
(1968) 10 AHC CK 0004

In the Allahabad High Court

Case No : Writ Petition No's. 1084, 1089, 1090 and 1091 of 1966

Deoki Nandan

APPELLANT

Vs

M.L. Gupta, Sales Tax Officer

RESPONDENT

Date of Decision : 16-10-1968

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 34

Citation : (1969) 23 STC 481

Hon'ble Judges : R.S. Pathak, J; R.L. Gulati, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.L. Gulati, J.—This and the connected writ petitions are being disposed of by this common order as they are of the same petitioner and raise identical questions. The petitioner in all these writ petitions is one Sri Deoki Nandan, who carries on business of sarrafa and pawning at Lakhna in the district Etawah under the name and style of Hulas Rai Raghunandan Lal.

2. On 30th January, 1966, Sri M. L. Gupta, Sales Tax Officer, Etawah, made a raid at the business premises of the petitioner to search and seize the books of accounts and other documents connected with the business activities of the petitioner. There is considerable controversy as to what exactly happened at the time of the search and seizure. According to the petitioner, all books of accounts including those pertaining to the business of pawning were indiscriminately seized and carried away by the raiding party which included Sri M. L. Gupta, Sales Tax Officer, Etawah, Servasri K. C. Saxena and A. H. Rizvi, Assistant Sales Tax Officers and a peon. According to the Sales Tax Officer, certain books of accounts relating to the assessment, years 1961-62 to 1965-66 were seized as they were found to contain some suspicious entries, but they were snatched away from the hands of the peon by some persons at the instigation of the petitioner. The incident was reported to the police and the matter is now sub

judice in certain criminal proceedings. It is, however, not necessary to go into that part of the case for the purpose of deciding this and the connected writ, petitions.

3. The main controversy raised in these petitions relates to the initiation by the Sales Tax Officer of proceedings against the petitioner u/s 21 of the U.P. Sales Tax Act (hereinafter referred to as "the Act") relating to the assessment years 1961-62, 1962-63, 1963-64 and 1964-65. Section 21 of the Act is meant to bring to tax the turnover of an assessment year which has escaped assessment either in whole or in part.

4. All the notices u/s 21 of the Act are dated 5th March, 1966. The present writ petition relates to assessment year 1961-62 and the notice u/s 21 relating to that year is annexure "I" to the writ petition. For all these years assessments u/s 7 of the Act had already been made by Sri J. C. Sinha, Assistant Sales Tax Officer, Etawah. The reassessment notices u/s 21 were, however, issued by the opposite party Sri M. L. Gupta, Sales Tax Officer, Etawah. The validity of these notices u/s 21 has been assailed in this and the connected writ petitions.

5. The first ground of attack is that the original assessments having been made by the Assistant Sales Tax Officer, the proceedings for reassessment u/s 21 in respect of the same years could not have been taken by Sri M. L. Gupta, who, according to the learned counsel for the petitioner, had no jurisdiction to take the impugned proceedings.

6. It appears that this bunch of writ petitions came up for hearing earlier before the Honourable Pathak, J., who considered that the question jurisdiction raised by the petitioner was of considerable importance and difficulty and he accordingly formulated and referred the following question for decision by a larger Bench :

Whether upon the facts and circumstances of the instant case, when the original assessment was made by Sri J. C. Sinha, Assistant Sales Tax Officer, Etawah, against the petitioner, it is open to Sri M. L. Gupta, Sales Tax Officer, Etawah, to initiate and take proceedings against the petitioner for the same assessment year u/s 21 of the U.P. Sales Tax Act ?

7. The reference so made by the Honourable Pathak, J., came up for decision before a Division Bench of this Court comprised of the Honourable the Chief Justice and the Honourable Pathak, J. The Bench answered the question as below :

It was open to Sri M. L. Gupta, Sales Tax Officer, Etawah, to initiate and take proceedings against the petitioner u/s 21, U.P. Sales Tax Act, in spite of the fact that original assessment of the petitioner had been done by Sri J. C. Sinha, Assistant Sales Tax Officer, Etawah.

8. In view of the answer returned by the Bench to the question referred by the learned Single Judge, the first contention of the learned counsel has got to be

rejected.

