
(1958) 04 RAJ CK 0008

In the Rajasthan High Court

Case No : Civil Writ Cases No's. 29 and 150 of 1957

Jethmal Ramswaroop and Others

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision : 08-04-1958

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Sales Tax Act, 1954 — Section 13, 14, 15

Citation : AIR 1958 Raj 262 : (1959) RLW 605 : (1959) 10 STC 270

Hon'ble Judges : K.N. Wanchoo, C.J.; Jagat Narayan, J

Bench : Division Bench

Advocate : Chandmal, for the Appellant; Kansingh, Deputy Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Wanchoo, C.J.—These are two connected cases under Article 226 of the Constitution and will be disposed of by one judgment as the point raised in them is the same. Case No. 29 is filed by three firms of Balotra, namely Messrs, Jethmal Ram Swarup, Messrs. Bansidhar Hastimal and Messrs. Madholal Rameswarlal. Case No. 150 is also filed by a firm of Balotra, Messrs. Bansidhar Kanmal.

2. The applicants in the two cases prepare Misri, Batasa, Makhana, Ola and toys from sugar and sell them in the market. Their case is that their preparation is really nothing more than sugar and as sales-tax is already paid on the sugar used by them, no further sales-tax can be charged on the articles prepared by them out of sugar. In the alternative, their case is that these articles prepared by them are Deshi sweetmeats which are exempt under serial No. 14 of the Schedule to the Rajasthan Sales Tax Act (No. XXIX of 1954) hereinafter called the Act. Consequently, no sales-tax could be charged on sales of these articles made by them.

The Sales Tax Officer, Barmer, however, called on them to furnish returns of their turnover for the purpose of assessment of sales-tax. They represented to the

Sales Tax Officer that they were not liable to pay any sales-tax on the articles pre-pared by them. The Sales Tax Officer, however, overruled their contention and assessed them on the gross turnover of their business. It seems that these articles are not the only articles in which Messrs. Bansidhar Kanmal are dealing & their claim apparently was that the sales of these articles should not be taken into account in calculating their gross turnover. The Sales Tax Officer, however, reject-ed the contentions of the applicants of both cases and assessed them to sales-tax. Consequently, the present applications were filed in this Court.

3. A preliminary objection has been taken on behalf of the State that this Court should not interfere in Its extraordinary jurisdiction at this stage as the applicants had an equally efficacious and convenient alternative remedy by way of appeal and revision under the Act.

4. Reliance in this connection has been placed on a decision of this Court in Ramniranjan Kedia Vs. The Income Tax Officer, "A" Ward, Udaipur and Others, Now the Act is a special self-contained Act providing for assessment of sales-tax and for remedies to correct wrong assessment.

The assessment is made u/s 10 of the Act. Thereafter an appeal is provided u/s 13 of the Act and any assessee objecting to an assessment may within 60 days from the date on which he was served with a notice of demand appeal to the appellate authority, provided that no appeal shall be entertained unless it is accompanied by a Satisfactory proof of the payment of the tax in respect of which the appeal has been preferred. u/s 14(2) of the Act, the Commissioner of Sales Tax has the power to revise an order on an application made by a dealer within six months of the date of the order.

Then u/s 15 of the Act, the case can be referred to the High Court on the application of a dealer within sixty days from the passing by the Commissioner of any order u/s 14 on any question of law arising out of such order. Thus it will be seen that it is open to a party if he is dissatisfied with an order of assessment to appeal u/s 13. If he is dissatisfied with the appellate order, he can go in revision to the Commissioner. If he is dissatisfied with the revisional order and a question of law arises, he can ask the Commissioner to state a case to this Court. If the Commissioner refuses to state the case, the assessee has a right to apply to the High Court to require the Commissioner to state the case.

5. The question, therefore, that falls for consideration is whether it is open to an assessee to come direct to this Court under Article 226 of the Constitution from an order of assessment without following the procedure provided in the Act. A similar matter came up for consideration before this Court in Ramniranjan Kedia's case (A) under the Income Tax Act.

