

(1972) 12 MP CK 0004
Madhya Pradesh High Court
Case No: M.C.C. No. 127 of 1964

Jiyajee Rao Cotton Mills Ltd. (M/s)

APPELLANT

Vs

Commissioner of Sales Tax,
Madhya Pradesh Indore

RESPONDENT

Date of Decision: Dec. 7, 1972

Acts Referred:

- Constitution of India, 1950 - Article 286, 286(1)(a)

Citation: (1973) JLJ 146 : (1973) 18 MPLJ 335

Hon'ble Judges: P.K. Tare, C.J; K.K. Dube, J

Bench: Division Bench

Advocate: K.A. Chitaley, for the Appellant; M.V. Tamaskar, Govt. Advocate, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K.K. Dube, J.

This is an application u/s 13(2) (b) of the Madhya Bharat Sales Tax Act (Act No. 30 of 1950) read with section 52 (3) of Madhya Pradesh General Sales Tax Act, 1958, seeking for a direction to the Commissioner of Sales Tax, Madhya Pradesh, Indore to refer certain questions of law arising out of an order of the Commissioner of Sales Tax in Revision Case No. 28/14 of 1956, dated 4-5-1963, whereby the Commissioner rejected the petitioner's revision.

The revision pertained to assessment year 1951-52. The petitioner had during the assessment period entered into several contracts with Bharat Trading Co. Ltd., Gwalior for sale of goods to the value of Rs. 7,09,306/-. The Goods under these contracts were supplied to dealers outside the State of Madhya Pradesh. The contracts were for delivery F.O.R. Murar Road Railway station and the applicants

delivered goods to the common carrier, that is, the railway administration obtaining railway receipts in the name of Bharat Trading Co. Ltd. as consignor and consigned to self. The petitioner contended that the delivery to the common carrier was constructive delivery to Bharat Trading Co. Ltd. and actual delivery was effected to the dealers outside the the State only after the bills were retired by them and the railway receipts obtained.

Before the Commissioner, the petitioners contended inter alia that the the goods supplied through the agency of Bharat Trading Co. Ltd. to the dealers outside the State of Madhya Pradesh were exempted from tax under Notification No. 9 of 11-9-1950. Dealing with this contention, the Commissioner observed that the notification in question did not apply to the the transactions as the despatches were by the purchasing dealers "M/s Bharat Trading Co. Ltd." as is borne out by the fact that they were the consignors and the consignees. The Commissioner found that the transaction comprised two sales: one by the petitioner to the Madhya Bharat purchasers (M/s Bharat Trading Co., Ltd. and the other, by Madhya Bharat purchasers to out of State dealers. The first sale along with the delivery being complete inside the State the question of despatch by the petitioner did not arise and thus the sales were not exempted under Notification No. 9 of 11-9 1950. This contention of the petitioner was thus rejected in revision.

The petitioner then applied to the Commissioner in Reference No.2/RHC of 1963-64 u/s 13(1) of the Madhya Bharat Sales Tax Act for stating the question of law arising out of the order in revision of on grounds stated in the application. One of the questions formulated for reference to the high Court was in the following terms:--

(i) That the sale of goods to the parties who function as the agency in inter-State trade is not subject to the Madhya Pradesh Sales Tax Act.

It is obvious that the reference to Madhya Pradesh Sales Tax Act is through mistake and what was meant was Madhya Bharat Sales Tax Act. It was conceded before the Commissioner that the questions have not been properly formulated. From the order of the Commissioner, it appears that the question whether the goods were exempted under Notification No. 9 was not specifically incorporated for reference to High Court. The question that was canvassed before the Commissioner was whether the sales were exempted under Article 286 of the Constitution of India or not. The Commissioner of Sales Tax did not consider the question whether a question of law arises on the contention that they are exempt from sales tax under Notification No. 9 of 11-9-1950. The Commissioner refused to refer holding that no question of law arose on the argument that there was a constitutional bar under Article 286 of the Constitution which exempted the transactions of sale.

The learned Government Advocate appearing on behalf of the Department pointed out that the question of law now sought to be raised namely that the goods were exempted from sales tax under Notification No. 9 was not pressed before the

Commissioner for being referred to the High Court and the question cannot, therefore, now be considered by the High Court.

