

GUJARAT HIGH COURT

Hon'ble Judges: B.J. Divan and Mehta JJ.

Kalaria Oil Mills Versus State Of Gujarat

Special Civil Application No. 354 of 1967 ; *J.Date :- JULY 10, 1968

- BOMBAY SALES TAX ACT, 1959 Section - 19(4)

Bombay Sales Tax Act, 1959 - S. 19(4) - purchase of machinery - notice to pay sales tax in lieu of the transferor-company - held, petitioner not liable for dues of sales tax on behalf of transferor company as transfer of assets does not constitute change of business as per S. 19(4) liability of transferee for transferor's dues arises in case of transfer or charge of business - petition allowed.

Imp.Para: [[15](#)] [[16](#)]

Cases Referred to :

1. A.C.A.&i. Society V/s. Workmen, AIR 1963 SC 1489
2. Commissioner Of Income-tax, Madras V/s. K.H.Chambers, AIR 1965 SC 970

Equivalent Citation(s):

1968 (22) STC 477 : 1968 GLHEL_HC 217994

JUDGMENT :-

B.J.Divan, J.

1 The first petitioner in this special civil application is a partnership firm registered under the Indian Partnership Act and the second petitioner is a partner of the first petitioner-firm. The respondent is the Sales Tax Officer at Jamnagar. The first petitioner was constituted as a partnership firm on 8th November, 1960, with the object of carrying on the business of manufacturing and selling vegetable oils. On 8th November, 1960, the first petitioner-firm purchased the machinery of M/s. Kailas Oil Mills by a sale deed also bearing the date 8th November, 1960. The amount paid by the first petitioner-firm for the purchase of that machinery was Rs. 35,001. M/s. Kailas Oil Mills from whom the petitioner-firm purchased the machinery was a partnership firm engaged in the business of manufacturing vegetable oils and also in the business of purchasing and selling groundnuts and groundnut oil. According to the petitioners, at the time when the machinery was purchased on 8th November, 1960, by the first petitioner-firm, M/s. Kailas Oil Mills had already stopped their business and had already disposed of their stock of groundnut and groundnut oil, as well as other furniture and fixtures and thereafter on 8th November, 1960, the machinery was sold by M/s. Kailas Oil Mills to the first petitioner-firm. According to the averments in the petition, the machinery was not in a working condition and the petitioners had to repair and oil the machinery in order to put it in a working condition. M/s. Kailas Oil Mills was being run in the premises

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taken or lease from one Haji Musa Ismail. After purchasing the machinery, the first petitioner-firm negotiated with the landlord of the premises for the lease of the land on which the machinery of Kailas Oil Mills was installed. The said landlord agreed to lease out the premises to the first petitioner-firm at the rent of Rs. 200 p.m.; and after purchasing the necessary raw materials and employing the technicians and workers, the first petitioner-firm started the manufacturing process after about a month's time from the date of the purchase. After purchasing the machinery, the petitioners applied for a licence under the Central Excises and Salt Act, 1930, in their own names and they also applied for registration under the provisions of the Bombay Sales Tax Act, 1959, for being registered as a dealer; and they applied to the Sales Tax Officer, Jamnagar, to register them as registered dealers and issue the necessary registration certificate. The petitioners were issued a registration certificate, bearing No. N-55-JMC-1190; and the registration number of M/s. Kailas Oil Mills was N-55-JMC-471. It is the contention of the petitioners, that the first petitioner-firm had only purchased the machinery and not the business of M/s. Kailas Oil Mills. They had not agreed to take over the liability of M/s. Kailas Oil Mills and had also not purchased M/s. Kailas Oil Mills as a running concern with goodwill; none of the employees of M/s. Kailas Oil Mills was employed by the petitioner-firm after they purchased the machinery and the petitioners had started the business in the name and style of M/s. Kalaria Oil Mills.

2 On 24th November, 1966, the petitioners were served with an order of assessment, in connection with the sales tax dues of M/s. Kailas Oil Mills for the period commencing from 1st January, 1960, to Aso Vad 30 of S.Y. 2016, and with a notice, dated 24th November, 1966, calling upon the petitioners to pay up the sales tax dues of M/s. Kailas Oil Mills on or before December, 1966. The petitioners were informed by the said notice that if they failed to pay the amount of the sales tax dues of M/s. Kailas Oil Mills, the process of coercive recovery would be set in motion. The notice was issued by the respondent herein and the respondent had stated in the notice that the petitioners had purchased the business of M/s. Kailas Oil Mills and were therefore the transferees of the business of M/s. Kailas Oil Mills and were, therefore, liable for the sales tax dues of M/s. Kailas Oil Mills.

