
(1959) 02 PAT CK 0008

In the Patna High Court

Case No : Misc. Judicial Case No. 44 of 1957

Dayabhai Gokulbhai Patel

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 04-02-1959

Acts Referred:

Bihar Sales Tax Act, 1947 — Section 2, 24, 25, 25(1), 25(2)
Central Excise Rules, 1944 — Rule 19, 24, 25, 28, 29
Constitution of India, 1950 — Article 226

Citation : AIR 1959 Patna 389 : (1959) 10 STC 483

Hon'ble Judges : V. Ramaswami, C.J; R.K. Choudhary, J

Bench : Division Bench

Advocate : S.K. Mazumdar, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramaswami, C.J.—The petitioner carries on a business in tobacco and bin leaves in the District of Manbhum. For the assessment year 1952-53 there was a dispute between the petitioner and the Sales Tax authorities as to the legality of the inclusion of the sum of Rs. 41,736/- to the taxable turnover of the petitioner. The amount represented the Central Excise duty paid by the customers on account of goods purchased from the petitioner.

It appears that the goods sold were non duly paid goods and were in the bonded warehouse. It further appears that the customers paid the excise duty direct into the Treasury, and after obtaining the challan showed it to the Collector of Excise who gave the necessary clearance permit. The petitioner issued cash memos to the customers in which he entered the actual cash price received by himself and not the amount of excise duty paid into the treasury by the customers.

The petitioners contended before the Sales Tax Officer that the amount of Rs. 41,736/- should not be included in the taxable turnover as the customers paid the money direct into the Treasury and not to the petitioner. This contention was rejected by the Sales Tax Officer who included the amount in the taxable

turnover. The action of the Sales Tax Officer was upheld by the Deputy Commissioner of Sales Tax on appeal. The petitioner took the matter in revision to the Board of Revenue, but the revision application was dismissed on 27-4-1955,

Thereafter the petitioner made an application to the Board of Revenue u/s 25 (1) of the Bihar Sales Tax Act for stating a case to the High Court on the question of law. On 13-2-1956, the Board of Revenue rejected the application and refused to refer the question to the High Court. The petitioner did not apply to the High Court u/s 25 (2) of the Bihar Sales Tax Act against the order of the Board of Revenue refusing to make the reference.

But on 16-1-1957, the petitioner made the present application to the High Court for grant of a writ under Article 226 of the Constitution in the nature of mandamus directing the respondent, namely, the State of Bihar, to refund to the petitioner the sales tax realised on the aforesaid amount of Rs. 41,736/-. Cause has been shown by the Government pleader en behalf of the respondent the State of Bihar, to whom notice of the rule was ordered to be given.

2. The first question raised on behalf of the respondent is that the petitioner had an alternative remedy u/s 25 (2) of the Bihar Sales Tax Act; and since the petitioner did not avail himself of that remedy within the time granted by the statute, the petitioner ought not to be granted a writ in the nature of mandamus under Article 226 of the Constitution. Reference was made in this connection to Section 25 (1) and (2) of the Bihar Sales Tax Act which state:

"25. (1) within ninety days from the passing by the Board of Revenue of any order under Sub-section (4) of Section 24 affecting any liability of any dealer to pay tax under this Act. Such dealer or the Commissioner may, by application in writing, together with a fee of one hundred rupees, where such application is made by a dealer require the Board to refer to the High Court any question of law arising out of such order.

(2) If, for reasons to be recorded in writing, the Board of Revenue refuse to make such reference, the applicant may, within forty five days of such refusal either--

(a) withdraw his application and if the applicant who does so is a dealer, the fee by him shall be refunded, or

(b) apply to the High Court against such refusal."

It was submitted on behalf of the petitioner that he could not apply to the High Court u/s 25 (2) of the Act because the order of the Board of Revenue dated 13-2-1956, was never communicated to the petitioner. But Section 25 (8) of the Act empowers the High Court to admit an application u/s 25 (2) after the expiry of the period of limitation if the High Court is satisfied that the petitioner had sufficient cause for not presenting that application within that period.

I think that there was no excuse for the petitioner for not following the procedure prescribed in the Bihar Sales Tax Act for ventilating his grievance. Section 13 of the Bihar Sales Tax Act makes a provision for assessment of the dealers after giving them proper notice and taking the necessary evidence. Section 24 of the Act provides for appeal, revision and review to the appropriate authorities. Section 24 enacts as follows:

"24. (1) any dealer objecting to an order of assessment, with or without penalty, u/s 13, or to an order passed under Sub-section (3) of Section 12 or u/s 24A, or any person objecting to an order passed u/s 14B may, in the prescribed manner, appeal to the prescribed authority against such order:

Provided that no appeal, other than an appeal against an order u/s 14B, shall be entertained by the said authority unless he is satisfied that twenty per centum of the tax assessed or such amount of the tax as the appellant may admit to be due from him, whichever is greater has been paid.

