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Copper Rollers Private Ltd. Vs. the State of Maharashtra

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Court : Mumbai

Decided On : Jan-30-1975

Reported in : [1975]36STC391(Bom)

Judge : D.P. Madon and ;M.H. Kania, JJ.

Acts : Bombay Sales Tax Act, 1959 - Sections 3, 7, 8, 9, 10, 19, 19(4), 19(6) and 61(1)

Appeal No. : Sales Tax Reference No. 64 of 1968

Appellant : Copper Rollers Private Ltd.

Respondent : The State of Maharashtra

Advocate for Def. : R.A. Dada, Adv.

Advocate for Pet/Ap. : B.C. Joshi and ;P.C. Joshi, Advs.

Judgement :

Madon, J.

1. The facts which have given rise to this reference under section 61(1) of the Bombay Sales Tax Act, 1959, are that by an agreement of partnership dated 26th June, 1963, Keshavlal Desai, Gopaldas Aggarwal and Devkumar Aggarwal agreed to carry on in partnership the business of manufacturing copper rollers under the

firm name and style of Copper Rollers Corporation. Under the said agreement of partnership the partnership was to commence from 1st July, 1963. The partnership firm of Copper Rollers Corporation got itself registered as dealer under the Bombay Sales Tax Act, 1959. Thereafter the said Keshavlal Desai retired from the partnership firm with effect from 1st June, 1965, and by a deed of retirement and assignment dated 4th June, 1965, assigned and transferred all his rights, title and interest in the said firm and in the goodwill thereof to the remaining partners, namely, Gopaldas and Devkumar. Gopaldas and Devkumar thereafter continued the said partnership business in the said firm name and style of Copper Rollers Corporation with effect from 1st June, 1965. On 2nd June, 1965, the applicant-company was incorporated with the object inter alia of acquiring the said business of the partnership firm of Copper Rollers Corporation and carrying on the said business. After incorporation of the applicant-company, by an agreement dated 14th June, 1965, the said partnership firm agreed to transfer and assign the said partnership business and all the rights, assets and liabilities thereof to the applicants upon the terms and conditions contained in the said agreement. Thereafter an indenture of assignment dated 5th November, 1965, was executed by and between the said partnership firm and the applicants whereunder the said business of the partnership firm of Copper Roller Corporation and all its rights, assets and liabilities were transferred to the applicants. This indenture of assignment was lodged for registration under the Indian Registration Act, 1908, and was registered on 8th November, 1965. Thereafter the applicants applied for registration as dealer under the said Act with effect from 5th November, 1965, namely, the date of the said indenture of assignment. The Sales Tax Officer, however, issued to the applicants a certificate of registration registering them with effect from 23rd November, 1965. The applicants thereupon filed an appeal to the Assistant Commissioner of Sales Tax. Relying upon certain recitals in the said indenture of assignment of Assistant Commissioner of Sales Tax came to the conclusion that the said business of the partnership firm of Copper Rollers Corporation was transferred to the applicants on 14th June, 1965, and not on 8th November, 1965. The view taken by the Assistant Commissioner of Sales Tax was confirmed by the Tribunal. Thereafter at the instance of the applicants the Tribunal has stated a case and submitted the following question for our determination :

'Whether, having regard to the facts and circumstances of the case and upon a true construction of the deeds dated 14th June, 1965, and 5th November, 1965, the Tribunal is justified in law in coming to the conclusion that the applicant is not entitled to the registration effective from 5th November, 1965 ?'

2. The determination of the aforesaid question turns purely upon the construction of the said agreement dated 14th June, 1965 and the said indenture dated 5th November, 1965. It is, therefore, necessary to refer to the relevant recitals and clauses of the said two documents. The first three recitals in the said agreement dated 14h June, 1965, deal with the history of the said partnership firm. The fourth recital refers to an agreement executed between the said firm and the promoters of the applicant-company for the applicants to take over the business of the firm and is in the following terms :

'AND WHEREAS by a mutual agreement between the vendors and the said Keshavlal Dipchand Desai as the partners of the said Copper Rollers Corporation prior to the retirement of the said Keshavlal Dipchand Desai and the promoters of the purchaser's Company, it was agreed to sell, transfer and convey the running business of the said partnership-firm of Copper Rollers Corporation to the purchaser with all its existing assets, liabilities, benefits of contracts, actual users' licences, quota rights, permits, allotments deposits and all other tangible and intangible assets and the goods will thereof as a going concerned together with the tenancy rights as incidental thereto.'

