

(1958) 11 OHC CK 0014
In the Orissa High Court
Case No : Second Appeal No. 205 of 1954

Kisanlal Kotari

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 01-11-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 226 , 227
Evidence Act, 1872 — Section 101 , 102, 103, 104
Sea Customs Act, 1878 — Section 19
Stamp Act, 1899 — Article 46, 40, 45, 56, 57

Citation : AIR 1959 Ori 144 : (1959) 25 CLT 381

Hon'ble Judges : S.P. Mohapatra, J;S. Barman, J

Bench : Division Bench

Advocate : M.S. Rao, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

S.P. Mohapatra, J.—This is a plaintiff's second appeal against the judgment and decree dated 3-5-1954 of Sri C. Mohapatra, Additional Subordinate Judge of Berhampur confirming a decision of the Munsif of Berhampur arising out of a suit for recovery of stamp duty and penalty realised by the Collector of Ganjam in exercise of his powers under the Indian Stamp Act. The plaintiff had filed a S. C. C. suit before the Munsif of Berhampur wherein he relied upon a deed which was framed as one for dissolution of partnership.

It not having been stamped, the document was sent to the Collector of Ganjam for realisation of stamp duty and penalty. The Collector thereon having construed the document as one for partnership called upon the plaintiff to pay a sum of Rs. 223/4 towards deficit stamp-duty and penalty. The plaintiff avers that the document is one for dissolution of partnership and as such he is liable to pay only Rs. 55/- as stamp-duty and penalty. He, therefore, after service of notice u/s 80, Civil Procedure Code, has brought the present suit for refund of the balance amount deducting the sum of Rs. 55/-from out of the money paid by him in

favour of the Collector, that is, Rs. 223/4, on the ground of illegal exaction of stamp-duty and penalty.

2. The learned trial court found that the document was really one for dissolution of partnership; but he dismissed the suit on the ground that the Civil Court had no jurisdiction to set aside the order of the Collector calling upon the plaintiff under the Stamp Act to pay the deficit stamp-duty and penalty. The lower appellate Court, however, has confirmed the view of the trial court that the Civil Court has no jurisdiction.

3. The main point argued by Mr. M. S. Rao, appearing on behalf of the plaintiff-appellant, is that the Civil Court has jurisdiction to entertain a suit of this nature. Before coming to examine the disputed point, I will refer to a few relevant sections of the Stamp Act in order to fully appreciate the implications of the point of controversy. Chapter IV of the Stamp Act deals with "Instruments not duly stamped." Section 33 empowers the authority, before whom an unstamped document is produced and who is entitled to take evidence, to impound the document. Section 35 provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having the authority to receive evidence unless such an instrument is duly stamped.

The proviso to the section recites that such instrument is to be admitted into evidence on payment of the duty, with which the document is chargeable and penalty or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with penalty. The next relevant section is Section 40 conferring upon the Collector of the district powers to examine as to whether an instrument sent to him under the provisions of Sections 33 or 38 is chargeable with duty, and if the Collector is of opinion that the instrument is duly stamped or is not chargeable with duty he shall certify by endorsement on the document that it is so duly stamped or that it is not so chargeable, as the case may be.

It further provides that if the Collector is of the opinion that such an instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same together with penalty. Sub-section (2) provides that a certificate under Clause (a) of Sub-section (1) shall, for the purposes of this Act, be the conclusive proof of the matter stated therein. Section 45 makes provisions for the Chief Controlling Revenue Authority to receive application in writing made within one year from the date of payment of stamp-duty and penalty to reconsider the matter and the section empowers the Chief Controlling Revenue Authority to pass an order for refund of such penalty wholly or in part. Sub-section (2) of the said section recites that if in the opinion of the Chief Controlling Revenue Authority stamp-duty in excess of that which is legally chargeable has been charged and paid u/s 35 or Section 40, such authority may, upon application made within three months of the order, refund the excess. The most important section for our purpose is Section 57 which runs as follows :

"57, (1) The Chief Controlling Revenue Authority may state any case referred to it u/s 56, Sub-section (2), or otherwise coming to its notice, and refer such case with its own opinion thereon :

(a) if it arises in Part A State, to the High Court of that State"

Section 56(2) runs as follows:

"If any Collector, acting u/s 31, Section 40, or Section 47, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority.

