometimes pays the entire sales price to the cultivator from his own pocket is not inconsistent with his being a kutcha arhatiya.

7. It was rightly contended on behalf of the commissioner that the High Court was wrong in holding that the assessee was to a dealer within Section 2(c) of the Act and that the Sales Tax Officer was not justified in making an assessment to the best of his judgment under Section 7(3). It is pointed out that the High Court has completely overlooked Explanation to Section 2(c) of the Act which was inserted by the U. P. Sales Tax (Amendment) Act, 1959, particularly the words 'through whom the goods are sold or purchased' appearing therein. With regard to the applicability of Section 7(3), it is urged that the question was not referred.

8. The finding arrived at by the High Court that the assessee as a kutcha arhatiya merely brought together the seller and the buyer charging and additional sum by way of commission and, therefore, could not be regarded as a dealer, i. e., a person engaged in the business buying and selling goods, is contrary to the admitted facts of the case. The facts stated in the agreed statement of the case clearly show that the assessee is not a kutcha arhatiya, in the usual sense of the term, but his business into existence the relation of vendor and purchaser. The nature of the business carried on by the assessee is described thus :

> Cultivators bring their produce to the assessee for sale. The goods are weighed at his shop and then supplied to the pucca arhatiyas or to other persons. Price of the commodity in full or part is paid by the assesses to the cultivators directly. The price from the purchasers is realised afterwards. In any case it is not the responsibility of the cultivators to realise the price from the purchasers. On the contrary, it is the assessee who is responsible for the payment of the price of the cultivators. Sometimes the cultivators are also paid advances and these are adjusted when the price of the produce is paid to the cultivators.

9. The decision on the question whether the assessee is a dealer must turn on the construction of Section 2(c), which insofar as material, reads :

> 2. (c) "dealer" means any person or association of persons carrying on the business of buying or selling goods in Uttar Pradesh, whether for commission, remuneration or otherwise.

> Explanation. - A factor, a broker, a commission agent or arhati, a del credere agent, an auctioneer, or any other mercantile agent by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying or selling goods on behalf of his principals, or through whom the goods are sold or purchased shall be deemed to be dealer for the purposes of this Act.

10. There can be no doubt that a pucca arhatiya comes within the substantive part of the definition of 'dealer' contained in Section 2(c) of the Act, but the question still remains whether a kutcha arhatiya is covered by the definition, by reason of the Explanation thereto.

11. The basic distinction between a kutcha and a pucca arhatiya is that a kutcha arhatiya acts as an agent on behalf of his constituent and never acts as a principal to him. The person with whom he enters into a transaction on behalf of his constituent is either brought into contact with the constituent or at least the constituent is informed of the fact that the transaction has been entered into on his behalf with a particular person. But in the case of a pucca arhatiya, the agent makes himself liable upon the contract not only to third parties but also to his constituent. He does not inform his constituent as to the third party with whom he has entered into a contract on his behalf.

12. Thus, a pucca arhatiya acts as a principal as regards his constituent and not as a disinterested middle man who brings about two principals together, there being no privity of contract between the constituent and the third party, and may substitute his own goods towards the contract made for the principal and buy the principal's goods on his personal account. On the other hand a kutcha arhatiya usually denotes a person who merely 'brings together the buyer and the seller' charging his commission, who has no dominion or control over the goods, unlike a pucca arhatiya who deals as a principal in relation to both his constituent and to the third party.

13. The crucial test is whether the agent has any persons interest of his own when he enters into the transaction or whether that interest is limited to his commission agency charges and certain out of pocket expenses, and in the vent of any loss his right to be indemnified by the principal. This principle was applied in the case of pakki arhat by Sir Lawrence Jenkins, C. J. in Bhagwandas Narotamdas v. Kanij Deoji and approved of by the Judicial Committee in Bhagwandas Parasram v. Burjorji Ruttonji Bomanji and by this Court in Shivanarayan Kabra v. State of Madras. As to the incidents of pakki arhat, Sir Lawrence Jenkins in Bhagwandas Narotamdas case succinctly states the legal position, in his own terse language :

> A pucca arhatiya is not, in the proper sense of the words, an agent or even a del credere agent. The relation between him and his up-country constituent is substantially one of principal and principal.

14. In a commercial sense, a kutcha arhatiya acts as an agent on behalf of his constituent. The main characteristic of a kutcha arhatiya has been described by the Judicial Committee in Sobhagmal Gianmal v. Mukundchand Balia in these terms :

> When a kutcha arhatiya enters into transactions under instruction from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent so that each becomes liable to the other, but also he render himself responsible on the contract to the third party.

15. Vivian Bose, J., in Kalyanji Kuwarji v. Tirkaram Sheolal puts the matter thus :

> The test to my mind is this : does the commission agent when the sells have authority to sell in his own name? He he authority in the own right to pass a valid title? If he has the he is acting as a principal vis-a-vis the purchases and not merely as an agent and therefore fro that point on he is a debtor of his erstwhile principal and not merely an agent. Whether this is so or not must of course depend upon the facts in each particular cases.

16. It is plain, on an examination of the language as it stood at the material times, for the definition of 'dealer' in Section 2(c) the even selling or purchasing agent is within that definition. A person to be a 'dealer' in that definition must be engaged in the business of buying and selling goods in Uttar Pradesh whether for commission, remuneration or otherwise Explanation to Section 2(c) brought within the definition of 'dealer' not only a commission agent, a factor, a del credere agent or any other mercantile agent by whatever name called, and whether of such description or not but also a broker, an auctioneer as well as an arhatiya. The use of the word "through whom the goods are sold or purchased" in the Explanation is significant, and they must be given their due meaning. Thus, the definition of 'dealer' in Section 2(c) is wide enough to include a selling or purchasing agent of whatever name or description. The term 'arhatiya' is wide enough to include a kutcha arhatiya.

