(1968) 02 PAT CK 0021

In the Patna High Court

Case No : C.R. No. 573 of 1967

Commissioners, Buxar Municipality — APPELLANT

Vs

Kailash Prasad — RESPONDENT

Date of Decision : 14-02-1968

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 25

Citation : (1968) 16 BLJR 957 : (1968) 1 PLJR 612

Hon'ble Judges : Tarkeshwar Nath, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarkeshwar Nath, J.—This application by the plaintiff u/s 25 of the provincial Small Cause Courts Act is directed against the judgment dismissing the suit of the plaintiff for realisation of Rs. 45/-on account of professional tax for the second half of the financial year 1962-63 and for the entire year 1963-64.

2. Plaintiff alleged that the defendant carried on the profession of selling cloth and as such he was liable to pay professional tax. The said tax was duly assessed and the defendant had to pay Rs. 25/- as professional tax for the second half of the year 1962-63 and Rs. 20/- for the year 1963-64. In spite of repeated demand, the defendant did not pay Rs. 45/- and hence the suit had to be instituted.

3. The defendant alleged that he did not carry on the business of cloth and he was never called upon to file a return showing his income and as such the plaintiff had no right to assess any professional tax. He further took the plea that the notices mentioned in the plaint were never served on him.

4. The only point for consideration in the Court below was whether the plaintiff was entitled to realise the amount claimed and the Court below held that the assessment of professional tax on the defendant was arbitrary and hence it could not be realised. Learned Small Cause Court Judge accordingly dismissed the suit

and hence the plaintiff has filed this application in revision.

5. The Court below held that the defendant dealt in Khadi clothes and to this extent the defence was not accepted. The next question which arose for consideration was as to whether it was incumbent on the plaintiff to ask for a return from the defendant before assessing professional tax. The Court below took the view that without calling for a return from the defendant, professional tax could not be assessed. Section 82(1)(ff) of the Bihar & Orissa Municipal Act, 1922, hereinafter to be referred to as the Municipal Act for the sake of brevity, authorises the commissioners to impose a tax on the trades, professions, callings and employments specified in the Fourth Schedule and Section l50A provides that on the determination that a tax shall be imposed on professions, every one who exercises a profession and who is liable to pay such tax, shall take out a half yearly licence and pay the tax assessed on him in pursuance of Clause (ff) of Sub-section (1) of Section 82. Section 150B(2) of the said Act reads thus:

For the purpose of assessing a tax on professions, trades, callings and employments, it shall be lawful for the Commissioners, by notice, to require any person or company carrying on any such profession, trade, callings or employment within the municipality to furnish any statement or return or to produce any document mentioned therein within such period as may be specified in the notice.

This provision, however, is an enabling one and it is open to the commissioners of a municipality to give a notice to a person carrying on any profession to furnish any statement or return of his income but it is not incumbent upon the commissioners to issue a notice under this sub-section. A similar provision occurs in the Patna Municipal Corporation Act (See Section 178(2) and it was held in Arun Chandra Mitra v. State of Bihar 1967 B.L.J.R. 135 at 139) that Clause (2) of Section 178 was merely an enabling Section which makes it lawful for the Chief Executive Officer by notice to require any person or company, as described in that subsection, to furnish any statement or return or to produce any document in accordance with that Section. The contention that it was obligatory to issue a notice under that Section upon an assessee before passing an assessment order was overruled. I am thus of the view that the Court below was not right in holding that it was incumbent on the municipality to call for a return from the defendant before assessing the professional tax.

6. It was further argued in the trial Court that the notice u/s 115(2) of the Municipal Act mentioned in the plaint were not served on the defendant, Plaintiff, however, examined Ramdayal Singh to state that one Sabir Khan, employee of the Buxar Municipality, had served the notice Exhibits 1 to 1(b) on the defendant who refused to acknowledge them, and the service reports exhibits 2 to 2(b) were written by Sabir Khan. The Court below observed that Sabir Khan was not examined by the plaintiff. Thereafter the Court below took the view that even if it were to be presumed that those notices were served on the defendant what would be the effect of the failure of the municipality to call for a return from the

defendant. The position thus is that there is no categorical finding that the notices were not served on the defendant. This point, however, with regard to the service of notice is made clear by the fact that the defendant filed an objection petition (Exhibit 3) against the assessment of professional tax. The defendant deposed that he had not filed any objection petition but the petition itself was proved to be in the pen of the defendant by Ramdayal Singh. Section 150E (1) of the Municipal Act provides that any person who is dissatisfied with the assessment of the total income or taxable income or the determination of the amount of tax payable by him or who disputes his liability to be assessed may apply to the commissioner to review the assessment of his total income or taxable income or the amount of tax assessed upon him or to exempt him from the liability to be assessed. The defendant could not file that objection unless he became aware of the assessment of professional tax.

7. The Court below found another illegality in the order of the revising Committee (Exhibit 4) in the sense that the objection petition filed by the defendant was not decided by a committee consisting of at least three municipal commissioners as provided by Section 117(2) of the Municipal Act. On this point as well, Ramdayal Singh stated that the objection petition was heard by Sri A. Munim, Magistrate, and two Others. The Court below observed that there was no evidence as to who were the other two persons who heard that objection petition and as such the order passed on that objection petition was invalid. In answer to this, the learned Counsel for the petitioner pointed out that an objection on this score was not at all taken in the written statement and as such it was not open to the defendant to take this objection at the stage of argument. This contention must be accepted as correct inasmuch as the plaintiff cannot be taken by surprise. If the defendant would have raised this objection in the written statement, the plaintiff could have given evidence in detail as to who were the members of that committee and their signature would have been proved to the hilt. I am accordingly of the view that the said order passed on the objection petition cannot be challenged as being invalid.

8. The Court below gave still another ground for dismissing the suit, viz., that the demand notice was not served on the defendant. Section 123 of the Municipal Act provides for a notice of demand to be given to a person who is liable to pay municipal tax; but failure to give a demand notice u/s 123 only affects the right of the municipality to levy arrears by distress and sale u/s 124, and not its right to sue u/s 120 (see Municipal Commissioners Vs. Kapur Chand Lall,). The view taken by the Court below must be held to be erroneous and the plaintiff was entitled to a decree in that Small Cause Court suit filed against the defendant.

9. In the result, the application is allowed and the suit of the plaintiff is decreed with costs of the trial Court only. There will be no order for costs of the present application as no one has appeared to oppose it.

