

CASE NO.:
Appeal (civil) 5081 of 2005

PETITIONER:
M/s Bharat & Company

RESPONDENT:
Trade Tax Officer & Anr.

DATE OF JUDGMENT: 17/08/2005

BENCH:
Ruma Pal & Dr. AR Lakshmanan

JUDGMENT:
J U D G M E N T
(Arising out of SLP(c) No. 3387 of 2004)

RUMA PAL, J.

Leave granted.

This appeal has been preferred from an order passed by the High Court of Allahabad dismissing the appellant's writ petition. The appellant had asked for a direction on the respondents to hand over possession of 400 bags of gambier which had been detained on 20th August 1999 and subsequently seized.

The appellant carries on business in Mumbai. It sent the gambier to one M/s Kamakhya Like (sic) Industries, Varanasi. A declaration form (Form 31) issued under the U.P. Trade Tax Act, 1948 (referred to as the Act) had been sent by the purchaser to the appellant in connection with the sale of the gambier. The gambier was despatched by truck from Bombay. At the Uttar Pradesh check-post the goods were detained on 19.8.1989. Certain documents were produced. The documents were found to be discrepant. A show cause notice was issued by the then Trade Tax Officer\026II (hereinafter referred to as TTO-II), Sahayta Kendra Trade Tax, Jhansi to the truck driver on 20th August, 1989. It was alleged in the show cause notice, inter-alia, that the appellant dealt in chemical and solvent and that the existence of the selling dealer was doubtful. As far as the purchasing dealer was concerned, it was said that the Form-31 was issued to the firm to import lime stone and coal and it was not registered or authorized to trade in gambier. It was also said that the registration certificate had expired and that the signature of the present dealer on the documents produced did not tally with the signature of the proprietor already on record. It was also noted that there was a discrepancy in the name of the purchaser in the documents produced by the truck driver in that the name in one place was shown as Kamakhya Like Industries, and in another as Kamakhya Lime Industries. On the basis of these facts, the TTO-II said he was satisfied that the goods were being imported with the intention of evading payment of tax by adopting fraudulent means and that the goods in question were detained under Section 28-A of the U.P. Trade Tax Act.

Although no copy of the show cause notice was served either on the purchaser or the appellant as the selling dealer. The appellant submitted an application for extension of time to reply to the show cause notice on 2nd September 1999. According to the respondents, the time to file the reply was extended till 10th September 1999. As there was no reply to the

show cause notice on 11th September 1999 an order was passed by the TTO-II seizing the goods on the grounds that the bills were discrepant and were, therefore, bogus and that the entry of the gambier in the account books of the appellant was doubtful. The estimated value of the gambier was given as Rs. 20 lakhs on the basis of which the release of the gambier was permitted to deposit of a sum of Rs. 8 lakhs either in cash or in the form of draft by 20th September 1999.

On 13th September 1999, one Mr. Arvind Desai claiming to be a partner of the appellant submitted an application under Section 13-A(6) of U.P. Trade Tax Act, 1948 for release of the goods. On receipt of the application, the TTO-II who had issued the show cause notice and passed the order of seizure, went to Mumbai and made inquiries from the Sales Tax Officer there who, according to the respondents, certified that the said Arvind Desai was not a partner of the appellant. The TTO also found that there were no entries of money transactions relating to the purchase of the gambier in the bank accounts of the appellant in Mumbai. Incidentally, the partners of the appellant admittedly registered with the Sales Tax Authorities, confirmed that Arvind Desai was a partner of the appellant firm.

On 8th October 1999, an order was passed by the assessing authority under Section 15A(1)(o) against the proprietor of the purchaser holding that the gambier had been transported with the "pre-plan intention of tax evasion" and, therefore, penalty of Rs. 8 lakhs was imposed. However, it was only subsequently, on 21st October 1999, that the Assistant Commissioner (Check Post) Raksa relying on the evidence of TTO-II regarding the enquiry at Mumbai, rejected the application submitted by the appellant under Section 13A(6) on the grounds:

(i) the application u/s 13A(6) is not maintainable as the person is not the owner of the goods.

(ii) The goods were imported into the State without proper and genuine documents and also with the intention to evade tax.

(iii) The person who signed the application and had shown himself as partner in the firm M/s Bharat & Co. Mumbai has been actually found not a partner in the records of Mumbai sales tax records.

