Commissioner of Sales Tax, Maharashtra State, Bombay Vs Vansal and Vansal Pvt. Ltd.

Court: Bombay High Court

Date of Decision: Feb. 27, 1981

Acts Referred: Bombay Sales Tax Act, 1959 â€" Section 22, 37, 37(1), 37(2), 37(3)

Citation: (1981) 48 STC 419

Hon'ble Judges: Sujata V. Manohar, J; D.P. Madon, J

Bench: Division Bench

Judgement

Sujata V. Manohar, J.
The respondents are the assessees. During the period 1st April, 1964, to 13th August, 1965, the respondents were

not registered as dealers under the Bombay Sales Tax Act, 1959, though they were registered under the Central Sales Tax Act, 1956. During the

period of 1st April, 1964, to 13th August, 1965, the respondents collected Rs. 2,005.91 as tax on their sales. The Sales Tax Officer, by his order

dated 9th May, 1967, held that this collection of tax was in contravention of the provisions of section 46(2) of the Bombay Sales Tax Act, 1959,

and forfeited this amount of Rs. 2,005.91 under the provisions of section 37 of the Act. Before passing the order, the Sales Tax Officer had given

a notice u/s 37 in form 29 which is prescribed by the Rules framed under the Bombay Sales Tax Act, 1959. This notice was in the form as then

prescribed.

2. The order of the Sales Tax Officer was challenged by the respondents before the Sales Tax Tribunal. By its judgment dated 27th September,

1971, the Tribunal set aside the order of the Sales Tax Officer on the ground that the notice in form 29 which had been issued by the Sales Tax

Officer was not a proper notice.

3. On 9th August, 1969, form 29 prescribed under the Bombay Sales Tax Rules, 1959, was amended. Thereafter, the Sales Tax Officer issued a

fresh notice u/s 37 of the Bombay Sales Tax Act in the amended form 29. It may be pointed out that the previous notice which had been given to

the respondents was a handwritten notice in which it had been stated :

Whereas I have reason to believe that during the period from 1st April, 1964, to 13th August, 1965, not being a dealer liable to pay tax under the

B.S.T. Act, 1959, you have collected by way of tax the sum of Rs. 2,005.91 .....

4. In the new notice which was issued in a printed form, the respondents were charged with the contravention as mentioned in printed clause (ii) of

the notice to the following effect :

not being a registered dealer and liable to pay tax on any sale or purchase, you have collected on your sales of goods a sum of Rs. 2,005.91 by

way of tax from other persons in contravention of section 46 of the said Act .....

4. After this fresh notice in the amended form 29 was issued to the respondents, the Sales Tax Officer passed a fresh order of forfeiture dated 30th

March, 1972. By this order, the Sales Tax Officer forfeited the amount of Rs. 2,005.91. The respondents filed an appeal from this order before

the Assistant Commissioner of Sales Tax, which appeal was dismissed. Thereafter, a second appeal was filed by the respondents before the

Tribunal. The Tribunal came to the conclusion that the respondents had acquired a vested right, inasmuch as, under the old form 29 of the notice,

the respondents could not have been penalised at all because the old form 29 was a defective form which did not set out all the grounds for

forfeiture prescribed u/s 37 of the Bombay Sales Tax Act. The ground on which the tax collected by the respondents was sought to be forfeited

was not set out in the old form 29. The Tribunal held that because of this defect in the prescribed form as it existed prior to 9th August, 1969, the

respondents had acquired an immunity from forfeiture, and the amended form 29 could not take away that immunity of the respondents. The Sales

Tax Officer, therefore, could not issue another notice in the amended form 29. On this basis, the Tribunal allowed the second appeal of the

respondents.

5. Thereafter, at the instance of the Commissioner of Sales Tax, the following question has been referred to us for determination :

Whether the Tribunal erred in law in coming to the conclusion that the impugned order dated 30th March, 1972, passed by the Sales Tax Officer

u/s 37(3) of the Bombay Sales Tax Act, 1959, forfeiting an amount of Rs. 2,005.91 collected by the respondents during the period 1st April,

1964, to 13th August, 1965, in contravention of section 46(2) of the said Act, was vitiated because the notice served u/s 37(2) was in form 29 as

amended on 9th August, 1969 ?

