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Babulal and anr. Vs. State

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Court : Allahabad

Decided On : Feb-17-1965

Reported in : AIR1966All204; 1966CriLJ390

Judge : Gyanendra Kumar, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 403; Code of Criminal Procedure (CrPC) , 1898 - Sections 251A(2); Uttar Pradesh Sales Tax Act, 1948 - Sections 2 and 3; Contract Act, 1872 - Sections 72

Appeal No. : Criminal Revn. Nos. 375 and 376 of 1964

Appellant : Babulal and anr.

Respondent : State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : J.N. Chaturvedi, ;Ram Shanker and ;D.S. Tewari, Advs.

Disposition : Application allowed

Judgement :
ORDER

Gyanendra Kumar, J.

1. These are two connected revisions filed by the accused persons. Revision No. 375 of 1964 has been filed by Babu Lal and Balwant Singh partners of firm 'Babu Lal Balwant Singh', while revision No. 376 of 1964 has been filed by Balwant Singh, Tirlok Chand, Chiranji Lal and Babu Lal who are partners of M/s. 'Balwant Singh Hari Kishan'. The two firms aforesaid were carrying on the business of forward contracts in silver and gold at Meerut. Both the firms were registered as 'dealers' under the U. P. Sales Tax Act and were assessed on their turn-over for the purposes of Sales Tax on forward contracts between them and their customers. Under bona fide mistake of fact and law the accused dealers had realised sales tax from their customers on forward contracts during the years 1948 to 1954. In their turn the accused had deposited the desired amount of tax with the Government. Later on a firm of Hapur styled as M/s. Budh Prakash Jai Prakash had filed writ petition No. 7297 of 1951 against the Sales Tax Officer and others challenging the relevant provisions of the Sales Tax Act as ultra vires.

A Division Bench of this Court allowed that writ petition by its judgment dated 27th February, 1952 and held that Explanation III to Section 2 (H) of the U. P. Sales Tax Act was ultra vires the U. P. Legislature. This case is reported in. Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur, 1952 All LJ 332: (AIR 1952 All 764). Being dissatisfied with the judgment of the High Court, the Sales Tax Officer filed Civil Appeal No. 23 of .1954 before the Supreme Court of India which was also dismissed by the Supreme Court by its judgment and order dated 3rd May, 1954 Sales Tax Officer Pilibhit v. Budh Prakash Jai Prakash,AIR 1954 SC 459. Thereafter the accused persons appeared to have claimed refund of the Sales Tax charged from them for the years 1948-54. The learned Judge Sales Tax made a reference to the High Court of Judicature at Allahabad which was registered as Sales Tax Reference No. 2549 of 1956 and was decided by a Division Bench of this Court on 30th October, 1958, (the case is reported in Sales Tax Commr. U. P. v. Sada Sukh Vyopar Mandal, (1959) 10 STC 57 (All).) Dayal J. delivering the judgment of the Bench observed as follows:

'It is not correct to say that the assessed collected the tax from the customer as an agent of the State. The Sales Tax Act in a way ignores the customer altogether. Section 3 of the Act makes a dealer liable to the payment of the tax on the basis of

his turnover of the previous year. There is no provision in the Act, which says that the customer will have to pay a sales tax at such and such rate. There is not even a provision to the effect that the dealer shall charge this amount from the customer. Section 8-A (2) of the Act prohibits an unregistered dealer from realising any tax as such on sale of goods from the purchaser. A registered dealer is not so prohibited, but he too is not bound to realise the tax from his purchaser. In case, however, he does realise the tax from his purchaser Sub-section (5) of Section 8-A requires him to act in a certain manner. He is required to issue a signed cash memo showing separately the price for which the goods are sold and the amount realised as tax from the purchaser. He is required to keep a counterfoil and to maintain a true and correct account of all moneys realised by him as tax in the prescribed manner. We do not agree with the contention of the Commissioner of Sales Tax that the dealer collects this amount from the customer under the authority given to him under Sub-section (3) of Section 8-A. This sub-section gives no authority to realise it. The authority, if any, is a general authority of a dealer to charge what he kes from his customer. It is only when he realises the tax as a tax from his purchaser that he has to comply with the requirements of Subsection (3).

The other question, that it would be inequitable to make a gift of this money to the assessee when it is not possible for him to refund it to the customer, is not material. We have already quoted from the judgment of the Supreme Court that any equitable consideration has no place in determining the rights of the assessee to get back his tax and no such consideration can certainly take away the right which the assessee otherwise possesses. Further, it may be said that it is not possible to say as a fact that the assessee will not be able to refund the realised tax to the customers. The taxes have been realised on forward transactions and it is likely that a record has been maintained of those transactions. It cannot be denied that the customer has a right to a refund of the money from the assessee, and the question whether his claim now would be barred by time is, to say the least, highly controversial.