On 31st March 2000, the appellant's appeal before the Trade Tax Tribunal was allowed. It found that the appellant was the owner of the gambier since delivery was not complete.

In the circumstances, the appeal was allowed and the matter remanded back to the Assistant Commissioner (Sahayata Kendra) Jhansi with the direction that he shall decide the matter afresh on merit after looking at the comments in the order.

On remand, the Assistant Commissioner again rejected the appellant's application for release of gambier holding that the appellant had failed to substantiate his claim of ownership of the gambier at any point of time. Some what inconsistently it was also held that the ownership of the gambier had been transferred to the purchasing dealer and that it had been proved indisputably that the goods in question were "imported/transported with an intention to defraud the

Government revenue and to evade due payment of tax likely to be leviable on the sale of the goods in question". The appellant preferred an appeal to the Sales Tax Tribunal. The Sales Tax Tribunal directed that the goods should be released to the appellant upon the furnishing of security of Rs. 4 lakhs. Against this order, both the appellant as well as the respondents filed a revisional application before the High Court under Section 10 of the Act. By an interim order dated 28th September 2000, the High Court directed the respondents to release the goods subject to the appellant furnishing security of Rs. 4 lakhs other than cash, bank guarantee, NSC or FDRs to the satisfaction of the Check Post Officer, Raksa, Jhansi for the amount of security as determined by the Tribunal. The security of Rs. 4 lakhs was furnished by the appellant on 3rd October 2000. These were, according to the respondents, verified by the TTO-II on 28th October 2000. There is some dispute as to whether the goods were formally released to the appellant or not. According to the appellant, when his agent went to take delivery of the goods the Godown Keeper left the premises and the goods were not released to him. The Godown Keeper sent a letter on 3rd November, 2000 to the appellant from the office of TTO, Sahayta Kendra Raksha, Jhansi to the following effect: "You are informed that your goods of 400 bags of Gambier have been taken out of the Godown. Kindly come and take and goods. On 1.11.2000 at 6.30 P.M. there was sudden pain in my stomach and I had gone to fields to attend the call of nature and by the time I returned, you had already left." (sic).

At the hearing, however, a register was produced by the respondents which purported to show that the goods had been released to the appellant's agent and had been signed for on 30th October 2000. If the entry is correct there is no explanation why the Godown Keeper wrote the letter which speaks for itself. It is, therefore, undisputed that at least physical delivery of the goods was not made.

On 4th November 2000, an order was passed by the TTO attaching the gambier on the ground that the recovery certificates totaling Rs. 18 lakhs had been received by the Assistant Collector (Collection), Trade Tax, Jhansi wherein it was directed that after the release of 400 bags of gambier to M/s Maa Kamkshya Lime Industries, Varanasi from Sahayata Kendra, Raksa the recovery of the arrears covered by recovery certificates against M/s. Kamakhya Lime Industries totally Rs. 18 lakhs may be made. Since the goods had been formally released they were attached. The TTO who issued the order of attachment said that 400 bags of gambier were being entrusted to his personal custody with the instruction that he shall not deliver the goods to any one else without the prior permission of his office and would make the goods available at the time of the auction proceedings.

It was against this order that the writ petition which culminated in the impugned order was passed. Before we consider the reasoning of the High Court it may be noted that the High Court had issued an interim order staying the sale of the gambier pending the disposal of the writ petition. The writ petition was dismissed on 15th November 2002. The goods have been sold by public auction in February 2003 and according to the respondents, fetched a sum of Rs. 7, 45,000/- . The sale was approved by Assistant Commissioner (Trade Tax) on 15th February 2003. The amount of sale proceeds is being held by the respondents.

Learned counsel for the appellant has submitted that in

law and in fact the title to the goods had not passed from the appellant to the consignee. According to the appellant, the issue of title had been concluded finally by the order of the Sales Tax Tribunal dated 31st March, 2000. The order of the Tribunal had not been challenged and it was not open to the respondent authorities to raise the issue again. It was then submitted that the refusal of the respondents to release the goods to the appellant despite specific order dated 9th August, 2000 passed by the Tribunal and its order by the High Court on 28th September, 2000 was malafide and contumacious. It was said that false statements had been made by the respondents to the effect that the goods had been released to the appellant on 31st October, 2000. It was said that the order of re-seizure was without jurisdiction. It was pointed out that the security bonds furnished by the appellant are still with the respondents.