6. It is the contention of the respondents that u/s 37 of the Bombay Sales Tax Act read with form 29 of the Bombay Sales Tax Rules, as

unamended, the amount in question could not have been forfeited. They, therefore, submit that, prior to 9th August, 1969, which was the date

when form 29 was amended, they have acquired a vested right not to have the amount forfeited. They further submit that this substantive protection

against forfeiture which they have acquired cannot now be taken away by the subsequent amendment of form 29.

7. The entire submission of the respondents rests on a false major premise because the submission is based on an assumption that, u/s 37 of the

Act read with old form 29, the respondents had an immunity against forfeiture. This submission is wholly unacceptable. u/s 46 of the Bombay Sales

Tax Act, there is a prohibition against collection of tax in certain cases. Sub-sections (1) and (2) of section 46 which are relevant in the present

case are as follows :

46. (1) No person shall collect any sum by way of tax in respect of sales of any goods on which by virtue of section 5 no tax is payable.

(2) No person who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum

by way of tax from any other person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him

under the provisions of this Act :

Provided that, this sub-section shall not apply where a person is required to collect such amount of the tax separately in order to comply with the

conditions and restrictions imposed on him under the provisions of any law for the time being in force.

8. u/s 37, as it was then in force, it was provided as follows :

37. (1) If any person -

(a) not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or being a registered dealer collects any amount by way of

tax in excess of the tax payable by him, or otherwise collects tax in contravention of the provisions of section 46, or .....

he shall be liable to pay, in addition to any tax for which he may be liable, a penalty of an amount not exceeding two thousand rupees, or double

the amount of tax which would have been payable had there been no such failure, whichever is less; and in addition, in the case of a contravention

referred to in clause (a), any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government.

(2) If the Commissioner in the course of any proceeding under this Act or otherwise has reason to believe that any person has become liable to a

penalty or forfeiture or both penalty and forfeiture of any sum under sub-section (1), he shall serve on such person a notice in the prescribed form

requiring him on a date and at a place specified in the notice to attend and show cause why a penalty or forfeiture or both penalty and forfeiture of

any sum as provided in sub-section (1) should not be imposed on him.

(3) The Commissioner shall thereupon hold an inquiry and shall make such order as he thinks fit.

(4) .....

8. Under the Act, the prohibition against collection of tax is contained in section 46. u/s 46(2), there is a clear prohibition against a person who is

not a registered dealer and liable to pay tax, collecting on the sale of any goods any sum by way of tax. This provision of section 46(2) has been

interpreted in a decision of this High Court in the case of Ramkrishan Kulwantrai v. Commissioner of Sales Tax [1979] 44 S.T.C. 117. While

interpreting the provision, the High Court has observed as follows :

The phrase "No person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect ....." in sub-section

(2) really means "No person other than or except a registered dealer liable to pay tax in respect of any sale or purchase shall collect ....."... The

prohibitions imposed by section 46(1) and (2) are complete. Section 46(1) and (2) properly analysed contain three prohibitions : (1) a prohibition

against any person, whether a registered dealer or not, from collecting any sum by way of tax in respect of sales of tax-free goods, (2) a

prohibition against any person who is not a registered dealer liable to pay tax from collecting any sum by way of tax on the sale of any goods and

(3) a prohibition against a registered dealer from collecting any amount by way of tax in excess of the amount of tax payable by him in respect of a

transaction of sale or purchase.

9. In the present case, the respondents have violated the second prohibition as explained in the above decision in the case of Ramkrishan

Kulwantrai v. Commissioner of Sales Tax [1979] 44 S.T.C. 117, i.e., although they were not registered dealers at the relevant time, they have

collected tax. Under the scheme of section 46(2), a registered dealer who is liable to pay tax is entitled to collect a sum by way of tax on his

transactions of sale. The person entitled to collect tax must be (i) a registered dealer and (ii) he must also be liable to pay tax. Both these conditions

must be fulfilled by a person seeking to collect any sum as tax. If either of the conditions is breached, the person cannot collect any sum as tax. The

respondents are not registered dealers. They do not, therefore, fulfil the first requirement of being a registered dealer. Hence they cannot collect

any sum by way of tax.

10. It was sought to be argued that the respondents were liable to pay tax and hence they were entitled to collect tax on their transactions of sale.

