
(1965) 01 CAL CK 0017

In the Calcutta High Court

Case No : Appeal from Original Order No. 147 of 1963

Akshoy Kumar Dey and Co.

APPELLANT

Vs

Commercial Tax Officer and Others

RESPONDENT

Date of Decision : 29-01-1965

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 70 CWN 71 : (1966) 18 STC 505

Hon'ble Judges : Bose, C.J.;B.C. Mitra, J

Bench : Division Bench

Advocate : S.K. Acharyya and Debesh Chandra Mukherjee, for the Appellant;B.C. Dutt and S.K. Banerjee, for the Respondent

Judgement

B.C. Mitra, J.—This is an appeal against a judgment and order of Banerjee, J., dated 14th January, 1963, discharging a rule obtained by the appellant under Article 226 of the Constitution.

2. The appellant is a partnership firm and carries on business as a dealer in bullion and also as wholesale and retail distributor of bullion and specie and manufacturer of ornaments and utensils. In 1941 it was registered under the Bengal Finance (Sales Tax) Act and was granted a registration certificate bearing number CS/4517A. Under this certificate the appellant could purchase bullion, without paying sales tax, for the purposes of manufacture only. But the certificate did not cover the purchase and resale of bullion and specie, as such.

3. Under the Bengal Finance (Sales Tax) Act, 1941, transactions in bullion and specie were not liable to sales tax, as provided in serial No. 22 of the Schedule of exempted goods u/s 6 of the Act. The Act however was amended in 1955 by the Bengal Finance (Sales Tax) (Second Amendment) Act, 1955, and this amending Act omitted item No. 22 altogether. By reason of such amendment, on and from 25th September, 1955, transactions in bullion and specie became liable to sales tax. Prior to the amendment, therefore, the appellant's business in sale and purchase of bullion and specie was not affected by the taxing provisions in the

Bengal Finance (Sales Tax) Act, 1941. But upon the amendment of the Act, the appellant's registration certificate, as a dealer in bullion and specie, needed amendment to cover its transactions in those commodities. After the amendment such transactions became taxable unless included in the registration certificate of a dealer.

4. After the amendment of the Act, certain amendments were made in the registration certificate of the appellant as noted below :-

For the purpose of manufacture :

(1) Raw materials.

(2) Plant, machinery, spare parts and accessories.

(3) Consumable stores, viz., bullion and silver provided that all goods for which exemption from payment of sales tax is claimed are intended for use in the actual process of manufacture of the goods named below :

(i) Gold and silver ornaments,

(ii) Utensils.

5. According to the appellant, it was under a mistaken belief that the amendments made in the registration certificate covered transactions in bullion and specie as well as refined or melted gold or silver, as such sales essentially formed part of the business of every bullion merchant. The appellant thought that it could continue its business in purchase and sale of bullion and specie as well as refined or melted gold and silver, by purchasing such commodities free of tax, from other dealers on issuing sales tax declaration forms as a registered dealer. Acting on this mistaken belief the appellant made tax free purchases of bullion for resale against declaration forms after 25th September, 1955.

6. On 4th February, 1958, the appellant received a notice from the Commercial Tax Officer, respondent No. 1, calling upon it to show cause why action should not be taken against it u/s 22(1)(c) and Section 14(1) of the Bengal Finance (Sales Tax) Act. Section 22(1)(c) of the said Act deals with the question of punishment of a registered dealer for making a false representation regarding the class of goods which are covered by his certificate of registration. The appellant compounded the offence with which it was charged, by paying Rs. 500 u/s 23 of the Act. This section empowers the Commissioner, to accept by way of composition, a sum not exceeding Rs. 5,000 from any person alleged to have committed an offence u/s 22 of the Act, and where the offence alleged to have been committed u/s 22(1)(a) or Section 22(1)(b), the composition money is not to exceed double the amount of the tax payable by the dealer. The appellant duly paid the said sum of Rs. 500, but even after such payment it was served with a fresh notice dated 7th April, 1958, from the respondent No. 1, whereby the appellant was informed that the composition of the offence for unauthorised purchase would not give exemption to selling dealers u/s 5(2)(a)(ii) of the Act

