

The State of Bombay Vs. United Coal Co.

The State of Bombay Vs. United Coal Co.

SooperKanoon Citation : sooperkanoon.com/335321

Court : Mumbai

Decided On : Oct-04-1957

Reported in : [1958]9STC19(Bom)

Judge : S.T. Desai and ;Tendolkar, JJ.

Acts : Bombay Sales Tax Act, 1946 - Sections 23(1)

Appeal No. : Sales Tax Reference No. 35 of 1956

Appellant : The State of Bombay

Respondent : United Coal Co.

Advocate for Def. : N. A. Palkhivalla and ;S.P. Mehta, Adv.

Advocate for Pet/Ap. : Little & Co., ;Marzban Mistree and;D.P. Madon, Advs.

Judgement :

Tendolkar, J.

1. This is a reference under the Sales Tax Act at the instance of the State of Bombay. The relevant facts are these. The respondents to this Reference are the United Coal Co. A firm known as C.P. Syndicate Ltd. owned coal mines in Madhya Pradesh and they had appointed Byramji Mining Combine Ltd., Nagpur, as their sole selling agents. By a letter dated 20th March, 1950, the said Byramji Mining

Combine Ltd. appointed the respondents as sole sub-agents for the sale of Damua Kalichhappar steam and slack coal for a period of one year from the first of July, 1950, for the territory of Gujarat. Now, certain mills in this Gujarat area situated at Kalol, Kadi and Petlad in the Bombay State had appointed the Kathiawar Coal Distributing Co. as their buying agents for coal. This company instructed the respondents to send to the respective mills coal required by them. This coal was despatched from the collieries direct to the mills; but the railway receipts were sent to the respondents together with the bills for the price of the coal. The respondents in their turn forwarded the receipts together with their own invoices to the Kathiawar Coal Distributing Co. and the latter company in its turn forwarded the receipts to the mills with their own invoices. The mills paid the amount of the invoices to the Kathiawar Coal Distributing Co. and this amount came back to the respondents and was by them paid ultimately to the C.P. Syndicate. In this transaction both the respondents and the Kathiawar Coal Distributing Co., charged the mills annas 8 per ton for their services. The Sales Tax Authorities held that the respondents had sold coal to the Kathiawar Coal Distributing Co., and assessed them to sales tax on that footing and also imposed a penalty under sub-section (3-A) of section 12 of the Bombay Sales Tax Act, 1946. It is against this order that the respondents went in revision to the Sales Tax Tribunal; and the Sales Tax Tribunal set aside the order holding that there was no sale by the respondents to the Kathiawar Coal Distributing Co. Arising out of this order the Tribunal has referred to this Court three questions which are as follows :-

(1) Whether the transactions between the opponents and the Kathiawar Coal Distributing Co., or between the opponents and the mills and factories for whom or by whom the coal was purchased were transactions of sale within the meaning of the Bombay Sales Tax Act of 1946

(2) Whether the opponents were dealers within the meaning of the said Act

(3) Whether the opponents are liable to pay the sales tax for the coal supplied to the Kathiawar Coal Distributing Co., or the said mills and factories

With regard to the second and third questions, Mr. Palkhivalla for the respondents urges that they do not arise out of the order of the Tribunal and there is no

jurisdiction in the Tribunal to refer these questions to the Court nor in the Court to decide the same. We will deal with this contention later.

2. Turning then to the first question, the ground on which the Tribunal took the view that there was no transaction of sale between the respondents and the Kathiawar Coal Distributing Co., is to be found under the provisions of the Colliery Control Order, 1945. The Tribunal took the view and, in our opinion, rightly that if the transaction that took place could have been carried out lawfully by all the parties concerned within the law, they should hold that it had been so carried out and they should not attribute to the parties a desire to carry out the transaction except in accordance with the law. It is from this point of view that the Tribunal considered the relevant provisions of the Colliery Control Order. Now, section 4 of that Order provides for the fixation of price at which coal may be sold. Section 6(1) provides that a colliery owner shall deliver the coal to the consumer at the price fixed and no commission or other charge shall be paid except when a broker is employed and the brokerage shall also not exceed six annas per ton to be paid by the owner to the broker. Then section 6(2) provides :-

'Where a consumer purchases coal through a del credere agent, such agent shall not, on the sale of such coal, charge or receive from the consumer a margin over the price fixed under clause 4 with exceeds :-

(1) (a) one rupee per ton in the case of coal; or

(b) one rupee eight annas per ton in the case of soft coke, or

(c) two rupees eight annas per ton in the case of hard coke and if, in any such transaction as aforesaid, a broker is employed, or the del credere agent himself serves as a broker, a brokerage not exceeding six annas per ton may be paid by the colliery owner to the broker or, as the case may be, to the del credere agent.'

The sub-clause (3) provides :-

'Where in any transaction governed by sub-clause (1) or (2) more than one broker or del credere agent is employed, the total of the brokerages or margins charged in respect of the transaction shall not exceed the maximum prescribed in the said

sub-clauses and shall be divided between the brokers or agents in such proportion as may be agreed upon.'

