
(1960) 04 OHC CK 0020
In the Orissa High Court
Case No : O.J.C. No. 115 of 1959

Sarwan Singh

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 20-04-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 52
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72

Citation : AIR 1962 Ori 136

Hon'ble Judges : R.L. Narasimham, C.J;G.C. Das, J

Bench : Division Bench

Advocate : R.N. Misra, for the Appellant; G.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—This is an application under Articles 226 and 227 of the Constitution for the issue of a writ of mandamus directing the opposite party No. 1, the State of Orissa, represented by the Commissioner of Sales-tax; Orissa, not to require the opposite party No. 2, Chief Engineer, Hirakud Dam Project, to make any payment towards the sales tax and to refund the amount under attachment.

2-3. The petitioner is a contractor under the Hirakud Dam Project for carrying on business of certain earth work and carriage work during the period 1951-55. Petitioner was assessed to sales- tax for the quarters ending with 31st March, 1952 to 31st March, 1954. He, however, did not receive either the several orders of assessment or the notices of demand as required under the provisions of the Orissa Sales-tax Act, and the rules there under. He subsequently came to know that as a consequence of these assessments he was assessed to a total tax of Rs. 19,326.44np, Eventually he came to know of this assessment when coercive processes were taken for realisation of the tax from him.

Out of the dues of the petitioner from the Hirakud Dam Project, on account of the work done by him a sum of Rs. 21,818-18 nP. had been recovered under

instructions of the sales-tax officer and Rs. 3,786-93 nP. were adjusted towards the sales-tax alleged to be payable by the petitioner for the quarters ending March, 1952, September, 1952, January 1953 and December 1953. Out of the aforesaid amount a sum of Rs. 16,433.63 nP. was still held by the Chief Engineer Hirakud Dam Project as is evident from his letter No. FA/GL- 67-76/1436 dated May 11, 1959 (Annexure B). From another letter issued by the Administrative Officer, Hirakud Dam Project (Annexure B/1) another sum of Rs. 2491.75 nP. was appropriated as sales-tax for the quarter ending December 1950 to December 1951. Thus, according to the above letter bearing No. A.1.31/6/301-02 dated January 24, 1959, the, total sum held by the Chief Engineer was found to be Rs. 13,941.88 nP. representing tax on earth work and carriage for which no sales-tax is payable.

Accordingly, the petitioner wrote to the financial adviser and Chief Accounts Officer, Hirakud Dam Project on 13-10-1958 to release the afore said sum, since the recovery made from his bill on account of sales-tax dues was illegal and his case was covered by the decision of the Supreme Court in the case of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., . The sales-tax officer following the aforementioned decision of the Supreme Court issued a circular letter dated July 24, 1958, a copy of which was sent to the petitioner stating that he was not liable for such contracts as were covered by the decision of the Supreme Court (Vide earth work and carriage work done by him for the Hirakud Dam Project He further admitted the sum of Rs. 3786.93 nP. and Rs. 2491.75 nP. were adjusted towards the tax dues. The final balance of Rs. 13,941.88 nP. was available to the petitioner which represented the tax on earth work and carriage for which no sales- tax is payable.

4. It was contended on behalf of the petitioner that in view of the Supreme Court decision in the well-known Gannon Dunkerley's case, the tax of earth work and carriage work is not legally leviable and hence the amount is mentioned in the letter of Administrative Officer for the Chief Engineer Hirakud Dam Project dated January 1959 should now be available for refund to the petitioner. Mr. Misra on behalf of the petitioner, however did not claim the refund in respect of Rs. 3786-93 nP. which was adjusted towards the sales-tax for the quarters ending March, 1952 to December 1953. He based his whole claim on the final letter of the Administrative Officer and accordingly claimed a sum of Rs. 13941.88 nP. His argument thus was that the expression "sale of goods" has been given the precise meaning by the Supreme Court in the above-mentioned case according to which "sales of goods" is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement.

5. Since there has been no sale of goods the petitioner is not legally liable for the earth work and carriage done by him in connection with the Hirakud Dam Project.

