
(1974) 08 CAL CK 0002
In the Calcutta High Court
Case No : First Appeal No. 847 of 1966

Ghusick and Muslia Collieries Ltd.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 08-08-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22

Citation : 78 CWN 1056

Hon'ble Judges : R. Bhattacharya, J;K.J. Sen Gupta, J

Bench : Division Bench

Advocate : Hariprasanna Mukherjee and Shib Kumar Majumder, for the Appellant; Chandidas Roy Choudhury and Gouri Prasanna Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Sengupta, J.—This appeal arises out of the judgment and decree of Sri R. Banerjee, Subordinate Judge, Additional Court at Burdwan passed in Title Suit No. 21 of 1959, re-numbered as 83 of 1961, dismissing the claim of the plaintiff. At the very outset it may be mentioned that there is no dispute with regard to the facts of the case. But to understand the case of the respective parties the following facts need be stated : --

2. Plaintiff Company is the owner of three collieries, Muslia. Radhamadhabpur and Kalipahari. They are situated in the sub-division of Asansol within, the District of Burdwan. The accounts of those collieries are jointly kept and are regularly audited by a recognised firm of auditors. The net annual profits of the said collieries are determined in a lump figure and for the purpose of assessment of cesses on each colliery, the said profits are proportionately distributed amongst the three collieries on the basis of the despatch of each colliery.

3. For the purpose of assessment" of road and public works cesses under the Cess Act (Act IX of 1880) and Education Cess Act (Act VII of 1930), the plaintiff

Company filed returns in compliance to the notice u/s 72 of the Cess Act in respect of those collieries. Thereupon the Deputy Collector of Burdwan proceeded to ascertain and determine the net profits of those collieries for the year 1952-53, in accordance with the provisions of section, 72 and 75 of the Cess Act, which required calculation of the average of the annual net profits of the said collieries for the last three years, that is, of the years 1949-50, 1950-51 and 1951-52. For that purpose the Deputy Collector accepted the net profits previously assessed for the years 1949-50 and 1950-51 but he did not accept the same for the year 1951-52. He calculated afresh the net profit of that year (1951-52) and fixed the same at a higher amount.

4. He considered the said (matters in case Nos. 39C, 41C and 42C of the year 1952-53 evidenced by Exts. A(7), A(8) and A(9). The Deputy Collector directed the Company to produced the balance sheets of those years. They only produced the same for the year 1951-52. From the same it was detected that the value of closing stock of coal, that is, Rs. 3,57,414 was shown on the debit side of account for the year ending 31st March, 1952. As the closing stock as on the 1st April, 1951 was not taken into account for the purpose of ascertaining the profit for the year 1950-51, he disallowed the debit of Rs. 3,57,414 being the value of the same in the accounts for the year 1951-52 and he added back the amount to the profit for the year 1951-52.

5. Taking value of the stock as on 1.4.51 and other items of income the total" profit assessed on the same was Rs. 411007-10 as. The said profit was reduced by the Additional District Magistrate on appeal who fixed the same at Rs. 406007-10-Op, which was found to be the net profits of those collieries for the year 1951-52.

6. On the basis of the net profits for the years 1949-50 1950-51, previously assessed and net profit for the year 1951-52 as assessed afresh by the Deputy Collector and taking average of the same the following net profit for the year 1952-53 was found for each colliery.

1.

Muslia..

Rs. 1,05,630/-

2.

Radhamadhabpur..

Rs. 55,733/-

3.

Kalipahari..

Rs. 85,158/-

7. After that, revised notice u/s 78 read with section 80 of the Cess Act and u/s 31 of P.E. Act was served on the company for" payment of cesses.

The cesses claimed from the collieries are as follows:

1.

Muslia

Cesses on the head of the Road P.W. Cess and Education Cess

Rs. 12,178-8-0-

2.

Radhamadhavpur

Cesses on the head of Road P.W. Cess and Education Cess

Rs. 6,433-3-0

3.