3. The next recital refers to the incorporation of the applicant-company and the request by the promoters to the said firm to execute an agreement of transfer with the applicant-company. The sixth recital refers to the industrial licence and the import licences obtained by the said firm. The other recitals refer to the fact that the firm had entered into a building lease and had purchased building materials for the construction of a manufacturing unit on the plot of land agreed to be leased to the firm. Clause 1 of the operative part of the said agreement provides as follows :

'Now IT IS HEREBY AGREED by and between the parties hereto as follows :

4. Subject to hereinafter (sic) provided the vendors will sell and the purchasers will purchase the said business of the vendors carried on by them at Bombay as a going concern as and from June, 1965, together with all the assets and liabilities thereof including .....'

5. Then follow certain assets and liabilities which are specified in sub-clauses (a) to (f) of clause 1. They include goodwill, the benefit of the aforesaid agreement to lease, the benefit of all subsisting contracts, engagements, letter of credit - opened or to be opened - orders, import licences and allotment of metals, future licences and allotments, plants, machinery, building materials and all the property, assets and liabilities of the business of the said firm. Clause 2 of the said agreement provides as follows :

'The purchaser shall pay, satisfy and discharge all the debts and liabilities of the vendors' said business as subsisting on the June, 1965, and shall indemnify the vendors from all actions, proceedings, claims and demands in respect thereof. Short particulars of the assets and liabilities as on the June, 1965, are specified by the vendors separately and the same shall be deemed to be a part of this agreement for all intents and purposes.'

6. Clause 3 specifies the consideration which under the said clause is to be paid by the applicants on the execution of the regular deed of transfer and assignment. Clause 5 of the said agreement provides that pending the completion and execution of the deed of transfer and assignment the applicants would be authorised to act for and on behalf of the said firm as its constituted attorneys and by the said clause the applicants were appointed as such constituted attorneys.

7. On a plain construction of the said agreement dated 14th June, 1965, it is clear that it is an executory agreement and the subject-matter agreed to be transferred is the entire business of the firm of Copper Rollers Corporation together with all its assets and liabilities and that under the said agreement none of the assets were transferred or passed from the said firm to the applicants. In fact, at the date of the execution of the said agreement the parties had not even agreed upon the date in the month of June, 1965, which would be taken by them as the valuation date for crystallizing the assets and liabilities of the said firm. This is apparent from the fact

that both in clause 1 and in clause 2 the date is kept blank. The intention of the parties was that this date should be some date in the month of June, 1965.

8. Turning now to the said indenture of assignment dated 5th November, 1965, after preliminary recitals there follow certain recitals on the basis of which the sales tax authorities and the Tribunal have come to their finding that the transfer took place as from 14th June, 1965. The said recitals are in these terms :

'AND WHEREAS the assignees have been carrying on the running business of the said Copper Rollers Corporation as and from the 14th June, 1965, in all respect and in every manner as assignees and all the dealings and transactions of the said business are binding on the assignees

'AND WHEREAS the deed of assignment required to be executed by the assignors in favour of the assignees has not been executed and the assignees have called upon the assignors to execute a proper deed of assignment of the business of the said Copper Rollers Corporation as a going concern and assign and transfer the same to the assignees

AND WHEREAS by reason of the premises, it is agreed between the assignors and the assignees that these presents shall be deemed to be effective and operative between the parties hereto as and from the 14th day of June, 1965 .....

AND WHEREAS the assignees have taken over the entire assets and liabilities of the assignors as per their books of account as on the 14th June, 1965

AND WHEREAS the said stock-in-trade, machinery and other tangible assets, etc., all capable of delivery by manual labour have been delivered to the assignees on the 14th day of June, 1965, before the execution of these presents.'

9. Then follows the operative part of the said indenture of assignment. Under the said operative part, in consideration of the amount agreed to be paid as consideration being paid, it is stated, 'the assignors DO HEREBY assign and grant to the assignees for ever ALL THAT goodwill, interest and connection (sic) of the assignors in the said business' and then follows a list of specific assets and liabilities which are included in the general words of assignment. The rest of the

operative part of the said indenture of assignment is in the usual form and it is unnecessary to quote extensively therefrom. The operative part leaves no doubt that it is by the said indenture of assignment alone that the business of the firm of Copper Rollers Corporation together will its assets and liabilities was transferred to the applicants. In subjecting the operative part of the said indenture of assignment to what was mentioned in the recitals, both the sales tax authorities and the Tribunal have overlooked the ordinary rules of construction of deeds and documents. These rules have been set out and elaborately illustrated in 'Norton on Deeds'. We will refer to only such of them as are relevant for our purposes. The following passage at page 197 of the second edition of that book correctly sums up the position where there is an inconsistency between the recitals in a document and its operative part as follows :

'Many deeds, particularly modern deeds, have recitals, and it sometimes happens that the recitals are not consistent with the operative part. When this is the case - if both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to preferred.'