3 On these facts, the petitioners have prayed for a declaration that the provisions of sec. 19(4) of the Bombay Sales Tax Act, 1959, are ultra vires the provisions of Article 19(1)(f) and (g) of the Constitution of India. They also prayed for a writ of mandamus or certiorari or any other writ, direction or order, quashing and setting aside the notice and the assessment orders and further permanently restraining the respondent or his servants and agents from enforcing or executing the impugned notice against the petitioners or recovering the amount of tax as per the impugned assessment order. It may be mentioned at this stage that the petitioner had at one stage contemplated going in appeal against the order of the respondent and actually had filed an appeal but since the appeal could not be entertained without payment of at least half of the assessment dues, viz., Rs. 15,000 and odd, the aggregate amount of dues being Rs. 30,000 and odd, they withdrew the appeal; it is the contention of the petitioners that since this amount had to be deposited, there was no other equally efficacious remedy; and hence the petitioners have withdrawn the appeal and thereafter have filed this special civil application.

4 In his affidavit-in-reply in para. 6, the respondent states that the facts stated in para. 4 of the petition are substantially correct, viz., that M/s. Kailas Oil Mills were being run in the leasehold premises of Haji Musa Ismail and that the landlord of the said premises had created a new lease in favour of the petitioners and that the petitioners were tenants of Haji Musa Ismail and were occupying the premises of Haji Musa Ismail as tenants on a monthly rent of

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Rs. 200 p.m.; and these statements regarding the premises are stated to be substantially correct so far as the affidavit-in-reply is concerned.

5 In para. 5 of the affidavit-in-reply, it has been contended by the respondent that the petitioners had applied for registration certificate on 22nd November, 1960, in the prescribed Form I, and had also written a letter, dated 22nd November, 1960, wherein they had specifically admitted that they had purchased Kailas Oil Mills on 8th November, 1960, and had taken possession of the said mills and, therefore, the registration certificate should be issued to the petitioners. Thereafter para. 5 of the affidavit in-reply proceeds :

"It was clear that the petitioners had considered themselves as successors of Shri Kailas Oil Mills, Jamnagar. It may also be noted that the petitioners continued the similar nature of business at the same place along with the same machinery, equipment etc. from their predecessors. I say that the identity and the integrity of the business of Shri Kailas Oil Mills has been completely retained by the petitioners and is confirmed by them in their letter dated 22nd November, 1960."

6 In para. 8 of the affidavit-in-reply, the respondent states :-

"With reference to para. 6 of the petition, I say that the petitioners, in this paragraph, had admitted that they had applied for registration certificate without waiting to put in the turnover exceeding the prescribed limit as they had taken over the machinery etc. of Kailas Oil Mills."

7 Sec. 19(4) of the Bombay Sales Tax Act, 1959, which came into force from 1st January, 1960, provides as follows :

"(4) Where a dealer, liable to pay tax under this Act, transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof by any other person, the dealer and the person succeeding shall jointly and severally be liable to pay the tax (including any penalty) due from the dealer under this Act or under any earlier law, up to the time of such transfer, disposal or change, whether such tax (including any penalty) has been assessed before such transfer, disposal or change but has remained unpaid, or is assessed thereafter.

8 It has to be borne in mind that under this sub-section, which creates the liability of the transferee for the dues of the transferor for some period prior to the date of the transfer, what is essential is that there must be either a transfer or any other disposition of the business by the transferor, who must be a dealer, and such transfer or other disposition may be either in whole or in part or even if there is any transfer or disposition of any business, since any change of the ownership either of the whole or of the part might be effected by the transferor or the dealer, then the consequence of such change in the ownership, whole or in part, is that the previous owner has been succeeded in the business or part of the business by any other person. The transferor and the transferee both are jointly and severally liable to pay the tax, including any penalty due from the previous owner in respect of the period up to the time of such transfer, disposition or change. It is clear from this analysis of the section that either the whole or a part of the business as such must be transferred and, secondly, if there is any change in the ownership of the business, then as a consequence of that change in the

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ownership, the previous owner must be succeeded in the business or part thereof by the transferee.

