

(1965) 07 CAL CK 0016

In the Calcutta High Court

Case No : Appeal from Original Order No. 181 of 1962

Ramdhari Saha

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 07-07-1965

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 70 CWN 19 : (1966) 17 STC 215

Hon'ble Judges : Bose, C.J.;B.C. Mitra, J

Bench : Division Bench

Advocate : J.K. Sen Gupta and A.P. Chatterjee, for the Appellant;N.C. Chakraborty and S.N. Dutt, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Mitra, J.—The appellant, a partnership firm, is a registered dealer under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the Act), and as such holds a registration certificate. Under the terms of this certificate the appellant is required to submit its returns of taxable turnover annually, according to the Bengali calendar year ending with the 31st Chaitra. This return is to be filed within two months of the closing of the accounting year. The return for the year 1364 B.S. was due to be submitted on or before 13th June, 1958, but the appellant failed to submit the return within the prescribed time. No application was made before the expiry of the time, for extension of the time to file the return.

2. On the appellant's failure to submit the return within the due date or to apply for an extension of the time for submission of the return, proceedings were commenced against the appellant u/s 11 of the Act. A notice dated 17th June, 1958, was served upon the appellant calling upon it to appear before the respondent No. 4 on 17th July, 1958, with the material books of accounts. After receipt of the said notice, the appellant made an application on 27th June, 1958, for extension of time to file the return. This application was rejected and

thereupon the appellant filed a return on 7th July, 1958. In this return the appellant admitted that it was liable to pay Rs. 283-20 nP. as sales tax, on the taxable turnover at the appellant's head office at Samsi, and branch office at Malda. This admitted liability was discharged by depositing the said sum of Rs. 283-20 nP. in the State Bank of India. The respondent No. 4, however, proceeded with the assessment u/s 11 of the Act. The appellant applied for and obtained several adjournments for production of books of account and other material documents. The case was finally fixed for hearing on 22nd July, 1959, when another application for adjournment was made, but was refused. After such refusal the respondent No. 4 completed the assessment to the best of his judgment and found that the gross turnover was Rs. 7,20,813-4-9 pies and the taxable turnover was Rs. 2,86,500. The respondent No. 4 assessed the total tax liability of the appellant at Rs. 13,700 and he also imposed a penalty of Rs. 10,000 u/s 11(1) of the Act. A notice of demand for Rs. 23,416.80 being the amount due from the appellant after giving credit for the said sum of Rs. 283.20 nP. was issued on 23rd June, 1959. Being aggrieved by the said assessment order for Rs. 13,700 and the order imposing a penalty of Rs. 10,000 the appellant moved a petition under Article 226 of the Constitution and obtained a rule nisi on 21st August, 1959. This rule was discharged by Banerjee, J., on 6th December, 1961. This appeal is directed against the said judgment and order of Banerjee, J.

3. Mr. J. K. Sen Gupta, learned advocate for the appellant, firstly contended that Section 11(1) of the Act required that in an assessment under that section, the dealer should be given a reasonable opportunity of being heard. This opportunity, Mr. Sen Gupta argued, was denied to the appellant. It was argued that the statute imposed upon the assessing authority the duty of giving an opportunity of being heard to the assessee. The appellant, it was argued, had asked for time to produce books of account and documents, and this prayer of the appellant for time having been refused, the assessment order was bad, as it was made in violation of Section 11(1) of the Act.

4. It appears from the assessment order that the Department was in possession of information that the appellant had been bringing goods from other parts of India in various false names, namely, Debendranath Saha, Upendranath Das or Saha and Umesh Chandra Saha. On enquiry it was found that there was no one at Samsi bearing the names of Upendranath Das or Saha and Umesh Chandra Saha. The respondent No. 4, therefore, came to the conclusion, that some representative of the appellant took delivery of the goods from the railway authorities by furnishing fictitious names. These deliveries were taken after payment sometimes by cheque through the account of the appellant and sometimes by cash. The appellant failed to produce the complete sets of books of account including the bank statement before respondent No. 4. The railway receipt register was also not produced although the appellant used to bring goods worth several lakhs of rupees from outside West Bengal. On 13th January, 1959, the appellant was supplied with a list of goods brought by it in fictitious

names during the year of assessment and was called upon to produce the relevant entries in the books of account. On 13th February, 1959, the appellant submitted before the respondent No. 4 that most of the transactions could not be located in the books of accounts, and on this submission the respondent No. 4 came to the conclusion that the appellant located at least some of the unauthorised transactions. Thereafter the appellant asked for, and was granted two further adjournments to produce books of account in support of its contentions. The case was fixed for hearing on 22nd July, 1959, on which date another application for adjournment was made and was rejected.

