

(1984) 04 BOM CK 0051

Bombay High Court

Case No: Sales Tax Reference No. 78 of 1978 in Reference Application No. 94 of 1975

Commissioner of Sales Tax,
Maharashtra State, Bombay

APPELLANT

Vs

Morarji Gokuldas Spg. and Wvg.
Co. Ltd.

RESPONDENT

Date of Decision: April 16, 1984

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 19, 19(4), 36(2), 61

Citation: (1987) 67 STC 186

Hon'ble Judges: P.S. Shah, J; M.H. Kania, J

Bench: Division Bench

Judgement

P.S. Shah, J.

This is a reference under sub-section (1) of section 61 of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the Act") made by the Sales Tax Tribunal at the instance of the applicant. The question referred to us for our determination runs as under :

"Whether, on the facts and in the circumstances of the case and on the true and proper interpretation of the contents of the letters referred to in para 7 of the judgment of the Tribunal and the evidence of Mr. Fernandes, the rent collector, the Tribunal was right in coming to the conclusion that the opponent-company did not succeed to the business of Shri Kishinchand Tolaram in whole or in part, within the meaning of sub-section (4) of section 19 of the Bombay Sales Tax Act. 1959 ?"

2. M/s. Tolaram, which was a proprietary concern of Mr. Kishinchand Tolaram, was doing business at 36, Colaba Road, Bombay-5, in textile fabrics, PVC plastic goods, cycle parts, etc., as an unregistered dealer. The said premises in which the business was carried on belonged to PRO-Cathedral of the Holy Name and were taken on rent from them by M/s. Tolaram. When M/s. Tolaram was assessed for the period from

April 1, 1960 to December 21, 1961, the respondent-company was made a party to the assessment proceeding by the Sales Tax Officer and a notice in form No. 27 was issued to them. In reply to that notice the respondent-company informed the Sales Tax Officer that they had no concern with the business which was conducted by M/s. Tolaram at the said premises and that they had only taken possession of these premises with effect from January 1, 1962. By the assessment order passed by the Sales Tax Officer, M/s. Tolaram was assessed to tax of Rs. 16,430 and in addition a penalty u/s 36(2)(a) of the Act at Rs. 3,286 was also levied. A demand notice for the said amount of Rs. 19,716 was issued to M/s. Tolaram. On the basis of the record before him the Sales Tax Officer was of the opinion that M/s. Tolaram had transferred to the respondent-company the business as a going concern with the stock-in-trade and furniture under advice to the landlord and as such was a transfer within the meaning of sub-section (4) of section 19 of the Act making the respondent-company jointly and severally liable to pay the tax due from the transferor till the time of such transfer. Accordingly, the Sales Tax Officer issued a notice dated April 23, 1964 to the respondent-company to show cause why they should not be held transferees of M/s. Tolaram u/s 19(4) of the Act. The company sent a reply to the said show cause notice by their letter dated April 25, 1964. They contended that they had taken the tenancy rights of the premises from the landlord directly and had not purchased the goodwill or stock-in-trade of M/s. Tolaram. The Sales Tax Officer after taking into consideration certain correspondence exchanged between the company, the landlord and M/s. Tolaram held that the company was a transferee of M/s. Tolaram u/s 19(4) of the Act. This order of the Sales Tax Officer was challenged by the company by filing an appeal before the Assistant Commissioner. The Assistant Commissioner upheld the order of the Sales Tax Officer and dismissed the appeal. The company filed a second appeal before the Tribunal. On a consideration of the five letters dated December 18, 1961, January 5, 1962, January 11, 1962, January 25, 1962 and April 15, 1964, as also the evidence of Mr. Fernandes, the Tribunal set aside the orders of the lower authorities holding that there was no evidence of transfer of business in the case and allowed the appeal.

3. Mr. Jetley, appearing for the department submitted that the Tribunal had totally misconstrued the correspondence and the evidence of Mr. Fernandes. He particularly relied on the letter dated December 18, 1961, sent by M/s. Tolaram to the landlords wherein it has been stated that Mr. Tolaram was disposing of his running store along with furniture, fixtures, counters, show-cases, etc., to M/s. Morarjee Gokuldas Spinning & Weaving Co. Ltd.

4. We have considered all the five letters and also the evidence of Mr. Fernandes. Now, it is an admitted position that the company took possession of the premises with effect from January 1, 1962. In the letter sent by the company to the landlords dated January 5, 1962, it is stated that the company has agreed to take over the premises occupied by M/s. Tolaram and/or Kishinchand Tolaram in the premises in

question. In this letter an undertaking has been given by the new tenant that the monthly rent would be paid to the landlord with effect from January 1, 1962. This letter obviously does not refer to any transfer of business by M/s. Tolaram to the company. It must be mentioned that the letter dated December 18, 1961, on which reliance was placed by the department, only an intention of disposing of his running store along with furniture, etc., is referred to and does not support the contention of Mr. Jetley that a transfer of business had taken place. There is no other definite material on record to show that there was a transfer of business in favour of the company. The department could have got produced the accounts of the company to show that certain amount was paid for transfer of the business in their favour. It does not appear that the stock books of the company were examined. The entries in the stock book could have thrown light on the question as to whether the furniture or any other goods belonging to M/s. Tolaram was transferred to the company. If it was a case of a transfer of a going concern along with its tenancy rights one would not have ordinarily expected surrender of tenancy rights to the landlord and re-letting the same to the new tenant by the landlord. The letter dated January 25, 1962, written by M/s. Tolaram to the company expressly refers to the fact that M/s. Tolaram had surrendered the tenancy rights to the landlord and at their instance they had transferred the tenancy in favour of the company.

5. In view of the above state of evidence, we are unable to find any error of law in the appreciation of evidence and the conclusion drawn by the Tribunal. We would, however, wish to make it clear that since a grievance was made by Mr. Jetley that the Tribunal has grossly misappreciated the evidence, we have considered the evidence and the circumstances only with a view to see whether the Tribunal has committed an error of law in the appreciation of evidence and reaching the conclusion that it was not established that M/s. Tolaram had transferred the business to the company. As observed by the Supreme Court in [Commissioner of Income Tax, West Bengal III Vs. Kamal Singh Rampuria](#), it is well-established that the High Court is not a court of appeal in a reference u/s 66 of the Indian Income Tax Act, 1922, and it is not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the appellate court. Since it is not our function to re-appreciate the evidence, we do not find that the Tribunal has committed any error of law in coming to the conclusion as it did. We answer the question referred to us in the affirmative and against the department.

6. The applicant to pay costs to the respondent.

7. Reference answered in the affirmative.