The respondents have submitted that the alleged purchaser had not appeared at any stage of proceedings and enquiry revealed that it was no longer an existing firm. According to the respondents no documents had been filed at any stage by the appellant in support of its claim of ownership to the gambier. It was further submitted that issue of title was pending in the Revisional Application filed by the appellant and the respondents from the order of the Tribunal dated 9th August, 2000. It was said that the documents which were produced by the appellant were interpolated and contradictory and that the appellant had not come to court with clean hands.

The High Court, dismissed the application on the ground that the title in the goods had not passed to the purchaser although the price for the goods had not been paid. It was also said that M/s. Kamakhya Lime Industries and M/s. Maa Kamakhya Lime Industries were one and the same and that therefore the outstanding dues of M/s. Maa Kamakhya Lime Industries could be recovered from the goods in question. The appellant filed an application for review of the judgment which was dismissed by the High Court.

Initially the special leave petition had been filed from the order dismissing the application for review. Subsequently, an application for amendment of the petition was filed including a challenge to the order of the High Court. At the hearing the application for amendment was not opposed and is allowed.

In our opinion, the High Court was wrong in dismissing the appellant's petition. The Trade Tax Tribunal as early as on 31st March, 2000 had held that the appellant had the locus standi to ask for the release of goods because the appellant was the owner of the goods. The decision of the Tribunal was not challenged by the respondents. The decision of the Tribunal not being challenged, the issue of title was concluded in the appellant's favour. In the face of this order, it was not open to Assistant Commissioner, Trade Tax on remand to reject the application of the appellant on the ground that it was not the owner of the goods. The High Court should have considered this aspect of the matter particularly when it had been expressly drawn to the High Court's attention. The High Court was also precluded from re-deciding the same issue between the same parties.

Besides, the High Court's finding that the ownership of the goods had passed to M/s. Kamakhya Lime Industries only because it had been named in the Consignment Note appears to be incorrect. In Commissioner of Income-Tax, Madhya Pradesh and Bhopal, Nagpur v. Bhopal Textiles Ltd., Bhopal, AIR 1961 SC 426,428, this Court said:-
"A railway receipt is a document of title to goods, and for all purposes, represents the goods. When the railway receipt is handed over to the consignee on payment, the

property in the goods is transferred. In this case, it is a matter of considerable doubt whether the property in the goods can be said to have passed to the buyers by the mere fact of the railway receipts being in the name of the consignees, as has been held by the High Court."

In the second round the Tribunal had directed the release of the goods to the appellant by its order dated 9th August, 2000 subject to furnishing the security of Rs. 4 lakhs. The High Court by the interim order passed in the revisional application also directed the seized goods to be released to the appellant on the furnishing of security by its order dated 28th September, 2000. Even according to the respondents the goods were released formally to the appellant against security furnished by the appellant. Yet the last order of seizure in execution of the recovery certificates against the purchaser was issued on the basis that the goods had been released to M/s. Kamakhya Lime Industries.

The submission of the respondents that the appellant had come to the Court with unclean hands is unacceptable. On the other hand the respondents have mis-directed themselves by seeking to question the appellant's ownership in the property to the goods. That could not have been in issue because unless ownership of the gambier was with the appellant, no title could have been transferred to the purchaser by it. The enquiry conducted by the TTO as to the business of the appellant, the existence of its office in Mumbai, etc. was therefore not only uncalled for but self defeating.

It is true that the respondents have said that the two invoices of the appellant have been prepared bearing the same number but in respect of different quantities of gambier. It is however, nobody's case that the total of the two invoices did not tally with the number of bags in fact found on the truck. No material has been brought on record by the respondents to show that the value of the gambier as on the date of transport was less than that shown on the invoices except for the unsupported estimate of the TTO that the gambier was worth Rs. 20 lakhs. The appellant in any event was not concerned with any interstate sale that the purchaser might have effected after the delivery. As far as it was concerned, the sale was and intrastate one and subject to Central Sales Tax 1956, and therefore, outside the purview of the State Act.

We accordingly allow the appeal and direct the respondents to forthwith pay the entire sale proceeds from the sale of the gambier to the appellant by a demand draft in the name of the appellant within a period of four weeks from today. If the payment is not made within the time aforesaid, the respondents would be liable to pay interest on the sale price proceeds at the rate of 12% per annum. No costs.