

(1975) 04 OHC CK 0021

In the Orissa High Court

Case No : Original Jurisdiction Case No. 539 of 1971

K. Jagadish Mitter

APPELLANT

Vs

Revenue Divisional Commissioner, Southern Division and
Others

RESPONDENT

Date of Decision : 17-04-1975

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 222, 232

Citation : (1976) 102 ITR 689

Hon'ble Judges : G.K. Mishra, C.J;P.K. Mohanti, J;N.K. Das, J

Bench : Full Bench

Advocate : R.K. Rath, for the Appellant; Standing Counsel, for the Respondent

Judgement

N.K. Das, J.—This is a petition under Articles 226 and 227 of the Constitution of India to strike down Section 222 of the Income Tax Act, 1961, as ultra vires the Constitution and to quash the proceeding for recovery of the Income Tax dues.

2. The case of the petitioner may be stated as follows : The petitioner purchased some stock-in-trade on July 1, 1963, from M/s. Hunsraj & Brothers which is a defunct firm. On March 29, 1968, he was assessed u/s 144 of the Income Tax Act, 1961 (hereinafter mentioned as "the Act"), to the tune of Rs. 38,454 for the assessment year 1963-64, as the successor of M/s. Hunsraj & Brothers. The demand notice, assessment order, etc., were not served on M/s. Hunsraj & Brothers. Proceeding for recovery of dues was started by the Tax Recovery Officer of Nawarang-pur against the petitioner. He appeared before the Tax Recovery Officer and objected that he was not the successor and was not liable to pay the tax. On January 28, 1969, the objection of the petitioner was overruled on the ground that the validity of the assessment cannot be questioned before the Tax Recovery Officer. Petitioner filed appeal under Rule 86 of the Second Schedule of the Act before the Revenue Divisional Commissioner, Berhampur, which was dismissed on May 15, 1971.

3. In the counter-affidavit by opposite parties 2 and 3 it is, inter alia, contended that the question whether the petitioner is the successor of M/s. Hunsraj & Brothers is a question of fact which cannot be raised in the writ application. The petitioner in his statements before the Assistant Sales Tax Officer, Jeypore, admitted u/s 19 of the Orissa Sales Tax Act, 1947, that the outstanding sales tax liability of the defunct firm should be paid by him. This material was utilised against the petitioner for Income Tax assessment. The petitioner was noticed as successor of the firm u/s 143(2) and 142(1) of the Act which were duly served on him on March 13, 1968, and March 23, 1968, respectively, and the assessment was completed on March 19, 1968. The assessment order and demand notice were also served on the petitioner. The petitioner cannot challenge the assessment which has become final. The petitioner also filed revision before the Additional Commissioner of Income Tax u/s 264(1) of the Act challenging the assessment which was rejected on November 30, 1970.

4. Two points have been raised by Mr. R. K. Rath on behalf of the petitioner--(1) Section 222 of the Act provides recovery of tax under a certificate by the Tax Recovery Officer in accordance with the rules laid down in the Second Schedule. Section 232 provides for institution of civil suit for recovery of the dues. As there are two alternative methods of recovery, the process of recovery through the Tax Recovery Officer being more onerous and disadvantageous to the assessee, exercise of option by the designated authorities to adopt any of the procedures is discriminatory and offends the provisions of Article 14 of the Constitution; (2) the Income Tax authorities acted illegally in assessing the petitioner as successor to the transferor of the business as no notice was served on the transferor-firm for apportionment of the dues and the ownership of the business had not been transferred to the petitioner.

5. Point No. 1 :--Section 232 of the Act is as follows :

" 232. The several modes of recovery specified in this Chapter shall not affect in any way--

(a) any other law for the time being in force relating to the recovery of debts due to Government; or

(b) the right of the Government to institute a suit for the recovery of the arrears due from the assessee ;

and it shall be lawful for the Income Tax Officer or the Government, as the case may be, to have recourse to any such law or suit, notwithstanding that the tax due is being recovered from the assessee by any mode specified in this Chapter."