In that case also Ramniranjan Kedia made an application under Article 226 of the Constitution after the Income Tax Officer had assessed him to Income Tax. It was pointed out there that once an assessment had been made, it could only be corrected by a writ of certiorari and no question of a writ of prohibition arose. It

was also pointed out that a writ of certiorari is a discretionary writ and in a case like the one coming under the Income Tax Act, where there are other remedies open to the assessee including the remedy by coming to the High Court on reference under the Act, there was no reason to interfere at an intermediate stage.

6. We are of opinion that Ramniranjan Kedia's case (A) applies with full force to the facts of this case. Here also the assessment order has been made by the Sales Tax Officer. Remedies by way of appeal, revision and reference to this Court are open to the applicant under the Act. We, therefore, see no reason why we should issue a writ of certiorari which is a discretionary writ at this stage short-circuiting the procedure provided in the Act.

If we were to permit this, it would only be a short step from here to permit writs of certiorari from judgments of trial courts in civil matters direct to this Court under Article 226 of the Constitution short-circuiting the procedure of appeals, second appeals and revisions provided in the Civil P. C. We do not see, therefore, why we should intervene at this stage when it is open to the applicant to take advantage of Sections 13, 14 and 15 of the Act.

7. It was urged on behalf of the applicants that the view taken by this Court in Ramniranjan Kedia Vs. The Income Tax Officer, "A" Ward, Udaipur and Others, has been overruled in view of a recent decision of the Supreme Court in Kailash Nath and Another Vs. State of U.P. and Others, In that case a writ application was filed in the Supreme Court under Article 32 of the Constitution. The question that arose for determination there was whether certain sales were exempt from sales tax in view of certain notification of the Government of Uttar Pradesh under the U. P. Sales Tax Act.

The Supreme Court decided that the sales were exempt and gave relief to the applicant in that case. Learned counsel for the applicants before us urges that that was also a case of exemption and the Supreme Court interfered even though all the remedies provided under the U. P. Sales Tax Act had not been exhausted, particularly the remedy of revision and reference to the High Court.

8. There is a certain amount of similarity between that case and the present cases. We may, however, point out that that was an application under Article 32 of the Constitution. Now Article 32 is in the part relating to fundamental rights and sub- Article (1) of it lays down that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by that Part is guaranteed.

Then comes Sub-Article (2) which gives power to the Supreme Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and cer-tiorari for the enforcement of any of the rights conferred by Part III. It will be seen, therefore, that where a fundamental right is invaded, citizens have a guaranteed right to move the Supreme Court for the enforcement of the right which has been invaded and it is

on that basis that the Supreme Court entertains applications for enforcement of fundamental rights. Article 226, however, is not in the same terms. It merely gives power to the High Court to issue directions, orders or writs for the enforcement of any of the rights conferred by Part III and for any other purpose; but there is no guarantee to the citizen to move the High Court by appropriate proceedings for the enforcement of the rights conferred by Part III. It seems to us, therefore, that a citizen cannot insist that the High Court must give him relief because his fundamental right is involved in the same way as he can insist, resting on his right under Article 32(1) that the Supreme Court should hear him, when he moves it for the enforcement of the rights conferred by Part III.

9. We may in this connection refer to *Romesh Thappar Vs. The State of Madras*, where it was held that Article 32 does not merely confer power on the Supreme Court as Article 226 does on the High Courts to issue writs for the enforcement of the rights conferred by Part III. Article 32 provides a "guaranteed" remedy for the enforcement of those rights and this remedy is made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights.

It is by virtue therefore of the provisions in Article 32(1) that the Supreme Court intervenes whenever a case of infringement of a fundamental, right is brought before it, The case of the High Court is different as is clear from *Romesh Thappar's* case (C). We are, therefore, of opinion that where the vires of any taxing enactment are not challenged and the question is only a question of law, as is said to be the case here, this Court should not intervene, even though the matter relates to payment of money as tax, when alternative remedies under the enactment are open to a party.

Therefore, *Kailashnath's* case (B), in the first place, does not specifically overrule what this Court said in *Ramniranjan Kedia Vs. The Income Tax Officer, "A" Ward, Udaipur and Others*, Further it can be distinguished on the ground that the Supreme Court was there dealing with an application under Article 32. We must, therefore, follow *Ramniranjan Kedia's* case (A) as it has not been overruled, either expressly or by necessary implication by *Kailashnath's* case (B).