Kalipahlari

Cesses on the head of Road P.W. Cess and Education Cess

Rs. 9,978-15-0

8. The Cess Deputy Collector Burdwan filed certificate case Nos. 201M, 202M and 203M of 1955-56 under the provisions of Public Demands Recovery Act for realisation of the same after service of notice u/s 7 of the said Act on the Company. The said company, however, on different dates paid the dues of the certificate claim which were disposed of on full satisfaction.

9. It may be mentioned here that the company preferred appeal and objection against the order of assessment upto the Member Board of Revenue but all the representations and appeals were rejected.

10. Thereafter the Company filed this Title Suit. It has been asserted therein that the Deputy Collector has erred in taking the value of the stock of coal as found on the 1st of April, 1951 in the balance sheet, as the profit of that company on that head. According to them out of the total sum of Rs. 28,590-10-Op realised by the above certificate cases the sum of Rs. 13,961-7-9p have been illegally realised as the said amount of cesses were calculated on the basis of illegal assessment of profit taking Rs. 3,57,414-0-0 as part of the same for the year 1951-52.

11. The plaintiff wants back the said sum of Rs. 13,961-7-Op with interest of Rs. 2,300/- on the allegation that the said sum of Rs. 13,961-7-9p was illegally realised.

12. The State of West Bengal has contested the claim of the plaintiff company

and has contended that the suit is not maintainable; the civil court has got no jurisdiction to try this case as the plaintiff company failed to get any remedy as per provision of the Act; the plaintiffs' suit is also barred under the provisions of the Public Demands Recovery Act; that the assessment of profits as calculated by the Deputy Collector was rightly made, and the same having been made under the provisions of the Cess Act, that has become final as between the parties concerned.

13. The learned Subordinate Judge, dismissed the suit. Against the said judgment and decree this appeal has been preferred by the plaintiff company.

14. Mr. Mukherjee, learned Advocate for the appellant has challenged the finding of the learned Subordinate Judge on the following grounds : --

15. Firstly, it is said that the value of the stock of coal found on the 1st April, 1951, ought not have been taken as the profit of the company; secondly, the Deputy Collector has erred in re-opening the assessment of profit for the year 1951-52 for the purpose of calculating the same for the subsequent year 1952-53.

16. Mr. Roy Chowdhury learned Advocate for the State has, on the other hand, supported the judgment on the grounds as will appear in our discussions hereafter. While supporting that judgment, he has challenged the learned Judge's finding regarding the maintainability of the suit under the provisions of the Public Demands Recovery Act. His further contention is that the Cess Act being a self contained Act, and the plaintiff company having failed to get any remedy under the provisions of the said Act, is debarred from bringing the instant suit.

17. To understand the points involved in this case we may quote the relevant provisions of the Cess Act, 1880 (Bengal Act IX of 1880) hereinafter referred to as the Act. How the cesses have to be assessed have been laid down in section 6 of the Act.

18. On the service of notice u/s 72 of the Act, the return of the net annual profits of such property, calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up, is to be furnished. The said is very important for the purpose of decision of the point at issue. In case of non-furnishing of the return on the same being incorrect, the Collector has been authorised to make its own valuation. That provision has been laid down in section 75 of the Act, which is as follows : --

If such return be not furnished within the period of two months from the date on which such notice was served, or within any extended time allowed by the Collector of the district or if such Collector shall deem that any return made in pursuance of such notice is untrue or incorrect, such collector shall proceed to ascertain and determine by such ways or means as to him shall seem expedient the annual net profits of such property calculated as aforesaid.

19. Section 78 contemplates service of notice on the owner client, agent, Manager or occupier of such property, informing him of the amount of the annual net profits so ascertained and determined by him. Section 80 speaks of notice of rate of cess and dates of payments to be served on the persons mentioned above. The provision of appeal against the order of the Deputy Collector has been provided in section 101 and 102. The Collector, Commissioner and the Member of Board of Revenue are authorised to revise the net profit as made by the Deputy Collector as per provisions of section 105 of the Act. That gives a complete picture of the relevant provision required to be considered in connection with this case.

