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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**SALES TAX REFERENCE No. 2 of 2008
IN
REFERENCE APPLICATION No. 75 of 2002**

M/s Gharda Chemicals Ltd ..Applicant.

Vs

The State of Maharashtra & ors ..Respondents.

Mr C. B. Thakar for the Applicant.

Mr V.A. Sonpal, Special Counsel for the Respondent-State.

**CORAM : S.C. DHARMADHIKARI &
N.W. SAMBRE, JJ.**

DATE : 10th FEBRUARY, 2015.

ORAL JUDGMENT. (Per : S.C. DHARMADHIKARI, J)

1) This reference under Section 61 of the Bombay Sales Tax Act, 1959 arises out of the Tribunal's order dated 15th April, 2002. The period of assessment is 1st July, 1988 to 30th June, 1989. The Gharda Chemicals Ltd and at whose instance the Tribunal referred the questions of law for answer and opinion of this Court, is stated to be holding a Registration Certificate No.NIH-780 under the Bombay Sales

Tax Act, 1959 (for short “the BST Act”) and also a Recognition Certificate issued under the Bombay Sales Tax Rules (for short “the BST Rules”). The dealer is manufacturer in chemicals and pesticides and also reseller in chemicals. The dealer has manufacturing unit in Ratnagiri District in the State of Maharashtra which facility has been set up from 27th April, 1987. The Assistant Commissioner Sales Tax (Assessment), H-Ward, Unit II, Mumbai assessed the dealer on 31st March, 1993 for the above period under the B.S.T. Act. That resulted in refund of Rs.27,91,770/-. The dealer was aggrieved by the assessment order in relation to reduction in set-off. According to the dealer, the set-off admissible under Rule 41-D of the B.S.T Rules in respect of purchases of scientific equipments used for research and development in proportion of the branch transfers out of the State, levy of purchase tax under section 13AA in respect of the goods covered by Part-I of Schedule-C, levy of purchase tax under section 13 on purchases of vehicles and non-grant of set-off under this rule on purchases of cement used in the foundation of plant and machinery was erroneously refused. He preferred a First Appeal before the Deputy Commissioner of Sales Tax (Appeals), III Mumbai City, Division

Mumbai. The First Appellate Authority dismissed the appeal by an order dated 3rd June, 1998. While deciding the appeal, the Appellate Authority reduced the set-off granted in the assessment order by Rs.31,492/-. In the opinion of this appellate authority set-off was wrongly granted on materials used for research and development purposes and thus the order impugned before him was erroneous. However, it confirmed the dis-allowance of set-off on purchases of goods for scientific research and development. This order of the First Appellate Authority dated 3rd June, 1998 came to be challenged by way of a Second Appeal and which, in terms of the provisions of the Act, was to be filed before the Tribunal. This second appeal was registered as II Appeal No.1320 of 1998. The Maharashtra Sales Tax Tribunal decided the Second Appeal on 16th March, 2002 and maintained the order insofar as refusal of set-off on the purchases effected of goods for research and development. The Tribunal also maintained the order in relation to rejection of the set-off on purchase of cement used in the foundation of plant and machinery.

2) An application was made by the dealer to the Tribunal being Reference Application No.75 of 2002 and by the order dated 17th

August, 2007 the Tribunal has referred the following two questions for answer and opinion of this Court. These questions read as under :-

(1) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the applicants were not entitled to the set off of the tax paid on purchases of cement which were used in the foundation of the machinery used for the manufacture of goods for sale?

(2) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the applicants were not entitled to the set off under rule 41-D of the Bombay Sales Tax Rules, 1959 of the tax paid on the purchases of materials acquired for research and development of the existing product and also a new product?

3) Thus, at the instance of the dealer these questions have been referred. Mr Thakar, appearing on behalf of the dealer would submit that the Tribunal's order dismissing the Second Appeal, gives rise to these questions of law and squarely. In his submission Rule 41D of the Bombay Sales Tax Rules enables set-off and to be claimed in purchase of goods used by the dealer within the State. Therefore, cement has been purchased and for strengthening the foundation of the plant. This cement which has been purchased for strengthening this plant is styled as goods. If the purchase of these goods are for the use within the State by the dealer in the manufacture of goods for sale, then, this

claim was allowable. The First Appellate Authority as also the Tribunal have failed to assign any reason for rejection of this claim. In that regard, our attention has been invited to the order passed by the First Appellate Authority. Our attention is also invited to the discussion in the Tribunal's order and which is to be found in paragraph 7. Mr Thakar complained that the Tribunal has granted similar benefit to M/s Ballarpur Industries Ltd, (Second Appeal No. 919 of 1994 decided on 7th August, 1999). If use of cement was integrally connected with the manufacturing activity, then, the Tribunal should have found out as to which part of the cement was used in the manufacturing activity and, therefore, it was integrally connected therewith. Without making any inquiry of this nature and giving an opportunity to the dealer to prove its case, the Tribunal should not have maintained the order of the First Appellate Authority.