17. If the Explanation to Section 2(c) of the Act were not there, perhaps it could be said that a kutcha arhatiya is merely an agent who helps cultivators who bring their produce to the market for sale, to find buyers, assist them in weighment and secure to them payment of price, but the assessee here certainly does not answer that description. That apart, the Explanation clearly brings within the definition of 'dealer' in Section 2(c) a kutcha arhatiya. It was not suggested at any time that the Explanation was ultra vires the State Legislature being beyond the ambit of Entry 54 of List II of the Seventh Schedule. The constitutional validity of similar Explanation to Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941 which brought an auctioneer within the purview of the definition of 'dealer' in that section, was upheld by this Court in Chowringhee Sales Bureau (P) Ltd. v. CIT. The whole object is to tax a transaction of sale of in the hands of a person who carries on the business of selling goods and who has the legal or customary authority to sell goods belonging to the principal.

18. It is evident from the statement of the case that the business carried on by the assessee was more or less similar to that of a pucca arhatiya and it is a misnomer to call it a kutcha arhatiya. It actually purchased the goods from the sellers, i. e., the cultivators, and then sold them in the market to the other buyers, as if they were its own, obviously at a profit. It paid to the cultivators the price of the goods it purchased and received from the buyers the price at which it sold. Selling of gods was not simultaneous with receiving them. These facts can lead to no other conclusion except that it bought and then sold goods and not merely brought buyers into contract with sellers and arranged transactions between them. In these circumstances, the High Court should have held that assessee to be a dealer under Section 2(c) of the Act, read with the Explanation thereto.

19. There remains the question whether the High Court was justified in holding that there was on basis for making a best judgment assessment. The Additional Judge (Revisions) had remanded the case for a reassessment on the basis of best judgment, on his finding that there was no material whatever on record to enable him to come to a conclusion one way or the other, on the disputed question of fact, i. e., whether the best judgment assessee of the taxable turnover at Rs. 3,80,000 could be sustained.

20. Though the question of the applicability of Section 7(3) of the Act was not, in terms, referred to the High Court under Section 11(4), the Additional Judge (revisions) in stating the case mentioned

that the assessee had contended before him that his account books had been wrongly rejected.

21. The statement of the case sets out the details of the various surveys made and the nature of the deficiencies found. The High Court treating the question referred to be a composite one, embarked upon an enquiry as to whether the Sales Tax Authorities were justified in rejecting the account books and in making the best judgment assessment assessment under Section 7(3). It has referred to the four surveys carries out on August 11, 1967, December 13, 1967, January 7, 1968 and March 8, 1968. In the first survey held on August 11, 1967 it was found that the nagal bahi had not been written for eleven days. The High Court observes that 'no adverse inference could be drawn on this account because the assessee's explanation was that there were no cash transactions for this period, and, therefore, the nagal bahi had not been written. With regard to the second survey carried out on December 13, 1967 it was discovered that there was a loose parcha containing several entries. One of the entries of Rs. 371.17 in the name of Sakh Chand Udit Mohan alone was entered in the account books. That too on December 13, 1967 after inspection while the payment was actually made on December 11, 1967 i. e. it was to contemporaneous with the transaction. The High Court observes that 'it was not been found that any other entry contained in the loose parcha had not been entered in the account books '. With regard to the third survey carried out on January 7, 1968 when twelve bags of wheat were found in stock, the stock register was to show to the surveying officer. The High Court has again accepted the explanation of the assessee saying that 'there was no duty cast on the assessee to produce the stock register and it was not shown since there as no demand of it. It observed that 'there is nothing in Section 13 or in any other provisions of the Act or the rules framed thereunder which requires a dealer to produce his books of accounts and other documents before the surveying officer. As regards the last survey held on March 8, 1968 the Mondhi bahi was found to be posted up to February 29, 1968. Thus there were no entries for either days. The explanation of the assessee was that it had not entered into any contract during the eight days in question. The High Court observes that as there was no material whatever for rejecting his explanation, no adverse inference could be drawn with regard to the veracity of the accounts, since Mondhi bahi line of reasoning. While we refrain from expressing any opinion on the requirements of Section 13(2) of the Act, we are satisfied that the finding of the High Court that there was nothing wrong with the method of accounting adopted by the assessee can not be upheld.

22. In our opinion, the High Court should have declined to go into the question of the applicability of Section 7(30 of the Act. When a question of law was neither raised before the Additional Judge (Revisions) not considered by him nor did it arise on the findings given by him, it will not be a question arising out of his order.

23. The question as to whether the Sales Tax Officer was justified in making a best judgment assessment under section 7(30 of the Act was not referred to the High Court. It was, therefore, not open to the High Court to go into the question. It could not allow the new point to be raised for the first time in reference. Nor was the High Court entitled on a reference under Section 11(4) of the Act to set aside the finding of the Additional Judge (Revisions) merely because on a reappraisal of the evidence it would have come to contrary conclusion. It was also not entitled to examine whether the explanation of the assessee in regard to the deficiencies found in the account book should to should not be accepted. It may be that the Sales tax Authorities should have accepted the explanation of the assessee with regard to the aforesaid deficiencies, but it may as well be that there are various other deficiencies which the assessee will have still to explain.

24. For all these reasons, the judgment of the High Court is set aside and that of the Additional Judge (revisions), Sales tax, Meerut remanding the case for a fresh best judgment assessment under

Section 7(3) of the Act is restored. There shall no order as to costs.

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