(2) every appeal under this section shall be presented within forty five days of receipt of the notice issued under Sub-section (4) of Section 14, but the authority before whom the appeal is filed may admit an appeal after the expiration of the said period if he is satisfied that the applicant had sufficient cause for not presenting the appeal within that period.

(3) Subject to such rules of procedure as may be prescribed the appellate authority in disposing of any appeal under Sub-section (1) may

(a) Confirm reduce enhance or annul the assessment or penalty if any or both or

(b) set aside the assessment or penalty if any or both and direct the assessing authority to pass a fresh order after such further inquiry as may be directed, or

(c) in case of an appeal against an order u/s 14B pass such order as it may think fit.

(4) Subject to such rules as may be prescribed and for reasons to be recorded in writing, the prescribed authority may, upon application or of its own motion, revise any order passed under this Act:

Provided that where prescribed authority revises any order of its own motion, no proceeding for such revision shall be initiated at any time except before the expiry of four years from the date of such order:

Provided further that no order u/s 13 shall be revised upon application by a dealer, unless an order under Sub-section (3) of this section has been previously passed in respect of the said order.

(5) Subject to such rules as may be prescribed, any order passed under this Act or the rules made thereunder by any person appointed u/s 3 may be reviewed by the person passing it or by his successor in office.

(5a) The Commissioner or any officer appointed u/s 3 or any authority prescribed

under Sub-section (1) may, at any time within one year from the date of any order passed by him or it either on application or of his or its own motion, rectify any mistake apparent from the record of such order. Provided that no such rectification if it has the effect of enhancing the tax or reducing a refund, shall be made unless the Commissioner, the officer appointed u/s 3 or the authority prescribed under Sub-section (1) as the case may be has given notice to the dealer of his or its intention to do so and has allowed him a reasonable opportunity of being heard.

(6) Before any order is passed under this section which is likely to affect any person adversely, such person shall be given a reasonable opportunity of being heard."

Section 25 (1) provides for referring a question of law by the Board of Revenue to the High Court, and Section 25 (2) states that if the Board of Revenue refuses to make the reference the assessee may, within forty five days of such refusal, apply to the High Court against such refusal. Section 25 (3) of the Act states that if the High Court is not satisfied that such refusal was justified, it may require the Board of Revenue to state a case and refer it to the High Court.

It is manifest therefore, that an elaborate machinery has been created by the Bihar Sales Tax Act for the determination of the liability of the dealers to pay sales tax. A special code of procedure has been provided by the Legislature for ensuring correct assessment of tax. It is the machinery which is created by the statute which should normally be used for the purpose of assessment and all complaints of the dealers against the assessment ought to be adjudicated upon in accordance with the machinery provided by the statute.

The normal method of challenging the assessment is, therefore, by way of appeal to the prescribed authorities u/s 24 of the Bihar Sales Tax Act, by way of revision to the Board of Revenue under the same section and by stating a case to the High Court as prescribed by Section 25 of the Act. A writ under Article 226 of the Constitution is an extraordinary remedy and may be used in proper cases where no other adequate legal remedy exists.

But the provision of Article 226 of the Constitution is not meant to short circuit or to override the legal tribunals created by the elaborate machinery of the Bihar Sales Tax Act. The general principle applicable in a case of this description is stated in an English case, *Alien v. Sharp* (1848) 2 Ex 352 where Parke B said:

"On a careful consideration of these acts of Parliament they seem to me to differ from the statute of Elizabeth, as to poor rate, and that the legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive unless appealed from in the first place, to the Commissioners, and further if necessary to the judges of the superior courts. It would be singular if there were no such provision for what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors had a right to dispute the propriety of their

assessment in an action against the collectors.

Actions would be innumerable, juries would have to decide on facts without end, judges on law, and cases would be carried to the highest tribunal when the exigencies of the State required a speedy determination. Without referring to the statutes I should say a priori that the object of the legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out."

