

(1972) 01 CAL CK 0028

In the Calcutta High Court

Case No : Appeal from Original Orders No's. 631 to 635 of 1969 in C.R. No's. 828, 3045-3048 (W) of 1965

Commercial Tax Officer, Central

APPELLANT

Vs

B.C. Nawn and Bros. Pvt. Ltd.

RESPONDENT

Date of Decision : 13-01-1972

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 10, 11, 11(1), 2, 26(1)
Bengal Finance (Sales Tax) Rules, 1941 — Rule 17, 19, 21, 24, 30
Constitution of India, 1950 — Article 133, 225, 226, 372(1), 395
Government of India Act, 1915 — Section 108

Citation : (1973) 2 ILR (Cal) 429

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

Bench : Division Bench

Advocate : B.C. Dutt and Asutosh Ganguli, for the Appellant; Nirmal Mukherjee and Prabir Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, C.J.—These five appeals are from the judgment and order of D. Basu J. dated May, 2, 1969. In that judgment the learned Judge found that a consolidated assessment order in respect of several return periods is ultra vires and accordingly, all subsequent proceedings for demand and recovery by the Government founded on such ultra vires assessment orders are invalid. The learned Judge, therefore, quashed the impugned orders and made the Rules absolute.

2. The learned Judge dealt with in his judgment all the five Rules, namely, from C.R. Nos. 3045(W) to 3048(W) of 1966 and C.R. No. 828(W) of 1965. The sole question that he determined in that judgment is whether it is competent for the assessing authority under the Bengal Finance (Sales Tax) Act, 1941, to consolidate the demands) for several quarters in one assessment or proceeding. He gave the judgment with reference to the materials in C.R. No. 3045(W) of 1966.

3. The Petitioner company, the Respondent before us, is a registered dealer under the Bengal Finance (Sales Tax) Act, 1941. The return period had been fixed by the assessing authority as each quarter of the "Akshaytritia year" according to the Bengali calendar. The Respondent was, according to the registration certificate, liable to furnish returns within 30 days from the expiry of each such quarter, that is, August 4, November 15, January 28 and April 25. The Respondent failed to furnish returns within the aforesaid dates in the year 1951-52. The Commercial Tax Officer issued a single notice dated October 25, 1952, u/s 11(1) of the Act in respect of all the four quarters ending with Baisakh 13, 1369 B.S. In pursuance of that notice, the Respondent filed a consolidated return for the four quarters on November 15, 1955, which was revised on December 7, 1955. Upon such return, the Commercial Tax Officer made his consolidated assessment order dated February 29, 1956, amounting to over Rs. 9 lakhs of which Rs. 8,35,846-3-3 was found to be due after deducting payments made by the Respondent. This sum was demanded from the Respondent by the single notice of demand dated March 1, 1956.

4. As against the aforesaid orders the Respondent preferred an appeal to the Assistant Commissioner of Commercial Tax which has been rejected by the order dated September, 5, 1966, on the technical grounds that the Appellant failed to file the certified copies of the impugned assessment orders within the period of limitation and that the full amount of the admitted tax was not put in with the appeal. In C.R. No. 828(W) of 1965 the appeal has been disposed of by a subsequent order dated June 21, 1968, by which the appellate authority has directed, the assessing authority to make a fresh assessment order after setting aside the existing one, but the plea of the Respondent that one single assessment order could not be made in respect of more than one quarter was rejected.

5. The learned Judge was of the view that the jurisdiction of the assessing authority to assess is separate as regards each period or unit of assessment and that if an order of assessment is made consolidating several units together, such order would be ultra vires the statutory provisions and hence invalid.

6. In other words, the learned Judge came to the conclusion that the assessing authorities under the Bengal Finance (Sales Tax) Act of 1941, are not competent to consolidate the demands for four quarters in one assessment proceeding. The contention of the Appellant before us, the Sales Tax authorities, is that the learned Judge misunderstood and misinterpreted the provisions of the Bengal Finance (Sales Tax) Act of 1941 and the Bengal Sales Tax Rules in holding that the jurisdiction of the assessing authority to assess is separate as regards each period or unit of assessment and that if an order of assessment is made consolidating several units together, such order should be ultra vires the statutory provisions and invalid.

7. In other words, the judgment of the learned Judge raise the question of tax under the Act and whether it could be quarterly, half yearly or any period within"

the year and not annual. The learned Judge apparently took the view that it could be any portion of the year or any day or month.