9. The other ground upon which the validity of the notice u/s 21 of the Act has been assailed is that the Sales Tax Officer had no reason to believe that any taxable turnover relating to the assessment years in question had escaped assessment. It was contended on behalf of the petitioner that the impugned notices had been issued out of malice and in order to harass the petitioner and to hunt out material for the criminal case pending against the petitioner instituted at the instance of the Sales Tax Officer. In other words, the contention is that there was really no material before the Sales Tax Officer upon which he could form a bona fide belief that any turnover had escaped assessment and that the notices u/s 21 had been issued out of extraneous considerations.

10. Section 21(1) of the Act under which the impugned notices have been issued, reads thus :

21. (1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer has, for any reason, escaped assessment to tax for any year, the assessing authority may, after issuing notice to the dealer, and making such enquiry as may be necessary, assess or reassess him to tax :

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment, or full assessment, as the case may be.

11. Section 21(1) of the Act corresponds to Section 34(1)(a) of the Income Tax Act, 1922, which also stipulates that if the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income u/s 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to Income Tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, etc., the Income Tax Officer may issue a notice and may proceed to assess or reassess such income, profits or gains.

12. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , the Supreme Court after perusing the facts as disclosed in the affidavits filed on behalf of the parties, recorded its conclusion in the following words at page 206:

It must, therefore, be held that the Income Tax Officer who issued the notices had not before him any non-disclosure of a material fact and so he could have no material before him for believing that there had been any material non-disclosure by reason of which an under-assessment had taken place.

We are, therefore, bound to hold that the conditions precedent to the exercise of jurisdiction u/s 34 of the Income Tax Act did not exist and the Income Tax Officer had therefore no jurisdiction to issue the impugned notices u/s 34 in respect of the years 1942-43, 1943-44 and 1944-45 after the expiry of four years.

13. In *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, , the Supreme Court once again had to construe Section 34(1)(a) of the Income Tax Act and at page 221 of the report made the following observations :

It is true that two conditions must be satisfied in order to confer jurisdiction on the Income Tax Officer to issue the notice u/s 34 of the Income Tax Act... first condition is that the Income Tax Officer must have reason to believe that the income, profits or gains chargeable to income,-tax had been under-assessed. The second condition is that he must have reason to believe that such "under-assessment" had occurred by reason of either, (i) omission or failure on the part of an assessee to make a return of his income u/s 22, or (ii) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income Tax Officer acquires jurisdiction to issue a notice under the section.

14. It was further held in that case that sufficiency of the grounds which induced the Income Tax Officer to act is not a justiciable issue, but it is of course open for the assessee to contend that the Income Tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. As to what constitutes "reason to believe" and to what extent that question may be examined by the Court can best be stated in the words of the Supreme Court occurring at page 222 of the report in *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*,

The expression "reason to believe" in Section 34 of the Income Tax Act does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The belief must be held in good faith : it cannot be merely a pretence. To put it differently, it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Income Tax Officer in starting proceedings u/s 34 of the Act is open to challenge in a court of law.

15. Observations to the same effect are to be found in some other later cases of the Supreme Court, but it is not necessary to multiply such cases. It is now well settled that the existence of reason to believe on the part of the Income Tax Officer that certain income has escaped assessment is a condition precedent to his jurisdiction u/s 34 of the Income Tax Act and further that the belief of the Income Tax Officer is not purely subjective but has to be based upon relevant material, howsoever meagre.

16. To this extent Section 34 of the Income Tax Act is in *pari materia* with Section 21 of the Act inasmuch as Section 21 of the Act also requires the Sales Tax Officer to have reason to believe that the turnover of a particular assessment year has escaped assessment before he can proceed to assess or reassess such

escaped turnover. No authority for this proposition is needed, but if one is needed, the same is to be found in the decision of a Division Bench of this Court in *Banwari Lal v. The Judge (Revisions) Saks Tax, U.P.* (Writ Petition No. 1966 of 1962 decided on 31st January, 1965).

