

**In Re: R.D. Fernandes**

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**Court :** Chennai

**Decided On :** Oct-24-1956

**Reported in :** [1957]8STC365(Mad)

**Judge :** Ramaswami, J.

**Appeal No. :** Criminal Revision Case No. 828 of 1956 (Criminal Revision Petition No. 777 of 1956.)

**Appellant :** In Re: R.D. Fernandes

**Advocate for Def. :** V.V. Radhakrishnan, The Public Prosecutor

**Advocate for Pet/Ap. :** G.K. Govinda Bhat, Adv.

**Disposition :** Petition dismissed

**Judgement :**

ORDER

**Ramaswami, J.**

1. This is a criminal revision directed against the conviction and sentence of the learned District Magistrate of South Kanara in S.T.C. No. 120 of 1956.

2. The facts are : The Mangalore Tile Agency, Bunder, Mangalore, reported a 'nil' gross turnover and a net turnover of Rs. 1,11,825-12-0? in its 'A' return submitted

for the year ending 31st March, 1951.

3. This firm is a partnership concern dealing in tiles and ridges. Its two partners are Messrs. A.M. Fernandes and R.D. Fernandes, who are related to each other. The head office of the firm is stated to be at Ratnagiri in Bombay State and Sri R.D. Fernandes is stated to be in charge of that head office. The branch at Bunder, Mangalore, is under the management of the other partner Sri A.M. Fernandes. There have been misunderstandings between the two partners. It is stated by A.M. Fernandes that he ceased to be a partner of the firm with effect from 1st October, 1951.

4. Inasmuch as the dealers failed to produce their accounts for check, the Deputy Commercial Tax Officer issued a Rule 9 notice calling upon them to show cause why they should not be assessed to tax on a turnover of Rs. 2,23,651-8-0 for 1950-51 to the best of his judgment on the data furnished therein.

5. In response to this notice A.M. Fernandes appeared without accounts and gave a written statement to the Deputy Commercial Tax Officer to the effect that he was purchasing tiles and ridges from different tile factories at Mangalore and shipping the same partly to the head office at Ratnagiri and partly to different ports in Bombay State against orders, that all these purchases and export sales were made by him under instructions from the other partner, R.D. Fernandes, that he used to pay the purchase price to the factories concerned and receive the major portion of the sale proceeds, that the sale invoices in respect of all export sales made against orders were signed and issued by him in the name of the firm, that the firm has not maintained any accounts except purchase bills and one sale invoice book and that they were with R.D. Fernandes from 1st October, 1951, and that the 'A' return submitted by him for 1950-51 included all the export sales made by him during the year and that the turnover shown therein was quite correct.

6. On account of this A.M. Fernandes expressing inability to produce the accounts for the reasons stated above, another notice was issued to R.D. Fernandes at Ratnagiri to produce the accounts. But no accounts were produced and this R. D. Fernandes seems to have directed this A.M. Fernandes to produce the accounts which naturally in the face of the assertions of A.M. Fernandes proved to be futile.

7. Therefore, the Deputy Commercial Tax Officer determined that the taxable turnover for 1950-51 was Rs. 1,11,825-12-0 to the best of his judgment on the data before him and found the tax due as Rs. 1,825-6-5, the tax paid as Rs. 330 and the tax to be paid as Rs. 1,495-6-5.

8. This Mangalore Tile Agency did not pay the tax within the time allowed as per notice in Form B served on the first partner on 9th July, 1952, and on the second partner on 23rd April, 1952. A sum of Rs. 550 was adjusted from the refund due to the firm for the year 1951-52 and a sum of Rs. 945-6-5 was in arrears. The prosecution in S.T.C. No. 120 of 1955 under Section 15 (b) of the Madras General Sales Tax Act is as regards the non-payment of arrears.

9. The case for the partners was that the sales in question were outside sales; that the firm of Mangalore Tile Agency is a non-resident dealer and as such the assessment could have been made only on the agent in the State under Section 14-A of the Act; and that the assessment order made on a firm after its dissolution is without jurisdiction and unenforceable against the partners of the dissolved firm.

10. The learned Magistrate held that the prosecution had proved their case beyond reasonable doubt and convicted the revision petitioners as charged and sentenced each of them to pay a fine of Rs. 20 and also directed the recovery of the tax arrears of Rs. 945-6-5 from the firm. Hence this revision.

11. Point 1:-- On the information furnished by the partner A.M. Fernandes and reproduced above regarding the modus operandi of purchases and despatch to Ratnagiri and other ports of Bombay, it is quite clear, applying the considerations set out in the recent Bench decision in State of Madras v. Ramalingam and Co. [1956] 2 M.L.J. 384, to which I was a party, the transactions in question are not outside sales. They are sales within the State of Madras liable to pay tax under the Madras General Sales Tax Act.