5. The proceeding against the appellant was commenced on 17th June, 1958. After two adjournments obtained by the appellant, it appeared before the respondent No. 4 on 26th August, 1958, with incomplete books of account. On that date the appellant was asked to furnish complete set of books of account and also the bank statements. Three further adjournments were obtained by the appellant and thereafter it appeared before the respondent No. 4 on 13th January, 1959, but without the books of, account and bank statement which it was called upon to produce on 26th August, 1958.

6. It is clear that several adjournments were obtained by the appellant for the purpose of producing material books of account. It also appears that the appellant was called upon to produce statements of account from its bank, which it failed to do. In some cases at any rate, payments were made by cheque drawn on the appellant's account and it was, therefore, incumbent on the appellant to render satisfactory explanation regarding the transactions. This, the appellant failed to do, although sufficient opportunity was given for that purpose.

7. The appellant was furnished with the list of goods brought by it in fictitious names during the year under assessment and was given the opportunity to explain the transactions. If the appellant had produced the complete set of books of account for the relevant year and also statements from the bank regarding operations on the appellant's account, sufficient explanation would have been forthcoming with regard to the transactions, which according to the Department were carried on by the appellant surreptitiously, in fictitious names, for the purpose of evading the liability for sales tax. It is abundantly clear to us from the facts mentioned above, regarding the several adjournments applied for and obtained (which were not disputed by the appellant) that there was no denial of opportunity to the appellant of being heard. The appellant knew what the charges against it were, and all material particulars were furnished to it, to enable it to give its explanation with regard to them. It obtained several adjournments for the purpose of producing books of account and bank statement. But having obtained the adjournments for the specific purpose of producing materials to repel the charges brought against it, it failed to produce any of the material books of account or any statement from bank regarding the operations on its bank accounts. In these circumstances, we cannot accept the appellant's contention that there was a denial of opportunity of being heard as

required by Section 11(1) of the Act.

8. The next contention of Mr. Sen Gupta was that even in case of best judgment assessment, the assessing authority could not act arbitrarily and should not have proceeded purely on surmise and conjecture. Mr. Sen Gupta's contention was that in imposing a tax liability of Rs. 13,700, the respondent No. 4 had drawn an inference, for which there was no basis. He argued that on the basis of goods worth Rs. 14,146.54 having been brought in course of 79 days, goods worth Rs. 47,058.99 having been brought in course of 109 days and goods worth Rs. 2,694.09 having been brought in course of a month, the respondent proceeded to draw an inference that goods were brought in the same proportion throughout the year, and on this basis the total value of goods surreptitiously brought by the appellant in fictitious names would be Rs. 2,34,000. Adding a five per cent, profit on these goods, the total value of the goods at which they were sold was taken to be Rs. 2,46,000. This total value was added to the value of the gross turnover in the return filed by the appellant which was Rs. 4,74,813.9 pies. Adding the two figures of gross turnover the total gross turnover of the appellant was fixed at Rs. 7,20,813-4-9 pies and accordingly the gross turnover of the appellant was assessed at the same figure. On the basis of this turnover the tax was assessed at Rs. 13,700.

9. It was argued by Mr. Sen Gupta that there was no basis for the inference drawn by respondent No. 4 who had proceeded entirely arbitrarily and capriciously. It was contended that even though the assessment order was made u/s 11(1) of the Act, the method adopted in arriving at the figure of gross turnover was not justified. In support of this contention reliance was placed upon a decision of this Court in *Aswini Kumar Dutt v. Commercial Tax Officer* (1957) 61 C.W.N. 953. That was also a case under the Bengal Finance (Sales Tax) Act, 1941. In that case also the assessee did not file any return for the relevant period within the time and the Commercial Tax Officer made a best judgment assessment u/s 11(1) of the Act. My Lord the Chief Justice (Bose, J., as he then was) in dealing with the question of best judgment assessment relied upon the following observations of the Judicial Committee in *Commissioner of Income Tax, United and Central Provinces v. Badridas Ramrai Shop* [1937] 5 ITR 170,

The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.