The section 12E provides :-

'No person shall acquire or purchase or agree to acquire or purchase any coal from a colliery and no colliery owner or his agent shall despatch or agree to despatch or transport any coal from the colliery except under the authority and in accordance with the conditions contained in a general or special authority of the Central Government.'

3. Having regard to these provisions of the Colliery Control Order, the Tribunal took the view that the respondents were del credere agents for the consignors and they were not the sellers of the coal to the Kathiawar Coal Distributing Co. Now, it appears to us that this finding of the Tribunal is well-founded. Section 12E of the Order clearly provides that no person shall acquire or purchase or agree to acquire or purchase any coal from a colliery except under general or special authority of Government. Therefore, the respondents could not have purchased the coal from the colliery in order to be able to sell it to the Kathiawar Coal Distributing Co., because it is not alleged that the respondents had general or special authority of the Central Government to purchase coal from the colliery. Again in their turn, even assuming that the respondents had purchased the coal from the colliery or they were agents for the colliery owners, they could not lawfully sell the coal to the Kathiawar Coal Distributing Co., which did not possess any authority general or special from the Central Government, to purchase the coal. Therefore, if the transaction is sought to have been put through by the respective parties concerned, it cannot be looked upon as a sale by the respondents to the Kathiawar Coal Distributing Co. Obviously the respondents are in this transaction del credere agents, because the bills were drawn on them by the colliery; the colliery looked to them for the payment of the bills, whether the Kathiawar Coal Distributing Co., paid the amount or not, and the railway receipts were actually sent to the respondents. This makes the transaction a transaction that was lawfully carried out, because between the respondents and the Kathiawar Coal Distributing Co., they have shared between them in terms of section 8(3) the brokerage of one

rupee per ton of coal each taking eight annas. In our opinion, the Tribunal was right in the conclusion they arrived at and our answer to the first question will be in the negative.

4. Coming now to questions 2 and 3, the first question that we have to determine is whether these questions arise out of the order of the Tribunal. The relevant section under which a reference lies is section 23 of the Sales Tax Act, 1946. Sub-section (1) of this section is a verbatim reproduction of section 66(1) in the Income-tax Act and as a result of several decisions, it is well established in income-tax law that a new point or plea cannot be raised upon a reference except in one case and that is where no additional facts are necessary to support that point and it is a pure question of law. In that case, even if the point or plea was not taken up before the Tribunal or determined by them, it may be dealt with on a Reference. Otherwise, if the question does not arise out of the order of the Tribunal, the Tribunal has no authority to refer any such question, and if it does so, the Reference is without jurisdiction to deal with such a question. Accepting that position as well established, Mr. Mistree urges that this is a case in which all relevant facts have been found by the Tribunal; and although at no stage of the proceedings the Department took up the attitude that the respondent was a dealer and therefore subjected to tax, on the facts found it is a pure question of law whether he falls within the definition of 'dealer' and becomes liable as a dealer to pay the tax. Now, no doubt, if the position on the facts found was that the liability of the respondent could be determined as a pure question of law without any more additional facts, there would be jurisdiction to entertain the question. It may perhaps be possible to determine on the facts found whether or not the respondent was a dealer. The definition of dealer that is relied upon is to be found in section 2(c), and that definition includes not only a person who carries on a business of selling but also a person who carries on a business of supplying goods, whether for commission, remuneration or otherwise; and the case of Mr. Mistree is that on the facts found by the Tribunal the respondent is a person who supplies goods for commission. Assuming for a moment that this submission was well-founded and the respondent was a dealer, yet his liability to tax would depend upon the person to whom the supply was made, because by virtue of section 6(3) certain supplies are exempt from taxation. Amongst such supplies are the supplies

to a registered dealer holding a licence in respect of goods specified in such licence and certified by him as being intended for use by him in the manufacture or processing of any goods for sale or supply. Obviously if it was at any time urged that the respondents were dealers in that they supplied the goods, it would be open to the respondents to show they supplied the goods, it would be open to the respondents to show that the supply was to the mills; and there is no finding by the Tribunal as to the person to whom the supply is made, and if such person was the mills whether they were registered dealers and they purchased these goods for the purpose of manufacture of textiles in their own mills. All these facts were not investigated or adjudicated upon by the Tribunal, obviously because no liability was sought to be fixed upon the respondents on the basis of their being dealers in the sense that they supplied the goods on commission and, therefore, this is a case in which several additional facts will be necessary to decide the liability of the respondents to sales tax, on the basis of their being dealers within this part of the definition.

5. In our opinion, therefore, the two questions, questions 2 and 3 - and in this context we consider question 3 as merely a corollary to question 2 - do not arise out of the order of the Tribunal. We have therefore no jurisdiction to determine them, and we, therefore, do not decide those questions.

6. The State to pay costs.

Reference answered accordingly.