

(1970) 08 KL CK 0015

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 253 of 1970

C. Correya

APPELLANT

Vs

The Sales Tax Officer and Another

RESPONDENT

Date of Decision : 27-08-1970

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 153, 222, 234, 435, 436

Citation : (1971) 28 STC 687

Hon'ble Judges : E.K. Moidu, J

Bench : Single Bench

Advocate : R.G. Dias, for the Appellant; State Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

E.K. Moidu, J.—This criminal revision petition is directed against the order dated 8th May, 1970, by the District Magistrate (Judicial), Ernakulam.

2. On the application of the first respondent, Sales Tax Officer, the trial Magistrate issued a distraint warrant against the revision petitioner u/s 23(2) of the Kerala General Sales Tax Act, 1963, which read as follows:--

(2) Any tax assessed or any other amount due under this Act from a dealer or other person may, without prejudice to any other mode of recovery, be recovered--

(a) as if it were an arrear of land revenue;

(b) on application to any Magistrate, by such Magistrate, as if it were a fine imposed by him :

Provided that no proceedings for such recovery shall be taken or continued as long as such dealer or other person has, in regard to the payment of such tax or other amount, as the case may be, complied with an order by any of the authorities to whom he has appealed or applied for revision, under the provisions of this Act.

The said order of the trial Magistrate is impugned in this revision petition on the ground that no previous notice of the proceeding had been given to the revision petitioner before the distraint warrant was issued. The question is whether the order passed by the Magistrate can be revised either u/s 438 or u/s 439, Criminal Procedure Code, as if the order is a judicial order or as an order passed by the Magistrate as *persona designata*. The District Magistrate held that it could not be so revised.

3. Before we consider the nature of the proceeding and the character of the Magistrate who entertained the application for recovery of tax, we have to examine the relevant provisions of the Act leading to the making of an application for recovery of the tax. Under Sections 17 to 19, 26, 29 and 30, the appropriate Sales Tax Officers have the right to assess sales tax on dealers. Any assessee objecting to the assessment made under the above provisions can file an appeal to the Appellate Assistant Commissioner u/s 34 of the Act in addition to *suo motu* revisions and revisions on applications to the Deputy Commercial Tax Officer in appropriate cases under Sections 35 and 36 of the Act and to the Board of Revenue under Sections 37 and 38 of the Act. If an assessee is dissatisfied with the order of those authorities, he would be entitled again to file an appeal to the Appellate Tribunal u/s 39 of the Act. u/s 40, the High Court is also the competent authority to hear appeals from the orders passed by the Appellate Tribunal. Section 40 provides appeal to the High Court and Section 41 revision to the High Court. Consequent upon passing the final order, provision is made in the Act for different modes of recovery of tax imposed on a dealer. Thus a Magistrate entertaining an application for recovery of the amount of sales tax has nothing more to do than to take steps to recover the same in the manner in which he would recover any amount of fine imposed by him. All the questions relating to the imposition of the tax are to be determined by the appropriate authority and the recovery in a specified mode is only to be conducted by the Magistrate. That proceeding before the Magistrate is simple and a limited proceeding for recovery of the tax. Such procedure is conducted under an executive order. The power of the Magistrate to take proceedings for recovery of any tax assessed or any other amount due under the Act from a dealer as if it were a fine imposed by him accrues to the Magistrate by virtue of Section 23(2) of the Act and not under any provisions of the Code of Criminal Procedure. Such proceedings are conducted by the Magistrate for recovery of tax and the Magistrate in such cases does not function or exercise his authority under the Criminal Procedure Code. Though the proceeding to recovery of fine is identical to the proceeding to the recovery of tax, the right to recover tax by the Magistrate is conferred upon him as he is designated under the Act to recover it. The right to pass an order in exercise of the power conferred on him under the Act cannot be equated with the power of the Magistrate to pass an order under the Criminal Procedure Code. Under the provisions of the above section, he cannot be regarded as an inferior criminal court within the meaning of the provisions of the Criminal Procedure Code. When there is, therefore, no provision

in the Act dealing with the recovery of the tax by the Magistrate in any particular form, he is bound to follow the provisions of the Act itself and not the provisions of the Criminal Procedure Code. When the procedure is such, it can be said that Sections 435 436 438 and 439 of the Criminal Procedure Code cannot be resorted to for interfering with an order passed by the Magistrate u/s 23(2) of the Sales Tax Act referred to above.

4. In a similar case, where proceedings u/s 234 of the Ajmer-Merwara Municipalities Regulation (6 of 1925) were taken for recovery of expenses by the Municipal Committee in carrying out certain repairs to a building u/s 222(4) of that Regulation from the owner of a building, who refused to conduct the requisite repairs to the building in spite of notice issued by the Municipal Committee, it was pointed out when the validity of the proceeding was questioned that the Magistrate who entertained the application u/s 234 of the Regulation for the recovery of the expenses of the repairs as if it was a fine cannot be regarded as an inferior criminal court. In this regard, the observation of the Supreme Court in *The Dargah Committee, Ajmer Vs. State of Rajasthan*, may be seen expressed at pages 577-578. It reads as follows:

Now looking at Section 234 it is clear that the proceedings initiated before a Magistrate are no more than recovery proceedings. All questions which may legitimately be raised against the validity of the notice served u/s 153 or against the validity of the claim made by the Committee u/s 222 can and ought to be raised in an appeal u/s 93(1), and if no appeal is preferred or an appeal is preferred and is dismissed then all those points are concluded and can no more be raised in proceedings u/s 234. That is why the nature of the enquiry contemplated by Section 234 is very limited and it Prima facie partakes the character of a ministerial enquiry rather than judicial enquiry. In any event it is difficult to hold that the Magistrate who entertains the application is an inferior criminal court. The claim made before him is for the recovery of a tax and the order prayed for is for the recovery of the tax by distress and sale of the movable property of the defaulter. If at all, this would at best be a proceeding of a civil nature and not criminal. That is why, we think, whatever may be the character of the proceeding, whether it is purely ministerial or judicial or quasi-judicial, the Magistrate who entertains the application and holds the enquiry does so because he is designated in that behalf and so he must be treated as a *persona designata* and not as a Magistrate functioning and exercising his authority under the Code of Criminal Procedure. He cannot therefore be regarded as an inferior criminal court.

5. The above decision was followed in *The State v. G.L. Udyawar and Anr.* [1963] 14 S.T.C. 628 KER. The observation, in that decision reads as follows:

The above statement of the Supreme Court would be equally applicable to a Magistrate functioning u/s 13(3)(b) of the Act; he cannot be regarded either as an inferior Criminal Court or as functioning or exercising authority under the Code of Criminal Procedure. That being so, no revision to the District Magistrate

was maintainable and the reference which has been made by him is incompetent.

6. In the light of the above decisions, I am of the opinion that this Court has no jurisdiction to interfere with the order passed by the trial Magistrate. The right to pass the order in exercise of the power conferred on the Magistrate under the Act cannot be equated with the power of the Magistrate to pass an order under the Criminal Procedure Code as he is not an inferior criminal court as required by the provisions of the Criminal Procedure Code. The Magistrate in such cases does not function or exercise his authority under the Criminal Procedure Code. The proceedings to recover fine may be identical to the proceedings to recovery of tax. But, the recovery of tax by the Magistrate is conferred upon him as he is designated under the Act to recover it. He cannot be regarded as an inferior court exercising jurisdiction under the Criminal Procedure Code. The revision petition, therefore, is not sustainable.

7. In the result, the revision petition fails and the same is dismissed.