This argument is based on a misreading of section 46(2). If the arguments were to be accepted, an unregistered dealer could collect taxes without

there being any corresponding obligation on him under the Act to file returns and account to the Government for the tax collected, since he is an

unregistered dealer. Section 46(2) prohibits an unregistered dealer from collecting any amount by way of tax. The respondents have clearly

violated the provisions of section 46(2).

11. In respect of the violation of the provisions of section 46, the penalty is provided u/s 37. A number of contraventions specified in that section

invite penalty or forfeiture. The last part of section 37(1)(a) ""... otherwise collects tax in contravention of the provisions of section 46"" is wide

enough to cover all prohibitions contained in section 46, whether expressly cited in section 37 or not, including the prohibition against a person who

is not a registered dealer and liable to pay tax, collecting any sum by way of tax. It is, therefore, quite clear that under the provisions of section

37(1)(a) as it was in force throughout the material time, a penalty could be imposed or an order of forfeiture could be made against a person who

violated any provision of section 46. There is, therefore, no substance in the contention of the respondents that, u/s 37, as it existed at the relevant

time, an order of forfeiture could not be made against them in respect of the sum collected by them by way of tax.

12. Sub-sections (2) and (3) of section 37 prescribe the procedure for levying a penalty or ordering forfeiture. From the scheme of section 37, it is

quite clear that the substantive provisions for levy of penalty or for forfeiture are contained in sub-section (1), while the procedure for imposing a

penalty or for forfeiture is prescribed in sub-sections (2) and (3). Thus, under sub-section (2) of section 37, the Commissioner is required to serve

a notice in the prescribed form requiring the person to show cause why a penalty or forfeiture or both should not be imposed on him. Thereafter,

under sub-section (3), the Commissioner is required to hold an inquiry and make such order as he thinks fit.

Sub-sections (2) and (3), therefore, do not give any substantive right to the parties but they prescribe a procedure which must be complied with

before a penalty can be levied or an order of forfeiture can be made.

13. Under the prescribed procedure, therefore, before the Commissioner can make any inquiry, he must give to the party concerned a notice in the

prescribed form. Under the Bombay Sales Tax Rules which have been framed under the Bombay Sales Tax Act, the form of notice required to be

given before any action can be taken u/s 37 is prescribed by form 29. The old form 29 which was prescribed prior to 9th August, 1969, covered

only two grounds relevant for the present purposes for levying penalty or ordering forfeiture, namely, (1) a person who, not being a dealer liable to

pay tax, collects tax; and (2) a person who, being a registered dealer, collects by way of tax a sum in excess of the tax payable. The old form did

not provide a third ground, namely, a person who is not a registered dealer and liable to pay tax, collecting any sum by way of tax from any

person. The first notice which was issued to the respondents charged them on the ground that they, not being dealers liable to pay tax under the

Act, had collected tax. This ground had no application to the respondents. The notice was thus defective. After 9th August, 1969, form 29 was

amended. The new form included the third ground for levying penalty or ordering forfeiture, namely, that a person, not being a registered dealer

and liable to pay tax, had collected tax. The second notice which was issued to the respondents in the amended form 29 has mentioned this third

ground as a ground for forfeiture in the case of the respondents.

14. The only question which arises for determination is whether the omission of this ground from the prescribed form of notice prior to August,

1969, can be said to give rise to any immunity from forfeiture in favour of the respondents. Since the giving of a notice u/s 37(2) is a procedural

requirement, any defect in the prescribed form of the notice can be subsequently remedied and a fresh notice in the amended form can be given

before taking action under the provisions of that section. The prescription of a defective form of notice cannot give rise to any substantive rights or

any immunity in favour of anybody.

15. Mr. Joshi, who appears for the respondents, relied upon the provisions of section 34 of the Indian Income Tax Act of 1922 and contended

that the notice which is required to be given u/s 34 of the Indian Income Tax Act of 1922 has been held by our High Court to be the foundation for

exercising jurisdiction under that section. Mr. Joshi, therefore, submits that a notice u/s 37(2) of the Bombay Sales Tax Act, 1959, should also be

considered as a part of substantive law and should not be considered as merely a procedural requirement.