8. A point argued on behalf of the Respondent is that this appeal is not maintainable in the first instance. The right of appeal is a constitutional right or a statutory right. The Constitution of India does not provide for an appeal from the decision of a single Judge of the High Court to the Division Bench of the High Court. It is said on behalf of the Respondent that this was a judgment and order passed by a single Judge under Article 226 of the Constitution. An appeal does not lie from such a judgment. The main plan on which this argument was built up was that Clause 15 of the Letters Patent is abrogated and there is now no longer after the Constitution of India any Letters Patent available for the High Court at Calcutta.

9. We are unable to accept that argument. Under Article 225 of the Constitution of India it is expressly provided that subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature, the jurisdiction of and the law administered in any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of the High Court and to regulate the sittings of the High Court shall be the same as immediately before the commencement of the Constitution. Under the Rules of the High Court made for application relating to Article 226 of the Constitution it is expressly provided in Rule 43 that

appeals from final orders in this jurisdiction shall be made in the same manner as appeals from original orders in the Original Side and appeals from orders in the Appellate Side according as they arise out of Original Side and Appellate Side applications and all rules applicable thereto in the rules of the Original Side and the Appellate Side, respectively; shall apply thereto *mutatis mutandis*.

Then it is provided by Rule 24 that

all applications under Article 226 of the Constitution shall, subject to any direction of the Chief Justice, be made before Judge on the Original Side taking interlocutory applications or such other Judge as the Chief Justice may appoint.

Reference may also be made to Article 372(1) of the Constitution of India which says:

Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

Article 395 of the Constitution says:

The Indian Independence Act, 1947 and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not

including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

On an interpretation of the above provisions of the Constitution we are of the opinion that the Letters Patent and Clause 15 thereof particularly has not been abrogated. They were the law immediately before the commencement of the Constitution.

10. There are also eminent authorities to support the view that we are taking. A Special Bench of this High Court in *The Chairman, Budge Budge Municipality v. Manghru Mia* (1952) 57 C.W.N. 25 consisting of five learned Judges of this Court came to the conclusion that there is nothing in Article 226 of the Constitution to exclude an appeal within the High Court from a judgment given under that Article by a single Judge of the High Court. It was also held there that a judgment of a single Judge on an application under Article 226 of the Constitution in a matter arising within the Original jurisdiction or in a matter arising outside is a judgment pursuant to Section 108 of the Government of India Act, 1915 and is appealable under Clause 15 of the Letters Patent. We are bound by the observation of the Special Bench. In a Division Bench decision of the Madras High Court in *M. Ramayya Vs. The State of Madras and Another*, this point came up for consideration and it was held that an appeal lies from an order passed by a single Judge of a High Court sitting under Article 226 of the Constitution. The observations of Govinda Menon J., who delivered the judgment, particularly at p. 303 of the report may be seen. In a recent Full Bench decision of the Allahabad High Court in *Aidal Singh and Others Vs. Karan Singh and Others*, the same view was expressed. See the observation of Beg J, in the Allahabad Full Bench decision at pp. 432-33 of the report. On behalf of the Respondent reliance was placed on a Full Bench decision of the Patna High Court in *Collector of Monghyr and Others Vs. Maharaja Pratap Singh Bahadur and Others*, . But that decision does not touch this point. It was more or less concerned with "Civil Proceedings of a High Court" and the interpretation thereof in Article 133 of the Constitution. We may mention here that in a recent decision of the Supreme Court in *S.A.L. Narayan Row and Another Vs. Ishwarlal Bhagwandas and Another*, the words "Civil Proceeding" has been construed to mean Article 226 proceedings.

11. We are, therefore, of the opinion that an appeal is maintainable in this case.

12. Now, about the merits of the appeal. The Bengal (Sales Tax) Act, 1941, makes it clear in its preamble that it is an Act "to impose a general tax on the sale of goods in Bengal". "Sales tax" as generally understood, refers to any tax which includes within its scope all business sales of tangible personal property at either the retailing wholesaling or manufacturing stage with the exceptions noted in the taxing law. It is a tax on the sale of goods. It cannot, be considered as at on the goods themselves : *Tata Aircraft Limited Vs. Member, Board of Revenue*, . Indeed, sales tax was first visualised in the report of the Taxation Enquiry Committee (1924-25) but only as a modification of the octroi through the

intermediate steps of taxing markets and slaughter houses. The suggestions by the Committee Were:

- (i) A turnover tax on retail merchants,
- (ii) registration of such dealers,
- (iii) collector of taxes quarterly, and
- (iv) licensing of and charging of fees from petty traders and hawkers whose turnovers were uncertain as no accounts were maintained by them.

