
(1958) 07 OHC CK 0006
In the Orissa High Court
Case No : O.J.C. No. 294 of 1956

Jami Narasaya Prusty and Bros.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 08-07-1958

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Sales Tax Act, 1947 — Section 12(3)

Citation : AIR 1959 Ori 79 : (1958) 24 CLT 377 : (1958) 9 STC 648

Hon'ble Judges : S. Barman, J; P.V.B. Rao, J

Bench : Division Bench

Advocate : Asok Das, for the Appellant; Government Advocate and G.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

P.V.B. Rao, J.—The petitioners Messrs. Jami Narasaya Prusty and Brothers through the Managing Partner Jami Narasaya Prusty filed this application for issue of a writ in the nature of mandamus on the opposite party not to collect the tax assessed on the turn-over of Rs. 45000/- during the three quarters as sales tax.

2. The petitioners are a partnership firm consisting of Jami Narasaya Prusty, Jami Sundarbalu Prusty and Jami Srivangan Prusty and are dealers registered as such under the Orissa Sales Tax Act. The petitioners submitted a return of their sales for the quarters ending 30-6-55, 30-9-55 and 31-12-55 for a gross turn-over of Rs. 36,332-6-3, Rs. 41,807 0-6 and Rs. 33,883-12-6 respectively. The petitioners are dealers in grocery, stationery, toilets, books, Khadi cloths, oils, oil-seeds, iron goods, agricultural implements etc. and maintained their accounts on the gross sales that took place in their shop.

The Sales Tax Officer was not satisfied with the gross return made by the petitioners and after scrutinising the evidence was satisfied with regard to all the sale transactions returned by the petitioners except with regard to time-piece

watches. The Sales Tax Officer felt that a correct return was not made with regard to this, as 13 watches were purchased and there were cash memos only for seven watches of Rs. 23/- each and one was held in stock.

So the officer called upon the petitioners to explain as to how the sale of the other five watches was recorded. The petitioner submitted their daily sole accounts & stated that no cash memo was granted for the same but the sale amount was included in the grosssum of the sale price of the daily retail sale. The Sales tax Officer was not satisfied with this explanation.

There was evidence that these five time-piece watches cost at Rs. 125/-. But the Sales Tax Officer estimated the suppressed turn-over at Rs. 15,000/- each in all the three cases and added the said sum to each of the returns submitted by the petitioners for the three quarters and taxed them on the amounts after addition of Rs. 15,000/-.

3. The petitioners contend that this assessment is arbitrary and contrary to the provisions of the Sales Tax Act. According to the petitioners, the Sales Tax Officer ought to have added only a sum of Rs. 125/- to the gross turn-over made by the petitioners for that particular quarter during which the sale amount of these time-piece watches was not shown.

The petitioners further contend that it is patent from the three orders that the assessment and the estimate were purely arbitrary inasmuch as for the same reason of the suppression of the sale amount of these five time-piece watches he added Rs. 15,000/- not only to the return made for the period during which these time-piece watches were sold, but to all the three assessments of the three periods. They submit that the assessments are illegal and without jurisdiction and that the illegality is apparent on the face of the orders themselves. Consequently they want that the assessments should be quashed and the opposite party directed not to collect tax from them.

4. Mr. G.K. Misra, the learned counsel for the Department takes a preliminary objection that the application is not maintainable inasmuch as the assessee petitioners" did not go up in appeal against the assessments made by the Sales Tax Officer and no writ in the nature of either mandamus or certiorari can be issued as there is another remedy in law provided for the petitioners. In my opinion this objection cannot stand.

The orders of the Sales Tax Officer are on the face of themselves contrary to law as I will show presently. They are vitiated by an error apparent on the face of the record as no case is made out on the face of the order to estimate the suppressed turn over at Rs. 15,000/-. It is also patent from the orders that the same ground, namely, the suppression of the sale of five watches is common to all the assessments for the three quarters.

Errors apparent on the face of the record are always treated as errors of jurisdiction for purposes of quashing and for issuing a writ of certiorari. If it Ss a

substantial error, it goes to the root of the matter. In *R. v. Northumberland Compensation Appeal Tribunal; Ex. Parte Shaw* reported in (1951) 1 All E. R. 268, it was held,

"As the Tribunal had stated on the Face of the order the grounds on which they had made it and as it appeared that in law these grounds were not such as to warrant the decision to which they had come, certiorari would issue to remove the order into the High Court to be quashed.""

"Lord Goddard C. J. in course of the judgment quoted the following observation of Lord Cairns L. C, in *Walsall Overseers v. London and North Western Rly. Co.* reported in (1878) 39 L. T. 453,

"If the Court of quarter sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and asked the Court of Queen's Bench to remove it by certiorari, and when so removed to pass judgment upon it, whether it should or should not be quashed."