9 The tests for determining whether there has been any change in the ownership or not have been laid down by the Supreme Court in the context of industrial legislation in *A.C.A.&I. Society V/s. Workmen* [A.I.R. 1963 S.C. 1489]. Gajendragadkar, J. (as he then was), delivering the judgement of the Supreme Court has observed in para. 9 at page 1492 as follows :

"The question as to whether a purchaser of an industrial concern can be held to be a successor-in-interest of the vendor will have to be decided on a consideration of several relevant facts. Did the purchaser purchase the whole of the business ? Was the business purchased a going concern at the time of the sale transaction ? Is the business purchased carried on at the same place as before ? Is the business carried on without a substantial break in time ? Is the business purchased carried on as the same or similar to the business in the hands of the vendor ? If there has been a break in the continuity of the business, what is the nature of the break and what were the reasons responsible for it ? What is the length of the break ? Has goodwill been purchased ? Is the purchase only of some parts and the purchaser having purchased the said parts purchased some other new parts and started a business of his own which is not the same as the old business but is similar to it ? These and all other relevant factors have to be borne in mind in deciding the question as to whether the purchaser can be said to be a successor-in-interest of the vendor for the purpose of industrial adjudication. It is hardly necessary to emphasise in this connection that though all the facts to which we have referred by way of illustration are relevant, it would be unreasonable to exaggerate the importance of any one of these facts or to adopt the inflexible rule that the presence or absence of any one of them is decisive of the matter one way or the other."

10 In the context of income-tax legislation also, a broad test as to when one person succeeds another in a business has been laid by the Supreme Court in *Commissioner of Income-tax, Madras V/s. K.H. Chambers* ([1965] 55 I.T.R. 674; A.I.R. 1965 S.C. 970), and in that case the Supreme Court was concerned with the question of interpretation of sec. 25(4) of the Indian Income-tax Act, 1922; and after considering the earlier case law, *Subba Rao, J.* (as he then was), delivering the judgement of the Supreme Court has observed in para. 11 at page 975 of the report :

"The tests of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person 'succeeded' to the business of another."

11 In para. 4 of the report, quoting from *Simon's Income-Tax*, *Subba Rao, J.*, observed :

"In particular, argument from decided cases has resulted in the acquisition by the word 'succession' of a somewhat artificial meaning In order to constitute a succession there must be, broadly speaking, a taking over of the whole of the business concerned But if a business is taken over as a whole, the fact that minor assets of the business are omitted from the transfer will not prevent there being a succession. The fact that the purchaser already has a similar business is not a material fact in

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establishing succession. The purchase of a business with a view to closing down would not appear to constitute succession.

Other questions which have been used as tests are : (1) whether a similar trade has been carried on after the transfer; (2) whether goodwill or other intangible assets are included in the transfer; (3) whether staff is taken over; (4) the treatment on transfer of the stock and debts of the transferor; (5) whether there was an interval in the carrying on of the trade as a result of the transfer."

12 It is, therefore, clear that though all the assets of a particular business may not be transferred what is required in order to constitute succession in business, is a transfer of a business or a part thereof as such and not merely some of the assets of the business. In the petition it has been stated categorically that the firm of M/s. Kailas Oil Mills had stopped its business prior to the date of the sale of the machinery to the petitioner-firm. M/s. Kailas Oil Mills also prior to that date disposed of its stock of groundnut and groundnut oil and other furniture and fixtures and what was sold to the first petitioner-firm was only the machinery of the partnership firm of M/s. Kailas Oil Mills. Annexure "A" to the petition is the agreement between the partners of the first petitioner-firm and the partners of M/s. Kailas Oil Mills, whereby an agreement, for the sale of machinery for the aggregate sum of Rs. 35,001 was arrived at between the parties. The document makes it clear that what were being sold were the different items of machinery set out in that agreement and the agreement in terms stated : "This agreement is made to sell the said machinery to you for Rs. 35,001 (Rupees Thirty-five thousand and one)." Nowhere in this document, annexure "A" to the petition, are there any words which would imply that anything else besides the machinery of the concern was being sold by the partners of Kailas Oil Mills. It is clear that the goodwill of the business and other assets and liabilities of the business or stock-in-trade are not contemplated as being transferred by the partners of Kailas Oil Mills to the partners of the first petitioner-firm. It has been clearly stated in this agreement, annexure "A" to the petition, that the partners of Kailas Oil Mills would not raise any objection if the landlord of the premises where the machinery was located were to agree to give a rent-note in respect of the premises to the partners of the first petitioner-firm, i.e., if the landlord were prepared to accept the first petitioner-firm as his tenants. Therefore, even the tenancy rights of the premises where Kailas Oil Mills was conducting its business were not being transferred. As we have already pointed out, it is the contention of the petitioners in para. 4 of the petition that after the purchase of the machinery from Kailas Oil Mills, the petitioners negotiated with the landlord of the premises and have become direct tenants of that landlord at the monthly rent of Rs. 200; and in para. 6 of the affidavit-in-reply, the respondent has admitted this statement in para. 4 of the petition to be substantially correct.

