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(1952) 12 GAU CK 0004

In the Gauhati High Court

Case No : Civil Rule No''s. 40, 69, 75 and 85 of 1952

Ghanashyam Das and Others — APPELLANT

Vs

The State of Assam and Others — RESPONDENT

Date of Decision : 19-12-1952

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1953 Guw 129

Hon'ble Judges : Ram Labhaya, Acting C.J.;Deka, J

Bench : Division Bench

Advocate : F.A. Ahmed and B.C. Barua, in No. 69, S.K. Ghose and P. Chaudhuri, in Nos. 75 and 40, P. Chaudhuri and A.R. Barooah, in No. 85, for the Appellant; S.M. Lahiri, A.G., R.K. Goswami, G.A. (Jr.) and P. Chaudhuri, for Nos. 5 and 6, S. Choudhuri, for No. 4 in No. 69, R.K. Goswami, G.A. Jr. for Nos. 1-3, S. Chaudhuri, for No. 4 in No. 75, D.N. Medhi, G.A. for No. 1 and R. Goswami, G.A. (Jr.) for No. 2 in No. 85, for the Respondent

Judgement

Ram Labhaya, Ag. C.J.

1. This order will cover C. Rules Nos. 69, 75, 85 and 40 of 1952. The question which cans for decision at this stage is common to all the four cases.

2. Rules were issued in all the four cases under Articles 226 and 227 of the Constitution of India. The petitions on which these Rules were issued are directed in each case against an order of the Excise Minister of the Government of Assam. Cases Nos. 69 and 75 arise out of the same order dated 29-5-52. The order purports to have been passed by Mr. J.J. Nichols Roy, Minister in charge of Excise, Assam, (the Excise Appellate Authority, Assam). The order in the other two cases, namely Nos. 85 and 40 of 1952 also purport to have been passed by the same Minister and in the same capacity.

3. On behalf of the State of Assam, the opposite party in all the four cases, a preliminary objection has been raised. It is contended that the petitions on which the Rules have been issued are not properly constituted, inasmuch as all

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necessary parties to the petitions have not been joined. It is urged that Mr. J.J.M. Nichols Roy, the Excise Appellate Authority, Assam, whose orders are challenged in all these cases, was a necessary party. It is further pointed out that Mr. J.J.M. Nichols Roy has since been succeeded by another Excise Appellate Authority and that the existing Appellate Authority also is a necessary party. The learned Advocate General urges further that the fact that the State of Assam has been impleaded as a respondent, is not enough inasmuch as the Minister of Excise, when giving his decision, was not acting for and on behalf of the Govt. of Assam, but he was acting as an Appellate Authority, under the Eastern Bengal and Assam Excise Act, 1910, as a creature of the Provincial Government.

4. Section 3, Clause (2) of this Act hereafter called the Excise Act defines the expression "Board", which means the Provincial Government of Assam. Section 9 of the Act provides that appeals shall lie to the Board from any order passed by the Excise Commissioner or by the Commissioner of a Division. In this case, the orders were passed on appeal from orders passed by the Excise Commissioner. It is contended on behalf of the petitioners, that the Excise Minister was exercising powers of the Board as provided in Section 9 (2) (c) and, therefore, his orders were for and on behalf of the Provincial Government as the word ''Board'' meant the Provincial Government.

5. The Government of India Act, 1935 came into force on 1-4-37. Before this Act came into force the Board which was the Appellate and the Revisional Authority u/s 9 of the Excise Act meant the Provincial Government. (Section 296 of the Govt. of India Act, (1935)) provided for Courts of Appeal in revenue matters. Clause 1 of the section is as follows:

"No member of the Dominion Legislature or of a Provincial Legislature shall be a member of any tribunal in a Governor''s or Chief Commissioner''s Province haying jurisdiction to entertain appeals or revise decisions in revenue cases."

The section enacts a prohibition against a member of the Dominion Legislature or of a Provincial Legislature from becoming a member of a tribunal in a Governor''s or Chief Commissioner''s Province having jurisdiction to entertain appeals or revise decisions in revenue cases. It further provides that;

"If in any Province any such jurisdiction as aforesaid was, immediately before the commencement of Part III of this Act, vested in the Local Government, the Governor shall constitute a tribunal, consisting of such per son or persons as he may think fit, to exercise the same jurisdiction until other provision in that behalf is made by Act of the Provincial Legislature."

