
(1995) 03 MP CK 0079
In the Madhya Pradesh High Court
Case No : M.P. No. 3340 of 1989

Lachhmandas

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 24-03-1995

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1995) 2 MPJR 20

Hon'ble Judges : U.L. Bhatt, C.J.;Rajeev Gupta, J

Bench : Division Bench

Advocate : P.M. Choudhary, for the Appellant; Sanjay Seth, G. A., for the Respondent

Final Decision : Dismissed

Judgement

U.L. Bhat, C.J.

Common Questions arise for consideration in these cases. Hence, common arguments are heard and the cases are being disposed of by common order.

Petitioner in M.P. No. 3340 of 1989 carries on business in purchase and sale of utensils. Petition relates to assessment under the M.P. General Sales Tax Act, 1958 (for short, the State Act) for the period 13.11.1985 to 2.11.1986. He is a registered dealer under the State Act. Sales Tax Officer completed the assessment on the basis of the report of the Flying Squad. According to the petitioner, though he maintained true and correct accounts and submitted true and correct returns. S.T.O. issued notice in Form - XVI dated 6.11.1987 against proposed assessment and levy of penalty u/s 43(1). Notice proposed levy of penalty under Sec. 17(3) and assessment under Sec. 18 (4) of the State Act. The petitioners contended that the notice was illegal as it was issued without application of mind, that the petitioner was not supplied copy of the report of the Flying Squad and was denied opportunity to effectively meet the case of the Department. Assessment was completed by order date 24.2.1989 levying penalty

of Rs. 24,000/- u/s 43 (1) for alleged concealment of turn over and submission of false return. Assessment was completed long after period of limitation u/s 18 of the Act was over. This was done on account of extension of time granted under notification dated 26.12.1988 which is challenged as illegal since the notification is untravires the powers of the State Government. On the basis of the above submissions, the petitioner contends that the notice and assessment are liable to be quashed. The further contention is that Sec. 38 (3) (o) of the State Act is arbitrary and unconstitutional as also the notification dated 26.12.1988. similar are the contentions of the petitioners in other writ petitions. On behalf of the respondents, return has been filed.

Learned counsel for the petitioners submitted that though the petitioners did not file appeals against assessment orders as they are required to deposit a pan of the amount due and they have preferred revision petitions and the same are pending and, therefore, the contentions raised in the writ petitions regarding the invaliding of the show cause notices and the assessment orders will he perused in the revision petitions and not in these writ petitions. Learned counsel confined arguments to the following points :

- (i) Section 38 (3) (e) of the States Act is arbitrary and unconstitutional.
- (ii) Section 18 (sic) of the State Act is ultra-vires the Constitution.
- (iii) Notification dated 26.12.1988 is ultra-vires the powers of the State Government.

POINT NO. (i)

Section 38 of the Stale Act contains the provisions of appeal against the order of assessment u/s 18, order of re-assessment u/s 19 or 19-A with or without penalty and order imposing penalty or relating to refund u/s 24 or order u/s 25. Sub-Sec. (1) States that any dealer or person objecting to such orders may in the prescribed manner, may appeal against such order to the Deputy Appellate Commissioner of Sales Tax. Sub-section (2) of Section 38 of the State Act contains the provision for second appeal to the Tribunal. Sub-section (3) of Section 38 reads thus :

No first or second appeal against an order of assessment, with or without penalty or against an order imposing penalty shall be admitted by the appellate authority unless out of the total balance due from the dealer -

(a) Where all returns for the period to which the order appealed against relates have been filed and tax payable according to such returns has been paid, one-tenth of such balance;

(b) where one or more of the returns for the poriod for which the order appealed against relates have not been filed and tax has not been paid or where such return or returns have been filed but tax has not been paid -

(i) one-third of such balance; or

(ii) such part thereof as bears the same proportion to the total balance due as the period for which the returns have not been submitted bears to the period for which the assessment has been made not exceeding seventy five per cent of such balance,

Whichever is more;

(c) where a penalty u/s 43 has been imposed, one half of such balance;

(d) where the order appealed against has been passed u/s 19 and a penalty has been imposed under the said section, one half of such balance, and

(e) in any other case, one-fourth of such balance; is paid and the memorandum of appeal is accompanied by satisfactory proof of payment of such amount and thereupon the appellate authority shall stay the recovery of the balance of tax and /or penalty till the decision of appeal; Provided that where a dealer is covered by more than one of the aforesaid clauses, the provisions of the clause requiring the payment of the highest amount, shall apply to such dealer and the first or the second appeal shall be admitted only after he has paid such amount.

