
(1975) 07 OHC CK 0014
In the Orissa High Court
Case No : O.J.C. No. 138 of 1974

Patnaik and Co. (P.) Ltd.

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 15-07-1975

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1975) 41 CLT 1099 : (1975) 36 STC 362

Hon'ble Judges : G.K. Misra, C.J.; P.K. Mohanty, J

Bench : Division Bench

Advocate : B.K. Mohanti, for the Appellant; A. Roy, Standing Counsel, Commercial Taxes, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—The facts referred to in the writ application may be stated at length to understand the point in issue.

2. The petitioner is a private limited company. It carries on business in automobiles and their accessories and is a dealer of several makes of motor vehicles in the State of Orissa. Besides dealing with private parties the petitioner carried a major part of its business with the Government of Orissa and other Government departments and corporations. The company was incorporated in the year 1959-60. From the years 1959-60 to 1967-68 there was a total assessment of Rs. 60,67,320.54 on the company. The petitioner paid the entire amount leaving a balance of Rs. 4 lakhs and odd.

The State Government exploited the credit worthiness of the petitioner in the market and compelled the petitioner to raise loan from the State Bank of India to the extent of Rs. 85 lakhs in the years 1961 and 1964 and invest the same in Government securities for the benefit of the State. The State Government provided funds to the extent of Rs. 13 lakhs by way of advance to the petitioner for paying security deposit required by the State Bank for giving the above loan.

The State Government in turn agreed to give preferential treatment in the matter of purchase of motor vehicles from the petitioner and to make a regular payment of fifty per cent advance for each order placed with it for supply of motor vehicles with a view to compensate the petitioner for the huge loss to be sustained every year on account of higher rate of interest payable to the State Bank for the loan raised by the petitioner on behalf of the State Government.

The State Government did not honour their commitments with regard to payment of regular advances against orders placed with the petitioner for the supply of motor vehicles and with regard to placing orders of the agreed percentage. On the other hand, the State Government put pressure for refund of money provided in the shape of advances for paying the security deposit to the State Bank for the purpose of the above loan by banning all purchases from the petitioner.

With a view to release the security deposit paid to the State Government for refunding the same to the Government the petitioner was forced to sell out in distress the above securities much below the face value. Besides a huge amount was spent on account of interest and commission paid to the State Bank and commission paid to M/s. Place Siddons & Gough, Calcutta, for arranging the sale of the Government securities in the share market. This is how the petitioner incurred heavy losses to the tune of several lakhs. As a result of the financial disability on account of the above deal with the State Government the petitioner could not liquidate its tax liabilities. The Assistant Sales Tax Officer (opposite party No. 2) took drastic action u/s 13-A of the Orissa Sales Tax Act, 1947 (hereinafter to be referred to as the Act), in attaching the petitioner's accounts with different bankers on two occasions in June, 1969, and February, 1970. As a result of this action the credit facilities extended to it were largely squeezed. The petitioner was not able to raise funds from the banking and other financial institutions to meet the tax liabilities.

The petitioner could not afford to fight against the State Government and claim compensation for non-fulfilment of their commitments in the matter of purchase of vehicles and payment of advance though the State Government were morally and legally liable for such compensation. With a view to keep up the good relationship and out of anxiety for getting the ban order vacated for enabling the petitioner to carry on day-to-day business with the State Government the petitioner was reluctantly forced to enter into agreement with the State Government to recover money paid for security deposit with the State Bank of India from its bills covering supply of vehicles and spare parts, etc. The State Government recovered from the petitioner's bills a sum of Rs. 4,74,174.53 in the course of three years from 31st March, 1967, to 16th March, 1970.

If the petitioner had not compromised with the Government it would have lost its exclusive distributorship for jeep and other vehicles and there would have been complaints by the State Government to the manufacturers for their inability in getting requirements of vehicles from the petitioner. The aforesaid compulsory

recoveries made by the State Government further crippled the financial position of the petitioner and stood in the way of liquidating liabilities.

Moreover, huge bills remained outstanding in the hands of the Government reducing the petitioner's financial condition to a stage where it was not able to pay the admitted taxes although returns were filed giving the exact figures. The admitted taxes for the quarters ending 30th June, 1967, to 31st March, 1968, to the tune of Rs. 6,70,957.04 remained outstanding. The petitioner has not been able to realise its dues from different departments of Government roughly amounting to Rs. 1 1/2 lakhs.

Notwithstanding the financial difficulties of the petitioner, opposite party No. 2 issued a notice u/s 13(5) of the Act. The petitioner showed cause. By his order dated 29th April, 1969, opposite party No. 2 imposed a penalty of Rs. 34,581.15 for the quarter ending 31st December, 1967. By his order dated 30th April, 1970, he imposed a penalty of Rs. 1,38,232.40 in respect of the quarter ending 31st March, 1968. The petitioner filed two revisions before the Commissioner of Sales Tax (opposite party No. 1). In the first case the Commissioner reduced the penalty to Rs. 3,458.11, which is one per cent of the tax payable.

The Commissioner by his order dated 6th May, 1971, reduced the penalty to Rs. 1 lakh in respect of the quarter ending 31st March, 1968.