6. This section gives the option to the Income Tax Officer or the Government to have recourse to a suit notwithstanding that the tax due is being recovered from the assessee by any mode specified in Chapter XVII which relates to collection and recovery of tax.

7. Section 222 runs as follows :

"222. (1) When an assessee is in default or is deemed to be in default in making a payment of tax, the Income Tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee, and the Tax Recovery Officer on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule--

- (a) attachment and sale of the assessee's movable property ;
- (b) attachment and sale of the assessee's immovable property;
- (c) arrest of the assessee and his detention in prison ;
- (d) appointing a receiver for the management of the assessee's movable and immovable properties.

(2) The Income Tax Officer may issue a certificate under Sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

8. Elaborate provisions have been made in the Second Schedule for investigation and reasonable opportunity has been provided for appeal, revision and review. Those provisions embody principles of natural justice analogous to those observed in the trial of a suit.

9. The provisions under the Second Schedule are in pari materia with the provisions embodied in Order 21 of the CPC as well as the provisions of the Public Demands Recovery Act. Rule 86 provides for appeal and revision and Rule 87 makes provision for review. Thus, the provisions for recovery of dues u/s 222 read with the Second Schedule of the Act are not more onerous and disadvantageous to the assessee than the procedure of recovery through civil suit. Though they are not identical, they furnish more or less similar opportunities to the assessee in protection of his interests.

10. In *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, , 2022 their Lordships observed thus :

"Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. Even there a provision for appeal may cure the defect. If from the preamble and surrounding circumstances, as well as the provisions of the statute explained and amplified by affidavits, necessary guidelines could be inferred, the statute will not be hit by Article 14. Then again where the statute itself covers only a class of cases the statute will not be bad. The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not affect the validity of the statute. Therefore, the mere availability of two procedures will not vitiate one of them,

that is the special procedure.

Merely because one procedure provides the forum of a civil court while the other provides the forum of an administrative tribunal, it cannot be said that the latter is necessarily more drastic and onerous. To attract the inhibition of Article 14 there must be substantial and qualitative differences between the two procedures so that one is really and substantially more drastic and prejudicial. Superfine differences are bound to exist when two procedures are prescribed. "

11. This court while considering the provisions of recovery of dues under the State Financial Corporations Act in Civil Ref. No. 1 of 1972 State Financial Corporation Ltd. Vs. Satpathy Brothers and Nanda Co. (P.) Ltd. and Others, , disposed of on March 18, 1975, followed the aforesaid decision and laid down that the choice of alternative procedure is not hit by Article 14 of the Constitution.

12. The present petitioner challenged the procedure of recovery of the sales tax dues under the Public Demands Recovery Act as unconstitutional which came up for consideration before a Full Bench in K. Jagadish Hitter Vs. Revenue Divisional Commissioner, Southern Division, and Others, and it was held that the Orissa Public Demands Recovery Act makes elaborate provisions for execution of the decrees and there are provisions for appeal, revision and review under the Act and consequently held that the procedure for recovery under the Public Demands Recovery Act is not more onerous or harsh and upheld the constitutionality of the mode of recovery u/s 13(7) of the Sales Tax Act.

13. Even though Section 232 provides institution of a civil suit, provision of Section 222 for alternative mode of recovery cannot be said to be offending Article 14 of the Constitution.

14. Point No. 2:--It is contended by Mr. Rath that the petitioner only purchased the stock-in-trade and the ownership of the firm was not transferred to him and according to Section 170 of the Act he can be assessed only if he has succeeded to the ownership of the firm and if the predecessor-firm cannot be found out by the department.

15. It is contended by the petitioner that notice should have been served on the transferor-firm so as to apportion and quantify the amount of assessment. In the assessment proceeding, notice was served on the petitioner on the footing that he was the transferee. Whether he merely purchased the stock-in-trade or was the transferee is a question of fact to be determined by the assessing authority. The petitioner not having raised objection on a question of fact at that stage, cannot raise it in the writ application. This point fails.

16. In the result, both the points raised by the petitioner fail and the writ petition is dismissed with costs.

G.K. Mishra, C.J.

17. I agree.

P.K. Mohanty, J.

18. I agree.