

The State of Gujarat Vs. Premier Auto Electricals Ltd.

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Court : Gujarat

Decided On : Jan-25-1982

Reported in : (1983)1GLR32; [1982]51STC115(Guj)

Judge : B.K. Mehta and; P.D. Desai, JJ.

Acts : Bombay Sales Tax Act, 1959 - Sections 39, 43, 61, 61(1), 61(2) and 61(4)

Appeal No. : Sales Tax Reference No. 20 of 1980

Appellant : The State of Gujarat

Respondent : Premier Auto Electricals Ltd.

Advocate for Def. : R.D. Pathak, Adv. for; S.L. Mody, Adv.

Advocate for Pet/Ap. : A.J. Patel, Assistant Government Pleader, i/b Bhaishanker Kanga and Girdharlal, Adv.

Judgement :

Desai, J.

1. The Gujarat Sales Tax Tribunal (hereinafter referred to as 'the Tribunal'), has referred the following question of law for the opinion of this Court under section 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as 'the Act') :

'Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that under rule 43(1)(a)(i) of the Bombay Sales Tax Rules, 1959, the opponent was entitled to claim set-off of the whole amount of tax which the selling dealers had actually recovered from it and not merely the amount of tax which was legally recoverable by them on the relevant sales of scrap batteries ?'

After the hearing of the reference commenced but before it concluded, Mr. A. J. Patel, the learned Assistant Government Pleader appearing on behalf of the applicant-State, stated to the court that the applicant does not wish to prosecute the reference and that, under the circumstances, the question need not be answered. Ordinarily, upon this statement being made, the matter would have been treated as having concluded and all that we would have been required to do was to record that since the applicant declares that it does not pursue the reference, the question is not required to be answered. However, Mr. R. D. Pathak, the learned Advocate appearing on behalf of the opponent-assessee, submitted that once a case is stated in respect of a question, the party at whose instance the case is stated is not entitled to abandon the proceeding unilaterally and to state that the question need not be answered as it is not pressed and that it is within the discretion of the court, even under such circumstances, to consider and decide whether or not to answer the question, and in exercising the discretion, the court is required to take into account all the relevant circumstances, and for that purpose, to afford a hearing to the party-opponent. In support of this submission, Mr. Pathak invoked the aid of the decisions in *Karnani Industrial Bank Ltd. v. Commissioner of Income-tax* : [1956]30ITR16(Cal) and *K. Ch. Venkataratnam v. Commissioner of Gift-tax* : [1974]95ITR277(AP) .

2. Before considering the question on principle and on the basis of the decided cases, it would be proper to look at the legal provision whereunder this Court derives its advisory jurisdiction under the Act and to consider the question raised in the light of the statutory language. The relevant provision is section 61, which reads as follows :

'61. (1) Within ninety days from the date of the communication of the order of the Tribunal, passed in appeal or revision, being in order which affects the liability of

any person to pay tax or penalty, or to forfeiture of any sum or which affects the recovery from any person of any amount under section 39, that person, or the Commissioner, may be application in writing (accompanied, where the application is made by that person, by a fee of one hundred rupees) require the Tribunal to refer to the High Court any question of law arising out of such order; and where the Tribunal agrees the Tribunal shall, as soon as may be after the receipt of, such application, draw up a statement of the case and refer it to the High Court :

Provided that, it in the exercise of its power under this sub-section the Tribunal refuses to state the case which it has been required to do, on the ground that no question of law arises, that person, or as the may be, the Commissioner may, within thirty days of such refusal either withdraw his application (and if he does so any fee paid shall be refunded), or apply to the High Court against such refusal. (2) If upon receipt of an application under sub-section (1), the High Court is not satisfied as to the correctness of the decision of the Tribunal, it may require the Tribunal to state the case and refer it; and accordingly, on receipt of any such requisition the Tribunal shall state the case and refer it to the High Court.

(3) If the High Court is not satisfied that the statements in the case referred under this section are sufficient to enable it to determine the question raised thereby, it may refer the case back to the Tribunal to make such additions thereto or alterations therein, as the High Court may direct in that behalf.

(4) The High Court upon the hearing of any such case, shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Tribunal a copy of such judgment under the seal of the court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly.

(5) Where a reference is made to the High Court under this section, the costs including the disposal of the fee referred to in sub-section (1) shall be in the discretion of the court.

(6) The payment of the amount of tax, if any, due in accordance with the order of the Tribunal in respect of which an application has been made under sub-section

(1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof, but if such amount is reduced as the result of such reference, the excess tax paid shall be refunded in accordance with the provisions of section 43.'