Under section 13 (1) of the Madhya Bharat Sales Tax Act, Samvat 2007 (Act No. 30 of 1950) on application of the dealer, the Commissioner is required to refer any question of law arising from the order u/s 12 of the Act affecting the liability of the dealer. The dealer has to make an application in this behalf and when the Commissioner refused to refer the questions the dealer may then apply u/s 13 (2) (b) of the Act to the High Court. If the High Court was not satisfied that the refusal was justified, it may require the Commissioner to state the case and refer the question. The jurisdiction u/s 13 (3), which the High Court inheres, arises on the refusal by the Commissioner to refer the questions to High Court. It follows that there has to be first a proper application u/s 13 (1) and that the dealer ought to have asked the Commissioner to refer the legal issue arising out of the order. The High Court can direct the Commissioner or the Tribunal to state only those questions which the dealer had himself required to be referred to the High Court.

In [Lakshmiratan Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh](#), dealing with the jurisdiction of the High Court to refer u/s 66 (4) of the Income Tax Act, 1920, the Supreme Court observed :

Correctness of an order of High Court calling for a statement of case may be challenged at the hearing of the reference and the Court may decline to answer the question referred pursuant to the direction of the High Court, if it did not arise out of the order of the Tribunal, or is a question of fact or is academic or could not have been raised because it was not incorporated in the application u/s 66 (1) : [Commissioner of Income Tax, West Bengal, Calcutta Vs. Smt. Anusuya Devi](#), Counsel for the Company has, therefore, rightly confined himself to the question which has originally submitted by the Tribunal by order dated December 29, 1954, and has raised his argument on that question only.

It is clear from the above observations of the Supreme Court that the High Court could only direct the Commissioner to refer those questions which not only arise from the order of the Commissioner or the Tribunal but that they were also incorporated in the application of the party desiring them to be thus referred, the idea being that when such questions were not asked in the first instance the controversy was set at rest and the order of the Commissioner became final. Since the controversy was not kept alive by not asking the questions to be referred to the High Court the party could not be allowed to resuscitate afterwards such questions by seeking a mandamus from the High Court. We have, therefore, to examine whether the question : "whether on the facts and in the circumstances of the case the sales by the petitioner to the Bharat Trading Co. Ltd. were covered by Notification No. 9 of the 11th September 1950, and, therefore, not liable to tax" was raised and incorporated in the application before the Commissioner u/s 13 (1) of the Act.

Shri K.A. Chitale, learned counsel appearing on behalf of the petitioner stated that he was only canvassing for the above question to be referred to the High Court. Looking to the application of the assessee it, no doubt, appears that such a controversy would be included in the question raised before the Commissioner. The question "whether the sale of goods to the parties who function as the agency in the inter-state trade being liable to pay sales tax," is quite comprehensive to include the present question. The difficulty arises if we look to the order of the Commissioner. In the order, dated 16-9-64, the Commissioner observed:

However, when the reference application was taken up for hearing, the learned counsel for the applicant admitted that the questions reproduced above had not been properly set out. He stated that the only question which required to be formulated for reference to the High Court was whether the sales of fibro hosiery, fibro cloth and woolen cloth and yarn amounting to Rs. 7,09,306/- made to M/s Bharat Trading Co. Ltd., Gwalior, being for the express purpose of export outside the then State of Madhya Bharat, were liable to tax in view of the constitutional bar prescribed by sub-clause (a) of clause (1) of Article 286 of the Constitution of India, as it stood at the relevant time.....

I have carefully considered whether the question as suggested by the learned counsel for the applicant is one which should be referred to High Court u/s 13 of the Act and am of the view that in the light of the facts found by the Commissioner, the question of applicability of Article 286(1)(a) of the Constitution just does not arise and that, therefore, this is not a fit case in which a reference should be made. My reasons for this view are set out in the paragraph next following.

It, therefore, appears that the assessee had abandoned this aspect of the case before the Commissioner. There is no discussion about the question now sought to be raised in the order of the Commissioner. There is no doubt that in the order of the Commissioner, dated 4th May 1963, dealing with the revision of the petitioner this question was elaborately dealt with by him. But it seems to have been given up when the petitioner required the Commissioner to refer the questions to the High Court u/s 13 (1) of the Act. The Petitioner had confined himself by raising a question as regards the applicability of Article 286 of the Constitution to the impugned transactions. It is, therefore, clear from the order of the Commissioner that petitioner did not want this question to be referred to the High Court and we do not think that it is permissible now to ask the Commissioner to refer this question along with the statement of the case u/s 13 (3) of the Act.

We, therefore, reject the application. Counsel's fee Rs. 100/-, if certified.