In order that first and second appeal be admitted, it is obligatory for the appellate to pay a part of the balance of the tax or panalty payable under the order impugned. According to sub-clause (o) which is attracted in these cases, appeal cannot be admitted unless 50% of the balance amount is paid and the memorandum of appeal is accompanied by satisfactory proof of payment. Thereupon, the appellate authority shall stay recovery of balance and/or penalty till the decision of the appeal. Constitutionality of section 38 (3) (o) is under challenge,

Section 43 of the State Act empowers the Commissioner or appellate authority to impose penalty on satisfaction that a dealer has concealed his turnover or aggregate of purchase prices or furnished inadequate particulars of sales and purchases or furnish a false return. This can be done only after giving a dealer reasonable opportunity of being heard. According to learned counsel for the petitioners, that statute confers a wide discretion on the statutory authority to impose penalty and very often this discretion is abused and heavy penalty is imposed and therefore, the provision compelling the appellant to deposit 50% of the balance amount for securing admission of the appeal is oppressive and arbitrary and renders the provisions of appeal illusory. It is on the basis of this reasoning that the provision is challenged.

We may in this connection refer to the decision in *M/s Babubhai and Company and others vs. State of Gujarat* (1) where the provision in the Bombay Town Planning Act conferring discretion upon the local authority in the matter of summary eviction without any guidelines being prescribed and without a provision for appeal was challenged. Supreme Court observed :

It cannot be disputed that the absence of a provision for a corrective machinery by way of appeal or revision to a superior authority to rectify an adverse order

passed by an authority or body on whom the power is conferred may indicate that the power so conferred is unreasonable or arbitrary but it is obvious that providing such corrective machinery is only one of the several ways in which the power could be checked or controlled and its absence will be one of the factors to be considered along with several others before coming to the conclusion that the power so conferred is unreasonable or arbitrary. In other words, mere absence of a corrective machinery by way of appeal or revision by itself would not make the power unreasonable or arbitrary, much less, would render the provision invalid. Regard will have to be had to several factors such as, on whom the power is conferred whether on a high officer or a petty officer, what is the nature of the power whether the exercise thereof depends upon the subjective satisfaction of the authority or body on whom it is conferred or is it to be exercised objectively by reference to some existing facts or tests, whether or not it is a quasi-judicial power requiring that authority or body to observe principles of natural justice and make a speaking order etc; the last mentioned factor particularly ensures application of mind on the part of the authority or body only to pertinent or germane material on record excluding the extraneous or irrelevant and also subject the orders of the authority or body to a judicial review under the writ jurisdiction of the Court on grounds of perversity, extraneous influence, sulphides and other blatant infirmities. Moreover, all these factors will have to be considered in the light of the scheme of the enactment and the purpose intended to be achieved by the concerned provision. The Court noticed that power in that case was required to be exercised by a responsible body in an objective manner, the power being quasi-judicial power implied that it be exercised only after observing principles of natural justice and the requirements of passing of speaking order implied giving reasons which ensured consideration of only germane or other materials. On these grounds, the court sustained the validity of the impugned provision.

Learned counsel for the petitioners placed strong reliance on the decision by High Court in *Manoranjan Chakraborty vs. State of Tripura and another* (1) where a similar provision in the Tripura Sales Tax Act was held to be ultra-vires Art. 14 of the Constitution. The Court noticed that very wide powers have been conferred on the Superintendent of Taxes in the matter of levy of tax and imposition of penalty on dealers and the discretion vested in him is enormous. The consequences and effect of an order of assessment or penalty passed by him are very serious, namely, the dealer shall have to pay within the time specified in the notice of demand at least 50% of the demand made and without making such a deposit, he cannot approach the authority to seek relief against arbitrary or illegal order. Therefore, the Court took the view that the corrective machinery by way of appeal or a revision is not effective and the power to levy tax or penalty conferred on an officer without such effective corrective machinery is unreasonable, oppressive and uncontrolled. The Court was led to this conclusion mainly by its perception that cases where huge demand had been raised on account of tax or penalty by erroneous interpretation of law or by arbitrary

exercise of powers are not few of far between and day in and day out one came across such cases. The Court also noticed that it had dealt earlier with cases where sales tax had been levied on transactions which did not involve sale and on industries which were exempted. This perception largely contributed in persuading the Court to take the view which it did.

In *D.K. Trivedi and Sons vs. State of Gujarat* (1), The Supreme Court held that whom a statute confers discretionary power upon the executive authority, the validity of such power cannot be judged on the assumption that the executive will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive acts arbitrarily, its action would be bad in law and liable to be struck down by the Courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power or the power which has been conferred by it. Thus, the approach of the Guwahati High Court, with great respect, does not appear to be correct.

Learned Government Advocate placed reliance on a decision of the Nagpur High Court in *Nemkumar v. C.S.T. Madhya Pradesh* (2) where challenge against Section 22 (1) of the Sales Tax Act was repelled. The Provision imposed a condition of payment of tax with penalty, if any, before appeal is admitted. The Court held that a person has no inherent right of appeal, that the right which is a creature of the statute and is therefore subject to conditions and restrictions imposed on it and it is open to Legislature to give or not to give a right of appeal against decisions made by the authorities under the Act.