In the instant case total cess assessed was Rs. 28,590-10 as. The company asserts that instead of that it should be Rs. 14629-2-3 p. and the balance sum of Rs. 13,961-7-9 p. already paid should be refunded. It shows that the company has challenged the pan-turn of assessment which he can only challenge under the provisions of the Act.

20. In this case the Deputy Collector has been authorised to assess the annual profit u/s 72 read with section 75 of the Act and he did the same. He has followed the provisions of law for the purpose of determination of the annual net profit. If any mistake in computation in the matter of annual net profit is made, it should be corrected under the provisions as laid down in the Act.

21. This takes us to the question whether the Deputy Collector had jurisdiction to fix the annual net profit of the collieries and if so whether the Civil Court has jurisdiction to re-open the matter and to entertain a suit of this nature.

22. Mr. Mukherjee has drawn our attention to the finding of the lower court; that in the background of this case the approach to the Civil Court was not barred. The State of West Bengal has not preferred any cross-objection against the said finding. Question, therefore, arises whether the respondent State of West Bengal can challenge the above finding of the lower court without service of notice as contemplated under order 41 rule 22 of C.P. Code. In our opinion the said provision is not attracted in a case like this. When a respondent challenges a finding, which, if accepted does not alter the ultimate decision of the trial court, he is not to prefer any cross-objection against the said finding and in consequence notice under order 41 rule 22 C.P. Code need not be served. The said view of ours is supported by a bench decision in the case of Majibar Rahman Molla and Others Vs. Rahu Bux Dhali and Others, . Let us now consider the contention of Mr. Mukherjee that the Deputy Collector has wrongly assessed the net profit by taking into consideration the value of the stock of coal though not sold and as such the company is competent to challenge the said assessment in this suit.

To consider that question whether Civil Suit as framed is maintainable, we are to see whether the Deputy Collector's action in assessing the annual net profit of the collieries in question were without jurisdiction or whether he acted in such a

way that he exceeded his jurisdiction. In such a matter, under the Act, Deputy Collector is charged with the duty of making such an assessment.

23. We are of the views that a tribunal or an officer otherwise empowered " under the Act, to assess the annual profit of a concern under particular provisions of the Act, and being clothed with that authority if he makes the assessment, his order cannot be challenged otherwise than under the provisions of that Act, and the same object cannot be achieved by invoking the power of the civil court, so long as he is within the province of his jurisdiction. In case such an officer purports to act under the provisions of the Act and the procedure as laid down therein is followed, his activities which originated under the provisions of the said Act must be tested with reference to those provisions. If any person is dissatisfied he must seek his remedies, as may be available under that Act specially when such provisions have clearly and in an unambiguous term been provided therein.

24. The above views of ours get support from a decision of the Judicial Committee in the Case of Raleigh Investment Company Ltd. v. The Governor General in Council, reported 51 C.W.N. 762. That was a decision in the case where the assessment of Income tax was in question. Their Lordships observed that:

The correct meaning of the phrase, "assessment made under the Act" in section 67 of the Income Tax Act, 1922, is an assessment, finding its origin in an activity of the assessing officer acting as such. The use of the machinery provided by the Act, not the result of that use, is the test.

25. The Lordships further held:

The circumstance that the Assessing Officer has taken into account an ultra vires provision of the Act, is immaterial in determining whether the assessment is made under the Act. The phrase describes the provenance of the assessment : it does not relate to its accuracy in point of law.

26. The instant case stands on a stronger footing. As already stated the Deputy Collector fixed the annual net profit in accordance with law as laid down in section 72 read with section 75 of the Act. The company thereafter moved the Collector. Next they moved the Commissioner and Member Board of Revenue in revision but they lost in their appeal and revisions.