The writ application has been filed under articles 226 and 227 of the Constitution to quash the impugned order of the Commissioner (annexures 3 and 4), on the ground that heavy penalty has been imposed without application of the mind to the grounds taken by the petitioner in its show cause to the notice issued u/s 13(5) of the Act.

3. In the course of hearing of the writ application Mr. Mohanti for the petitioner did not assail annexure 4 whereby a penalty of ten per cent imposed by opposite party No. 2 was reduced to one per cent by opposite party No. 1. The validity of annexure 4 need not, therefore, be examined by us. We confine our discussion to annexure 3.

4. Mr. Mohanti's contention is that the Commissioner should have applied his mind to the facts of the case and then decided whether penalty should at all be imposed and, if so, what would be its quantum.

5. Section 13(5) of the Act, so far as material, may be extracted :

13. (5) If any amount is not paid by the due date in pursuance of a notice issued under Sub-section (4), the Commissioner may direct that the dealer or the person, as the case may be, shall, in addition pay by way of penalty a sum not exceeding one-half of the total amount due within thirty days from the date of service of notice upon the dealer or the person in this behalf:

Provided that in the cases of continuing default the penalty may be levied in instalments from time to time so however as not to exceed one half of the total

amount due....

The underlined expression shows that the imposition of penalty is not mandatory but is discretionary with the concerned taxing authority even if the tax is not paid by the dealer in time. The expression "may direct that the dealer shall pay by way of penalty" takes within its sweep the power of the Commissioner not to direct payment of such penalty. As to how this discretion is to be exercised has not been indicated in the section. One thing is however clear that the discretion must be judiciously and not arbitrarily exercised. The authority cannot impose the maximum penalty in all and every case. There may be cases where the authority may not impose any penalty. There may be cases calling for imposition of maximum penalty. In-between there may be cases where the quantum of penalty may be low or high. The ultimate decision to be taken by the taxing authority in the matter of imposition of penalty would depend upon the facts and circumstances of each case. There must be objective determination. The onus is on the dealer to bring to the notice of the taxing authority the facts and circumstances under which the tax due was not paid in time. The judicial determination so made is open to revision before the Commissioner of Sales Tax who would be influenced by similar considerations. If the discretion has been judiciously exercised and is based on materials on record the High Court in exercise of its powers under articles 226 and 227 of the Constitution cannot interfere with the exercise of discretion as, in doing so, this court does not act as an appellate authority. The function of the High Court in such matters is to see whether the taxing authority has exercised discretion within the limits of its jurisdiction.

Penalty proceedings are quasi-criminal in nature. Though the language of the section does not give any indication as to how the discretion of the taxing authority is to be exercised, the onus on the dealer would be discharged by preponderance of probabilities as in a civil case and not beyond reasonable doubt. Reference in this connection may be made to the observations in the judgment in S. J. C. No. 17 of 1973 (Commissioner of Income Tax, Orissa v. Gangaram Chapolia) and O. J. C. No. 684 of 1974 (M/s. Gangaram Chapolia v. Commissioner of Income Tax, Orissa) delivered on 2nd April, 1975. Those observations have no strict application to the facts of this case as they were made under the provisions of the Income Tax Act and with different wordings. Reference has been made to those observations only to give a clear picture of the nature of the onus on the dealer and the manner in which judicial determination is to be made by the taxing authority.

6. We may now proceed to examine annexure 3 in the light of our observations made above. Opposite party No. 1 in a cryptic manner dealt with the case of the petitioner in paragraph 3 of his order. He considered the case in paragraph 4 and the same may be extracted :

4. In this case the tax in respect of which the penalty in question has been levied was all collected from the consumers. Obviously the petitioner utilised these

collections for other purposes. Even assuming that the petitioner-firm had certain financial difficulties it was certainly unusual on his part to withhold the tax due under the Act. It would appear that the assessing officer has given the petitioner adequate opportunity to pay up the dues. Under these circumstances there is hardly any justification for annulling the order imposing the penalty.

The aforesaid passage does not indicate that opposite party No. 1 applied his mind judiciously to the facts and circumstances presented by the petitioner as to why it was unable to pay the tax due though collected. The fact that the tax collected was not paid in due time is not disputed. The question is whether penalty is to be imposed and if so to what extent for the default made. If opposite party No. 1 had applied his mind to all the facts and circumstances referred to by the petitioner the conclusion would have been pure finding of fact binding on this court. This court would have no jurisdiction to interfere with the exercise of discretion. In this case there has been complete non-application of mind and the conclusion is based on materials not germane to the question in issue which is whether penalty should be imposed on the facts and circumstances of the case.

7. Opposite party No. 1 reduced the penalty to Rs. 1 lakh on the ground that the petitioner did face certain financial difficulties. If he would have discussed all the facts in their true perspective he might have recorded a different conclusion. What it would have been, we cannot speculate nor we have the jurisdiction to go into facts and consider the reasonableness of the penalty.

8. On the aforesaid analysis, we quash annexure 3 dated 6th May, 1971. The case would go back to opposite party No. 1, who would apply his mind fully to the facts and circumstances averred by the petitioner and decide the case in accordance with law and the observations made above.

9. In the result, the writ application is allowed. A writ of certiorari be issued quashing annexure 3. Opposite party No. 1 would dispose of the case within two months from today. In the circumstances, there will be no order as to costs.

P.K. Mohanty, J.

10. I agree.