H. B. Gandhi, Excise and Taxation Officer-Cum-Assessing Authority, Karnal and Others

v.

Messrs Gopi Nath and Sons and Others

(Supreme Court Of India)

HON'BLE JUSTICE A. M. AHMADI HON'BLE JUSTICE M. N. VENKATACHALIAH

Civil Appeal No. 5092-93 Of 1989 | 11-12-1989

1. Special leave is granted

2. These appeals are by the Revenue and are directed against the order dated May 20, 1983 of the Division Bench of the High Court of Punjab and Haryana in L.P.A. Nos. 444 and 445 of 1982 dismissing the appeal preferred by the appellant against and affirming the orders dated January 13, 1983 of the learned Single Judge in Civil Writ Petition Nos. 2054 and 2170 of 1982. By those writ petitions, the respondents assailed orders of assessment of sales tax under the Haryana General Sales Tax Act, 1973 bringing to tax a turnover of sales of articles of food said to have been sold by the respondents in their restaurants

3. Against the respective orders of assessment the respondents filed appeals provided for in the statute. Section 39(5) of the Act contemplates that no appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied that the amount of tax assessed has been paid. The proviso to that sub-section, however, invests the appellate authority with the discretion to waive the requirement of the payment of tax as a precondition to the entertainability of the appeal and to proceed to consider it on the merits subject to the appellant furnishing a bank guarantee or adequate security for the tax. In the present cases, appeals envisaged and permitted by the statute had been lodged. However, respondents were aggrieved by the order of the appellate authority declining to exercise the discretion under proviso to Section 39(5) in favour of respondents and calling upon them to deposit the tax due as a condition for the appeals being heard on the merits. Respondents appear to have assailed the order declining to exempt them from payment of the tax in further appeals; but without any success

4. Respondents thereafter approached the High Court under Article 226 of the Constitution. From the order of the learned Single Judge, which has come to be affirmed by the Division Bench, it would appear that the appellants did not confine their challenge to the legality of the order of the appellate authorities declining relief under proviso to sub-section (5) of Section 39, but the respondents raised and the High Court permitted a challenge to the merits of the assessment itself on the ground that the transactions assessed to sales tax were in fact services rendered by the respondent restaurants to their customers and did not constitute sale of articles of food. The High Court entertained the writ petition and upon a re-appreciation of the facts proceeded to hold that the transactions did not constitute sales but were mere transactions of service. In these appeals the permissibility of such a re-assessment of the evidence by the High Court at a stage where appeals were the appropriate remedy and where in fact such appeals had been filed is assailed. Learned counsel for the Revenue urged that the question whether supply of articles of food and drinks to a customer in a hotel constitute sale of goods invoking a transfer of the property in the goods to the customer or whether the transactions are essentially and predominantly one of merely the rendering of service - the supply of food and drinks being merely incidental - is a complex and difficult question to be decided on a number of criteria and dependent on primary facts to be found by the fact-finding authority under the statute. This, indeed, is so. In the Northern India Caterers (India) Ltd. case [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167, 173 : 1980 SCC (Tax) 222 : (1980) 45 STC 212] the complexities of the exercise were indicated by this Court : (SCC p. 173, para 12)"[W]e have no hesitation in saying that where food is supplied in an eating house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended."