It was on the background of these suggestions that the recommendations of the Taxation Enquiry Committee were made and ultimately led to the entry in the Government of India Act, 1935. Taxes on the sale of goods being a kind of commodity taxes has been demarcated from other commodity taxes, time, excise, octroi, terminal tax, market dues etc. Now let us examine the provisions of the Bengal Finance (Sales Tax) Act, 1941. Section 4 of the Act shows the incidence of taxation. It provides, inter alia, that

...Every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax under this Act on all sales effected after the date so notified.

Therefore, for this incidence of taxation, the gross turnover during the year immediately preceding the commencement of this Act has to be noticed. It is only when that exceeds the taxable quantum that the question of liability to pay tax arises. By Section 4(5) of the Act the expression "taxable quantum" is defined and it means:

- (a) in relation to any dealer who imports for sale any goods into West Bengal or manufactures or produces any goods for sale, 10,000 rupees or
- (b).....
- (c) in relation to any other dealer, 50,000 rupees.

13. Now, having provided for the incidence of taxation in Section 4 the Act then proceeds to provide in Section 5, to say, the tax payable by a dealer under this Act shall be levied on his "taxable turnover" at certain specified rates. Section 5(2) of the Act defines what "taxable turnover" means in the case of a dealer who is liable to pay tax u/s 4, that part of his gross turnover during any period which remains after deducting therefrom certain amounts. Then Section 7A of the Act provides for special certificates for dealers liable to pay tax u/s 4A. Thereafter, Section 8 of the Act provides for voluntary registration and there again it says:

Any dealer whose gross turnover during a year exceeds 10,000 rupees may notwithstanding that he may not be liable to pay tax u/s 4 apply in the prescribed manner to the prescribed authority for registration under this Act.

14. From Sections 4, 5, 7 and 8 it appears that it is a tax which is annual. It brings with the incidents of taxation as the "gross turnover during the year immediately preceding the commencement of this Act" and ends with voluntary registration which also shows "gross turnover during a year". It would be seen from these provisions that the tax is annual and the assessment is annual.

15. Thereafter, the Act proceeds to provide for the payment of tax and returns. Section 10 of the Act says as follows:

10(1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Such dealers as may be required so to do by the Commissioner by notice served in the prescribed manner and every registered or certified dealer shall furnish such returns by such dates and to such authority as may be prescribed.

16. This only indicates when is the tax payable under the Act. It means that it is payable in the manner hereinafter provided at such intervals as may be prescribed. It also means that the dealer may be required by notice served in the prescribed manner to furnish such returns by such dates and to such authority as may be prescribed. While the assessment therefore is annual, returns may be two monthly, quarterly or six monthly, as the case may be Section 11 of the Act goes on to deal with the assessment of tax.

17. These are all the material provisions in the statute itself. It seems to us that the tax can only be regarded as annual and the assessment as annual though returns may be quarterly or half yearly. The word "year" is defined in Section 2(j) to mean

"Year" used in relation to any particular dealer means the year by reference to which, according to a declaration made by that dealer, the accounts of that dealer are ordinarily maintained in his books and where no such declaration is made, the year commencing on the first day of January and reckoned according to the British Calendar.

18. Coming now to the Bengal Sales Tax Rules which are made under powers conferred by Sub-section (1) of Section 26 of the Bengal Finance (Sales Tax) Act, 1941, the picture boils to the same annual assessment. Rule 17 says that

Every registered dealer who establishes to the satisfaction of the appropriate Commercial Tax Officer that his annual taxable turnover is not likely to exceed 10 per cent of his annual gross turnover shall furnish a return annually within sixty days from the expiry of each year with effect from such year as the Commercial Tax Officer may direct.

It definitely emphasises the annual taxable turnover and a return to be made annually. Rule 19 similarly talks about "the average annual gross turnover". On behalf of the Respondent our attention was drawn to Rule 21 which says:

Every registered dealer other than those referred to in Rule 17 shall furnish

returns quarterly within thirty days from the expiry of each quarter.