and declaration forms, issued for such purchase, might not be accepted as valid evidence Under Rule 27A in support of the claim of exemption. The appellant objected to this interpretation of the effect of the composition mentioned above, and thereafter moved the Commissioner, Commercial Taxes, for appropriate relief. On 20th January, 1959, Mr. A.C. Roy, Commissioner, Commercial Taxes, made an order by which a sum of Rs. 2,000 was accepted as composition. A further order was made, whereby the declaration forms issued by the appellant, were to be treated as valid, so that the dealers from whom the appellant made purchases might not ask the appellant to pay tax in respect of the transactions, and the Commercial Tax Officer was directed to issue an order to the appellant so that it might be shown to the selling dealers and the Commercial Tax Officer concerned. This further sum was also duly paid by the appellant.

7. The respondent No. 1 however did not issue any letter to the appellant as directed by the order of the Commissioner, Commercial Taxes. Furthermore, the Commercial Tax Officer, Raja Katra, decided to disallow purchases made by the appellant of bullion valued at Rs. 91,55,204-2-3 as sales to a registered dealer u/s 5(2)(a)(ii) of the Act. The consequence of this decision was that the appellant became liable to pay sales tax on the said purchase in spite of the order made by the Commissioner, Commercial Taxes, on 20th January, 1959. The appellant thereupon applied before the Commissioner, Commercial Taxes, for an order on the Commercial Tax Officer, Raja Katra, that the declaration forms issued by the appellant in respect of the aforesaid purchases be treated as valid and the claim for exemption made by the dealers on the basis of the declaration forms, be allowed. This application was disposed of by Mr. S.K. Ghosh, who succeeded Mr. A.C. Roy, as Commissioner, Commercial Taxes, by an order dated 15th March, 1960. By this order, it was held that the order made by Mr. A.C. Roy on 20th January, 1959, in so far as he directed that the declaration forms issued by the dealer in an unauthorised manner were to be treated as valid, was bad in law and void ab initio and that Mr. A.C. Roy as Commissioner, Commercial Taxes, was not competent to make such an order u/s 23(1) of the Act. That part of the order of 20th January, 1959, which dealt with validation of declaration forms already issued, was held to be bad.

8. It was against this order that the appellant moved a petition under Article 226 of the Constitution and obtained a rule nisi which was discharged by Banerjee, J., as mentioned above. This appeal is directed against the order discharging the rule nisi.

9. Mr. S.K. Acharya, learned counsel for the appellant, firstly contended that the offence alleged to have been committed by his client was compounded twice u/s 23 of the Act which empowered the Commissioner to compound an offence u/s 22(1) of the Act. Section 22(1) which deals with offences and penalties, has classified the various offences under different sections of the Act and has also prescribed the punishment. It was argued that the offence of the appellant would either be u/s 22(1)(a) or Section 22(1)(c) or Section 22(1)(d). Section 22(1)(a)

deals with the case of a dealer carrying on business in contravention of Section 7(1) of the Act, which provides that no dealer shall, while liable to pay tax, carry on business as dealer unless he has been registered and possesses a registration certificate. The offence with which the appellant was charged was that he issued declaration forms for purchase of goods and thereby made tax-free purchases, although the commodities purchased were not included in the registration certificate. Learned counsel argued that reading these three sections together, namely, Section 23, Section 22(1) and Section 7(1), the offence with which the appellant was charged was that he had made declarations in the prescribed forms in his transactions, which he should not have done, as such transactions were not included in its registration certificate. It was contended before us that the declaration forms were issued by the appellant under a mistaken belief with regard to its rights to enter into tax-free transactions in bullion and specie. In any event the appellant paid the composition money twice as mentioned above, for compounding the offence with which it was charged.