The observations of the Judicial Committee quoted above make it clear that so long as the assessing authority acts honestly and not vindictively or capriciously, in making a fair estimate of the figure of assessment, the assessment order cannot be assailed on the ground that it had been made on surmise. The Judicial Committee quite clearly indicated that there was bound to be guess-work, and the assessment must necessarily be to some extent arbitrary in all cases where returns were not filed by the assessee, and the assessing authority made the assessment order to the best of his judgment. In our opinion the decision in Aswini Kumar Dult's case [1957] 61 CWN 953 and the observations of the Judicial Committee are entirely against the contentions of Mr. Sen Gupta. It is true that the respondent No. 4 had drawn an inference with regard to the value of the gross turnover of the appellant, but in doing so he had proceeded on some basis, namely, the value of the goods which according to him were brought by the appellant in fictitious names during certain periods of the assessment year. We cannot, therefore, hold that the respondent No. 4 in drawing the inference, which he did, proceeded entirely arbitrarily or capriciously or dishonestly. He had before him the figures relating to the value of the goods, which according to him, were brought by the appellant in false and fictitious names, and in drawing the inference, he assumed that the appellant had throughout the year brought goods into West Bengal of similar value. We cannot hold that he was wrong in drawing this inference or that this inference was drawn by him entirely arbitrarily or dishonestly. Nor can we hold that there was no basis for the inference drawn by the respondent No. 4.

10. Mr. Sen Gupta next referred to another Bench decision of this Court in Jagadish Prosad Pannalal Vs. Member, Board of Revenue, . That was a reference to this Court u/s 21(1) of the Act. The facts in that case were very similar to the facts in the appeal now before us, a best judgment assessment having been made u/s 11 of the Act. The dealer failed to file returns, and by a notice u/s 10 of the Act it was directed to file the accounts and documents and was also informed that in default, the assessment would be made u/s 11 of the Act. Repeated adjournments were taken by the dealer, who ultimately took the plea, that the books of account were looted and destroyed during the communal disturbances. Thereupon the assessing authority taxed the dealer to the best of his judgment. It was held that the dealer did not help the taxing authorities to arrive at the correct turnover, books of account were not produced and no assistance was given to the assessing authority. Under those circumstances it was held that the assessing authority had to make the assessment to the best of his judgment, and in coming to this conclusion reliance was also placed on the abovementioned decision of the Judicial Committee. It was further held that the applicants were given full opportunity to present their case before the authorities, who considered all available materials, and thereafter came to a conclusion and they did apply their mind and tried their best to come to the correct conclusion. This decision, in our opinion, is entirely against the contentions raised by Mr. Sen Gupta. The appellant was given full opportunity to

produce materials relating to the transactions, several adjournments were taken for that purpose, but no materials were produced before the assessing authority. It is clear from the order dated 22nd July, 1959, that the assessing authority did apply his mind to the facts of the case. He took into consideration the several consignments which, according to him, were brought by the appellant in fictitious names. He gave the appellant ample opportunity to give its explanations with regard to these transactions. But the appellant failed to render any explanation whatsoever. It is only then that the respondent No. 4 drew the inference regarding the total gross turnover of the appellant.

