(1970) 02 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Writ Petition No. 93 of 1968

Jammu Metal Rolling Mills APPELLANT

Vs

Assessing Authority RESPONDENT

Date of Decision : 25-02-1970

Acts Referred:
Constitution of India, 1950 — Article 226
General Sales Tax Act, 1962 — Section 4

Citation : (1970) KashLJ 447

Hon'ble Judges : J.N.Bhat, J

Bench : Single Bench

Advocate : Ishwar Singh, Advocates appearing for the Parties

Judgement

(1) This writ petition was originally presented on 207968 and was later on amended and presented on 49196 In ;he amended petition the

petitioner added further grounds questioning the vires of Section 4 of the Jammu & Kashrus General Sales Tax Act, 1962 (hereinafter referred to

as ""the Act"" in this Judgment) I need not details all the ground taken in the writ or in the rejoinder because some of the grounds relate to the merits

of the case which is a matter that should not be commented upon in this writ petition. Briefly put the relevant and important allegations in this writ

petition which are in my opinion necessary for the disposal of this petition, are as under :

(2) The petitioner, M/S Jammu Metal Rolling Mills, is a registered firm under the Partnership Act and carries on the business of rolling of brass and

copper and manufacture of utensils. The petitioner filed a return of the turnover for the years 196465 196556 claiming deductions therein. The

Assessing Authority was satisfied with this return but took objection to the deductions claimed by the petitioner regarding the rolling charges. The

objection was raised at the instance of the Deputy Sales Tax Commissioner (Inspections) (hereinafter to be referred as ""DSTC"") who was biased

against the petitioner. That at the instance of the Commissioner and DSTC further proceedings were started. The Assessing Authority was

instructed by the DSTC vide his letter No RN/ DCJ/260709 dated 19101967 to hold the enquiry in his i. e DSTC's chambers; in consequence

where of some of the statements of the witnesses were recorded in the Chambers of the DSTC. who also has signed there statements. The

petitioner and his counsel having taken objection to this procedure, the rest cf the enquiry was held by the Assessing Authority himself; that the

DSTC at every stage verbally or in writing and also through his Inspector has in fact been directing the operation of the enquiry held by the

Assessing Authority. A number of annexures to prove this point have been appended with the petition. It is also alleged that behind the back of the

petitioner, the Assessing Authority made some enquiry from the Canal Octrol Post, Jammu and based his order on this information without

allowing the petitioner to meet the same. The petitioner moved a transfer application before the Commissioner but that also was rejected; that the

respondent Assessing Authority also sent a notice to the petitioner on 2356S to show cause why penalty should not be levied for concealing

taxable turnover. The petitioner demanded that as no assessment order had been passed, the petitioner did not know the ground which had led 'the

Assessing Authority to issue the notice for penalty and a request was made for time for filing objections, which was rejected by the Assessing

Authority who ultimately passed two composite orders regarding the years 196465 and 196566 in which both the sales tax and the penalty were

leived upon the petitioner, that whole proceedings were illegal and directed by the superiors and particularly the DSTC of the Assessing Authority

who acted as a tool in the hands of his superior officers, without having applied his judicial mind and without following the rules of evidence or of

natural justice. Then the evidence of some witnesses is discussed and certain factual allegations are made. Lastly, as I said in the beginning, the

vires of Section 4 of the Act has been attacked as being discriminatory and void, and violative of fundamental rights.

(3) An affidavit was sworn against this long writ petition by one Mr. Madan Mohan Chanda, Assessing Authority, Sales Tax Circle 'B' Jammu.