4) In relation to set-off under Rule 41D on purchases of scientific equipments and other materials which are used for research and development purpose, Mr Thakar would submit that the Tribunal has rendered conflicting orders and opinions. He relied upon a recent order dated 15th April, 2013 rendered by the Tribunal in the case of

M/s Tata Motors Ltd Vs. State of Maharashtra, Second Appeal Nos.591 and 592 of 2005 decided on 15th April, 2013. The Tribunal relied upon the judgment of the Hon'ble Supreme Court in the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd Vs. Sales Tax Officer, Kanpur and Another [Vol.16 Sales Tax Cases page 563]. Thus, the Tribunal on one occasion grants this benefit while only in the case of present dealer the same has been denied. This inconsistency and contradiction in the conclusions of the Tribunal would, therefore, squarely raise a question and which is of law. Further, the orders passed in the case of Tata Motors Ltd by the Tribunal and granting similar relief are not questioned by the Revenue. The revenue has not brought any application seeking reference of any question of law for opinion and answer of this Court arising out of the order passed in Tata Motors Limited. That connotes the acceptance of the view of the Tribunal. In these circumstances, as well this Court must answer the question in favour of the dealer and against the Revenue.

5) On the other hand, Mr Sonpal appearing on behalf of the Revenue would submit that none of the contentions of Mr Thakar deserve acceptance. He would submit that Rule 41D, as it stands does

not take within its import the above deductions. If the deduction is restricted to the one specified in the Rule itself, then, nothing else other than what is mentioned and in clear terms can be introduced or inserted by a Court of law. The Court does not legislate. The Court merely interprets a provision of law existing in the statute book. In the instant case, bearing in mind the language of Rule 41D the object and purpose sought to be achieved by the deduction thereunder, the view taken by the Tribunal and which raises a mixed question of fact and law, there was no requirement of referring any question for answer and opinion of this Court. As such conclusions do not raise questions of law. In the circumstances, Mr Sonpal would submit that the reference be answered in favour of the Revenue.

6) Mr Sonpal would submit that merely because the Tribunal has rendered a contrary and contradictory view and which has not been questioned by the Revenue does not mean the Revenue's inaction in any way binds this Court. This Court cannot take into consideration such developments simply because a question of law will have to be answered by this Court on the language of the statute. It would not be bound by any act of parties and understanding of a legal provision by

them. In the circumstances, no reliance can be placed on this inaction of the revenue. For these reasons, he would submit that the reference be answered accordingly.

7) Having noted the rival contentions the only question that we have to consider is whether under Rule 41D these claims were admissible. Rule 41D (1) with the Provisos would read as under :-

Rule 41D. Drawback, set-off etc., of tax paid by a manufacturer in respect of purchases made on or after the notified day.--

(1) In assessing the amount of tax payable in respect of any period by a Registered dealer who manufactures [goods] for sale or export (hereinafter in this rule referred to as "the claimant dealer") the Commissioner shall, in respect of purchases made by the claimant dealer on or after the notified day, of any goods specified [in entry 6 of Schedule B and in Schedule C] and used by him within the State,

(i) in the manufacture of [goods] [not being kerosene for sale, which manufactured goods have in fact been sold by him, or, exported by him, or

(ii) in the packing of goods so manufactured, grant him subject to the reduction specified in sub-rule (3), a drawback, set-off, or as the case may be, a refund of aggregate of the sums determined in accordance with the provisions of rule 44D.

Provided that where the turnover of sale of such manufactured goods consists principally of sales of waste or scrap goods, then the claimant dealer shall not be entitled to any drawback, set-off or as the case may be a refund under this rule.

Provided further that where such manufacture results in production of goods other than taxable goods, then such draw back, set-off, or as the case may be, the refund, shall not be granted on purchase of goods including Capital Assets effected prior to the 1st April 1998 and also in respect of capital assets on which depreciation has been earlier claimed by any other person or dealer and which have been purchased by the claimant dealer on or after the 1st April, 1998]

Provided also that, the claimant dealer shall not be entitled to claim any drawback, set-off or refund in respect of purchases of molasses and rectified spirit used by him in the manufacture of country-liquor and Indian Made Foreign Liquor.]

Provided also that, set-off under this rule shall not be granted to a dealer, in respect of purchases of goods, which are used by him in the manufacture of goods, treated as Capital Assets by him or parts and components of such Capital Assets.]