16. This contention of Mr. Joshi does not appear to be correct. The provisions of section 34 of the Indian Income Tax Act, 1922, are very

different from the provisions of section 37 of the Bombay Sales Tax Act, 1959. u/s 34 of the Indian Income Tax Act, 1922, the basis for

reopening the assessment is the belief of the Income Tax Officer that, by reason of the omission or failure on the part of an assessee to make a

return of his income u/s 22 or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to Income

Tax has escaped assessment for that year, or has been under-assessed, or assessed at too low a rate, etc. In the alternative, the Income Tax

Officer can take steps u/s 34 if he has reason to believe, in consequence of information in his possession, that income chargeable to Income Tax

has escaped assessment, etc.

17. Under the Bombay Sales Tax Act, 1959, the prohibitions against collection of tax in certain cases are expressly provided in section 46. The

grounds for taking action are, therefore, expressly laid down in the statute and are not a matter of belief of the Sales Tax Officer. Two types of

consequences of violating these provisions are laid down in section 63(1)(h) and section 37 of the Act. u/s 63(1)(h), a person is liable to

prosecution for contravening the provisions of section 46. u/s 37(1), a penalty can be levied against him or an order of forfeiture can also be made

against him. Sub-section (4) of section 37, however, provides that no prosecution for an offence under the Act shall be instituted in respect of the

same facts on which a penalty has been imposed u/s 37. There is a corresponding provision to this effect in section 63(3) also. After specifying the

grounds for taking action in section 37(1), sub-sections (2) and (3) of section 37 lay down the procedure for levying a penalty or for making an

order of forfeiture. In view of the scheme of the Act, it is not possible to apply the analogy of section 34 of the Indian Income Tax Act, 1922, to

sub-section (2) of section 37 of the Bombay Sales Tax Act, 1959. The giving of a notice required to be given u/s 37(2) is a procedural

requirement. If there is a defect in this procedure which has been subsequently remedied, it cannot be said that any substantive right of the

respondents has been taken away. If the amended procedure is available at the date of taking action, resort can be had to the amended procedure.

18. It is now well-settled that the provisions relating to procedure are retrospective in their operation in the sense that the procedure which is in

existence on the date on which the procedure is resorted to must be applied. As Maxwell has succinctly put it : ""No person has a vested right in

any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he

sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode. Alterations in the form of

procedure are always retrospective, unless there is some good reason or other why they should not be."" (Maxwell on the Interpretation of

Statutes, 12th Edition, page 222)

19. The above passage has been referred to with approval by the Supreme Court in the case of Anant Gopal Sheorey Vs. The State of Bombay,

In this connection, one can also usefully refer to the case of Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass [1952] 54 L.R. 330, where

a Division Bench of this High Court consisting of Chagla, C.J., and Bhagwati, J., held that in a case where an immovable property which was the

subject-matter of dispute was outside the jurisdiction of the court at the time when the suit was instituted but was brought within the jurisdiction of

the court by virtue of the Greater Bombay Laws and the Bombay High Court (Declaration of Limits) (Amendment) Act (8 of 1950), before the

suit was heard, the court had jurisdiction to hear and dispose of the suit in respect of that property. They also observed that no party has a vested

right to a particular proceeding or to a particular forum. All procedural laws are retrospective unless the legislature expressly states to the contrary.

Therefore, procedural laws in force must be applied at the date when a suit or proceeding comes on for trial or disposal. Applying this principle,

they held that if the court has jurisdiction to try the suit when it comes on for disposal, the court cannot refuse to assume jurisdiction by reason of

the fact that the court had no jurisdiction to entertain it at the date when it was instituted.

20. In the present case, all that has happened is that the procedure which was originally prescribed was defective. The defect has been

subsequently remedied. It was, therefore, open to the sales tax authorities to issue a notice in the amended form 29 for the purpose of taking action

against the respondents under the provisions of section 37 of the Bombay Sales Tax Act, 1959. At no time did the respondents have any

protection of any substantive law against forfeiture. There can, therefore, be no question of taking away that protection.

21. The respondents had raised some other contentions before the Tribunal and had argued that, on the facts of the case, the amount in question

was not liable to be forfeited. We are not concerned with those contentions in the present case. Those contentions may be considered by the

Tribunal when the matter goes back to it for consideration in the light of the answer given by us to the question referred to us.

22. In the premises, the question is answered in the affirmative, that is to say, in favour of the department and against the assessees. The

respondents to pay to the applicant the costs of the reference fixed at Rs. 300.

23. Reference answered in the affirmative.