The third circumstance, i.e., the fact that the assessee had realised tax from the customerand has not suffered any loss, is not any reason to disentitle the dealer-assessee from getting the refund to which he is entitled. If we agree with the

contention, it would mean that the right given to a person under Section 72 of the Contract Act is not a plain right to a refund of the money in case it is paid by mistake but is a right to get back the money only when he has not suffered any loss on account of that payment. This would mean adding something to Section 72 of the Contract Act and will, in every case, lead to a consideration of the original source from which the person paying tax got the money. Further, this is a circumstance which goes to the light of a person to the refund of money he had paid under a mistake and is not a circumstance which should disentitle him, if he is entitled, to a refund. It is significant to mention in this connection that the person who gets the money, which he is not entitled to get, has no right to it and cannot retain it unless the person who originally paid it under a mistake had lost his right to get it back. As we have already stated above, the legal liability to pay the tax is of the dealer and he is bound to pay the tax even though he may not have recovered it from the customer. The dealer-assessee thus pays his own money to the State Government as tax and he would thus suffer a loss if the money is not refunded to him, even though he may have wrongly realised it from the customer.'

2. From the above quoted observations of their Lordships it is abundantly clear that there is no direct connection between the money realised by the dealer from his customers and the amount paid by him to the Slate by way of sales tax. Irrespective of the fact whether the dealer had or had not realised any amount from the customers he was liable to deposit the tax with the Government. The money so deposited by the dealer with the Government was his own money and did not belong to the customers. Therefore, if under a mistake of law the dealer had deposited certain amount with the Government but had later on received back the amount of the tax wrongly deposited by him with the Government he was doing nothing else but receiving back his own money. There can, therefore, be no question of 'dishonestly' misappropriating or converting to his own use' the said money which he has legitimately received back from the Government. He was entitled to receive it back from the Government under Section 72 of the Contract Act and he could use it in any manner he liked.

3. It is true that if under a similar mistake of law the dealer had realised some amount from his customers towards Sales Tax (which was really not leviable), the

dealer would correspondently be liable under Section 72 of the Contract Act to refund that amount to the customers. Hut the liability of the dealer to the customers would be altogether independent of his right to realise the amount from the Government which had been paid by mistake. In other words, even if the dealer had not claimed back the aforesaid amount of Sales Tax from the Government, he would still be liable to repay the amount to his customers, which had beenmistakenly realised from them, subject of course to the law of limitation, estoppel and acquiescence etc. Thus the money which the accused dealers in the instant cases had realised back from the Government in the year 1900 was not the same which they had realised from their customers between the years 1948 and 1954. That being the position of law, the trying Magistrate was in obvious error when he charged the accused under Section 403 of the Indian Penal Code on the ground that they had between 27th February and 22nd July, 1960 converted to their own use certain amounts which they had received from the customers, as sales tax on forward contracts (but which in fact had been received back by them from the Government).

4. There is yet another aspect of the matter. A perusal of the record shows that on 6-12-1963 the trying Magistrate had framed the aforesaid charge under Section 403 I. P. C. as provided by Section 251-A (3) Cr. P. C. The record further shows that before framing the charge, the Magistrate had not cared to examine the accused under Sub-section (2) of the same section to explain the evidence appearing against them. It is true that Section 251-A (2) Cr. P. C. confers a judicial discretion on the trying Magistrate to make an examination of the accused before framing a charge against him, yet that discretion has to be exercised judicially. If there is no prima facie evidence against the accused flowing from the documents referred to in Section 173 (4) Cr. P. C. they need not be examined, inasmuch as there is nothing for them to explain in the matter. However, if there is a prima facie evidence emerging against the accused from those documents, it is the duty of the Magistrate to examine the accused to explain the circumstances appearing against him. It is only then that the Magistrate can legitimately proceed to frame a charge, if he is not satisfied with the explanation of the accused.

This view is fully supported by the observations of their Lordships of the Supreme Courtin Ramnarayan Mor v. State of Maharashtra,AIR 1964 SC 949, wherein, dealing with thecorresponding provisions relating, to enquiryunder Section 207-A Cr. P. C., it was laiddown.

'The object underlying the procedure prescribed by Sub-sections (4), (6) and (7) is to determine, after the accused has been apprised of the nature and the details of the prosecution case together with the evidence oral and documentary on which the case against the accused is sought to be proved, whether there is a prima facie ease against the accused which should go before the Court of Sessions for trial. .....

The Magistrate is also authorised to examine the accused if necessary, for the purpose of enabling him to explain any circumstances in the evidence against him. The power is in terms discretionary--that is made clear by the use of the expression 'if necessary'--but me discretion must be exercised on sound judicial principles having regard to the purpose of the inquiry which is to judicially ascertain whether there is a prima facie case made out against the accused for commitment.'

5. In view of the above discussion, I find e Magistrate was not justified in framing the charge against the accused under Section 405 I. P. C., even though they might be accountable or liable to return the money to their customers which they had bona fide realised from them under a mistake. Such a liability would obviously be of civil nature, subject to the law of limitation and set off, if any, which might be claimed by the accused on a suit instituted for refund of the amount by their customers.

6. I accordingly allow the revisions andquash the charge and proceedings against theaccused in each case.

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