In the case of *Soorajmull Nagarmull Vs. The Asst. Controller of Customs and Others*, , it was held,

"Where there has been a denial of natural justice and violation of fundamental principles of judicial procedure, a writ of certiorari would lie even though there may be an alternative remedy open to the petitioner by way of an appeal under the provisions of the Sea Customs Act or by way of right of action under the general law."

The Supreme Court also held in the recent case of "*Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam*, reported in AIR 1958 S. C. 398,

"One of the grounds on which the jurisdiction of the High Court on certiorari may be invoked, is an error of law apparent on the face of the record."

For these reasons, there is no force in the preliminary objection taken by the learned counsel for the Department.

4a. As already stated, the Sales Tax Officer treats the suppression of five time-piece watches as the ground for estimating the amount of turn-over suppressed. This is clearly wrong and the learned counsel for the Department frankly admitted that it was so, though he submitted that that ground may be a ground for the subsequent two assessments being quashed.

Mr. Misra submitted that in the assessment order for the quarter ending 30-6-55 the assessing officer has acted upon some material and that if it is so, then this Court has no jurisdiction and the assessment is legal. In support of his

contention he relied upon the decision in the case of Commr. of Income Tax. U. P. and C. P. v Badridas Ramrai shop Akola . In this case it was held by the Judicial Committee of the Privy Council,

"The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guesswork. In that sense too the assessment must be to some extent arbitrary. Section 23(4) places the officer in the position of a person whose decision as to amount is final and subject to no appeal, but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by Section 33. There is no justification in the language of the Act for holding that an assessment made by an officer u/s 23(4) without conducting a local inquiry and without recording the details and results of that inquiry cannot have been made to the best of his judgment within the meaning of the section."

Mr. Misra contends that these factors enunciated by the Judicial Committee were taken into consideration by the Sales Tax Officer in estimating the suppressed turn-over at Rs. 15,000/-. I do not think this submission is correct. A reading of the order will show that a greater portion of the order was devoted as to why the accounts and the explanation submitted by the assessees could not be accepted.

Therefore he comes to the conclusion that "the suppression of sales in respect of these five watches cannot be said to be the only instances of suppressions since he must have indulged in such suppressions to a large extent consistent with the volume of his business¹ and the only relevant portion where he gives the reasons for assessing the reputation of his business, I would fix his suppressed turnover at Rs. 15,000/- which should be added to the gross turnover returned."

The only word which finds a mention as observed in the judgment of the Judicial Committee and used by the assessing officer is the word "reputation". The use of this word alone, in my opinion, is not sufficient under the authority of the decision of the Judicial Committee to make out a valid assessment. In my opinion, the estimate is arbitrary and is merely a guesswork.

The Sales Tax Officer has not even taken into consideration the returns made by the assessees in the previous years. The Inspector's report also, as seen from the order, is only with regard to the five watches. The assessing officer has not stated that there is any other information in the Inspector's report. In the latest

decision of the Supreme Court in the case of Raghubar Mandal Harihar Mandal v. State of Bihar reported in 8 S.T.C. 770: (S) AIR 1937 SC 810) it was held,

"The provisions of section 10(2)(b) of the Bihar Sales Tax Act, 1944 and Section 23(3) of the Indian Income Tax Act, 1922 are substantially the same and impose on the assessing authority a duty to assess the tax after hearing such evidence as the dealer may produce and such other evidence as the assessing authority may require on specified points. In making an assessment u/s 10(2)(b) the Sales Tax Officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in Court of law; but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment. When the returns and the books of account are rejected, the assessing officer must make an estimate and to that extent he must make a guess; but the estimate must be related to some evidence on material and it must be something more than mere suspicion. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstance, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate."

The Supreme Court followed its previous decision in the case of Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal, . I am therefore satisfied that the assessment made in this case for the three periods is based upon mere guess-work and there is no proper basis for making the best judgment assessment. As the error is apparent on the face of the order, it is not necessary for the assessee to go in appeal under the Sales Tax Act before invoking the jurisdiction of this Court.

The orders of the Sales Tax Officer are therefore quashed and the addition of Rs. 15,000/- made to the turn-over of each quarter is set aside. The petitioners are not liable to pay the assessments so far as this excess amount of Rs. 15,000/- is concerned in each quarter. An order will issue to the Sales Tax Officer to reduce the turn-over in each case by Rs. 15,000/- and modify the assessments made after such reduction. The petition is, therefore, allowed with costs, hearing fee Rs. 100/-

S. Barman, J.

5. I agree.