10. It was next urged that the provision in Section 13 of the Act which required the assessee to pay up the tax before making the appeal was very onerous and, therefore, the assessee could not have an equally efficacious remedy by proceeding under the Act. Reference in this connection was made to certain observations of the Supreme Court in *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, . That was a case under the C. P. and Rerar Sales Tax Act and the vires of certain parts of the Act were challenged there. We have always held in this Court that where the vires of a fiscal Act are challenged, a writ application will lie. At the end of the judgment, however, in *Himmatlal's* case (D), it was observed as follows at page 406:

"Moreover, the remedy provided by the Act is of an onerous and burdensome character. Before the appellant can avail of it he has to deposit the whole amount of the tax. Such a provision can hardly be described as an adequate alternative remedy."

11. We may point out with respect that these observations were in a sense obiter in that case, for the case related to the vires of certain parts of the law and that matter could never be gone into by the tribunal constituted under the Act itself. It was, therefore, unnecessary in that case to decide the question whether remedy by way of appeal where tax has to be deposited before the appeal is filed was so onerous as not to provide an adequate alternative remedy.

12. However, even if full force is to be given to these observations, which appear with all respect, to be obiter, the question arises whether the mere fact that the Act provides that the tax has to be deposited before an appeal is filed makes the remedy so onerous as to make it an inadequate alternative remedy in every case. This aspect of the matter was not considered by the Supreme Court in *Himmatlal's case* (D), for the obvious reason that the point did not seriously arise in that case, as it was concerned with the vires of the enactment.

We feel, however, that even if this principle is to be applied, it cannot be applied baldly in every case. Suppose that the tax imposed in a particular case is only Rs. 5/-. Can it be said that the law which requires the deposit of tax is so onerous in a case where the tax imposed is only Rs. 5/- as to make the remedy under the law an inadequate alternative remedy? We feel that if this matter of the onerousness of the alternative remedy has to be gone into, the tax actually imposed has also to be taken into account along with the status and circumstances of the assessee before it can be said that the alternative remedy is so onerous as to become inadequate.

It would, in our opinion, be bordering on absurdity to say that merely because Rs. 5/- had to be deposited in the instance given by us, the alternative remedy of appeal was so onerous as to be inadequate. Therefore, even if these observations of the Supreme Court, though they appear to us to be obiter, have to be given full force, we must say that each case will have to be judged on its own merits to decide whether the alternative remedy is so onerous as to become inadequate.

13. We may also mention that in the case of Sales Tax what usually happens is that the dealer realises the tax from the consumer even before he is called upon to file the return. That is why most Sales Tax Acts provide for deposit of tax along with the return according to the return submitted by the dealer (See Section 7 (2) of the Act). This special circumstance has to be borne in mind also in considering the onerousness of the alternative remedy in a Sales Tax Act case.

14. Let us, therefore, turn to the facts of this case. In case No. 29 Messrs. Jethmal Ramswarup have been assessed to a tax of Rs. 494/7/6, Messrs. Bansidhar Hastimal to a tax of Rs. 536/2/6 and Messrs. Madholal Rameshwarlal

to a tax of Rs. 440/2/6. In case No. 150, Messrs. Bansidhar Kanmal have been assessed to a tax of Rs. 404/10/3, We are of opinion that these amounts, which have been taxed on these four firms, cannot be said to be so onerous as to make the appeal after paying them an inadequate alternative remedy.

We are, therefore, of opinion that the preliminary objection succeeds. The applicants had "an alternative remedy by way of appeal u/s 13 of the Act and further remedies under Sections 14 and 15. They have not availed themselves of those remedies. In the circumstances, we should not interfere in our extraordinary jurisdiction.

15. Turning briefly to the merits of the case, we are of opinion that there is no force in the contentions raised by the applicants. Misri, Batasa etc., are not merely sugar and the fact that sales-tax has been paid on sugar is no reason for not levying sales-tax on these articles made from sugar. Nor are we prepared to accept that they are Desi Sweetmeats.

It would be impossible to attempt a definition of Desi sweetmeats. But it is common knowledge that no one in this part of the country would consider Misri, Batasa or toys made of sugar etc., Desi sweetmeats. So they are not exempt under the Schedule.

16. We therefore dismiss the applications with costs.