Provided also that, the claimant dealer shall not be entitled to claim any drawback, set-off or, as the case may be refund of the sum mentioned in clause (a) of rule 44D in respect of purchases of the goods purchased against declaration in Form A1 in accordance with the entry 148 of Group "A" of Schedule appended to the notification issued under section 41 of the Bombay Sales Tax Act, 1959.]

Provided also that, where the process of

manufacturing resulted in the production of taxable goods as well as tax-free goods, then such drawback, set-off or, as the case may be, refund shall be apportioned before reduction between the goods which are taxable and tax-free on the basis of the sale prices of such manufactured goods and shall be calculated and allowed accordingly after appropriate reduction.]

8) We must at once clarify that when language of the statute is plain, unambiguous and clear, there is no room for interpretation. The principles of statutory interpretation would come into play only if the plain language of a statute and about which there is no ambiguity leads to a construction which can be termed as absurd. The law frowns upon absurdity and does not attribute it to the legislature at all. It is only in that event that these principles can come into play. When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself. (State of U.P. Vs. Vijay Anand Maharaj, **AIR 1963 SC 946 at page 950.**

9) In the present case, what Rule 41D provides for is a drawback, set-off of a tax paid by a manufacturer in respect of purchases made on or after the notified day. The language is that in assessing the amount of tax payable in respect of any period by a Registered dealer who manufactures goods for sale or export, the

claimant/dealer can claim set-off and the Commissioner shall allow in respect of purchases made by such claimant dealer on or after the notified day, of any goods specified in entry 6 of Schedule 'B' and in Schedule 'C' and used by him within the State. The rule does not stop here. It goes on further to say that the set-off is admissible if the purchased goods are used by the claimant dealer within the State in the manufacture of goods [not being kerosene] for sale, which manufactured goods are in fact been sold by him or exported or in the packing of the goods so manufactured. The set-off is subject to reduction specified in sub-Rule (3). There are several provisos. They throw light on the object as well. Where the turnover of sale of such manufactured goods consists principally of sale of waste or scrap goods, then, the claimant dealer is disentitled from drawback, or set-off or as the case may be a refund under the rule. Then, by further proviso the dealer is disallowed this relief where such manufacture results in production of goods other than taxable goods. Thirdly, the claimant/dealer cannot claim this relief in respect of purchases of molasses and rectified spirit used by him in the country liquor and Indian Made Foreign Liquor. By another proviso added and inserted

by the Government Notification of 19th November, 2001 the set-off under this Rule shall not be granted to a dealer in respect of the purchased goods which are used by him in the manufacture of goods, treated as capital assets by him or part and component of such capital assets.

10) In the backdrop of this clear language, if one notices the claims, it is evident that the First Appellate Authority was concerned with a set-off on purchases of scientific equipments and other materials which are used for research and development purposes. Upon a plain reading of this Rule, the First Appellate Authority found that if the language of the same does not admit of any relief of the present nature, then, by indirect or oblique method the same cannot be granted. It is worthwhile to note that such expenditure and any purchase of scientific equipments and other materials which are used for research and development purposes, reliefs or deductions can be granted under the Income-tax Act, 1961 (See section 35). However, in the instant case, the set-off can be claimed and granted provided the manufacturer sells the goods manufactured by using the goods purchased and during the assessment year or period in question. It is

in that period and if at all the conditions under this sub-Rule are satisfied that this set-off is admissible. Once it is found that the goods brought in are not used in the manufacture of goods for sale and which goods have in fact been sold by the dealer or exported by him or in the packing of the goods so manufactured, then, there was no scope for any such set-off.

11) Once both the First Appellate Authority and Second Appellate Authority, namely, the Tribunal as a final fact finding authority find that this expenditure is not of the nature and incurred on purchase of goods which have gone into the manufacture of the goods sold, then, we do not find any basis for referring a question and stated to be of law. The law does not envisage the above deduction.

12) Similarly, in the case of set-off under Rule 41D of purchase of cement the Tribunal as also the First Appellate Authority found that the cement may have been brought in and purchased for the purposes of strengthening the foundation of the manufacturing plant and the manufacturing plant may have been used in the manufacture of goods sold, still, the cement brought in was not used for such purpose. The cement was not used during the course of the manufacture of goods

but substantial portion of this cement was used for construction of staff quarters etc. That had nothing to do with the manufacturing activity. The cement brought in having no direct connection with the manufacturing activity that the Tribunal and the First Appellate Authority concluded that no set-off is admissible in terms of the rule and as it stands.

13) That set-off was rightly disallowed.