3. Section 61, sub-section (1), confers upon any person, who is aggrieved by an order of the Tribunal passed in appeal or revision, which affects his liability to pay tax or penalty or to forfeiture of any sum or affects the recovery from him of any amount under section 39, as well as upon the Commissioner, the right to move the Tribunal by an application in writing to refer to the High Court any question of law arising out of such order. The sub-section further provides that where the Tribunal agrees, i.e., where it accedes to the request with regard to the making of reference, the Tribunal will draw up a statement of the case and refer it to the High Court. It is thus clear : (1) that the Tribunal derives jurisdiction to refer a case to the High Court only upon an application made to it by the designated persons aggrieved by its order and that, therefore, it cannot suo motu draw up a statement and refer any question of law to the High Court, even if the question is one of general public importance upon which it considers it essential to obtain the opinion of the High Court and (2) that only a question of law arising out of the specified categories of orders of the Tribunal passed in appeal or revision can be referred to the High Court for its opinion. It would appear, therefore, that in substance and reality, the party at whose instance the reference is made is in the position of a plaintiff and that he seeks adjudication from the High Court on a question of law arising out of certain specified orders of the Tribunal passed in appeal or revision by which he is aggrieved.

4. The proviso to sub-section (1) provides for a situation where the Tribunal refuses to state the case in respect of a question which it has been requested to do under the main provision on the ground that no question of law arises. In such a case, the party who has moved the Tribunal has two options. Within a period of 30 days of such refusal, he may either withdraw the application, that is to say, the application for reference, or he may apply to the High Court against such refusal. The revision with regard to withdrawal is apparently made to enable him to claim a refund of the fee paid by him on the application.

5. Sub-section (2) provides that upon receipt of an application under sub-section (1), the High Court may require the Tribunal to state the case and to refer the question, provided it is not satisfied as to the correctness of that decision of the Tribunal. The decision which the High Court is required to take at this stage is whether the Tribunal's view that no question of law arises out of its order is correct. An order under sub-section (2) made by the High Court requiring the Tribunal to state the case and to refer the question cannot, therefore, be treated as an expression of its view, even *prima facie*, as to the correctness or otherwise of the decision of the Tribunal on the merits of the said question. The stage for the consideration of the said aspect will be reached only when the High Court deals with the case under sub-section (4).

Sub-section (3) empowers the High Court, where it is not satisfied that the statement in the case which is referred is sufficient to enable it to determine the question raised thereby, to refer the case back to the Tribunal to make such additions thereto or alterations therein as the High Court may direct in that behalf. Under this sub-section although the case is referred back to the Tribunal, there is no decision on the merits of the case. All that the High Court does is to call upon the Tribunal to re-submit the case with an additional or revised statement of the case.

Sub-section (4), which has direct relevance so far as the question under consideration is concerned, provides that 'upon the hearing of any such case', the High Court shall : (1) decide the question of law raised thereby, (2) deliver its judgment thereon containing the grounds on which the decision is founded and (3) send to the Tribunal a copy of such judgment. The sub-section further enacts that the Tribunal shall thereupon dispose of the case 'accordingly', meaning thereby, in accordance with the decision of the High Court. It is true that this sub-section uses somewhat peremptory language and that it appears to have been cast in a mandatory would which would suggest, *prima facie*, that the High Court is obliged to do the things therein mentioned. It is important to bear in mind, however, that before the obligation to do the things therein prescribed arises, the condition precedent which is required to be satisfied is that there must have been a hearing of the case. It is only upon the hearing of any such case that the duty to take the

several steps prescribed in the sub-section arises and the context suggests that the hearing must be one which is full, effective and complete.

6. Reference may be made in this connection to the decision of the Calcutta High Court in *M. M. Ispahani Ltd. v. Commissioner of Express Profits Tax* : [1955]27ITR188(Cal) . In that case, the question arose whether the High Court was bound to answer a reference under section 66 of the Indian Income-tax Act, 1922, if the assessee, at whose instance the reference was made, does not appear at the hearing of the reference. Chakravarti, C.J., with whom Lahiri, J., agreed, after referring to section 66(5) of the 1922 Act, which in its material part is *in pari materia*, stated :