17. In *Allahabad Milling Co. Private Ltd. v. The Sales Tax Officer* [1965] 16 S.T.C. 888, one of us sitting single (Honourable Pathak, J.) also expressed the same opinion. It was held there that what was essential for the purpose of deciding the validity of the proceedings u/s 21 of the U.P. Sales Tax Act was that the assessing authority must have material on the basis of which it bona fide and honestly believed that the turnover had escaped assessment and further that the considerations which apply to the law of Income Tax relating to Section 34 of the Income Tax Act apply fully to the proceedings u/s 21 of the U.P. Sales Tax Act. This case was later affirmed on appeal in *Allahabad Milling Co. Private Ltd. v. Sales Tax Officer II, Allahabad* [1966] 17 S.T.C. 211. It is also well settled that an Income Tax Officer cannot initiate proceedings u/s 34 of the Income Tax Act with a view to launching a fishing and roving enquiry on the off-chance of finding some escapement of tax. He must have in his possession some material pointing towards the escapement of income before he can entertain a belief about the escapement and can assume jurisdiction u/s 34. The same considerations will apply to proceedings u/s 21 of the Act.

18. Learned counsel for the opposite party urged that the petitioner in the instant case did not challenge the existence of the belief on the part of the Sales Tax Officer or the want of material for such a belief. We are unable to accept this submission. There is ground No. 7 in the writ petition which reads as under :

Because there was no reason at all or reason to believe for issuing a notice u/s 21, No. 2326, dated 5th March, 1966, for the assessment.

19. This ground is backed by averments made in paragraphs 19, 22 and 25 of the writ petition wherein the petitioner has clearly stated that there was no escapement of any turnover and there was no reason at all for any such belief with the opposite party "and the letters and notices of the petitioner Nos. 2321 to 2326 dated 5th March, 1966, are founded on malice and have been issued with ulterior motives." There is thus a clear challenge to the jurisdiction of the Sales Tax Officer and it is open to this Court in the exercise of its jurisdiction under Article 226 of the Constitution to scrutinize the material on the record to ascertain as to the truth or otherwise of the challenge.

20. To begin with we do not find that Sri M.L. Gupta kept any record of the reasons which led him to issue the impugned notices. The Act, of (1) course, does not require the Sales Tax Officer to record such reasons as is the case u/s 34 of the Income Tax Act, but since such reasons are open to scrutiny by the Court on a challenge from an assessee, it would have been advisable for the Sales Tax Officer to have kept some record of the reasons. There is another reason why we consider that the record of reasons is essential. The Sales Tax

Officer may be transferred or the case of the petitioner may be transferred to another officer. In either case, the successor-in-office would like to know the reasons behind the initiation of proceedings u/s 21. In the absence of any record of reasons, he would find it difficult to proceed with the case and to disclose such reasons to the court, if called upon to do so. We then turned to the counter-affidavits filed by Sri Gupta to find out the reasons for the issuance of the impugned notices. Sri Gupta has filed two counter-affidavits, one is dated 31st March, 1966, filed on 1st April, 1966, and the other is dated 15th April, 1966, filed on 18th April, 1966. In neither of these affidavits could we find any relevant material. In the first counter-affidavit Sri Gupta has stated that on 30th January, 1966, he visited the shop of the petitioner and found that the stock in his shop was worth about Rs. 50,000, while the petitioner had estimated the same at about Rs. 27,000 to 30,000. He has further stated that the entries in the books which related to the assessment years 1960-61 to 1965-66 were also found to be suspicious. The reasons for his belief of the escapement of the turnover have been stated by Sri Gupta in the following words :

From the suspicious entries in the books which the deponent was not allowed to bring for detailed examination and the gross underestimation of the stocks by the petitioner at the time of survey on 30th January, 1966, the deponent had the reason to believe that the petitioner was not disclosing his correct sales and that a part of his turnover for the years 1960-61 to 1964-65 had escaped assessment to tax.

21. These averments have been controverted in the rejoinder affidavit filed on behalf of the petitioner. It is admitted that no inventory of the stock was prepared at the time of the survey on 30th January, 1966. It is difficult to understand as to how Mr. Gupta was able to estimate the stocks at Rs. 50,000 without preparing an inventory. Moreover, the value of the stock on 30th January, 1966, can have no relevancy to the escapement of turnover for the years 1960-61 to 1964-65. Had it been the case of the Sales Tax Officer that the actual stock position was different from that entered in the petitioner's books of accounts, it might have been possible for him to infer that undervaluation of the stocks in the books of accounts was being practised by the petitioner with a view to suppressing sales, but that is not the position here. Similarly Sri Gupta has not indicated as to what entries in the books of accounts had been noticed by him at the time of survey and how they were found to be suspicious. He has not given even one instance of the so-called suspicious entries.