This was quoted with approval in *King v. Swansa Income Tax Commissioners* 1925 2 KB 250 in which the applicants were assessed to Income Tax by the General Commissioners for the year ending 5-4-1925, under Schedule D, Case 1 of the Income Tax Act, 1918, on an amount computed on their average profits for the three preceding years

At the time the assessment was made it was impossible for the applicants to ascertain whether there would be a balance of profits for the year in question and no notice of appeal against the assessment was given. After the time for appeal had expired, the applicants alleged that during the year of assessment their business had resulted in a loss, whereupon, claiming that they were not liable to be assessed at all they obtained a rule for a writ to prohibit the General Commissioners from making or enforcing any assessment

It was held in these circumstances by the Kings Bench Division that the prohibition would not lie to the General Commissioners, who had acted in accordance with their statutory duty in making the assessment and had not exceeded their jurisdiction. The same principle has been stated by the Judicial Committee in *Baleigh Investment Co. Ltd. v. Governor General in Council* 74 Ind App 50: AIR 1947 PC 78 where a suit had been brought by an assessee claiming repayment of part of a larger sum of money under an assessment to Income Tax made upon it.

The claim was based upon the fact that in the computation of assessable income effect had been given to a provision of the Income Tax Act which in the submission of the assessee was ultra vires the Indian Legislature. It was held by the Judicial Committee that the suit was not maintainable in view of Section 67 of the Income Tax Act. Lord Uthwatt, who pronounced the opinion of the Judicial Committee, stated as follows at page 62 (of IA): (at p. 80 of AIR) of the report;

"In construing the section it is pertinent, in their Lordships opinion, to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income Tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to inquire into the same subject-matter.

The absence of such machinery would greatly assist the appellant on the

question of construction and indeed it may be added that, if there were no such machinery and if the section affected to preclude the High Court in its ordinary civil jurisdiction from considering a point of ultra vires, there would be a serious question, whether the opening part of the section, so far as it debarred the question of ultra vires being debated, fell within the competence of the legislature.

In their Lordships' view it is clear that the Income Tax Act, 1922, as it stood at the relevant date, did give the assessee the right effectively to raise in relation to an assessment made on him the question whether or not a provision in the Act was ultra vires. u/s 30, an assessee whose only ground of complaint was that effect had been given in the assessment to a provision which he contended was ultra vires might appeal against the assessment.

If he were dissatisfied with the decision on appeal-- the details relating to the procedure are immaterial-- the assessee could ask for a case to be stated on any question of law for the opinion of the High Court and if his request were refused he might apply to the High Court for an order requiring a case to be stated and to be referred to the High Court (see Section 30 and Secretary of State Vs. V.M. Meyyappa Chettiar, .

It cannot be doubted that included in the questions of law which might be raised by a case stated is any question as to the validity of any taxing provision in the Income Tax Act to which effect has been given in the assessment under review. Any decision of the High Court on that question of law can be reviewed on appeal. Effective and appropriate machinery is therefore provided by the Act itself for the review on grounds of law of any assessment. It is in that setting that Section 67 has to be construed."

The same view has been expressed by the Judicial Committee in a later case in AIR 1948 102 (Privy Council) , in which Lord Simonds stated as follows in the course of his judgment at page 316 (of IA): (at p. 107 of AIR):

"On this part of the case the argument for the respondent which found favour with the High Court, was that the refusal of the commissioner was improper in the sense that it was contrary to equity and good conscience that money should be retained which ought never to have been paid. It was not very clear how far this argument was based on the premise, now held by their Lordships to be fallacious, that the assessments were a nullity" but it can presumably, be placed on a broad ethical basis whatever may be the true view of the assessments.

On this footing then, the argument must be that the assessee has a right enforceable against the commissioner to require refund of tax paid by him, on grounds of equity and good conscience, though the assessment has been made and the tax received in good faith. Their Lordships cannot accept this argument. They have reviewed the code of income tax law for the purpose of showing that it exhaustively defines the obligation and remedies of the tax-payer. It would be wholly incompatible with this that he should have a collateral right, necessarily

vague and ill-defined founded on the principles of equity and good conscience."

Applying the principle of these authorities to the present case I hold that the petitioner had an effective remedy provided by the machinery of the Bihar Sales Tax Act; and not having chosen to avail himself of that statutory remedy within the time granted, the petitioner cannot be permitted to attain his object by a method of his own choosing namely, by an application under Article 226 of the Constitution.

3. I shall however, assume in favour of the petitioner that a writ under Article 226 of the Constitution is the proper remedy in this particular case. On that assumption also I am of the opinion that the petitioner has not made out a case for a refund, of the amount of tax. The submission of the petitioner is that he is not liable to pay sales-tax on the amount of Rs. 41,736/- which is the excise duty on the tobacco sold to customers.

It was alleged on behalf of the petitioner that the excise duty was paid direct by the customers into the Treasury and the amount was not received by the petitioner as part of the consideration for the sale. I do not accept the argument of the petitioner as correct.

4. Section 2 (h) of the Bihar Sales-tax Act defines "sale price" to mean "the amount payable to a dealer as valuable consideration for (i) the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is separately charged or (ii) the carrying out of any contract less the cost of labour and other services".