'It will be noticed that the section is expressed in mandatory language and deploys the word 'shall' throughout its many clauses. Prima facie, therefore, it would seem that upon a reference being received, it becomes an obligation of the High Court to answer the question referred and take the further steps mentioned in the section and it becomes equally the obligation of the Appellate Tribunal to adjust its order, if necessary, to the opinion which the High Court may express on the question concerned. It seems to me, however, in spite of the apparently mandatory language of the sub-section, that its true import cannot be to require the High Court to answer the questions referred to it in all circumstances, irrespective of whether the parties appear before it or not. To take an extreme case, suppose instead of only the party who had caused the reference to be made being absent both the parties fail to appear, would the court still be bound to deal with the reference and answer the question referred I cannot imagine that the section purports to impose upon the court any such obligation. It seems to me that before the duty contemplated by the section to decide the questions of law referred can arise, a hearing of the case must take place, because the section opens with the words : 'The High Court upon the hearing of any such case' etc. Where the party, who has caused the reference to be made and who is in the position of a plaintiff, fails to appear, no hearing of the case can take place and in my view since the preliminary condition of the sub-section is not satisfied in such a case, the consequent obligation of deciding the questions of law and delivering a judgment does not also arise.'

This decision clearly supports the view which we have taken above, namely that the obligation to answer the question arises only upon the hearing of any case and by hearing, what is meant is full, effective and complete hearing.

7. Even in cases where there has been a full hearing of the case, however, it is not as if there is no discretion in the High Court to refuse to answer the question. Reference may be made in this behalf to the decision in *Lakshmi Cotton Mfg. Co. Ltd. v. Commissioner of Sales Tax, Bombay* [1970] 26 STC 263 (SC). The Supreme Court there held in the context of section 34(5) of the Bombay Sales Tax Act, 1953, which was the precursor of the statute under consideration, as follows :

'..... but section 34, clause (5), of the Act provides that the High Court upon the hearing of any such case shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Tribunal a copy of such judgment under the seal of the court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly. It is implicit that all questions submitted to the High Court must be decided. That rule may be departed from only in those cases where the question is academic or does not arise out of the order of the Tribunal or is such that it will not dispose of the dispute, or is unnecessary or irrelevant and the High Court declines to answer the question.'

It would not, therefore, be right to construe sub-section (4) of section 61 as if it creates an immutable obligation requiring the High Court to answer the question referred to it for its opinion, irrespective of the facts and circumstances of the case.

8. The foregoing discussion would show that the High Court is not bound to answer the question of law referred to it under sub-section (1) or sub-section (2) of section 61 under all circumstances and in all events. If any event occurs either before the case reaches hearing, or when it is called on for hearing, or even after the hearing has commenced but before it finally concludes, which renders it impossible or unnecessary to proceed with the hearing, the duty contemplated by sub-section (4) to decide the question of law referred will not arise.

9. Even where there has been a full, effective and complete hearing of the case, the High Court is not bound to answer the question if it finds, for example, that the question is academic, or that it does not arise out of the order of the Tribunal, or that it is such that it will not dispose of the dispute, or that it is unnecessary or irrelevant. In all such cases, the High Court has power to decline to answer the question.

Sub-section (5) is not material and we need not pause to consider the same. Sub-section (6), in substance, provides that the payment of the amount of the tax, if any, due in accordance with the order of the Tribunal is not to be stayed pending the disposal of the application under sub-section (1) or any reference made in consequence thereof and that if such amount is reduced as the result of the reference, the assessee will be entitled to a refund of the excess sum paid in accordance with law. This would indicate that while the application under sub-section (1) or the reference pursuant thereto is pending, the order of the Tribunal is not to be treated as having become inoperative, in so far as it creates the liability to pay tax. The order of the Tribunal will remain operative, unless stayed by a competent court, subject, however, to the right, if any, arising in a party to claim refund in case it is ultimately found that the tax paid pursuant to the order of the Tribunal is in excess of what could be legitimately charged.

10. The statutory provisions analysed above enact no bar, express or implicit, against the abandonment midstream of the reference by the person at whose instance it is made. He is the person who has caused the reference to be made and he is in the position of a plaintiff. He is at the centre of the stage and in charge of the proceeding. The choice of not seeking adjudication on the question of law from the High Court, which was his at the initial stage, is not lost or to be denied to him merely because the reference is caused to be made by him. Even after the reference is made, it is still within the domain of his choice whether or not to prosecute it and the High Court would not ordinarily impose the adjudication upon him even if he does not seek it any longer. If, therefore, such person declares at any stage before the hearing has concluded that the question of law which has been referred should not be answered, which he is entitled to do, the High Court will not answer the same unless, of course, it is shown that the abandonment of

the proceeding at that stage will result in defeating a vested right which has come into existence in favour of the other party before the declaration is made. The other party will be entitled to object and be required to be heard on the objection only in the latter case and not otherwise. This view is entirely in consonance with the statutory scheme and language and with the spirit of the enactment.