27. We are of the views that when the Officer concerned is authorised to do certain act, and he does the same under the provision of that Act and when provision has been made in the said Act, authorising other superior authorities to test the correctness of the action of that Officer, the Civil Suit does not lie to further probe into the matter. Similar points were raised in the case of The State of West Bengal Vs. The Indian Iron and Steel Co. Ltd., . That is a case where the provisions of Bengal Cess Act came for consideration of the Court. The finding of their Lordships (J.C. Shah and K.S. Hegde JJ.) is as follows :

We are of the opinion that it is impermissible for us to go into that question in these proceedings. The liability to pay tax is one thing and mode of computation of the net profits is another. The mode of computation is the matter of assessing authorities except when computation is done in violation of the provision of law. If there was any mistake in the computation, that mistake should have been got rectified by following the procedure prescribed by the Act. If the respondent Company was aggrieved by the mode of computation adopted by the assessing authority, it should have agitated that question firstly before that authority and thereafter before the appellate authority. Having not done so, the Company cannot be permitted to raise that question in the present suit, otherwise the finality contemplated u/s 102 of the Act would become illusory.

28. Considering the materials on record, we are unable to accept the finding of the trial court as to the maintainability of the suit. In the instant case the Company exhausted its remedy available under the Act. For the reasons stated the contention of Mr. Mukherjee that such a suit is maintainable also fails.

29. The first point raised by Mr. Mukherjee that the Deputy Collector had no authority to take the value of the coal in stock in the year 1951-52 for the purpose of assessing the annual net profit for the year 1952-53, must also fail. The Deputy Collector had the authority to assess the same u/s 72 read with section 75 and he did the same being clothed with the power to do the same. Accordingly, the said assessment cannot be said to be without jurisdiction. Moreover, there is no allegation that by adopting that process of assessment for finding out net profit, there was any double assessment. That apart, the company admitted the liability for payment of the cess for the year in question. According to them, the sum payable on that account was Rs. 14,629-2-3 p. which have already been paid. The Collector on the other hand demanded Rs. 28,590-10-0 p. and realised the same by certificate proceeding without any objection being filed by the Company though they entered their appearance in the said proceeding

30. The claim of the Company suffers from another infirmity. The entire sum has already been realised from the Company by certificate proceedings under the provisions of the Public Demands Recovery Act (Bengal Act III of 1913)".

31. Public Demands Recovery Act is a self contained one. The Party affected may get the remedy under the provisions as provided in the said Act. Section 9 of the Act, authorises the certificate debtor to deny liability in whole or in part within thirty days of the service of notice u/s 7 of the Act. The party failing to do the same, loses the remedy on that score. Section 34 of the Act contemplates a civil suit for cancellation or modification of the certificate provided such a suit is brought within six months from the date of rejection of the petition filed u/s 9 of that Act. It is also laid down that such a suit is not maintainable, if no application u/s 9 is filed or other steps as provided therein have been taken. Next comes section 37 of the Act which bars a civil suit relating to the making, execution, discharge or satisfaction of a certificate duly filed except on the ground of fraud.

32. The above section imposes a general bar to the jurisdiction of civil courts. It may be noted here that no allegation of fraud has been made in this case.

33. From the above, Mr. Roy Chowdhury has contended that apart from other considerations, the above provisions of the Public Demands Recovery Act also bar the jurisdiction, of the Civil Court to entertain such a suit. Moreover, in the Certificate Proceeding the certificate dues have already been realised. The remedy of the Certificate debtor, if any, has already been barred.

34. It has been contended on behalf of the Company that this is not a suit as contemplated u/s 34 or 37 of the Act, as such the bar of the said Act is not attracted in this case. Mr. Mukherjee has further submitted that in this suit the jurisdiction of the Deputy Collector has been challenged and as a consequential relief the refund money paid has been demanded.