The substance of the affidavit is that the predecessor of the deponent had been informed by the DSTC that the petitioner had concealed certain

taxable sales which information had been conveyed to the DSTC and the latter directed the deponent to conduct an enquiry expeditiously to verify

the truth of the information. Denovo enquiry was conducted. It is admitted that the enquiry was, held in the presence of the DSTC with a view to

expedite the proceedings but as this procedure was objected to during the enquiry by the petitioner, the rest of the enquiry was held by the

Assessing Authority alone. The statements made in the presence of the DSTC were not taken into consideration by the Assessing Authority while

passing the assessment orders. The influence of the DSTC over the deponent in deciding the case is denied. It is further admitted that

administrative instructions were received from the DSTC. Filing of transfer application before the Commissioner is admitted. It is also stated that

the petitioner had filed appeal and revision and both are pending, as such the present writ petition is not competent. About the penalty it is stated

that a show cause notice was given to the petitioner before the order of penalty was imposed It is further contended that there is nothing illegal in

passing a composite order assessing the tax and the penalty by means of the same order. It is also stated that the information collected from the

public records maintained at the Canal Octrol Post Jammu, were not used as the basis of assessment order but have been incidentally referred to.

The findings arrived at by the Assessing Authority are based on cogent evidence.

(4) I have heard rather detailed arguments in this case. As already indicated this writ petition can be disposed off on a very simple point without

going into the details about the many intricate points of law discussed and raised by the petitioner.

(5) So far as the most important point of the vires of Section 4 of the Act is concerned, the matter is conclusively set at rest by this court.

Therefore being a party to that Judgment or even the author thereof and even otherwise sitting singly I am bound by that judgment, therefore there

is no merit in this contention of the petitioner that Section 4 of the Act is ultra vires.

(6) The main ground of attack by the petitioner about the impugned order passed by the Assessing Authority is that the Assessing Authority has

not acted independently on his own but in the words of the learned counsel for the petitioner, has acted as a tool in the hands of his superiors

particularly the DSTC. A few facts have been relied upon by the learned counsel for the petitioner to prove this allegation. An application on

181267 was made by the petitioner to the Sales tax Officer seeking an opportunity to produce evidence. On this application the DSTC passes the

following order :

As you have asked him to produce account books, a date may be given to him.1'

(7) On another application dated 15368 to the Sales Tax Officer, seeking time to move a transfer application by the petitioner, the Assessing

Authority orders as under :

As per verbal instructions of the DSTC Jammu no further opportunity is granted as the dealer has already been allowed many opportunities.

Another order dated 121267 reads as under :

The matter was discussed with DSTC Jammu in reference to his letter No. RN/ DCJ/ 260709 dated 191067 who instructed me that no further

adjournment in this case for 6465 and 6566 years of account be allowed. Accordingly this application for adjournment is rejected Dealer to please

note.

(8) These are Annexures 'b' 'c' and CIII respectively. Annexure C II is detailed copy of the orders passed in this case from time to time. Only a

few of the orders may be referred to A portion of the order dated 181267 may be quoted.

...........The question of adjournment had already been decided by rejecting the application dated 1212 67 as per instructions of the DSTC

Jammu. However the application of Shri S. Dutta, Counsel as presented was brought to the notice of the DSTC. Jammu in pursuance of his letter

No. RN/DCJ/260709 dated 191067 and he was kind enough to pass orders dated 181267 on it under his signatures directing me to adjourn the

case for production of accounts.........

(9) Another Order of 102 68 reads as :

..........On verbal instructions from the DSTC as conveyed through Shri Durga

Dass Inspector, the case is adjourned to 28268.

(10) Another order dated 15368 lays down :

However in view of the order dated 28268 on the order sheet and as perverbal instructions of the DSTC Jammu as conveyed through Sh .Durga

Dass Inspector, the application of the Advocate for adjournment in the case is rejected and the proceedings are closed by me.

(11) Many other Annexures have been presented to illustrate the same point. These allegations ere based on the records of the Assessing

Authority a certified copy of the ordersheet has been placed on the file, from which above quotations have been made. In the affidavit of the Sales

Tax Officer also it is admitted that some statements were recorded in the Chamber of the DSTC (vide para 6) and in the paragraph 8 it is admitted

that administrative instructions were received from the DSTC, so on and so forth.