14) The Tribunal also endorsed this finding in paragraph 7 of the order passed in the Second Appeal.

15) During the course of the Reference Application, the Tribunal expressly termed this conclusion as involving a mixed question of fact and law. It is inexplicable, therefore, why a reference has been made and with such findings. If it was not purely a question of law but a mixed question of fact and law, then on facts the view cannot be termed as perverse. If we now accept the argument of Mr Thakar and allow the assessee/dealer to produce material in the form of bills etc to demonstrate that some part of the cement has gone in the manufacturing activity that would be exceeding our jurisdiction. We cannot take note of this request and when the Tribunal concurred

with the First Appellate Authority in holding that the claimant dealer could not produce evidence in support of the claim of set off. He could not produce evidence with regard to its use and as connected with the manufacturing activities. If the Tribunal as also the First Appellate Authority found that the cement purchased was substantially used in construction of staff quarters etc, then that has no relation with the set-off which is admissible under sub-Rule (1) of Rule 41D.

16) Even this conclusion therefore cannot give rise to any question of law. Then what remains is the argument of Mr Thakar that in two other cases and possibly of similar nature the Tribunal has taken a view in favour of the Dealer and against the Revenue. The Revenue has not challenged this order nor has it made any application to the Tribunal requesting it to refer any question of law arising therefrom for opinion of this Court. Once again if same view which has been taken by the Tribunal and on peculiar fact and circumstances that would not raise any question of law and that cannot be a answer on the reference made in the present case. This reference according to the Tribunal is on a question of law and that will have to be answered on the reading of the law and uninfluenced by any

inaction of the Revenue or contrary view of the Tribunal. Mr Thakar does not contend that any view of the Tribunal and taken contrary to the one in the present case would have bearing on the answer to be given by this Court to a question of law. That will have to be given independent of such opinion and in the light of the language of the law. The Revenue's inaction does not assist therefore the assessee in any manner. If the Tribunal's view is appearing to be contradictory even that has no relevance in the present case. It is too well settled to require any reiteration that two wrongs do not make one right. There is no equality in illegality. Article 14 of the Constitution of India is, thus, a positive concept. It cannot assist any one in such a negative manner for that would mean that if a wrong has been committed, the Court must perpetuate it or continue it by applying the doctrine of equality. That cannot be done.

17) The Hon'ble Supreme Court in the case of Ekta Shakti Foundation v. Govt. of NCT of Delhi reported in **(2006) 10 SCC 337** held as under :-

13. In Coromandel Fertilizers Ltd v. Union of India 1984 Supp SCC 457 it was held in paragraph 13 that wrong decision in favour of any party does not entitle any other party to

claim the benefit on the basis of the wrong decision. In that case, one of the items was excluded from the schedule, by wrong decision, from its purview. It was contended that authorities could not deny benefit to the appellant, since he stood on the same footing with excluded company. Article 14, therefore, was pressed into service. This Court had held that even if the grievance of the appellant was well founded, it did not entitle the appellant to claim the benefit of the notification. A wrong decision in favour of any particular party does not entitle another party to claim the benefit on the basis of the wrong decision. Therefore, the claim for exemption on the anvil of Article 14 was rejected.

14. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order could not be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality to cause another unwarranted order. The extraordinary and discretionary power of the High Court under Article 226 cannot be exercised for such a purpose.” (emphasis in original) (See Secy., Jaipur Development Authority v. Daulat Mal Jain, SCC p. 51, para 27.)

15. “30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in

favour of any individual or group of individuals others cannot claim the same illegality or irregularity on the ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in Gursharan Singh & Ors. v. NDMC & Ors. [1996 (2) SCC 459] held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed: (SCC p. 465, para 9)

'Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.'

Again In Jaipur Development Authority's case (supra) this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding:

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalized. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

31. In state of Haryana v. Ram Kumar Mann this Court observed: (SCC p. 322, para 3).

"The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for Reinstatement? The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation

for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right". (See State of Bihar v. Kameshwar Prasad Singh, SCC pp 111-13, paras 30-31.)

16. So far as the allotment to non-eligible societies is concerned even if it is accepted, though specifically denied by the Authority, to be true that does not confer any right on the appellants.

"Two wrongs do not make one right. A party cannot claim that since something wrong has been done in another case direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the appellant cannot strengthen its case. It has to establish strength of its case on some other basis and not by claiming negative equality." (See Union of India v. International Trading Co., SCC pp. 444-45, para 13.)

18) As a result of the above discussion, we answer both the questions posed before us in favour of the Revenue and against the dealer. The reference is disposed of accordingly. No costs.

(N.W. SAMBRE, J.)

(S.C. DHARMADHIKARI,J)