11. Having considered the question from the above viewpoint, let us see whether there is any rule of law or practice *de hors* the statute which prevents the party seeking a reference from requesting the court, as of right, not to answer the question. It is well to remember in this connection that under the general law, the legal position is well-settled that where an application for unconditional withdrawal of a suit is made, the court has to allow that application and that the suit thereupon stands withdrawn.

12. In *Bijayananda Patnaik v. Satrugna Sahu* : [1964]2SCR538 in which an election appeal was sought to be withdrawn, it was held that where an application for withdrawal of a suit is made under Order 23, rule 1(1), the court has to allow that application and the suit stands withdrawn. It is only under sub-rule (2) where a suit is not being withdrawn absolutely but is being withdrawn on the condition that the plaintiff may be permitted to institute a fresh suit for the same subject-matter that the permission of the court for such withdrawal is necessary.

13. In *Hulas Rai Baij Nath v. Firm K. B. Bass & Co.* AIR 1964 SC 111 a suit for rendition of accounts had been filed. The defence was that the accounts had been settled before any preliminary decree for rendition of accounts was passed. The plaintiff applied for withdrawal of the suit. It was held that there was no ground on which the court could refuse to allow withdrawal of the suit because no vested right in favour of the defendant had come into existence at the point of time when withdrawal was sought.

14. In *R. Ramamurthi Aiyar v. Rajeswararao* : [1973]1SCR904 the suit was for partition of a cinema which the parties owned in equal shares. One of the prayers in the suit was that the court in exercise of its inherent jurisdiction should direct the property to be sold by public auction and pay the plaintiff his one-half share in the net proceeds because the property, having regard to its nature, could not be

divided into two halves by metes and bounds. The defence was that the said property was capable of division by metes and bounds into two shares and that the plaintiff was not entitled to a decree for sale. The alternative contention was that the defendant was ready and willing to buy the plaintiff's share and that, therefore, a valuation of the plaintiff's share should be made and the said share should be offered in sale to the defendant. The court appointed a Commissioner whose report indicated that he had considerable difficulty in suggesting a division. Even the learned single Judge of the High Court, who tried the suit, felt *prima facie* on inspection of the property that it was not capable of division by metes and bounds. Before final decision was rendered, however, an oral application was made by the plaintiff for withdrawal of the suit with liberty to institute a fresh suit. An objection was raised before the learned single Judge that because the defendant had invoked the provisions of section 3 of the Partition Act, the plaintiff could not be permitted to withdraw the suit. The learned single Judge, however, took the view that so long as a preliminary decree had not been passed in the partition suit, it was open to the plaintiff to withdraw the same. The learned single Judge was further of the view that as the cause of action was recurrent, even if the plaintiff was not granted permission, he would nevertheless be entitled to file a suit for partition at any time he pleases. Under the circumstances, the plaintiff was allowed to withdraw the suit with liberty to bring a fresh suit. An appeal was carried to the Division Bench which held that since section 2 of the Partition Act had been invoked by the plaintiff, he could not withdraw the suit in the circumstances of the case. In further appeal before the Supreme Court, the sole question which was argued was whether in the circumstances of the case withdrawal of the suit was permissible. The Supreme Court rejected the contention of the plaintiff that under Order 23, rule 1, he had an unqualified right to withdraw the suit if he did not wish to proceed with it and observed that the plaintiff's contention would have good deal of force if the vested right had not come into force in favour of the defendant. However, in the context of sections 2 and 3 of the Partition Act, it was difficult to accede to the contention that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under section 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff under section 3 and thereby acquired an advantage or privilege. In that view of the

matter, the Supreme Court upheld the decision of the Division Bench.

15. The principle which emerges from these decisions governing the right of a plaintiff with regard to the withdrawal of a suit under the general law is that the plaintiff being the dominus litis is entitled to withdraw the suit unless the withdrawal has the result of defeating a vested right which has come into existence in favour of the defendant before the prayer for withdrawal is made. If any such right has come into existence, the court is not bound to allow the withdrawal.