(3) Such authority shall consider the case and send a copy of its decision to the Collector who shall proceed to assess and charge the duty (if any) in conformity with such decision."

4. From the foregoing sections it appears that a special machinery is provided for in the Act for determination of the legal dues payable by a person producing a document which is unstamped or insufficiently stamped. What is important to note in this connection is that there is no express provision within the four corners of the Act ousting the jurisdiction of the Civil Court, nor even is there any provision making the order of the Collector or of the Chief Controlling Revenue Authority final. The principle has been very well settled and well recognised for a fairly long period and I should only quote a decision of their Lordships of the Bombay High Court reported in *Balwant Ramchandra v. Secretary of State* ILR 29 Bom 480 the decision being of the year 1905. Their Lordships enunciated in very clear and unambiguous terms and the pronouncement still holds good today as good law:

"The general principle is against construing a statute as ousting or restricting the jurisdiction of the superior Courts. The intention must be expressed in clear terms, not merely implied, but necessarily implied; the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Act of Parliament. Such statutes are to be strictly construed when their language is doubtful. A construction which would impliedly create a new jurisdiction is to be avoided specially where it would have the effect of depriving the subject of his freehold or of any common law right, or of creating an arbitrary procedure. No doubt when a power has been conferred in unambiguous language by statute, the Courts cannot interfere with its exercise and substitute their own discretion for that of persons or bodies selected by the Legislature for the purpose. Nor does any presumption arise against the finality of a decision by an authority with statutory powers to pronounce in respect of a duty or liability created by the statute"".

This was a case under the Forest Act and the final decision was that the Act did not oust the jurisdiction of the Civil Courts after discussion of several sections of the said Act. It is therefore clear, the powers of the Parliament or the appropriate

Legislature are wide enough to provide in a statute ousting the jurisdiction of the ordinary courts of law in express terms. In the absence of such express terms, it is the duty of the Court to determine, on examination of the provisions of the particular statute, as to whether ousting of jurisdiction of the ordinary Courts of law is necessarily implied, and the Legislature in framing the Act did so intend.

5. We will now take up a similar case coming under the provisions of Central Excises and Salt Act reported in *Union of India v. Vitappa Kamath* AIR 1957 Mad 110. In the second appeal before their Lordships the appellant was the Union of India, represented by the Secretary, Ministry of Finance, Government of India, and the question that arose was whether a Civil Court has pot jurisdiction to order refund of the amount alleged to have been illegally collected under the Central Excises and Salt Act on betelnuts and secondly whether on the facts of the case there has been such illegal collection. Their Lordships on a review of several cases on the point and the provisions of the Act, observed:

"But it seems to us that the Income Tax Act and the Central Excises and Salt Act are not ad idem with regard to the provisions thereof. There is much greater similarity between Sections 17 and 19 of the Madras General Sales Tax Act and Section 40 of the Central Excises and Salt Act and if according to the Madras General Sales-tax Act a suit would lie in respect of illegal levy, we see no reason why there should not be a suit with regard to illegal collection of tax under the Central Excises and Salt Act as well".

Their Lordships following the previous decision of the same Court held that the Civil Court had jurisdiction to entertain a suit with regard to illegal recovery of Central Excise duty. It is important to note chat under the said Act a similar machinery has been provided for in several sections for determination of the duty leviable against the citizens and particularly in Section 35 the Collector's order has been made final. But in spite of it their Lordships came to the conclusion that the Civil Court had jurisdiction to entertain a suit for recovery and refund of the money on the basis of that the exaction was illegal.