22. The second affidavit of Mr. Gupta is more specific inasmuch as it contains parawise replies to the petitioner's writ petition. In paragraph 16 of his counter-affidavit which is in reply to paragraph 19 of the writ petition, Sri Gupta has averred :

It is denied that these notices and letters were issued out of malice or to harass and to hunt out material for the prosecution of the petitioner. From the suspicious entries in the books which the deponent was not allowed to bring for

detailed examination and gross underestimation of the stocks by the petitioner at the time of survey on 30th January, 1966, the deponent had the reason to believe, that the petitioner was not disclosing his correct sales and that a part of his turnover for the years 1960-61 to 1964-65 had escaped assessment to tax.

23. In paragraph 20 of this counter-affidavit Sri Gupta has merely denied the allegations in paragraphs 23, 24 and 25 of the writ petition and has asserted that the notices issued against the petitioner were in accordance with the law. As already observed, these averments of Mr. Gupta do not disclose any definite material in support of his belief that any part of the turnover of the petitioner liable to assessment for the assessment years 1960-61 to 1964-65 had escaped assessment.

24. Mr. Vijay K. Mehrotra, learned counsel for the opposite party then invited our attention to the statement of Mr. Gupta contained in paragraph 6 of his second affidavit dated 15th April, 1966, wherein Mr. Gupta had referred to some survey notes recorded by him in his survey diary. In order to find out any material which might be contained in the survey diary, we summoned the same and perused it along with Mr. Mehrotra, but unfortunately the survey diary also contained nothing more than what has been stated by Mr. Gupta in his counter-affidavits.

25. Mr. Vijay K. Mehrotra then urged that it was not necessary to point out any material to support the belief of the Sales Tax Officer, as, according to him, such a belief was subjective. In support of this argument he relied strongly upon the following observations of Desai, C. J., in the case of Allahabad Milling Co. Private Ltd. v. The Sales Tax Officer [1966] 17S.T.C. 211:

"Has reason to believe" means that there is belief and that it is not arbitrary or capricious but based on, or justified by, facts. Belief is a subjective and not objective fact and the Sales Tax Officer's statement in his counter-affidavit that he formed the belief must be accepted unless it is disproved.

26. These observations have to be read in the context of the case. It must be remembered that the observations of the learned Chief Justice relied upon by Mr. Mehrotra occur in the appellate order of the Bench passed on appeal against the judgment of brother Pathak in the case reported in Allahabad Milling Co. Private Ltd. v. The Sales Tax Officer [1965] 16 S.T.C. 888. In his judgment brother Pathak had enumerated the materials on which the Sales Tax Officer had based his belief. Those materials were as under :

(i) Dealer's stock of pledges with the bank did not tally with the stocks shown in the production and issue register. The entries also did not tally with the delivery memos. and for certain sales no delivery memos. were issued.

(ii) Some goods sold by the dealer and transported by M/s. Bharat Transport Co. were not found incorporated in the dealer's account books and thus the turnover was suppressed.

(iii) The production ratio of bran, as shown by the dealer was found to be high ;

thus the production of costly and taxable wheat products like atta, maida and suji was understated.

27. The Sales Tax Officer in that case in paragraph 10 of his counter-affidavit had stated :

In view of the aforementioned modes of suppression of turnover practised by the petitioner in the accounting year 1957 and his tax evading tendency in the said year, the deponent honestly believed that the same mode of suppressing the turnover must have been followed by the petitioner in the subsequent years also and in these circumstances the deponent had reasons to believe that a part of the turnover of the dealer had escaped assessment for the year 1959-60. Consequently, the deponent issued the notice u/s 21 to the petitioner.

28. The material relied upon by the Sales Tax Officer in the Allahabad Milling Co.'s case [1966] 16 S.T.C. 888 was undoubtedly relevant and justified the belief of the Sales Tax Officer. In the instant case there is no such definite material. We are, therefore, not prepared to hold that Desai, C.J., laid down a proposition different from the one laid down by the Supreme Court in S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore, , namely, that the reason to believe does not mean purely subjective satisfaction on the part of the Income Tax Officer.

29. For these reasons we allow this and the connected writ petitions. The impugned notices u/s 21 of the Act dated 5th March, 1966, relating to the assessment years 1960-61 to 1964-65 are quashed. The respondent, Sales Tax Officer, Etawah, is prohibited from taking any action in pursuance of the impugned notices. The petitioner is entitled to his costs.