35. In order to support the contention of Mr. Mukherjee that the jurisdiction of the civil court is not ousted even when money is realised by the certificate proceeding by the Certificate Holder, the decision in the case of Kartick Chandra Jana and Others Vs. State of West Bengal and Others, has been referred to us. That is the decision of Debiprasad Pal, J. In our view the principle laid down therein is not attracted in the instant case. The facts of that case is distinguishable from one under our consideration. In that case the Commercial Tax Officer filed a certificate against the assessee for realisation of certain sum being the liability under the Act. The assessee preferred objection under the Public Demands Recovery Act, contending, inter alia, that no proper notice was served upon the petitioners and hence the assessment was illegal and the certificate was liable to be cancelled on that ground. That objection having been overruled, that suit was filed. In that suit the jurisdiction of the authorities to assess the tax without serving any notice on the assessee was challenged. It was contended therein that the condition precedent for assessing the tax was the service of the notice as contemplated therein. That notice seems to be the source of Jurisdiction under which that assessment could be made. It is thus clear that the jurisdiction of that assessing authority was challenged. In the instant case, however, the assessee company after receiving notice u/s 72 of the Act, appeared and contested the assessment made by the Deputy Collector at every stage. That apart we have already held that the Commercial Tax Officer had jurisdiction to assess the net profit and that he fixed the same in accordance with law.

36. We are of the view that the certificate proceeding wherein the dues are realised without any objection being raised by the certificate debtor at any stage of the proceeding cannot subsequently be challenged, in a civil suit, if the dues were assessed and determined by an authority authorised to do the same and specially when no allegation of fraud is made.

37. For the reasons stated the company cannot get any advantage of the decision referred to above and the said contention of Mr. Mukherjee must fail.

38. Considering the materials on record, we hold that the Deputy Collector was authorised to take into consideration] he stock of coal found on the 1st of April, 1951 for assessing the net profit of the year 1951-52 and as such his action cannot be challenged in this suit. In the result, the first point raised by Mr. Mukherjee fails.

39. The second point urged on behalf of the company is that the Deputy Collector had already assessed the net annual profit of the collieries for the years 1949-50, 1950-51 and 1951-52 under the law, the Deputy Collector ought to have taken the average of the said annual profits, in order to calculate the same for the year 1952-53. We have seen that the Deputy Collector accepted the annual net profit for the year 1949-50 and 1950-51 but he did not accept the same for the year 1951-52. According to the Deputy Collector the company suppressed the net profit of that year. Moreover, the same was summarily assessed. Mr. Roy Chowdhury, learned Advocate for the State submits that, in case the Collector thinks the return to be untrue or incorrect, he can proceed to ascertain and determine by such ways and means, as to him shall seem expedient, the annual net profits of such property calculated as aforesaid. In support of that contention our attention has been drawn to section 75 of the Act. On the other hand, it is contended by Mr. Mukherjee that the Deputy Collector could only revise his previous order under the provisions of section 105 of the Act. True, if the Deputy Collector wanted to revise his order of assessment for the year 1951-52 for the purpose of realising more cess on account of that year the said contention of the appellant might have been tenable. But in the instant case the Deputy Collector was assessing the net annual profit for the year 1952-53. It is an assessment for a new year and it was done in accordance with law as laid down for that purpose. While assessing net profit, the authority concerned may accept the annual net profit already calculated and the said authority is also within" his jurisdiction to determine afresh the same for the purpose of calculation of the net annual profit for a new year and such a right is not restricted to the provisions of sec. 105 of the Act. When an officer can assess the net annual profit in the way he deems fit, he cannot be compelled to do the same in a particular manner. His action in that respect cannot be challenged so long as he does not exceed his jurisdiction. The fixation of net annual profit of the colliery in question as made by the Deputy Collector cannot be challenged.

For the reasons stated the second contention of Mr. Mukherjee also fails.

In the result, the appeal is dismissed with cost subject to our findings in this appeal. The judgment and decree of the learned Subordinate Judge are upheld.

Hearing fee is assessed at 10 gold mohurs.

R. Bhattacharya, J.

I agree.