16. Although a tax reference is not a suit and it is not, in terms, governed by the provisions contained in the Code of Civil Procedure relating to withdrawal of a suit and the request of the party at whose instance the reference is made that the answer to the question referred need not be recorded as the question is not pressed may not strictly amount to the withdrawal of a reference, there is no reason why the principle underlying those provisions cannot be applied when such party does not press the question of law and requests that it need not be answered. Such request will ordinarily have to be entertained and granted unless it is shown that though the request is made before the hearing has concluded, the granting of such request would defeat the vested right, if any, acquired by the other party. Barring such an exceptional case, there will ordinarily be no discretion in the court to refuse to accede to such requests.

17. We may next turn to the judicial decisions in which such or similar question arose for consideration in taxation matters. In *Hood Barrs v. Commissioners of Inland Revenue* (No. 3) (1958-1961) 39 (1958-1961) 39 Tax Cas 209 the Commissioners for the Special Purposes of the Income Tax Act stated a case for the opinion of the High Court in respect of two questions of law arising out of the assessee's surtax assessments for the years 1941-42 to 1953-54. The case was stated under sections 229(4) and 64 of the Income Tax Act, 1952. The assessee was desirous of withdrawing the appeal in so far as it was directed against the assessments in respect of the years 1947-48 to 1953-54 while keeping the appeal alive in respect of the years 1941-42 to 1946-47. The assessee made an application accordingly and submitted that he was entitled to do so notwithstanding that a common set of facts and law applied to all the years of

assessment. Upjohn, J., granted the application and permitted the assessee to withdraw the appeal in respect of the years 1947-48 to 1953-54 inclusive. While granting leave for the partial withdrawal of the appeal, Upjohn, J., pointed out at page 236 that it was settled law that although the Assessing Commissioners and on appeal the Special Commissioners had to find facts and express opinions upon questions of law, their only duty was to fix the actual figure of assessment for each year which was an administrative act. There was no lis between the Crown and the taxpayer and no estoppel and no res judicata was created by any finding of fact for future years. While rejecting the contention advanced on behalf of the Crown that when the assessments for a number of years depend upon the same set of facts and law, the assessee should be allowed to appeal on all the relative years and not upon some of them, Upjohn, J., observed as follows at page 237 :

'It seems to me that when an appellant expresses dissatisfaction and asks for a case to be stated that brings the lis into operation and then the ordinary rules apply. The figure of assessment is different for each year, and each year must be treated differently, for the simple reason that the only duty of the Commissioners is to fix the assessment for each year. It seems to me in principle, therefore, that, as happens in ordinary litigation, an appellant can select the year upon which he will appeal and the grounds upon which he will appeal, except, of course, that in appeals from the Commissioners he can only appeal upon questions of law. Subject to that, it seems to me that the ordinary rules must apply and therefore he is entitled to ask the Special Commissioners to state a case in respect only of the years which he chooses. That being so, and the appellant having given due notice that he was going to take this point before the appeal came on, it seems to me right that I should let him now, before the case has been fully heard and argued, withdraw such years in respect of which he does not desire to appeal.'

This decision, though rendered in the context of the English taxing statute, has a considerable bearing on the question in hand. The decision is an authority for the proposition that once a case is stated, the rules governing the ordinary litigation are attracted and become application and that, therefore, the party at whose instance the case is stated is entitled to withdraw the case wholly or in respect of such years in regard to which he does not want the decision before the case is

fully heard and argued.

18. As we have earlier pointed out, under the rules governing the ordinary litigation in our country, the plaintiff being the dominus litis is entitled to withdraw the suit unconditionally unless a vested right has come into existence in favour of the defendant before the prayer for withdrawal is made. Adopting the principle underlying the decision in Hood Barrs' case (No. 3) (1958) 39 Tax Cas 209 it would be legitimate to hold that since it is open to the party aggrieved by the order of the Tribunal to request it to state a case or not, or to state a case in respect of one question or more, the choice being entirely his, it would be open to such party, even where a case is stated, to request the court to permit it to withdraw the reference or not to answer the question before the reference is fully heard and argued, unless it is manifest that such request cannot be entertained because it would amount to defeating, in some sort, a vested right, if any, which has come into existence in favour of the other party.