13 The learned Assistant Government Pleader, on behalf of the respondent, urged before us. That even if a part of the business is transferred by the previous owner, the liability of the transferee for the sales tax dues of the transferor in respect of the period prior to the date of the transfer is provided for under section 19(4) of the Act. It is to be borne in mind that even though section 19(4) speaks of a transfer or other disposal or change in the ownership of a part of the business, what is contemplated by sec. 19(4) is that it must be a transfer, disposal or change of business and not merely of the assets of the business. There is a wide distinction between the assets of a business and a part of the business. When the assets of any particular business, viz., machinery, are sold or disposed or transferred, it cannot be said that a part of the business has been transferred, or disposed of. In the instant case, on the terms of the document, annexure "A" to the petition, it is clear that what was sold was the machinery

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which was formerly employed for carrying on the business of M/s. Kailas Oil Mills but no part of the business of M/s. Kailas Oil Mills was being transferred or has been transferred by the partners of M/s. Kailas Oil Mills to the first petitioner-firm.

14 The learned Assistant Government Pleader also placed considerable reliance on the fact that on 22nd November, 1960, the petitioners applied in the prescribed Form I for registration as a dealer under the provisions of the Bombay Sales Tax Act, 1959; and along with the prescribed form for application for being registered as a dealer, a letter was sent, bearing the date 22nd November, 1960. That letter is annexure "B" to the petition and is in these terms :-

"With salutations it is to be stated that we have purchased Shri Kailas Oil Mills of Jamnagarwala from the date 8th November, 1960, and a writing is passed in respect of the same on a stamped paper bearing No. 1251, dated 8th November, 1960. We have taken possession of the said mill. It bears sales tax No. N. 55 J.M.C. 471. We have taken possession of the said very mill. Therefore, we request you to give sales tax number to us from its said number.

We shall produce if required a copy of the partnership deed and a copy of the sale deed."

15 It was contended, relying on this letter addressed by the first petitioner-firm to the Sales Tax Officer, Jamnagar, that there was a clear admission on the part of the first petitioner-firm that they had purchased the business of Kailas Oil Mills. We are unable to accept this contention urged on behalf of the respondent because all that has been stated is that they had purchased Kailas Oil Mills, meaning thereby, the machinery of Kailas Oil Mills. In this very letter, the sale deed, annexure "A" to the petition, has been referred to and, as we have pointed out, by that document there was merely a sale of the machinery for the aggregate price of Rs. 35,001. When the letter of 22nd November, 1960, speaks of the first petitioner-firm having purchased Kailas Oil Mills, what is meant is that the machinery of Kailas Oil Mills had been purchased by the first petitioner-firm. If there had been no reference to the document of 8th November, 1960, bearing stamp No. 1251, there would have been some scope for this argument urged before us on behalf of the respondent; but in view of the reference to the sale deed dated 8th November, 1960, it is clear that the petitioners were stating before the Sales Tax Officer that a purchase had been effected in accordance with the terms of that document of 8th November, 1960. If in law the petitioners had not purchased the business or any part of the business of Kailas Oil Mills, by the mere statement referred to above in annexure B to the petition, it cannot be said that they had succeeded to the business of Kailas Oil Mills or were transferees of the business or any part of the business of Kailas Oil Mills.

16 In our opinion, therefore, the respondent was in error when he treated the first petitioner-firm as the transferee of the business of Kailas Oil Mills and sought to recover the sales tax dues of Kailas Oil Mills in respect of the period prior to the date of the sale of the machinery, viz., prior to 8th November, 1960, from the first petitioner-firm. The liability of the first petitioner-firm could have arisen only if there was a transfer of the business or any part of the business of Kailas Oil Mills, and as we have analysed and pointed out above, there was only a sale of the machinery and not the sale of any part of the business or of the whole business of Kailas Oil Mills to the first petitioner-firm. None of the tests mentioned in the decisions cited above for deciding whether there was a succession in the business, is satisfied in the instant case and even the fact that the business is carried on in the same premises as before, is

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explained by the fact that the landlord has recognised the first petitioner-firm as his tenants and it is not by virtue of any transfer of tenancy rights by Kailas Oil Mills to the first petitioner-firm that the business is carried on in the same premises as before.

17 It is, therefore, clear that the respondent had no jurisdiction to proceed to recover the sales tax dues of M/s. Kailas Oil Mills from the first petitioner-firm.

18 In the result, we allow this special civil application and issue a writ of certiorari quashing the notice and the assessment orders, annexure "C" to the petition, and also issue a writ of mandamus permanently restraining the respondent, his servants and agents, from enforcing or executing the said notice and the assessment orders as against the petitioners. Rule made absolute with costs.

19 Application allowed.