It appears that in compliance with the requirements of Clause (2) of Section 296, a Revenue Tribunal called the Board of Revenue was constituted by the Govt. notification in the Revenue Department No. 1228-R, dated 1-4-37. This Board continued to function till the Assam Revenue Tribunal was constituted by Act 2 of 1946 of the Assam Legislature. The Board constituted by the notification dated 1-4-37 was abolished by Section 9 of Article 2 of 1946. The Tribunal constituted

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under the Act was given jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Govt. immediately before the 1st day of April 1937 under any law for the time being in force. This would have given appellate power to" the Tribunal in appeals from the decisions of the Commissioner u/s 9, Excise Act. Notwithstanding this, and without prejudice to the generality of the provisions, it was expressly provided that the Tribunal shall have jurisdiction to entertain appeals from decisions in all revenue cases arising under the provisions of the enactments specified in the schedule, in which such jurisdiction was vested in the Provincial Government immediately before the 1st day of April, 1937. Item No. 5 of the schedule covers appeals against orders of the Excise Commissioner, & power to call for proceedings and revise orders of a subordinate officer u/s 9, Excise Act. The Tribunal constituted under the Act thus exercised the powers of the Board u/s 9 (2) (c) just as the Board constituted by the notification of 1-4-37 did before it came into being.

6. By the Assam Revenue Tribunal (Transfer of Powers) Act, 1948 (4/48), the Assam Revenue Tribunal Act, (2/46) and the Assam Revenue Tribunal (Amendment) Act (3/47) were repealed, with the result that the Assam Revenue Tribunal was abolished. The Act abolishing the Revenue Tribunal provided for the transfer of the powers and jurisdiction of the Assam Revenue Tribunal. The Assam High Court was vested with such jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Government immediately before the 1st day of April, 1937 under any law for the time being in force. In particular it was vested with jurisdiction to entertain appeals and revise decisions in all revenue cases arising under the provisions of the enactments specified in schedule A of the Act. In matters arising under the provisions of enactments specified in Schedule B, the jurisdiction to entertain appeals and revise decisions was left to be exercised by the authority to be appointed by general or special order of the Provincial Govt. The authority so appointed was to exercise jurisdiction vested in the Provincial Government before 1-4-1937. The first Item of Schedule B relates to appeals from orders of the Excise Commissioner and power to call for proceedings and revise order of subordinate Officers u/s 9. According to the Scheme of this Act, the Provincial Government was to appoint an authority by general or special order for entertaining appeals and exercising revisional jurisdiction in matters falling u/s 9 of the Excise Act. By notification No. MEX. 120/48/1 dated 15-6-1948, the Provincial Government appointed the Minister of Excise as the authority for exercising jurisdiction to entertain appeals and revise decisions in cases covered by item No. 1 of schedule B. It is in the exercise of the powers so conferred that the Excise Minister disposed of appeals from the orders of the Commissioner of Excise in the four cases in which his orders are being challenged.

7. By notification No. REX. 184-52-1, dated 15-9-52 the jurisdiction exercised by the Excise Minister has been conferred on an appellate authority consisting of the Revenue Secretary, the Finance Secretary, and the Commissioner. In other words, the existing appellate authority Is the Tribunal consisting of the three

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officials named above. The contention raised before us is that the final appellate authority which passed the orders in question and its successor, both are not parties to these petitions and, therefore, these petitions are not properly constituted.

8. It is argued that the proceedings are original in nature and character. They are characterised as original mainly for the reason that they have to be from the nature of things between an aggrieved party and a Tribunal or authority that has disposed of the matter in the exercise of powers vested in it under the law.

In such original proceedings, that authority is the only proper party. It is pointed out that it is only by the issue of a notice to the Tribunal or authority that the records of the proceedings can be brought into Court. In support of this contention reliance has been placed in the first place on--''Devichand v. Dhanraj'' AIR 1949 Mad 53 . The application in this case was for a writ of certiorari to quash the order of the Chief Judge of the Court of Small Causes. It was held that

"it is absolutely necessary that the Tribunal to quash whose order the application for the issue of a writ of certiorari is taken, should be a party because without notice issuing to him, the records of the proceedings cannot be brought up to the High Court"

It was further observed in this case that "The Writ of certiorari is the process by which the King''s Bench Division in Britain in the exercise of the superintending power over inferior jurisdictions, requires the Judges or Officers of such jurisdiction to certify or send proceedings before them into the King''s Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below."

In-- Belait Sheikh and Others Vs. State of West Bengal and Another, the second case relied on by the learned Advocate General the writ prayed for was also of the nature of certiorari for the quashing of the notifications by the Government under the Bengal Municipal Act, 1932. The application by which the Court was asked to exercise powers under Article 226 of the Constitution was held to be of the nature of an original action between the parties to the application, mainly on the ground that there had been no previous decision as between the aggrieved party and the authority against whom relief was sought. It was stated that "one of the respondents in such an application is invariably the inferior tribunal or the public official, against whose order relief is sought. The application asks in effect for a decision of a dispute between him and the inferior tribunal or the public official, for the first time"

The jurisdiction exercised in such a case, therefore, is original. The practice obtaining in England in regard to applications for writs of certiorari, prohibition or mandamus, was relied upon. Applications for writs of certiorari, or prohibition or mandamus were always dealt with in England by the King''s Bench, (or Queen''s Bench) in the exercise of its original jurisdiction.