12. Point 2:-- I am unable to see how in view of the proof that the firm had two partners, that the head office was at Ratnagiri and that the branch office was in Mangalore and that the first partner was in charge of the branch and was making purchases from various tile factories at Mangalore on behalf of the firm and on

instruction from the second partner and the statements of the partners P. 4 and P. 12 which can be used as corroborative evidence -- Vide P.P. v. Doraiswami (1955) M.W.N. 25 , that the Mangalore Tile Agency can be described as a non-resident dealer and as such the assessment should have been made only on its agent in the State under Section 14-A of the Act. Similarly in the lower Court it was alternatively pleaded that the accused firm is merely a commission agent for the constituents of the Bombay State. But this contention was rightly repelled by the lower Court because this firm did not apply for licensing and exemption under Section 8 of the Act. There was no proof adduced to show that it was merely a commission agent. The burden of proving that a transaction is exempt is on the licensee. Besides a commission agent could, in the context of the case where he does not claim to be a broker only, be a dealer also : Vide Radhakrishna Rao v. Province of Madras [1952] 65 L.W. 250, Public Prosecutor v. Sarisetti Venkatasubbiah [1953] M.W.N. CrI. 77.

13. To sum up : the first partner on behalf of the firm purchased the goods, viz., tiles and ridges, from the various tile factories and paid for the purchases at Mangalore and the tile factories at Mangalore had nothing to do with the constituents of the firm in Bombay and their dealings were only with the first partner representing the firm and the dealings took place within Madras State and not in Bombay State : Vide Poppatlal Shah v. State of Madras, 1952 M.W.N. CrI. 249, Public Prosecutor v. Varkey [1954] M.W.N. CrI. 261. The decision in State of Madras v. Govindlal, 1956 M.W.N. 189 does not apply because there, there was a specific contract for property to pass at the buyer's end. In fact no evidence of any description was adduced in order to even lay a foundation for the claim of non-resident dealer or agency. In cases where exemptions are pleaded the party pleading such exemption should adduce some evidence and in the absence of such evidence we cannot speculate whether these accused persons could have been non-resident dealers or commission agents : In re Narasingamuthu Chettiar [1948] 61 L.W. 64 and Velu Konar v. The State, 1951 M.W.N. CrI. 245. Point 2 therefore fails.

14. Point 3:-- The law regarding the recovery of Crown or State debts is not as helpless as the revision petitioners seem to imagine. The consequences following

the dissolution of a firm are provided for in Sections 45 to 55 of the Indian Partnership Act. These sections deal with the various consequences which follow on dissolution of a firm. The important questions considered are : (i) rights of partners after dissolution (Sections 46 and 47); (ii) method of settling partnership accounts (Section 48); (iii) discharge of partnership debts (Section 49); and (iv) rules as regards sale of goodwill (Section 55). This State debt will be recoverable from and out of the partnership assets even after dissolution and in the hands of the partners or otherwise. How the State of Madras propose to collect this debt from this firm is a matter with which this Court has no concern at this stage. We are now deciding the question of liability and not the modus of collection to which Government may resort to. It is enough to point out that the order made by the learned Magistrate making the firm liable to pay the tax arrears of Rs. 945-6-5 is a perfectly valid order. Point 3 also fails.

15. I must point out, before parting with this case, that it is now settled law that Section 16-A of the Madras General Sales Tax Act is intra vires and under that section the validity of the assessment of any tax, or of the levy of any fee or other amount, made under this Act, or the liability of any person to pay any tax, fee or other amount so assessed or levied shall not be questioned in any criminal Court in any prosecution or other proceeding, whether under the Act or otherwise. Section 16-A was inserted by the Madras Amending Act XXXV of 1947 and is designed to render the decisions, as in *Ramaswami Iyengar v. Sivakasi Municipality* (1936) M.W.N. CrI. 221, *Public Prosecutor v. Khader Khan* [1946] 1 S.T.C. 142 and *In re Chakka Appa Rao* [1948] 1 S.T.C. 211, given prior to the amendment to the effect that the jurisdiction of the Court to go into the validity of the assessment was not taken away, nugatory.

16. That Section 16-A is intra vires has been held in the decision of Panchapakesa Aiyar, J., in *In re Gigina Basha Sahib*, 1950 M.W.N. CrI. 87, of myself in *Hajee Meeran v. Public Prosecutor*, rl. R.P. No. 11 of 1952), and of a Bench of this Court in *Syed Mohammed and Co. v. State of Madras*, 1952 M.W.N. CrI. 235. It is quite true that a later Bench decision of this Court in *Guruviah Naidu and Co. v. State*, 1954 M.W.N. CrI. 237, held that Section 16-A was ultra vires. But that decision itself has been subsequently reversed by the Supreme Court. The Supreme Court

decision was on other grounds however and did not deal with the point relating to Section 16-A. But I respectfully agree with the earlier Bench decision and in fact the conflict of these Bench decisions is now the subject of a reference to a Full Bench made by me.

17. This Section 16-A has to be read along with Section 18-A of the Act. The result is Section 16-A bars a defence while Section 18-A bars the institution of proceeding itself at the instance of the assessee. Therefore subject to certain qualifications, with which we are not concerned here, an assessment or levy can be questioned only under the provisions and by the methods prescribed under the Act and not de hors the Act. (For scope and object of Section 18-A see the lucid discussion in N.R. Raghavachariar and V.C. Sri Kumar's Sales Tax in Madras, page 242 and foll.).

18. In the result, this criminal revision fails and is dismissed.

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