11. The next case relied upon by Mr. Sen Gupta in support of his contention was a decision of the Supreme Court in Raghubar Mandal Harihar Mandal Vs. The State of Bihar, . That was a case under the Bihar Sales Tax Act, in which the assessee had failed to file the returns in respect of three quarters out of seven. With regard to the four quarters for which returns were filed, the assessing authority rejected the returns as also the books of account filed by the assessee for all the seven quarters and thereafter made the assessment order on an estimate. The matter went up to the High Court of Patna on a reference made by the Board of Revenue and thereafter to the Supreme Court. It was found that certain transactions were not recorded in the books of account and silver was imported by the assessee in the names of five confederates in order to suppress the details of the transactions. Again there was a discrepancy between the return filed for one quarter and the accounts filed in support of the same. On these facts the assessing authority rejected the returns for the four quarters, which were filed by the assessee. But the Supreme Court held that in proceeding to make an estimate of gross turnover of the assessee, the assessing authority did not refer to any materials at all and indulged in a pure guess and adopted a figure without reference to any evidence or any material at all. After referring to the decision of the Judicial Committee discussed earlier in this judgment, the Supreme Court held at page 814 of the report :-

No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence or material and it must be something more than mere suspicion. To use the words of Lord Russell of Killowen again, "he must make what he honestly believes to be a fair estimate of the proper figure of assessment" and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate. In the case under our consideration, the assessing officer did not do so, and that is where the grievance of the assessee arises.

The Supreme Court thereafter approved of the application of a flat rate of seven per cent, in arriving at the taxable income in the decision of the Lahore High Court in (1937) 5 ITR 464 , and in doing so the following observations of Din

Mohammad, J., were quoted with approval:-

It cannot be denied that there must be some material before the Income Tax Officer on which to base his estimate but no hard and fast rule can be laid down by the Court to define what sort of material is required on which his estimate can be founded.

Thereafter it was held in that case that if the taxing authorities had based their estimate on some material, no objection could have been taken, but the assessment was held to be bad, as the assessing authority made the estimate without referring to any materials to justify the adoption of a particular figure. To our mind this decision again does not assist the appellant. On the other hand, the principles laid down make it abundantly clear, that if the assessing authority had proceeded on some material in drawing the inference, as quite clearly he has done in the instant case now before us, the estimate cannot be challenged, nor can the order imposing liability for tax be assailed, on the ground that the assessing authority had acted arbitrarily or capriciously. The respondent No. 4 had some materials before him for drawing the inference which he did. He gave the appellant the opportunity to produce materials to arrive at a correct decision, but the appellant failed to produce any materials although he applied for and obtained several adjournments for that purpose. For these reasons the order made by the respondent No. 4 imposing a liability for sales tax in the sum of Rs. 13,700 cannot be held to be bad. The second contention of Mr. Sen Gupta, therefore, must fail. In our opinion, Banerjee, J., was entirely right in rejecting this contention of the appellant.

12. The third and the last contention of Mr. Sen Gupta was that the penalty of Rs. 10,000 imposed upon the appellant in exercise of the power conferred by Section 11(1) of the Act was not justified. He argued that the delay, according to his client, was only of 22 days and this short delay, he argued, did not merit the heavy penalty of Rs. 10,000. It was further argued that the penalty was imposed without rejecting the contentions raised by the appellant in its application for extension of time, and there were substantial reasons for the delay in submitting the returns in time.

13. The only explanation of delay as set out in paragraph 6 of the petition, is that the managing partner of the appellant was involved in the affairs of the family, as one of his younger brothers had been suffering from Tubercular Meningitis, for which he was taken to Calcutta on 10th June, 1958, and was detained in hospital there till December, 1958. In paragraph 6 of the affidavit-in-opposition affirmed by Ardhendusekhar Mukherjee on 4th February, 1960, however, it is alleged that there was a delay of about 28 days, inasmuch as the return which was due to reach the Commercial Tax Officer by 13th June, 1958, was actually received on 11th July, 1958. It is also alleged in the said affidavit-in-opposition that on 27th June, 1958, an application was filed on behalf of the appellant for extension of time for submission of the return by 15 days. This application was rejected by an order dated 9th July, 1958, on the ground that action had already been taken

against the appellant for default in submission of the returns within the prescribed date. It was also stated in the order that as a notice in Form VI had already been served upon the appellant, the belated application was redundant and there was no reason to allow the extension of time prayed for.