That means that, apart from the registered dealer mentioned in Rule 17, this is a provision of furnished returns, quarterly by other dealers. It does not mean to say that quarterly assessment is permitted by this Rule. Only quarterly returns are called for. Similarly, Rule 24 authorises the appropriate Commercial Tax Officer to

fix monthly return period for a registered dealer who would otherwise be required to furnish returns annually or quarterly under these Rules.

Rule 30 provides:

If in the opinion of the Commissioner the annual tax payable by any dealer for whom annual return periods have been prescribed is not likely to exceed Rs. 500, such dealer shall pay tax annually before furnishing the, return;

Here also the expression "tax annually" is used. Rule 32 is important. It provides:

The assessing authority shall estimate the amount of tax payable by the dealer for the whole year and shall communicate the same to the dealer.

Therefore, it is a tax "for the whole year". Rule 34 and Rule 35 are relevant. Rule 34 provides:

The estimate under Rule 32 shall be communicated to the dealer by a notice in Form V not less than fifteen days before the expiry of the first quarter of the year to which it relates.

It has again a reference to "the year". Then Rule 35 says:

An estimate shall not be changed during a year and shall remain in force until a fresh estimate is communicated in the manner provided in Rule 34.

Therefore, "the year" seems to be the unit of assessment. In that view of the matter Rule 49 dealing with the assessment to tax u/s 11 does not at all help the Respondents. The form of notice in Form VI only says that a dealer is to furnish return for the year, half year, quarter or month. But that does not relate to the incidence of taxation or assessability, nor does it mean that there may be a half yearly tax or a quarterly tax or a tax for a few months.

19. In *State of Mysore Vs. N.A. Saravathulla and Co. and Another*, it was held that an order of assessment would not be invalid merely because it pertained to more quarters than four, particularly when for the purpose of the assessment of tax the turnover of each quarter has been taken separately into consideration. This was under the Mysore Sales Tax Act.

20. There is another decision of the Supreme Court : *The State of Orissa and Another Vs. Chakobhai Ghelabhai and Company*, :

It has been argued before us that one notice was issued for several quarters and

an assessment was made for each quarter separately four quarters on July 4, 1951 and eight quarters on August 29, 1951. This, it is contended, was illegal. We are unable to accept this contention as correct.

The Supreme Court decision in Mathra Prashad and Sons Vs. State of Punjab, held definitely that as the tax under the Act was a yearly one and was to be paid on the taxable turnover of a dealer, the exemption, whenever it came in, in the year for which the tax was payable would exempt sales of those goods throughout the year unless the Act said that the notification was not to have this effect. This was a case under the East Punjab General Sales Tax Act. The Supreme Court in Ghanshyam Das Vs. Regional Assistant Commissioner of Sales Tax, Nagpur, was mainly concerned with the question of escape of assessment. It only mentioned the statutory obligation of a registered dealer to make a return within the prescribed period but did not decide this particular point we have in this appeal.

21. There are two more decisions to be cited in this connection. The Bombay High Court in Commissioner of Sales Tax Vs. Cooper and Co., came to the definite conclusion that the year was the unit both for the purpose of chargeability and assessment proceedings under the Central Sales Tax Act, 1956. No doubt it was a case under the Central Sales Tax Act. The Supreme Court in the State of Punjab Vs. Sant Singh Kanwarjit Singh, held that under the Punjab General Sales Tax Act, 1948, sales tax is an yearly tax, but the provisions relating to assessments contemplates assessments for a period shorter than a complete year and for that purpose the tax-payers are required by the Act to submit periodical returns of their turnover and to pay tax due thereon.

22. In conclusion, we only need refer to a judgment of Arun Kumar Mukherjea J. (as yet unreported) in the matter of Sunil Kumar Roy v. The Assistant Superintendent of Commercial Taxes Central Circle Bihar Calcutta and Anr. where the learned Judge observed:

The charging section of the Act under which the assessment order is made permits the assessment to be done only on an annual basis. The reasons mentioned by the Respondent No. 1 for making quarterly assessment could not possibly have enlarged his jurisdiction to make an assessment on a basis different from what is warranted by the Statute.

The learned Judge of course was dealing with the Bihar Sales Tax Act and the Central Sales Tax Act.

23. For the reasons stated, we set aside the order of the learned Judge. The appeals are allowed. The Rules are discharged. There will be no order as to costs.

B.C. Mitra J.

24. I agree.