
(1985) 03 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 2444 of 1985-K

McDowell and Co. Ltd.

APPELLANT

Vs

Assistant Commissioner of Sales Tax

RESPONDENT

Date of Decision : 29-03-1985

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 220

Citation : (1986) 62 STC 164

Hon'ble Judges : K.S. Paripoornan, J;K.K. Narendran, J

Bench : Division Bench

Advocate : B.S. Krishnan, for the Appellant; P.V. Ayyappan, Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Paripoornan, J.—The petitioner is a company registered under the Indian Companies Act. It is engaged in the business of manufacture and sale of Indian-made foreign liquor. It is an assessee on the files of the first respondent-The Assistant Commissioner of Agricultural Income Tax and Sales Tax (Assessment), Special Circle, Alleppey. The petitioner was assessed under the Kerala General Sales Tax Act and the Central Sales Tax Act for the years 1976-77 to 1979-80. It was also assessed under the Central Sales Tax Act for the year 1975-76. There are in all 9 assessments for these years. They are evidenced by exhibits P13 to P21 orders. According to the petitioner, these assessments were made arbitrarily and without affording sufficient opportunity to the petitioner to substantiate its case. The notice calling for verification of accounts was issued on 16th April, 1984. There were subsequent notices to similar effect on 3rd May, 1984, 3rd August, 1984, and 8th October, 1984. Finally exhibit PI pre-assessment notice dated 25th January, 1985, was received by the petitioner on 2nd February, 1985. The petitioner was given 7 days time to file its objections. The petitioner made an attempt to get extension of time by exhibit P2. By exhibit P3 order dated 6th February, 1985, it was rejected. So, the petitioner filed objections dated 8th

February, 1985, on 11th February, 1985. Since 9th February, 1985, was a second Saturday and a declared holiday and 10th was a Sunday, the objections could be filed only on 11th February, 1985. Assessment orders dated 9th February, 1985, evidenced by exhibits P13 to P21, were served on the petitioner on 16th February, 1985. The petitioner filed appeals against all the nine assessment orders before the Deputy Commissioner of Agricultural Income Tax and Sales Tax (Appeals), Quilon-second respondent herein-on 28th February, 1985. Petitions for stay of recovery proceedings were also filed. Since the matter was urgent, the petitioner moved a petition for early hearing of the stay petitions. The petitioner was heard on 7th March, 1985, and exhibit P6 order dated 11th March, 1985, was passed in all the petitions by the second respondent. By the said order, the petitioner was directed to pay 50 per cent of the balance amount and surcharge that remained payable under the orders and to furnish adequate security for the balance 50 per cent of the amount within seven days from the date of receipt of the order. In the meanwhile, by exhibits P7, P8 and P9 garnishee proceedings were set in motion by the assessing authority. As could be seen from exhibits P10 and P11, revenue recovery proceedings were set in motion for recovering a sum of Rs. 32,81,623.97 (sic) and Rs. 6,44,65,410.08. In para 27 of the O. P., the petitioner has stated that the total amount now demanded is Rs. 9,75,70,119.60 (Rs. 9 crores and odd). The assessing authority also initiated proceedings u/s 23(2) of the Kerala General Sales Tax Act against the petitioner before the Sub-Divisional Magistrate, Alleppey (exhibit P12). In this original petition, the main grievances of the petitioner are two-fold : (1) The assessment orders (exhibits P13 to P21) dated 9 th February, 1985, were passed in undue haste, without proper notice and without affording sufficient opportunity to the petitioner. It is contended that the said orders are violative of the principles of natural justice and so void and illegal. On that hypothesis, the petitioner further contends that the recovery proceedings in pursuance to such orders are equally bad in law and infirm; (2) Regard being had to the inordinate delay, in completing the assessments and in passing the assessment orders for the various years (exhibits P13 to P21) simultaneously, and also setting in motion, more than one of the recovery proceedings simultaneously have resulted in irreparable injury and harm to the petitioner. The petitioner has been asked to deposit 50 per cent of the balance of the tax due -which is nearly Rs. 5 crores. It is impossible for any person, regularly doing business to deposit nearly 5 crores of rupees. So, it is contended that the recovery proceedings are also arbitrary and without bona fides.

2. Learned Advocate-General invited our attention to the fact that the petitioner has filed appeals from exhibits P13 to P21 before the second respondent and that they are still pending. The learned Advocate-General contends that in view of the pendency of the appeals, it is not open to the petitioner to simultaneously invoke the discretionary jurisdiction of this Court under Article 226 of the Constitution of India as a parallel remedy and assail the assessment orders. That will in effect, deprive the appellate authority of its jurisdiction to dispose of the appeals

pending before it. Strong reliance was placed on a Division Bench decision reported in *Kunjahammad Haji v. State of Kerala* 1960 KLT 930 (Ker) and also on the Supreme Court decision reported in *Jai Singh Vs. Union of India and Others*, to contend that it is not open to the petitioner to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution and assail the assessment orders when such orders are pending in appeals before the statutory authorities. Learned Advocate-General also brought to our notice the decision reported in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, wherein the Supreme Court has adverted to its earlier decisions, *Siliguri Municipality and Others Vs. Amalendu Das and Others*, and *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, and other decisions, wherein the guidelines in the matter regarding the scope of interference under Article 226 of the Constitution in taxation matters have been laid down. It is contended that this original petition is not maintainable. The petitioner does not deserve any relief at the hands of this Court at this stage. The recovery proceedings initiated in this case are authorised and valid.