A Full Bench of Kerala High Court in *Sundari Bai vs. State of Kerala* (3), considered and upheld a similar provision in Kerala Building Tax Act.

In *Anant Mills vs. Municipal Corporation, Ahmedabad* (4). the Court upheld the constitutionality of a statutory provision which barred entertainment of an appeal unless the amount demanded from the appellant has been deposited by him. The provision contained a proviso enabling the Judge to mitigate hardship in appropriate cases. The Supreme Court held in paragraph 40 that the requirement of deposit of the amount is a condition precedent for the entertainment of the appeal and has not the effect of nullifying right to the appeal. The Court observed :

All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time, prevents the delay in the payment of tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as in offensive to the principles of equality enshrined in Art. 14 of the Constitution.....We fail to understand and as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of

such right. In the absence of any special reasons, there appears to be no legal or constitutional impediment to the imposition of such conditions..... such conditions merely regulate the exercise of the right of appeal so that the same is not abused by recalcitrant parties and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid place of legislation and we can discern no contravention of Art. 14 in it.

(emphasis supplied)

In *Nand Lal vs. State of Haryana* (1), the Court upheld the constitutionality of the provision in Haryana Ceiling on Land Holding Act which prescribed a condition of depositing a sum equal to 30 times the land holdings tax payable in respect of the disputed area before any appeal or revision is entertained. The Court held that :

It is well settled by several decisions that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory..... Counsel for the appellants, however, urged that the conditions imposed should be regarded as unreasonably onerous especially when no discretion has been left with the appellate or provisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases, and, therefore, the fetter imposed must be regarded as un-constitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolous appeals and revisions that impede the implementation of the ceiling policy; secondly, having regard to sub-section (8) and (9) it is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing manse profits from the person who is ultimately found to be in unlawful possession of the land; thirdly, the deposit or the guarantee is correlated to the land holdings tax (30 times the tax) which, we are informed, varies in the state of Haryana around a paltry amount of Rs. 8 per acre annually fourthly, the deposit to be made or bank guarantee to be furnished is confined to the land holdings tax payable in respect of the disputed area; i.e. the area or part thereof which is declared surplus after leaving the permissible area to the appellant or petitioner. Having regard to those aspects, particularly the meagre rate of the annual land tax payable, the fetter imposed on the right of appeal / revision, even in the absence of a provision conferring discretion on the appellate / provisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable.

(Emphasis supplied)

In *Shyam Kishore vs. Municipal Corporation of Delhi* (1), the Supreme Court considered a provision of Delhi Municipal Corporation Act laying down that no appeal shall be heard or determined unless the amount in dispute in the appeal has been deposited by the appellant. After referring to the decision in *Anant Mills Co. Ltd. vs. State of Gujarat* (2) and other decisions the Court gave a broad interpretation to the provision and held that the bar was only against hearing or determination of the appeal and not admitting or entertaining the appeal and therefore, the provision was constitutionally valid. By virtue of the broad interpretation, it was held that interim orders could be passed before final hearing even without deposit.

The right of appeal is a statutory right. It is open to the legislature to provide for a remedy of appeal and also impose conditions in the matter of exercise of that right. The possibility of the lower authority passing a perverse order imposing a disproportionately heavy penalty is only a possibility of abusing of power. Such a possibility cannot be taken into consideration in testing whether right of appeal provided is effective or illusory. The requirement is not to deposit the entire amount due, but only a part of the balance due. It cannot be said that huge or disproportionate amounts are required to be deposited as condition precedent. It is true that there is no discretion granted to the appellate authority to relax the condition. But this is of no moment in view of several factors, namely, the satisfaction of the taxing officer is required to be objective, opportunity to show cause is required to be granted, the officer has to pass a reasoned order, and the deposit required is not of the entire balance but only a part of it. The provision is regulatory in nature and is not oppressive or arbitrary.

POINT NO. (ii)

Section 18 of the State Act deals with assessment of tax. Sub-section (8) of Section 18 prescribes the period within which assessment is to be made in different cases. Clause (i) of sub-section (8) which is relevant for the purpose reads thus:

8. The assessment shall be made under this section.

(i) in respect of a registered dealer and a dealer referred to in clause (b) of sub-section (6), within a period of two calendar years from the end of the period for which assessment is to be made.

Proviso (a) requires that where a fresh assessment has to be made to give effect to any finding or direction contained in any order u/s 38, 39 or 44 or to any order of any court, the assessment shall be made within a period of two calendar years from the date of the order containing such finding or direction or the order of any Court and in case fresh assessment is not made within the specified period, the Commissioner shall take steps to ensure that assessment is made as expeditiously as possible.