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9. ''Mahi Chandra Borah v. Secy., Local Self Govt., State of Assam'' AIR 1952 Gau 119 , has also been relied upon. In this case, it was held that

"The writ that can suitably be issued against a person who has wrongfully usurped or taken charge of a public office, such as the office of the Chairman, Local Board, is a writ in the nature of ''quo warranto''. No such order or writ can issue to a person unless he is made a party to the proceeding."

Mr. Lahiri has also referred us to "The Law of Extraordinary Legal Remedies" by Ferris, and has relied on para. 175 dealing with ''Parties Respondent'' at page 201. It relates to parties in cases where writs in the nature of certiorari are prayed for and is as follows:

"Those parties whose action is to be reviewed and who are interested therein and affected thereby, and in whose possession the record of such action remains, are not only proper, but necessary parties. It is to such parties that notice to show cause against the issuance of the writ must be given, and they are the only parties who may make return or who may demur. The omission to make parties those officers whose proceedings it is sought to direct and control, goes to the very root of the relief sought. But, in order that the Court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondent."

10. Though the petitioners before us have not expressly prayed for writs in the nature of certiorari, the relief claimed in the petitions aims at obtaining review & even the quashing of the orders by which the petitioners feel aggrieved. The authorities relied on by Mr. Lahiri, therefore, would apply to the proceedings before us.

11. The view of law enunciated in the authorities referred to above has not been questioned by the learned Advocates for the petitioners in the 4 cases. It is thus not disputed that the authorities whose action is to be reviewed and also the authorities in whose possession the records of the proceedings have to remain and who are charged with the duty of maintaining the regularity of the proceedings of which a review is sought, are necessary parties.

12. We ourselves entirely agree with the view which prevailed in--''AIR 1949 Mad 53 and which formed the basis of the decision in-- Belait Sheikh and Others Vs. State of West Bengal and Another, as to the nature of proceedings under Article 226, Constitution of India. In the Madras case, it was held that the Tribunal whose order was sought to be quashed was a necessary party. In- Belait Sheikh and Others Vs. State of West Bengal and Another, the nature of the proceeding was determined on the assumption that the tribunal or the official whose order is sought to be quashed, was a necessary party. Our conclusion, therefore, is that the authority whose action is challenged, and also the authority who may be in possession of the records or who is interested in maintaining the regularity of the

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proceedings out of which these petitions arise, are necessary parties.

13. The learned counsel for the petitioners have urged that the notification by which the Minister of Excise was given the authority to hear appeals u/s 9, Excise Act, practically revived the position that existed before 1-4-37. The Provincial Govt. was the appellate authority before that date, and when power was given to a Minister of the Government, for all practical purposes, the Provincial Government assumed appellate powers. This does not appear to us to be the correct view of the matter u/s 296 of the Govt. of India Act, 1935, a tribunal or an authority had to be constituted for appeals in revenue cases in all provinces where this jurisdiction was being exercised by the Provincial Govt. A tribunal was first constituted by a notification. An Act of the Provincial Govt. was then passed constituting the tribunal. In 1948 the tribunal was abolished. The Act abolishing the tribunal authorised the Provincial, Government to appoint an authority for the disposal of appeals u/s 9 of the Excise Act. In the exercise of this authority, the Provincial Govt. appointed the Excise Minister to function as the appellate authority. The appellate authority, in these circumstances, was a creature of the Provincial Government and, therefore, could not be identified with the Provincial Government. The Provincial Government could not retain the power to itself. If it could, and wanted to retain it, the notification investing the Excise Minister with jurisdiction to hear appeals, would not have been necessary. In any case, the Excise Minister derived his appellate jurisdiction from a notification of the Provincial Government and, therefore, was not acting for or on behalf of the Provincial Government as such. The orders passed by him indicate that he was functioning as the Excise Appellate Authority. In these circumstances, the fact that the Govt. of Assam has been included in the list of respondents would not suffice to make the proceedings properly constituted. The Minister of Excise who passed the orders which are sought to be reviewed and the existing Appellate Authority that has succeeded the Revenue Minister, are both, in our view, necessary parties.

14. Under Rule 4 of Chapter VA (Part II) of the Appellate Side Rules embodying rules governing applications under Article 226 of the Constitution of India, we may order any necessary party not impleaded to be included in the list of respondents in proceedings under Article 226 of the Constitution of India. In the exercise of this power, we direct that Mr. J.J.M. Nichols Roy, the then Excise Minister, and the appellate authority constituted by the notification dated 15-9-52, consisting of the Revenue Secretary, the Finance Secretary, and the Commissioner, shall be included in .all the four cases as respondents. In C. R. No. 85/52 and 40/52 the Commissioner and the Deputy Commissioner concerned shall also be included as respondents. In C. R. No. 85/52 the S. D. O. Sibsagar shall also be added as party respdt. The petitioner in all these cases shall amend the petitions by the addition of the parties as ordered above. The Rules already ordered to issue shall be served on the parties now ordered to be included.

15. Let the four Rules come up for hearing in due course.

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Deka, J.

16. I agree.

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