19. A contrary view appears to have been taken in *Karnani Industrial Bank Ltd. v. Commissioner of Income-tax, West Bengal* : [1956]30ITR16(Cal) . In that case, the reference was made at the instance of the assessee. The reference was caused to be made, although the point was covered by the decision of that High Court in another case, in order that the question might be finally determined by the Supreme Court. By the time the reference came on for hearing, the application to the Supreme Court for special leave to appeal from the decision which covered the question under reference had been dismissed. Under the circumstances, at the hearing of the reference, a request was made on behalf of the assessee that it may be allowed to withdraw the reference, as it did not want to pursue the same in the changed circumstances. While rejecting the said application, the Calcutta High Court observed as follows :

'There does not appear to be any provision in the Income-tax Act under which a party who has caused a reference to be made can be allowed to withdraw it after the Tribunal has made a reference to this court. A reference made to this court must be decided unless at least the party who had caused the reference to be made fails to appear and to take any interest in the matter. In the present case the

assesseees have appeared through an Advocate and have brought it to our notice that the question has now been finally determined against the contention of the assesseees by the highest court of the contrary. In the circumstances the only order which we can possibly make is an order in accordance with our previous decision now affirmed by the Supreme Court.'

In this view of the matter, the question was answered in conformity with the previous decision which was meanwhile affirmed by the Supreme Court.

20. This decision was considered by the Andhra Pradesh High Court in K. Ch. Venkataratnam v. Commissioner of Gift-tax : [1974]95ITR277(AP) . In that case, the reference under the Gift-tax Act, 1958, was at the instance of the assessee and at the hearing it was stated on behalf of the assessee that he was not interested in pursuing the matter and that he would like to withdraw the reference. The Andhra Pradesh High Court, in this connection, observed that it was settled by a number of decisions that the court may decide not to answer a reference if the party fails to appear or does not take any interest in the matter. It was further observed that the same principle had been applied to a case where the party appeared and stated that it was not interested in the reference being answered or made an application for withdrawing the reference. Reference was also made to the decision in Karnani Industrial Bank Ltd.'s case : [1956]30ITR16(Cal) and it was observed that the said case is not an authority for the proposition that in no case can the High Court allow an assessee to withdraw the reference or to say that he is not interested in pursuing the matter. The following pertinent observations were then made :

'A number of decisions have held that if a party fails to appear or to take any interest in the matter, the High Court is not bound to answer the reference and it may refuse to do so. When an applicant says that he wishes to withdraw the reference, it means that he does not take any interest in the matter within the meaning of the decisions. When an assessee makes request to withdraw from the reference or says he is not interested in pursuing the matter, it is left to this court, having regard to the circumstances of the case, either to accede to his request and decide not to answer the reference or to proceed to answer the reference in

spite of such a request.'

In that particular case, the Andhra Pradesh High Court acceded to the request of the assessee and declined to answer the reference.

21. We are, with respect, unable to agree with the reasoning and the conclusion in Karnani Industrial Bank Ltd.'s case : [1956]30ITR16(Cal) . For the reasons given earlier, it is not possible to agree that because the law contains no provision whereunder a party who has caused a reference to be made can be allowed to withdraw the same, the court must proceed to decide the reference, although such party states to the court even before the hearing has commenced that he wishes to withdraw or abandon the proceeding. On the view which we have taken earlier, the assessee in that particular case was, with respect, entitled to request the court to permit it to withdraw the reference or to refuse to answer the question. Such request could not have been rejected on the facts and in the circumstances of the case. It would be pertinent to point out in this connection that in the Law and Practice of Income Tax by Kanga and Palkivala, Vol. I, this decision has been commented upon at page 1168 and the learned authors have observed that the view expressed in the decision is 'incorrect'.

22. So far as K. Ch. Venkataratnam's case : [1974]95ITR277(AP) is concerned, we respectfully agree with the view therein expressed that when the party at whose instance the reference is made states that he wishes to withdraw the reference, it means that he does not take any interest in the matter and that, therefore, it would fall within the principle enunciated in a number of decisions that, under such circumstances, the court has the power to decline to answer the reference. We also respectfully agree that in such circumstances it is left to the court, having regard to the circumstances of the case, either to accede to the party's request and decide not to answer the reference or to proceed to answer the reference in spite of such a request, subject to the rider, however, that where such request is made before the reference is fully heard and argued, the court will have to accede to the request unless it is manifest that the acceptance of the request would amount to defeating, in some sort, a vested right, if any, which has come into existence in favour of the other party.

23. In view of the foregoing discussion, we are of the view that in the instant case the State is entitled to request that the reference should not be answered and that such request is required to be granted because it is made before the hearing is concluded and it is now shown that any vested right has come into existence in favour of the assessee before the request was made.

24. In the result, the reference is disposed of with no order as to costs, with the question left unanswered as the applicant does not desire the court to give the answer.

25. Reference unanswered.