By M.P. Ordinance No. 10/88, sub-sec. (9) has been substituted, sub-sec. (9)

reads as follows :

Notwithstanding anything contained in sub-section (8), where assessment proceedings in respect of any dealer relating to any year can not be completed before the expiry of the period specified therefor in the said sub Section the State Government may, by notification, for reasons in be recorded in writing, extend the period for the completion of the assessment proceedings in respect of such dealer by such further period as may be specified in such notification.

Learned counsel for the petitioners contended that the period for completion of assessment is fixed statutorily in order to give expeditious finality to the proceedings so that the democle's sword may not hand over the head of the assesses indefinitely and it is an eminently reasonable provision affording protection to the assesses and the core of the protection is sought to be taken away by sub-section (9), that sub-section (9) confers arbitrary and unguided power on the State Government, that it does not furnish any guidelines to the State Government in the exercise of its power and, therefore, it is arbitrary. The answer of the learned Government Advocate is that this is only a machinery provision for the purpose of completion of assessment, that the scheme of the Act and the provisions itself contain implied guidelines and therefore, the provision does not confer untrammelled or unguided power on the State Government, that conferment of the power on a high authority such as State Government is reasonable. The learned counsel for the petitioners pointed out that during subsequent years, State Government had issued series of orders extending the period. However, learned Government Advocate pointed out that these extensions were only for a short periods of 2 to 4 months.

Sub-section (8) is a provision for the purpose of completing assessment. The prescribed period for completion of assessment is a period of two calendar years Sub-section (9) enables the State Government for reasons to be recorded in writing to extend the period for completion of assessment by a further period as may be specified, there assessment proceedings in respect of any dealer relating of any year cannot be completed before expiry of the prescribed period. The principle of expeditious completion of assessment reflected in sub-section (8) is, in no way, stultified by sub-section (9). On a reading of sub-section (9), it is not possible to accept that the Legislature has conferred on the State Government unbridled and uncanalised discretion to extend the period for any irrelevant reason. Sub-sec. (9) of course does not contain express guidelines but the scheme of the provision contained in sub-sections (8) and (9) and the language of sub-section (9) clearly spell out guidelines. The Government while acting under sub-section (9) must have regard to the mandate of sub-sec. (8) regarding early or expeditious completion of assessment. It must also consider whether assessment proceedings can not be completed, within the period and if it decides to extend the period, must record reasons. The word "reason" connotes a statement of fact as would reasonably justify the conclusion. See *Garg Trading Co. Vs. S.T. O.* (1). Conclusion is a judgment arrived at by

reasoning, inference or deduction. The reason must be relevant and must have foundation. It must be connected with the inability to complete the assessment as can be spelled out from the words "cannot be completed/ It is, therefore, clear that guidelines in the matter of exercise of statutory power by the State Government are implicit. We reject the contention that sub-section (9) confers arbitrary and unguided power on the State Government.

POINT No. (iii)

The impugned notification extends the period from 31.12.1988 to 28.2.1939. The reasons given are : (i) there has been considerable increase in the number of dealers liable to pay tax under the State Act, Central Act and the Entry Tax Act. (ii) there has been no increase in the number of authorities competent to make the assessment of such dealers under the said Acts, commensurate with the increase in the number of such dealers (iii) the assessment proceedings are required to be completed before 31.12.1988,

(iv) correct assessments of such dealers on merits have to be made by the said authorities after affording them reasonable opportunity of being heard (v) despite efforts being made by the said authorities to complete such assessment proceedings by the end of 31.12.1988. Such proceedings cannot be completed before the end of the period and (vi) the proceedings need to be completed.

It is contended by the learned counsel for the petitioner that the reasons must be those which have relevance to the individual dealers or individual proceedings and cannot be general to all proceedings or to all dealers of the entire State. We are unable to agree with this submission. The expression "any dealer" in sub-section (9) of Section 18 is restricted to any particular dealer. It comprehends all dealers. The reason for not being able to complete the assessment during the period prescribed can be general reason which affect the performance of the statutory authorities. The correctness of the statement contained in the impugned Notification is not controverted, namely, considerable increase in the number of dealers liable to pay tax, absence of increase in the number of authorities commensurate with the increase in the number of dealers, requirement of affording reasonable opportunity to dealers of being heard and efforts made to complete the proceedings by the end of the period. These reasons are relevant and germane to the guidelines implicit in sub-section (9). Sub-section (9) does not contain any restriction about the period of extension which can be granted by the State Government. The guideline implicit in sub-section (9) is that the extension can be only for a reasonable period. The extension effected in the instant cases is for a period of two months which cannot be said to be unreasonable. Under the circumstances, the challenge against the impugned notification must fail.

The writ petitions are accordingly dismissed. Advocates fee Rs. 500 /-in each case.