3. Mr. M. Rajasekharan Nair, Advocate, has filed C. M.P. No. 9408 of 1985 to implead the General Secretary of McDowell and H. R. B. Employees Congress and another in the original petition. We indicated to counsel that the petitioners have no locus standi in these proceedings to get themselves impleaded. However, we intimated the counsel that we will hear him also in exercise of the powers under Rule 152(2) of the Rules of the High Court of Kerala, 1971. Accordingly, we heard Mr. Rajasekharan Nair also in the O. P.

4. We shall bear in mind the guidelines laid down by the Supreme Court, regarding the scope of the jurisdiction of this Court in exercise of the powers vested in it under Article 226 of the Constitution, in taxation matters in a number of recent decisions. They are, *Siliguri Municipality and Others Vs. Amalendu Das and Others*, , *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, .

5. We heard counsel at length. Bearing in mind the principles laid down by the Supreme Court, referred to above, and the other decisions mentioned hereinafter, we are of opinion that the preliminary objection taken by the Advocate-General is entitled to acceptance. Delivering the judgment of the Bench, in *Kunjahammad Haji v. State of Kerala* 1960 KLT 930 (Ker), Ansari, C. J., held :

But the party complaining must not invoke the extraordinary jurisdiction of this Court, and at the same time exercise his statutory right of appeal; for, where such a right of appeal has been availed of, the appellate authority becomes vested with the legal jurisdiction of adjudicating on the complaint, and the authority should not, by our issuing certiorari, be divested of its jurisdiction of adjudication on the order, which becomes the subject-matter of appeal before it. Nor there is, in such case, overriding equity in favour of the petitioner.

The Supreme Court in *Jai Singh Vs. Union of India and Others*, observed as follows :

It has also been brought to our notice that after the dismissal of the writ petition by the High Court, the appellant has filed a suit, in which he has agitated the same question which is the subject-matter of the writ petition. In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time.

These decisions certainly support the arguments of the learned Advocate-General, that at this stage when the appeals filed by the petitioner are pending before the second respondent, we should not exercise the discretionary jurisdiction of this Court under Article 226 of the Constitution of India. We may also add that the first appellate authority exercising jurisdiction under the Kerala General Sales Tax Act, has got the power even to "enhance" an assessment [section 34(3)(a)(i) of the Act]. This is a special jurisdiction, unlike ordinary, appellate authorities.

...his competence is not restricted to examining those aspects of the assessment which are complained of by the assessee; his competence ranges over the whole assessment and it is open to him to correct the Income Tax Officer not only with regard to a matter raised by the assessee but also with regard to a matter which has been considered by the Income Tax Officer and determined in the course of the assessment. It is also well-established that an assessee having once filed an appeal cannot withdraw it. In other words, the assessee having filed an appeal and brought the machinery of the Act into working cannot prevent the Appellate Assistant Commissioner from ascertaining and settling the real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuses to appear at the hearing, the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there has been an under-assessment, he can enhance the assessment" [*Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*,]. This is a special power of jurisdiction conferred by the statute and if this Court were to annul the assessment orders, it will disable the first appellate authority from exercising "its statutory duty" which it is bound to carry out [see Lord Wright in *King v. Income Tax Special Commissioners* [1936] 1 KB 487-see also *Simon's Taxes* (1976 Edition), Third Edition, Vol. A, (pages 612 and 620) quoted with approval in *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*,]. For these reasons, we are not inclined to exercise our discretionary jurisdiction under Article 226 of the Constitution of India and to examine the validity or legality of the various assessment orders impugned, exhibits P13 to P21, which are pending in the appeals. We hold that, in so far as the appeals assailing the above assessment orders (exhibits P13 to P21) are pending before the 2nd respondent, it is not open to the petitioner to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India at this stage. We decline jurisdiction on this sole ground.

6. The petitioner's counsel next contended that the initiation of more than one mode of recovery as done in this case, is unauthorised. Even assuming that the statute permits the assessing authority to invoke simultaneously more than one mode of recovery, it has been set in motion in this case, without regard to the repercussions it may have on a company which employs a big labour force. Counsel for the trade union, Mr. Rajasekharan Nair, supported the petitioner's contention and argued that the effect of continued recovery proceedings in this case will result in the crippling of the company itself and throw out of employment the innumerable workmen. Counsel argued that public interest requires that this is a matter in which the petitioner should be allowed sufficient time to pay the huge amount demanded, in instalments. Section 23(2) of the Kerala General Sales Tax Act provides as follows :

(2) Any tax assessed or any other amount due under this Act from a dealer or other person may, without prejudice to any other mode of recovery, be recovered-

(a) as if it were an arrear of land revenue;

(b) on application to any Magistrate, by such Magistrate, as if it were a fine imposed by him.