10. What happens in the converse case where the operative part of a deed is ambiguous and its recitals clear is set out at page 201. In such a case, the recitals govern the construction. Otherwise, it is only in the case of certain specific types of documents, such as powers of attorney and releases, that the recitals would control the operative part. We are not concerned in this case with a document of that class. The position is, therefore, clear. Where there is an inconsistency between the operative part of a deed and its recitals, if the operative part is clear and unambiguous, it prevails over the recitals. The same position is to be found in Halsbury's laws of England, third edition, volume XI, at pages 418 to 422. In the case before us, the operative part of the said indenture of assignment is clear. There is no ambiguity about the operative part or any portion thereof and the recitals which precede it cannot govern or cut down the effect and operation of the operative part. Apart from this position in law which has been overlooked both by the Tribunal and the taxing authorities, we are unable to construe the recitals taken by themselves as transferring or as evidencing a transfer or assignment which took place on 14th June, 1965. Under clause 5 of the said agreement dated

14th June, 1965, the applicants were appointed constituted attorneys of the said firm for the purpose of carrying on its business. From the recitals it appears that the date for ascertaining the debts and liabilities and the assets and the stock-in-trade was agreed upon by the parties as 14th June, 1965. It is to reflect this position that the recitals, which we have quoted above, were incorporated in the said indenture of assignment. The transfer of the entire business of the said firm involved transfer of certain properties and assets which in order to be operative must of necessity be in writing and in some cases in writing registered under the Indian Registration Act. One of the assets which has been transferred is the benefit of the said agreement to lease. The lease agreed to be taken by the said firm was of a building site. Under section 17(1)(d) of the Indian Registration Act a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent requires to be registered. Under clause (7) of section 2 of the Indian Registration Act a lease, inter alia, includes an agreement to lease. Thus, the assignment of the agreement to lease of the said building site is to be in writing and would require registration to be operative. The debts owing to the said firm would be actionable claims within the meaning of the said term as defined by section 3 of the Transfer of Property Act, 1882. Under section 130 of the Transfer of Property Act the transfer of an actionable claim can be effected only by the execution of an instrument in writing signed by the transferor or by his duly authorised agent and is complete and effectual upon the execution of such instrument.

11. The applicants claim that they are transferees of the business of the said firm under sub-section (4) of section 19 of the Bombay Sales Tax Act, 1959, and that they, having applied within the period prescribed by sub-section (6) of section 19 of the said Act, were entitled to be registered with effect from the date of such application by reason of the provisions of rules 8(3)(a) of the Bombay Sales Tax Rules, 1959. Sub-sections (4) and (6) of the said section 19 provide as follows :

'(4) Where a dealer, liable to pay tax under this Act, transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding shall

jointly and severally be liable to pay the tax (including any penalty) due from the dealer under this Act or under any earlier law, up to the time of such transfer, disposal or change, whether such tax (including penalty) has been assessed before such transfer, disposal or change but has remained unpaid, or is assessed thereafter.

(6) Where a dealer, liable to pay tax under this Act, is succeeded in the business by any person in the manner described in clause (a) of sub-section (1) or in sub-section (4), then such person shall, notwithstanding anything contained in section 3, be liable to pay tax on the sales or purchases of goods made by him on and after the date of such succession, and shall, unless he already holds a certificate of registration, within thirty days thereof apply for registration :

Provided that, where such person resells any goods purchased by the dealer while carrying on business before such succession, he shall be entitled to such deductions in respect thereof, as are permissible under section 7, 8, 9 or 10, as the case may be, had the resale been effected by the dealer himself.'

12. The relevant provisions of rule 8(3) of the Bombay Sales Tax Rules, 1959, are as follows :

'Where a certificate of registration is issued to a dealer on an application made therefor, then -

(a) .....

(iii) if it was made within the time specified in sub-section (6) of section 19, it shall take effect from the date on which the dealer became liable to pay tax under the said sub-section; and

(b) if such application was made after the expiry of the aforesaid period, it shall take effect from the date on which the application was made.'

It will be noticed that what sub-section (4) of the said section 19 requires is that the business of a dealer liable to pay tax should be transferred or otherwise disposed of in whole or in part or there should be a change in the ownership of the said

business, in consequence of which the dealer is succeeded in the business or any part thereof by any other person. The business of the firm of Copper Rollers Corporation was transferred and the change in its ownership took place only upon the execution of the said indenture of assignment. The fact that the said indenture of assignment specified an earlier date as the date on which the assignee took over some movables or the assets and liabilities is, in our opinion, irrelevant because but for this indenture of assignment there would have been no such taking over or assignment of the business at all either from the date of the indenture of assignment or from any other date.

13. In the result, we answer the question submitted to us in the negative.

14. The respondent will pay to the applicants the costs of this reference.

15. Reference answered in the negative.

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