10. Learned counsel for the appellant next argued by referring to Section 7(5) of the Act that since his client had paid composition money u/s 23, it was entitled to be registered and was also entitled to an amendment of its certificate of registration so as to include therein transactions in bullion and specie. The offence charged being issue of declaration forms without a corresponding entry in the registration certificate and that particular offence having been compounded, learned counsel contended that the registration certificate should have been amended so as to include therein transactions in bullion and specie. It was contended that it was the statutory obligation of the Commissioner, Commercial Taxes, to give the appellant a certificate of registration relating to transactions in bullion and specie.

11. It was next contended that the offence with which the appellant was charged was an offence u/s 22(1)(c) which dealt with false representation made by a registered dealer when purchasing any class of goods which were not covered by the certificate of registration. This offence quite clearly is covered by Section 7(1) of the Act which prohibits a dealer, who is liable to pay tax, to carry on business as a dealer unless he has been registered and has obtained a registration certificate. This contention of the appellant seems to be well founded. The composition was with regard to a particular offence, namely, making use of declaration forms for purchasing goods which were not included in the certificate of registration, and it was this offence which was compounded. The order made on 20th January, 1959, further proceeded to direct that declaration forms issued by the appellant for the period in question were to be treated as valid so that the selling dealers might not ask the appellant to pay tax in respect of the same sales. The letter from the Commercial Tax Officer, Raja Kutra, dated 25th February, 1959, which is annexure H to the petition also makes that position quite clear, namely, that upon payment of the composition money of Rs. 2,000, the declaration issued by the appellant were to be treated as valid. The question is whether the order of 20th January, 1959, could be reviewed or revised by Mr.

S.K. Ghosh, and whether in making the order on review the Commissioner followed the procedure laid down by law.

12. It was next contended by the learned counsel for the appellant, that Mr. Ghosh had no jurisdiction to review the order dated 20th January, 1959. It was argued that u/s 20(4) an order under the Act or the Rules made thereunder could be reviewed only by the person passing it, upon application or of his own motion. Relying upon this provision, learned counsel argued that Mr. S.K. Ghosh had no jurisdiction to review and revise the order passed by Mr. A.C. Roy on 20th January, 1959. It was urged that the order dated 15th March, 1960, having been made entirely without jurisdiction, could not stand and should be quashed. I shall deal with this contention of the appellant later in this judgment.

13. It was next argued by the learned counsel for the appellant that Section 20 of the Act dealt with appeal, revision and review. Sub-section (5) of Section 20 provides that before any order is passed under this section which is likely to affect any person adversely, such person shall be given reasonable opportunity of being heard. It was argued that the order of 15th March, 1960, was an order made on review of the earlier order made on 20th January, 1959, and that being so, it was incumbent upon Mr. S.K. Ghosh, the then Commissioner, to give reasonable opportunity to the appellant to make representations against the proposed order. No such opportunity was at all given to the appellant. The order dated 15th March, 1960, prejudicially affects the appellant. He was entitled to be heard and the statute has conferred upon him the right to be heard. The provisions in Section 20(5) are mandatory in nature and as there is a clear violation of this provision, the order made on 15th March, 1960, must be quashed. This point, namely, that the appellant was not given a reasonable opportunity of being heard was specifically taken in ground No. IX(e) set out under paragraph 23 of the petition.

14. This contention of the appellant has been dealt with in paragraph 17 of the affidavit affirmed by Subodh Kumar Ghosh on 19th September, 1960. Excepting a bare statement that reasonable opportunity was given to the petitioner, for making submission, there is nothing to sho that any opportunity was ever given to the appellant before the order of 15th March, 1960, was made. There is nothing in the order itself to sho that the appellant was heard or any opportunity was given to him to make representations. Mr. Ghosh was going to upset a portion of the order made by his predecessor on 20th January, 1959, and no doubt he kne that this would vitally affect the appellant. Yet he never thought of giving any opportunity to the appellant to make its representations, which it was entitled to do u/s 20(5). There is nothing in the records to sho that any notice was given to the appellant or any communication was sent to it by the Commissioner directing it to make its representations on the question why the previous order of 20th January, 1959, should not be revised. In support of this contention reliance was placed upon the decision of this Court in Aswini Kumar v. Commercial Tax Officer (1957) 61 C.W.N. 953. In that case, my Lord the Chief

Justice (Bose, J., as he then was) considered the question of opportunity being given u/s 20(5) of the Act. In that case a notice was served, but the notice was a misleading one and it was held that the petitioner in that case was not at all given a proper opportunity of being heard to contradict the correctness of the facts or materials which the Commercial Tax Officer had collected and which was prejudicial to the interest of the petitioner in that case. In the instant case no before us no opportunity was at all given to the appellant of being heard.