(12) A simple narration of these orders shows that the Assessing Authority has never exercised his own discretion, he has conducted this enquiry

as a very dutiful and faithful subordinate carrying out the wishes of his superiors. In the first place the proceedings were started in the Chamber of

the DSTC, some statements were recorded before the said gentleman, which statements were also signed by him. Later on when an objection was

taken by the petitioner and his counsel to this procedure, the rest of the proceedings were taken by the Assessing Authority himself. But the

Assessing Authority was acting as an agent or as argued by the counsel for the petitioner as a tool in the hand's of the DSTC. Even adjournments

were granted or refused according to the instructions, verbal or in writing, sent by the DSTC to the Assessing Authority. From the manner in which

whole proceedings have been conducted one can easily infer that the entire proceedings and the final order are those of the DSTC or taking the

most favourable view for the Department, it is very difficult to judge, guess or analyse what portion of the proceedings or the final order are the

result of the original brain work of the Assessing Authority and what part of it has been dictated to him directly or in direct suggestions by his

superiors To say the least such a conduct on the part of the Assessing Authority has deprived the entire proceedings and the final order of any,

semblance of sanctity of judicial or quasijudicial order. In a recent case in the Supreme Court Re: A.K. Kriapak and others vs. Union of India and ors., which arose from this very State in connection with the selection of officers of the Forest Department for Indian Forest Service. The Selection

Board consisted of one M. A. Venkataraman as the Chairman of the Board (nominee of Union Public Service Commission) Inspector General of

Forests of the Government of India, The Chief Secretary to State Government of Jamm and Kashmir and Naiqshbundi the acting Chief

Conservator of Forests of Jammu and Kashmir Incidentally one of the members of the selection board as well as a candidate for this post Mr.

Naqishbundi Acting Chief Conservator of Forests of the State."" The respondent's .allegation in that case was Mr. Naqishbund did not sit in the

Board while his case was being considered and about the other officers selected his opinion did not influence the other members of the Board who

were very highly placed and responsible gentlemen, as mentioned above. But the Supreme Court still did not place reliance of the numerous

affidavits of these highly placed officials constituting the Board and remarked:

The members of the selection board other than Naqishbundi each one of them separately, have filed affidavits in this court swearing that

Naqishbundi in no manner influenced their decision in making selection. In a group deliberation each member of the group is bound, to influence,

the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder

that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept

the contention that in adjudging the candidates the members of the board did not have any mutual discussion. It is not as if the records spoke of

themselves We are unable to believe that the members of the selection board functioned like computers At this stage it may also be noted that at

the time selections were made, the members of the selection board other than Naqishbund were not likely to have known that Basu had appealed

against his suspension and that his appeal was pending before the State Government. Therefore, there was no occasion for them to distrust the

opinion expressed by Naqishbund. Hence the board in making the selections must necessarily have given weight to the opinion expressed by

Naqishbund.

(13) The case of the petitioner here ' is stronger. Here he is the Assessing

Authority, he is the deposing authority, and his affidavit particularly to the

effect that the whole proceedings and the final order were passed by him in his own judgment without being influenced by his superiors particularly

by the DSTC is nullified by his orders that he has passed from time to time which have been reproduced above. Even, as I already stated to the

extent of either refusing or granted an adjournment, the Assessing Authority was guided by the instructions of his superiors. It was argued by the

learned counsel for the respondent that the petitioner had been allowed full opportunity to produce his evidence and his counsel had made a

statement closing his evidence. That point at all does not in any way mitigate the basic infirmities in ' the order and the proceedings namely whether

the proceedings were conducted by the Assessing Authority or by the DSTC some time directing the proceedings in his own chamber and some

time acting through the Asse. Authority. There are numerous authorities under the Sales Tax law also whereunder such circumstances the

Assessment orders have been set aside. In a case before the Supreme Court reported as (1958) 9 S.T.C. page 428 Re. Mahadayal Prcmchandra