6. A few other decisions on Sea Customs Act also were placed before us, but it will be needless to refer to those decisions in view of the recent decision of their Lordships of the Privy Council reported in AIR 1940 105 (Privy Council) . In our opinion we may receive some guidance from the principles discussed and enunciated by their Lordships of the Privy Council in that case even though the final conclusion of their Lordships was to the effect that the Civil Court's jurisdiction was ousted as necessarily implied by the provisions of the Act. As it appears at page 110 of the report, their Lordships observed as follows:

"It is now necessary to determine whether the order of the Collector of Customs, dated 20-6-1933, which dismissed the appeal u/s 188, and which was confirmed by the Governor General in Council on an application u/s 191, excludes the jurisdiction of the Civil Courts to entertain a challenge of the merits of that decision. It is settled law that the exclusion of the jurisdiction of the Civil Courts

is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not; acted in conformity with the fundamental principles of judicial procedure. Many of the cases referred to in the judgments below are of this nature, and are not relevant to the present case, in which there are no allegations of that nature. Section 188 provides that every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final".

After quoting the provision of Section 188 of the Sea Customs Act their Lordships interpreted the provisions of Sections 188 and 191 of the Act in the following terms:

"By Sections 182 and 191 a precise and self-contained code of appeal is provided in regard to obligation which are created by the statute itself, and it enables the appeal to be carried to the supreme head of the executive Government. It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the Civil Courts".

It is clear from these observations, their Lordships of the Privy Council were very much impressed by the feature of the said Act (Sea Customs ACT) that the aggrieved party had the right to approach the supreme head of the Government of India, that is, Governor General, who was conferred with the powers of revision under the Act. From this main reason their Lordships had to conclude that the remedies of the party were confined to the provisions of the Act itself and the provisions necessarily implied exclusion of jurisdiction of the Civil Courts. Their Lordships were further impressed by another feature that a finality clause was attached to the order of appeal passed by the Collector u/s 188.

It appears therefore that the party had the right of appeal to the Collector and further that he could approach the Governor General of India to revise the order passed in appeal. But nevertheless, as I have quoted above, their Lordships recognised the very well known principle and pronounced it in very clearest terms that the exclusion of jurisdiction of the Civil Courts was not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. Even if the jurisdiction is so excluded the Civil Courts had jurisdiction to examine in cases where the provisions of the Act had not been complied with or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure. Another point arose whether before a party could go up in appeal he could resort to the Civil Courts. The question remains undetermined by their Lordships. The observation is as follows:

"Their Lordships are of opinion that in this case the jurisdiction of the Civil Courts is excluded by the order of the Collector of Customs on the appeal u/s 188, and it is necessary to consider whether prior to taking such appeal u/s 188 the respondents would have been entitled to resort to the Civil Courts, or whether

they would have been confined to the right of appeal u/s 188."

7. In the present case under the Stamp Act the most striking point of distinction is that there is no such remedy by way of revision to the supreme head of the Government of India as contained in Section 19 of the Sea Customs Act which impressed their Lordships of the Privy Council. Moreover as I have already indicated, there is no specific clause attaching finality to the order of the Collector. It may be mentioned here, immediately after the order of the Collector the party has come to the Civil Court and the Chief Controlling Revenue Authority was not approached. Following the general principle, therefore, we are definitely of the view that the Act does not exclude the jurisdiction of the Civil Courts.

8. We may also note that when there has been an illegal exaction of the stamp duty and penalty, the aggrieved party ordinarily has got his right to approach the Civil Court to get his redress on proof of the position that the exaction was illegal and the presumption is that the Civil Court has jurisdiction to entertain and determine. The onus is always on the defendant to show that the jurisdiction of the civil court is ousted or that some other court has exclusive jurisdiction to entertain and determine the position.