5. In the course of the proceedings of assessment the assessing authority said

"After going through the above judgment of the Supreme Court of India, it becomes clear that where a food is supplied in an eating house or a restaurant and the substance of the transaction has a dominant object of sale and rendering of services is merely incidental, the transactions would be subject to sales tax. The deciding factor in the case of this dealer, therefore, is whether the transaction made by him is the purpose of providing entertainment and other services to the customers or the dominant factor was sale of foodstuffs. As already held by the Supreme Court in Northern India Caterers case [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167, 173 : 1980 SCC (Tax) 222 : (1980) 45 STC 212], there may be high style restaurants or residential hotels rendering a bundle of special services like ball dance, rare music, viands of high regale, etc. as described by learned judges in their above-cited judgment. The establishment of the dealer does not answer the above description and cannot be considered to be of a high style restaurant providing services. It is an ordinary restaurant. I have paid a visit to the restaurant and have observed that the furniture and crockery provided in the restaurant is of an ordinary type which is barely necessary to run any restaurant in a small place like Karnal. No special music has been provided nor any bikini dances or special shows are held. Their Lordships of the Supreme Court have clearly held that where the charges for music, dances and the supply of foodstuffs are made in a consolidated form and it is not possible to bifurcate the items and decide the bills to discover separately the components of goods sold and in case where the service charges are much more than the value of the goods supplied, the transactions would not attract the levy of sales tax. It is, however, unambiguous that where the charges for the foodstuffs are dominant in the bills and the services are nominal, the object of the dealer is definitely one of sale of foodstuffs and not of rendering services. I have examined some of the bills of the dealer and find that he has charged the price of foodstuffs only and there is no other consideration for any type of services. The dominant object in his case is, therefore, undoubtedly the sale of foodstuffs and not of providing any music, or entertainment services. I think the Supreme Court had in mind those establishments where the entrance is on some payment, where shows are held and the supply of foodstuffs is just nominal and incidental to the entertainment. A visitor to such entertainment or amusement house spends few hours for the purpose of entertainment on payment. Naturally, the establishment providing such amusement/entertainment to the customer has to satisfy his bodily wants and amounts charged for satisfying such bodily wants are nominal as compared to the charges of services and providing amusement etc. No such thing is, however, found in his restaurant...."

6. The constitutional validity of the provisions in sub-section (5) of Section 39 of the Act were not assailed in the writ petition. Similar provisions, accompanied by similar proviso, have been held valid. At the stage at which the respondents approached the High Court, what the respondents could have, if the facts so justified, assailed was the question of the refusal of the appellate authority to exercise the discretion under the proviso. When an hierarchy of appeals is envisaged by a taxing statute, it is generally to be insisted that an assessee must go through the statutory proceedings. In C. A. Abraham v. ITO [(1961) 2 SCR 765 : AIR 1961 SC 609 : (1961) 41 ITR 425], it was observed

"In our view the petition filed by the appellant should not have been entertained. The Income Tax Act provides a complete machinery for assessment of tad and imposition of penalty and for obtaining relief in respect of any improper orders passed by the income tax authorities, and the appellant could not be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal..."

7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court to re-appreciate the primary or perceptive facts which have otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law

8. But here what was assailed was the correctness of findings as if before an appellate forum. Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself

9. On a consideration of all the circumstances of the case, we think that the order of the High Court cannot be allowed to remain undisturbed. We allow these appeals, set aside the judgments of the Division Bench in the letters patent appeals as also the orders of the learned Single Judge in the writ petitions in the High Court

10. Learned counsel for the respondents, however, said that though the legality of the refusal of the benefit of an order under the proviso to Section 39(5) had been raised before the High Court, that question receded to the background in view of the relief having been allowed on the main question touching the nature of the transactions. Learned counsel said that the former question yet remains to be examined. Learned counsel also submitted that the refusal of the appellate authorities to exempt respondents from the deposit of the assessed tax as a precondition to the entertainability of the appeals was unsupportable and that in their present straitened financial circumstances it will not be possible for the respondents to avail themselves of the right of appeal

11. It appears to us that having regard to the circumstances that we are considering this matter after lapse of several years it would neither be necessary nor appropriate to remit the matter to the High Court to examine the question whether the refusal of the appellate authorities to give to the respondents a benefit of the proviso to Section 39(5) was legal or not. It appears just that respondents should be enabled to have the benefit of the right of appeal and that we should, as a rough and ready measure, determine the conditions on which

relief under the proviso should be given to them. We, accordingly, set aside the orders of the appellate authorities declining or confirming, as the case may be, the refusal of the benefit of an order under said proviso and direct that the appeals filed by the respondents before the first appellate authority be now restored and proceeded with on the merits in accordance with law, subject to the condition that the respondent, in each of the appeals, deposits a sum of Rs 5000 towards the assessed tax and furnishes security in respect of the balance of the tax to the satisfaction of the said first appellate authority within two months from today

12. The appeals shall be taken up for consideration of the merits and dealt with and disposed of in accordance with law after compliance with these conditions

13. These appeals are disposed of accordingly. No costs.