15. Mr. B.C. Dutt, appearing for the respondents, contended that whether opportunity was given or not was a question of fact and therefore we should not go into that matter at all. I cannot accept this contention of Mr. Dutt. There is nothing in the order to show that any such opportunity was given. On the other hand, the last sentence in the order dated 15th March, 1960, is : "Inform the petitioner-dealer accordingly." In the affidavit filed on behalf of the respondents dealing with the question of opportunity being given, no reference has been made to any materials or records to show that any opportunity was ever given to the appellant. I cannot accept the contention of Mr. Dutt that this is a question of fact and cannot be gone into.

16. Mr. Dutt next contended that Mr. S.K. Ghosh was quite competent to review the order passed by Mr. A.C. Roy on 20th January, 1959. In support of this contention Mr. Dutt relied upon Rule 82 of the Bengal Sales Tax Rules, which provides that no officer below the rank of Commissioner shall review any order which has been passed by any of his predecessor-in-office. He contended that the rule clearly provides for review by one Commissioner of an order passed by his predecessor-in-office. Mr. Dutt's contention on this question is well founded. It is true that Section 20(4) provides that an order made by any person appointed u/s 3 of the Act may be reviewed by the person passing it, but this Sub-section has been made expressly subject to such rules as may be prescribed and Rule 82 quite clearly empowers a Commissioner to review an order made by his predecessor-in-office. That being so, in my opinion, the order made on 15th March, 1960, cannot be assailed on the ground that the Commissioner had no jurisdiction to review the order made on 20th January, 1959.

17. It was next contended by Mr. Dutt that the application under Article 226 was premature and the appellant should have waited until the assessment order was made on the basis of the directions contained in the order dated 15th March, 1960. That order, according to Mr. Dutt, does not give sufficient grounds for an application under Article 226 of the Constitution. In support of this contention Mr. Dutt referred to a decision of the Sales Tax Tribunal, Bombay, in *F.A.S.A. Dharmajwala v. The State of Bombay* [1952] 3 S.T.C. 58. In that case, it was held that it would be better if questions of prosecution u/s 24 were considered after the assessment proceedings out of which they arose were completed. In my view, this decision has no application to this case at all, firstly because we are not concerned in this appeal with the question of any prosecution. Secondly, if the impugned order has been made in violation of statutory provisions or without

jurisdiction, there is no reason why the appellant should wait until assessment order has been made. Mr. Dutt also referred to another decision in *The State of Kerala and Ors. v. C.M. Francis and Co. and Ors.* [1961] 12 S.T.C. 119 That decision however does not support the contention of Mr. Dutt.

18. It was next contended by Mr. Dutt that the powers of the Commissioner u/s 23 were restricted to an offence committed u/s 22(1). Therefore, he argued that the effect of the composition was that the offence in purchasing commodities without a registration certificate, free of tax, was condoned. But the Commissioner had no power to validate the declaration forms issued by the appellant to other dealers who sold goods to the appellant. In support of this contention, he also relied upon Section 11(5) of the Act which provides that any assessment made u/s 11 shall be without prejudice to any prosecution instituted for an offence against this Act. Therefore, Mr. Dutt contended that the Commissioner's power of composition u/s 23 being limited to an offence already committed by purchasing free of tax, a class of goods which were not included in the registration certificate, the Commissioner had no authority to direct that declaration forms issued by the appellant to the selling dealers should be treated as valid.