The learned Standing Counsel appearing on behalf of the State, however, has argued on the basis of Section 57 of the Stamp Act and in support of the argument he has placed special reliance on a decision of the Supreme Court reported in Chief Controlling Revenue Authority v. Maharashtra Sugar Mills, AIR 1950 SC 218. I have already quoted Section 57 of the Act which provides that the Chief Controlling Revenue Authority may state any case referred to him u/s 56(2) or otherwise coming to its notice and refer such a case with its own opinion to the High Court. The contention on behalf of the State is that a citizen is not entirely at the mercy of the Chief Controlling Revenue Authority but has a right to approach the High Court to compel the C. C. Revenue Authority to state a case u/s 57. The Supreme Court decision is in support of this contention. Their Lordships of the Supreme Court, in this case coming from Bombay High Court which was reported in AIR 1948 Bom 254, Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd., decided:

"The power to make a reference u/s 57 is not only for the benefit of the C. C. R. A. but enures also for the benefit of the party affected by the assessment and can be demanded to be used also by such a party. It is coupled with a duty cast on him, as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so it is within the power of the Court to direct him to discharge that duty and make a reference to the Court".

This view was taken by their Lordships of the Bombay High Court and was confirmed by their Lordships of the Supreme Court. The view is entitled to the highest respect; but we must observe that it does not affect the determination of

our present case. The Bombay High Court exercised their writ jurisdiction in calling upon the Chief Controlling Revenue Authority to make a statement u/s 57 of the Act.

Before our Indian Constitution came into force the three Presidency High Courts of Calcutta, Bombay and Madras and after the Constitution came into force" all the High Courts in India can, in exercise of their writ jurisdiction, call upon the Chief Controlling Revenue Authority to make a statement u/s 57. But in our opinion, simply because a citizen has got his remedy by way of invoking the jurisdiction of the High Courts under Articles 226 and 227 of the Constitution, it can never be accepted that the jurisdiction of the Civil Courts is ousted. To accept such a proposition that in a case where a party can approach the High Court to invoke its jurisdiction under Articles 226 and 227 of the Constitution, the Civil Court has no jurisdiction to entertain a suit, will lead to very dangerous complication.

There is another aspect which is worth being considered for determination of the present point of controversy. Prior to the constitution coming into force, it is only the High Courts of Calcutta, Bombay and Madras who could call the C. C. Revenue Authority to make a statement u/s 57 and if at that time prior to the operation of the Constitution in any other part of the Country such a question would arise the party would be entirely at the mercy of the C. C. Revenue Authority. Therefore it cannot be suggested that the provisions of the Act necessarily implied the jurisdiction of the Civil Court where ordinarily the party has got the right to place his grievances of illegal exaction and get it determined after fully canvassing the point. The interpretation of the Stamp Act differs on account of coming into force of the Indian Constitution empowering the High Courts with special jurisdiction under Articles 226 and 227. In our view, therefore, the Courts below were wrong in dismissing the suit on the ground that the Civil Court had no jurisdiction.

9. The standing counsel has also placed much reliance on a decision of the Allahabad High Court reported in *Municipal Board Vs. Abdul Aziz Khan* .

"Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute. Apart from the special penalty imposed for the non-payment of the octroi dues, the right to recover which has been created by the Act itself, there is therefore no further and additional right to recover the same by suit."

The head note standing by itself may be deceptive without reference to the facts and special features of the Act under consideration of their Lordships. It was a revision by the Municipal Board through its Chairman who was a plaintiff in a suit for recovery of certain octroi dues alleged to be payable by the defendants on

account of their introducing within the Municipal limits on cart loads of bricks without paying the proper duty. The defendants took the plea that a suit of this nature was not maintainable in the Civil Court. Their Lordships first observed,

"The question mainly is one of an interpretation of the Sections of the Municipal Act."