Vs Commercial Tax Officer it was held that where the Commercial Tax Officer was satisfied on the materials placed by the assessees and their

representative that the assessee was not liable to pay sales tax in respect of these transactions, he referred the matter first for instructions and then

for obtaining the Valued opinion' of his superior, the Assistant Commissioner (CS) and the latter expressed his opinion that the assessees were

liable in respect of these transactions. It was held that the procedure adopted by the officer was contrary to the principles of natural justice and it

was unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sale tax department. In a

recent case before the MadrasHigh Court viz. Mps. Savitri Sam vs. Income Tax Officer reported (1969) 2 I. T. J. page 842, an application was

made to the Income Tax authority u/s 220(6) asking for stay. It was held:

11.........The jurisdiction of the Income Tax Officer under Section 220(6) is qua""ijudicial and has been exclusively entrusted to him by the statute. It

follows, therefore, that he has got a duty to apply his own mind to the question of grant of stay, not controlled in such exercise by any direction or

guidance by any higher authority including the Commissioner. It is true the

Commissioner of IncomeTax is higher up in the hierarchy of officials of

the IncomeTax department and as such he has got administrative jurisdiction over all his subordinates. That can enable him only to give such

administrative directions as are not prohibited or impliedly forbidden by the provisions of the said Act. Where an Incometax Officer is entrusted

with a quasi judicial function, no direction can be given to him by the Commissioner in exercise of his administrative superiority. Even if there is

such a direction given by the Commissioner, however embarrassing it may be for the Incometax Officer, it is his statutory duty to consider the

question of stay by applying his uncontrolled mind and express his view which will be embodied in his order.

In another authority which is also a recent one, of the Patna High Court given by a Div. Bench of the court, reported as (989) 2 I T J. page 380

Re. Elphinstone picture Palace vs. Union of India and another, it was held that:

It is now well settled that where power is vested to do a certain, thing in an authority and that authority does not exercise that power itself, but

acts according to dictates of another authority not having such a power, with out applying itself to the propriety or otherwise of that order, such an

order is illegal.

(14) It was however argued by the learned counsel for the respondent that as the petitioner had filed an appeal and a revision, against the order of

the Assessing Authority, this writ petition should be dismissed because the appellate authority would consider all the points raised by the petitioner

in this petition, and it is well settled by now that where an alternative remedy is available more so when it has been taken into hand, relief by means

of writ petition should be refused I am not impressed with this argument Before supporting my view from various authorities of the Sup Court and

other High Courts, I look at the whole matter from this point of view. In my opinion the order of the Assessing Authority is no order in the eye of

law as it is vitiated and rendered null ad void for the reasons given above particularly that it is not an order passed by the Assessing Authority on

his own and who has not conducted the proceedings according to his own rights without being influenced by his superior officers. When this order

is a nullity the whole proceedings taken by the Assessing Authority fall to the ground. If this order is set aside by the appellate authority, the result would be the same Let me put the matter like this; I dismiss this writ petition because an appeal is pending. The appeal is dismissed and the

petitioner would again have to move this court for a writ and on the finding that I have given, the petition shall have to be accepted because the

basic order of the Assessing Authority which has been affirmed by the appellate authority, is not order in the eyes of law. What would be the result

multiplicity of litigation and wasting the time of all concerned. Therefore, in my opinion, the mere pendency of an appeal is no bar to the

maintainability of this writ petition. There are reported cases from the highest courts of law in the land where applications have been entertained

and writ issued while appeals were pending before the appellate authority only a few may be mentioned In (1965) 16 S. t. C. page 769 Re. K. S.