Under Section 2 (i) of the Bihar Sales-tax Act "turnover means "the aggregate of the amounts of sale prices received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract, effected or made during a given period or where the amount of turnover is determined in the prescribed manner, the amount so determined." It appears from the order of the Sales-tax Officer in the present case that the Central Excise duty was deposited in the Treasury by the customers in the name of the petitioner himself, showing the names of the customers as the persons tendering the money.

It is clear, therefore, that the Excise duty was deposited into the Treasury by the purchasers of the tobacco as the agents of the petitioner. The legal liability to pay the Excise duty was upon the petitioner under the rules framed under the Central Excise and Salt Act, 1944. Rule 19 is in the following terms :

"19. Liability to duty. Duty shall become chargeable as soon as the products have been cured and are in a fit state for sale or where manufacture precedes sale for manufacture and the curer shall be liable for the payment thereof and shall remain, so liable until the liability is to the knowledge and satisfaction of the

proper officer, transferred as provided in Rule 29 to another person duly licensed to carry on business in such products."

Rule 24 states as follows :

"24. How curer may dispose of his products. (1) Notwithstanding the provisions of Rule 9, unmanufactured products shall immediately after they have been cured be

(i) cleared on payment of duty or (ii) deposited in a public warehouse appointed for the storage of such products or (in) deposited in a bonded storeroom on the curer's own premises, or

(iv) transferred to a wholesale dealer possessing a private warehouse licensed for the storage of such products either to the dealer direct or through a broker or commission agent acting on his behalf.

(2) whichever of the foregoing alternatives the curer elects to adopt he shall sell the products wholesale except to a person duly licensed under these rules to carry on business in such products or to a person so licensed to warehouse such products on which duty has not been paid."

Rule 25 provides for clearance of unmanufactured products on payment of duty. It states as follows:

"25. Clearance of unmanufactured products on payment of duty. Where the products are to be cleared on payment of duty, the curer shall apply to the nearest officer who shall cause the products to be weighed in his presence and shall deliver to the curer a notice in the proper form setting out the amount of duty due on the products and calling on him to pay this sum into the treasury within ten days from that date. If the duty is duly paid, the officer shall on request grant to the curer a transport permit in the proper form authorising him to remove the products to any destination named by him."

Rule 28 provides as follows :

"28. Unmanufactured products retained for retail sale to be assessed to duty. Any unmanufactured products which the curer may wish to retain for retail sale shall be assessed to duty in the manner prescribed in Rule 25".

Rule 29 is in the following terms :

"29. Continuance of curer's liability for payment of duty. When the curer sells unmanufactured products without payment of duty as provided in Rule 24, both the purchaser of products and the person into whose possession the products pass after purchase shall become liable for the payment of the duty due thereon but the curer shall not be absolved from the liability laid upon him by Rule 19 until the transfer of ownership has been reported to, and acknowledged by, the proper officer."

The effect of these statutory rules is that the liability to pay the excise duty is

upon the petitioner. If the customers agree contractually to pay the excise duty which is payable by the petitioner under Excise Rules, then the payment of the excise duty is manifestly a part of the valuable consideration for the purchase of the goods. I hold, therefore, that the payment of the excise duty constituted as a matter of law a part of the sale price for the tobacco within the meaning of Section 2 (h) of the Bihar Sales-tax Act.

It is true that there was no actual receipt of the amount of the duty by the petitioner, but the customers paid the amount of the excise duty amounting to Rs. 41,736/- into the Treasury on petitioners behalf and so there was a constructive receipt of the amount by the petitioner within the meaning of Section 2 (i) of the Bihar Sales-tax Act. It was submitted by learned Counsel that the petitioner did not show the excise duty in the receipt granted by him to the customers.

But that circumstance is quite immaterial and the petitioner cannot escape the liability of payment of sales tax by means of such a contrivance. It is obvious that in examining the question of liability of the petitioner to sales tax we must look at the substance of the transaction and not at the mere form in which the petitioner granted receipts or in which he kept his accounts. For the reasons already given, I hold that the amount of Rs. 41,736/- which was paid as excise duty by the customers was part of the valuable consideration for the sale of the tobacco and so constituted part of the sale price within the meaning of Section 2 (h) of the Bihar Sales-tax Act.

5. It follows, therefore, that the amount of Rs. 41,736/- was rightly included in the taxable turnover of the petitioner and assessed to sales tax by the authorities constituted under the Bihar Sales-tax Act. In my opinion, the petitioner has not made out a Case for grant of a writ under Article 226 of the Constitution. The application fails and is accordingly dismissed with costs. Hearing fee Rs. 200/-.

Choudhary, J.

6. I agree.