Subsequently their Lordships observed:

"Chapter 5, Municipalities Act, deals with imposition and alteration of taxes. Section 128 confers the right of Municipal Boards to impose taxes including an octroi on goods or animals brought within the Municipality for consumption or use therein. Section 153 confers power on the Board to make rules in order to regulate certain matters including assessment, collection or composition of taxes and, in the case of octroi or toll, the determination of octroi or toll limits."

Section 154 of the Municipalities Act confers power to fix octroi limits. The significant feature in that case was that in the exercise of its power the Municipal Board had framed rules contained in Chap. 10 of the Municipal Account Code regulating how octroi dues are to be assessed and collected and how there have to be octroi barriers. It is further significant to note, their Lordships observed:

"Thus, in these other cases, although a special procedure is prescribed for the recovery of the Municipal claims which are speedy and effective, the Legislature has taken care to provide that instead of proceeding in that way, the Board may sue the person liable to pay the same in any court of competent jurisdiction."

This observation is based upon Section 176 of the Act, The important distinction between octroi dues and some other taxes is that whereas in respect of other taxes there is a special provision in the Act empowering the Municipal Board to choose the alternative remedy by way of suit, such a provision is absent in the case of octroi dues for which rules had been framed for fixation and realisation. Finally their Lordships therefore observed:

"The fact remains that the right to make the demand find recover the octroi dues has been conferred on the Municipal Board by the Municipalities Act & did not exist independently of it. The Legislature has prescribed a penalty for non-payment of such dues. Although it is expressly laid down that a suit would lie for recovery of other taxes, there is no such express mention as regards other duties.

* * * * * "It therefore seems to us that having regard to the general scheme of the Municipalities Act, it was not intended by the Legislature that apart from the special penalty imposed for the non-payment of such dues, the right to recover which has been created by the Act itself, there should be a further and additional right to recover the same by suit"

The case, therefore, is clearly distinguishable as in that case it was the Municipal Board who was a plaintiff for recovery of octroi dues in a civil suit.

Even though a special remedy was provided for in the rules framed in accordance

with the statute for recovery of the same and even though an alternative remedy was provided for in respect of other taxes by way of a suit, such a remedy was not provided for in the case of Octroi dues. This case would have been relevant for consideration if the Collector would have been the plaintiff for realisation of the, stamp duty in the Civil suit. The instant case stands entirely on a different footing as the cause of action is illegal exaction of the penalty and the stamp duty. In our opinion, in the case of an illegal, exaction, a citizen has always the remedy by way of invoking in suit the jurisdiction of competent courts of law unless such a remedy is expressly denied to him by the provisions of a particular statute or the ouster of the jurisdiction of the Civil Courts is necessarily implied.

We may make it clear, no general principle can be laid down and that each case will be determined on construction of the provisions of the particular statute under consideration. Our final conclusion is that the suit is maintainable and the Courts below have gone wrong in dismissing the suit on the ground that the Civil Court had no jurisdiction to entertain a suit of this nature.

10. Coming to the document itself, the trial Court had found that the document was one for dissolution of partnership and not a deed of partnership. The position is not controverted before us. I have gone through the document myself and I am of the definite view that no second opinion is possible. After adjustment of the dues of each of the two parties to the document it is finally recited "From this day onward each party should enjoy and bear loss and profit in any transaction and have no concern a whatever with their business (borrowing in or giving loans)." I am surprised, how the Collector could construe the document as one for partnership.

11. On the basis that it is a document for dissolution of partnership, it was agreed by the learned Advocates appearing on both sides before us that the plaintiff was entitled to recover a sum of Rs. 85/12, It is accordingly ordered that the appeal is allowed, the plaintiff's suit is partly decreed, that is "to say, the plaintiff is entitled to recover a sum of Rs. 85-12 (Rs. eighty-five and annas twelve only) from the defendant. The judgments and decrees passed by the Courts below are set aside and the plaintiff is entitled to proportionate costs throughout, and the hearing fee of this Court which is assessed at Rs. 150/- (rupees one hundred and fifty only).

Barman, J.

12. I agree.