19. I am not impressed by this contention of Mr. Dutt. Section 23 of the Act deals with the Commissioner's power of composition of offences u/s 22(1) of the Act and the appellant was charged with an offence under a particular Section of the Act, namely, Section 22(1)(c), which, as noticed earlier, deals with the question of a false representation made by a registered dealer when purchasing goods. The appellant in this case was charged with making a false representation, namely, that the purchase of bullion and specie was covered by its registration certificate. The offence of the appellant, therefore, which the Commissioner compounded, was the offence of making a false representation relating to the certificate of registration. It cannot be overlooked that the offence with which the appellant was charged was an offence u/s 22(1)(c) and it was that particular offence which was compounded. I cannot therefore hold that Mr. A.C. Roy, Commissioner, Commercial Taxes, had no jurisdiction to direct that the declaration forms issued by the appellant were to be treated as valid and therefore the order having been made without jurisdiction is bad and void ab initio.

20. Mr. Dutt next advanced another argument based on the provisions in Section 11(5) of the Act. This Sub-section provides that any assessment made u/s 11 shall be without prejudice to any prosecution instituted for an offence against this Act. He argued that the order made by Mr. S.K. Ghosh on 15th March, 1960, was fully protected by Section 11 (5) of the Act. An order of assessment made in respect of a dealer's transactions, Mr. Dutt argued, did not bar a prosecution of the same dealer for an offence under the Act. I am not impressed by this contention of Mr. Dutt. The order made by the Commissioner on 15th March, 1960, is neither an order of assessment nor an order made in a prosecution of

the appellant for an offence under the Act. It was an order made on a review of the earlier order of the Commissioner. Section 11(5) of the Act therefore is of no assistance to Mr. Dutt's client.

21. It was next urged by Mr. Dutt that the appellant had a statutory remedy by way of appeal as provided in Section 20 of the Act. In support of this contention Mr. Dutt relied upon a decision of the Supreme Court in C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, Relying upon this decision, Mr. Dutt argued that the statute provided a complete remedy to the appellant who could have obtained the relief which it claimed, if that remedy was pursued. The appellant, Mr. Dutt argued, should have pursued the remedy provided by the statute, instead of moving this Court by a writ petition. But the decision of the Supreme Court does not support Mr. Dutt's contentions in this appeal, as Section 20 of the Act provides for an appeal against an assessment order. The order with which we are concerned in this appeal is not an order of assessment and therefore is not controlled or covered by Section 20 of the Act. In support of this branch of the argument, Mr. Dutt also relied upon two other decisions in Khem Chand Vijay Kumar v. Shri J.S. Malhotra [1963] 14 S.T.C. 821 and Dayabhai Gokulbhai Patel Vs. The State of Bihar, These decisions have no application, as the impugned order in the instant case no before us, is not an order against" which, an appeal lies u/s 20 of the Act.

22. Mr. Dutt next argued that reasonable opportunity as provided in Section 20(5) of the Act was given to the appellant and therefore there was no substance in the appellant's contention that Section 20(5) of the Act had been violated. As I have already dealt with this argument, it is not necessary for me to linger on this question any further.

23. In my opinion, Mr. A.C. Roy, Commissioner, Commercial Taxes, had the jurisdiction and the authority to make the order dated 20th January, 1959, including the order directing that the declaration forms issued by the appellant were to be treated as valid. Mr. S.K. Ghosh, the successor in the office of the Commissioner, Commercial Taxes, also had the jurisdiction to review the order passed by his predecessor-in-office and the order passed by him on 15th March, 1960, was not made without jurisdiction and is not void or invalid on that ground. But the order made by Mr. Ghosh on 15th March, 1960, was made in violation of Section 20(5) of the Act and for that reason the order must be quashed.

24. For the reasons mentioned above this appeal is allowed. The judgment and order of Banerjee, J., dated 14th January, 1963, are set aside. Let a writ issue in the nature of certiorari for quashing the order dated 15th March, 1960. Let a writ in the nature of mandamus also issue directing the respondents not to give any further effect to the said order of 15th March, 1960. The respondents are directed to act according to law. Each party to pay its own costs.

25. This order is made without prejudice to any further steps or proceedings

which the respondents may be advised to take pursuant to the suo motu proceedings initiated by the respondents.

Bose, C.J.

26. I agree.