Further mode of recovery is provided in Section 25 of the Act. It is common ground, that the recovery proceedings initiated at present, are sanctioned by the relevant statute. No arguments were addressed attacking recovery proceedings as "ultra vires" or "unauthorised". Nor was it urged, that initiation of more than one mode of recovery proceedings, simultaneously, as such is illegal. We are of the view, that, primarily it is for the revenue to resort to any one or more of the modes of recovery, as authorised by the statute, in its discretion. The arrears due here is very huge-nearly 10 crores of rupees. The resort to, more than one mode of recovery, simultaneously, in the context of huge arrears, in this case, was not shown to be in any way illegal or unauthorised. On motion by the petitioner, the appellate authority by exhibit P6 dated 11th March, 1985, granted a conditional order of stay. The petitioner was directed to pay 50 per cent of the balance tax and further directed to give security for the balance of 50 per cent. In the original petition, there is a complaint that the second respondent in passing exhibit P6 order has acted "mechanically" and "failed to act judicially", and has failed to state "any reason", etc. (paras 18 and 19 of the O. P.). But there is no prayer to quash exhibit P6. The averments are very general and vague and lack in particulars. The "discretion" to stay recovery of tax assessed or due, pending the first appeal, is contained in the proviso to Section 34(5) of the Kerala General Sales Tax Act. The revenue has filed detailed counter-affidavits dated 21st March, 1985, and 28th March, 1985, controverting the averments contained in the original petition. It is useful to refer to the decision of the Supreme Court in Third Income Tax Officer, Mangalore Vs. M. Damodar Bhat, , wherein the scope of a somewhat similar provision occurring in Section 220(6) of the Income Tax Act was considered. It was held:

We proceed to consider the next question arising in this appeal, viz., whether the High Court was right in taking the view that the Income Tax Officer did not properly exercise the statutory discretion in issuing the impugned notice with regard to the first item, viz., tax for the assessment year 1960-61 amounting to Rs. 7,056.15. It was argued on behalf of the respondent that there was an appeal pending with the Appellate Assistant Commissioner against the order of assessment and, therefore, it was incumbent upon the Income Tax Officer to exercise the statutory discretion properly u/s 220(6) of the new Act in treating the assessee as being in default. The finding of the High Court is that the Income Tax Officer "was not shown to have applied his mind to any of the facts relevant to the proper exercise of his discretion". In our opinion, the finding of the High Court cannot be upheld, because, the respondent has not alleged in his writ petition any specific particulars in support of his case that the Income Tax Officer has exercised his discretion in an arbitrary manner. In paragraph 12(b) of the writ petition the respondent had merely said that "the order of the Income Tax Officer made u/s 220 was arbitrary and capricious. No other particulars were given by the respondent in his writ petition to show in what way the order was arbitrary or capricious. In the counter-affidavit the allegations of the respondent have been denied in this respect. We are of opinion that, in the absence of specific particulars by the respondent in his writ petition, it is not open to the High Court to go into the question whether the Income Tax Officer has arbitrarily exercised his discretion.

In the light of the above, the general and vague complaint in the original petition that the second respondent has acted "mechanically" and "failed to act judicially" and has failed to state any reason, etc., is without force. Moreover, there is no prayer in the original petition to quash or annul exhibit P6 order. We consider that this is also relevant in the context. So long as exhibit P6 order passed by the statutory authority stands, the petitioner is bound to comply with it. The learned Advocate-General brought to our notice that on motion by the petitioner, Government modified exhibit P6 order and allowed some concession [vide exhibit R1(a)]. Recovery proceedings are not attacked on any other ground.

7. We are of opinion that when once we are not in a position to interfere with the assessment orders, it is not within our province to give any direction, regarding the manner or method by which the tax assessed should be recovered by the revenue unless recovery proceedings themselves are independently shown to be vitiated or illegal in any manner. This has not been urged or proved in this case. It is for the revenue to decide, in which form or by which mode of recovery, it will realise the tax due to it as per the statute. But, we dare say that the circumstances pointed out by the petitioner's counsel as also Mr. Rajasekharan Nair are worthy of consideration by the (Government and) revenue, if they are inclined to consider the petitioner's case sympathetically. We should make it clear that it is not within our province to consider all such matters. It is entirely a matter to be considered by the Government or revenue. We leave it there.

8. No other point was argued by the petitioner's counsel.
 9. The original petition is dismissed. There shall, however, be no order as to costs.
- Issue carbon copy of this judgment to counsel for the parties, on usual terms.