14. Before proceeding any further it is to be noticed that the appellant did not produce any documentary evidence regarding the alleged illness of the managing partner's younger brother or his alleged detention in the hospital for treatment. Furthermore, there is nothing in the petition to show that the grounds mentioned in paragraph 6 thereof, even though insufficient and inadequate, in justification of the delay in submitting the returns, were stated in the said application dated 27th June, 1958, for extension of time. It is clear, however, that before the order imposing the penalty was made, the appellant's application for extension of time was rejected. In our opinion, there is hardly any force in Mr. Sen Gupta's contention that the order of penalty was made without rejecting the appellant's contentions and explanations in its application for extension of time, regarding delay in not filing the return in time. As I noticed earlier, there is nothing on record to show that the grounds set out in paragraph 6 of the petition were also the grounds of the application for extension of time made on behalf of the appellant on 27th June, 1958. But even assuming that the illness of the managing partner's younger brother was made a ground in the said application for extension of time, the order dated 9th July, 1958, undoubtedly has the effect of rejecting the grounds for extension of time prayed for by the appellant. Banerjee, J., dealing with this contention on behalf of the appellant, held that it was the statutory duty of the Commissioner or his delegate, the Commercial Tax Officer, to start proceedings u/s 11 of the Act. He also held that the application for extension of time was rightly rejected and that once proceedings u/s 11 of the Act were commenced, it was not possible for an assessee to arrest those proceedings by filing a belated return. Mr. Sen Gupta, however, contended that the trial Court was not justified in holding that the penalty of Rs. 10,000-imposed on the appellant could be upheld merely because the statute had imposed upon the assessing authority the power to commence proceedings u/s 11 of the Act.

15. We do not think that the trial Court was wrong in upholding the order imposing the penalty on the appellant. It appears from the order dated 22nd July, 1959, that from 1360 B.S. to 1363 B.S. the appellant was a habitual defaulter in filing his returns. The respondent No. 4 observed in the said order that the unwelcome habit of the appellant in making default in submitting returns had assumed scandalous proportions and, therefore, merited an exemplary punishment. In the petition the appellant has not denied that default had been made in filing the returns within the prescribed time as recorded in the said order. Section 11(1) of the Act has conferred upon the Commissioner the power to impose a penalty, if he was satisfied that default was made without reasonable cause, and such penalty may amount to a sum not exceeding one and half times of the tax imposed. The assessing authority came to the conclusion that there was no reasonable cause for the delay. He also took into consideration the fact

that the appellant was a habitual defaulter in filing its returns. Then again the application for extension of time to file the return was made nearly two weeks after the expiry of the time within which the return was to be filed. It is also to be noticed that though the dealer applied for 15 days' extension of time, such extension, even if granted, would have expired on 28th June, 1958, and the return was filed by the appellant on 11th July, 1958, nearly two weeks after the expiry of the date, up to which extension was prayed for on its behalf. It is clear to us, therefore, that even if the application for extension of time was granted, the appellant would have been out of time in filing the return, which was filed on 11th July, 1958.

16. The assessing authority in imposing the penalty acted on certain materials which he treated as the evidence of the appellant's conduct in the matter of filing the return. It is not a case of the order having been made on no evidence at all or on evidence which was not admissible. If on the materials the assessing authority came to a conclusion that a penalty ought to be imposed in terms of Section 11(1) of the Act, it is not for this Court in exercise of its jurisdiction under Article 226 of the Constitution to interfere with the findings of the assessing authority. For these reasons we do not think that there is any ground for interfering with the judgment of Banerjee, J., on this aspect of the case. No grounds have been made out for interfering with this aspect of the judgment of the trial Court, beyond a submission of the learned advocate for the appellant, that the respondent No. 4 imposed the penalty without dealing with the grounds for extension of time to file the returns. The trial Court had taken that contention into consideration and had refused to interfere with the order of the respondent No. 4 regarding the penalty imposed. We see no reason to interfere with the judgment of the trial Court on the question of the penalty imposed.

17. These are the only grounds which were urged before us in this appeal. It appears that certain other grounds were canvassed before the trial Court, namely, that the Commercial Tax Officer bore a grudge against the appellant and was biased. These points have not been canvassed before us and we, therefore, refrain from dealing with the same.

18. For the reasons mentioned above, this appeal fails and is accordingly dismissed. Each party to pay its own costs.

Bose, C.J.

19. I agree.