Shivji & Co: vs. Joint Commercial Tax Officer, a division Bench of the Madras High Court held that ordinarily an assessee who has been assessed

to sale tax must first resort to the remedy available to him under the Sale Tax Act. When actually he has resorted to it and the appeal is pending the

High Court would be reluctant, in a petition .filed under Article 226 of the Constitution, to interfere with the order of assessment. But there may be

cases where this rule may not outweigh other considerations which may compel the interference by the Court, because assessment proceedings are

quasijudicial in nature In that case a mistake in totalling certain items occurred in the report of the intelligence staff of the department and. in

computing the turnover this had been bodily embodied by the assessing authority without any scrutiny, the assessment order was clearly vitiated by

an apparent error and was quashed by means of that writ petition. In (1965> 16 S. T. C page 973 Re: Kantilal Babulal & Brothers vs. H C. Patel

Sales Tax Officer, the Gujarat High Court held that general principle of granting relief under Article 226 of the Constitution is discretionary.

Ordinarily a writ will not issue unless the justice of the case requires it; but there is no such hard and fast rules which limits the discretion of the

court in all cases and besides, different Considerations prevail in case of different writs and particularly in the case of writ prohibition. In (966) 17

S. T. C. page 380 the Karala High Court in M. Appukatty Vs. Sales Tax Officer, held that:

If the quasijudicial authority disregards the materials available or if it refuses to apply its mind to the question and if it reaches a conclusion which bear no relation to the facts before it, to allow those decisions to stand would be violative of the principles of natural justice. Arbitrary decision can

also, therefore, result in violation of the principles of natural justice which is a fundamental concept of Indian jurisprudence. In certain cases, where

an authority refuses to apply its mind to the question and makes a decision as it likes, it may amount to even a mala fide decision.

(15) The existence of an alternative remedy is not an absolute bar to the issue of a writ of certiorari when there has been violation of the principles

of natural justice and infringement of fundamental rights. The remedy available by way of appeal to the Appellate Authority and then by way of

second appeal to the Tribunal and then by a revision to the High Court is not adequate where an assessee is compelled in the meantime 10 pay the

tax imposed on him by an arbitrary assessment which has been solely guided by the whim and fancy of the assessing authority.

(16) To the same effect is (1965) 16 S. T. C. page 511. In (1960) 11 ST. C. page 805, the Andhra Pradesh High Court in Sree Saibaba and Co:

Vs Commercial Tax Officer laid down that an assessment order passed against an assessee without an opportunity being given to him to attend the

hearing is void on the ground of denial of natural justice and can be quashed by the High Court by the issue of a writ of certiorari in spite of the fact

that other remedies are available. In (1968) 21 S. T. C page 363 the Punjab and Haryana High Court in B K Bajaj Vs. State of Punjab held that

when the stand of the department has been predetermined by departmental instructions, no purpose would be served by going through the

formality of appeal and revision, the decision of the appellate and revisional authorities being a foregone conclusion in consonance with the

departmental instructions. In such a case the assessee could challenge an order of assessment under Art. 226 of the Constitution.

(17) The last argument of the learned counsel for the petitioner was that composite order of assessment and penalty would be bad in law.

According to the learned counsel for the petitioner these two are "" distinct proceedings and the order of penalty is penal in nature. The assesses

must be first given reasons for the finding of the assessing authority that this is a case where penalty should also be imposed upon him. On the other

hand the stand of the respondent is that the assessee was given notice about the imposition of a penalty on 2351968 and the impugned order was passed on 1261968, therefore the petitioner cannot now make any grievance of penalty having been imposed upon him by the same order which

decided his assessment case. As I am setting aside the whole order, I need not comment on this aspect of the case but I would require the Taxing

authority to keep in view the following authorities cited by the learned counsel for the petitioner (1965) 16 S T. C. page 756 and (1970) I. T. R.

Vol. 75 page 285.

(18) The result is that this writ petition succeeds and the entire order of the Assessing Authority dated 1271968 by means of which the petitioner

has been assessed to a sales tax for the year 196465 and 196566 and penalty is quashed arid the Assessing Authority is directed to start the

proceedings afresh and decide them according to law without any influence or interference from his higher officers. There will be no order as to

costs.