6. The contentions were raised by Mr. G. K. Misra who appeared both on behalf of the Commissioner as well as on behalf of the Chief Engineer since the

assessment proceedings have not neer, (1) The relief is not available to the petition kept alive. The ordinary use of the remedies of appeal, reference or revision has. not been taken recourse to by the petitioner. (2) The fact of contract is now disputed, the dispute being whether the petitioner was an earth work and carriage work contractor or was a contractor merely to supply rubbles and sand etc. Thus, his main contention was that the proceedings have not been kept alive and the fact of contract being disputed the extra-ordinary jurisdiction of this Court cannot be invoked.

7. From various orders of assessment it appears that the sales-tax officer, Sambalpur, has described the petitioner, Sarwan Singh as a contractor working under the Hirakud Dam Project. Nowhere in the body of several assessments it has been stated that he was a contractor for supply of rubbles and sand etc. Even in the counter-affidavit filed on behalf of the Commissioner all that was stated was that from the various assessment orders, it would be evident that the dealer was a contractor and received his payments on supply of rubbles and sand etc. There is nothing in the assessment orders to support the same. No positive assertion has been made by the Commissioner either. Mr. Misra, however, sought to rely upon a previous deposition of the petitioner taken by the sales-tax officer in the year 1954 in which he had stated the nature of work to be carriage of materials and dispensing of rubbles, sand and shingle in E. D. Division and carrying shingle, and sand at batching plant of the concrete dam Division.

On the contrary from the various correspondences between the Administrative Officer for the Chief Engineer, Hirakud Dam Project and the petitioner, it is abundantly clear that the petitioner was carrying on earth work and carrying work. In the final letter of January 24, 1959, it is stated that the balance of Rs. 13,941.88 nP. represents sales-tax assessed on payments relating to earth work and carriage for which no sales-tax is payable. Therefore, much importance cannot be attached to this deposition. On the other hand sufficient materials are available from the various letters written by the Project Authorities who are in a much better position to speak about the exact nature of work done by the petitioner that he was carrying on the earth work and carriage. Thus, the intrinsic evidence inherent in the documents filed before this Court directly militates against the contention that the petitioner was not an earth work and carriage work contractor, but merely a contractor for the supply of rubbles and sand etc. Mr. Misra on behalf of the Department in view of the above evidence ultimately conceded the position. Thus, both the department as well as the Hirakud Dam Project took it for granted that the petitioner was a contractor for earth work and carriage work between the period 1951-1955.

8. With regard to the other contention of Mr. Misra, it may be stated that the last assessment for the quarter ending 31-3-1954 was ended on 28-10-1954. The petitioner having defaulted to pay the tax demanded the sales-tax, officer, Sambalpur, issued a requisition for the realisation of the sum of Rs. 21,818.18 nP. from the pending bills of the petitioner towards the sales-tax dues for the

quarter ending 31-12-1950 to 31-12-1954. Accordingly, Revenue case No. 4/6-234 of 1955-56 was started and a prohibitory order under Order 21, Rule 52 of the CPC was issued to the Financial Adviser and the Chief Accounts Officer of the Hirakud Dam Project. The letter of the Tahsildar, Sadar, stated:

"The petitioner having applied, under Rule 52, of Order 21 of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands, please deduct a sum of Rs. 21,818-3-0 from the landing bill of the above said contractor towards sales-tax dues for the quarter ending 31-12-1950 to 31-3-1954. I request that you will hold the said money subject to the further order of this Court"

While this proceeding was pending the judgment in Gannon Dunkerley's case was pronounced by the Supreme Court on 1-4-1958. In view of the aforesaid decision of the Supreme Court a circular letter was issued by the Sales-tax Officer, Sambalpur, to all contractors and a copy was sent to the petitioner in which amongst other things it was stated that the contractors who were carrying on business in execution of pure works contracts which are entirely indivisible, are no more liable to pay tax and for registration under the Orissa Sales-tax Law and their registration stands automatically cancelled with effect from 1st April, 1958. It was further stated therein:

"In case you are carrying on the business in the execution of pure works contracts, which are entirely indivisible, you are hereby instructed to surrender your registration certificate granted under the Orissa Sales-tax Act to this Office immediately. In case you are also registered u/s 7(2) of the Central Sales-tax Act, you should surrender that registration granted under the Orissa Sales-tax Act. You should surrender forthwith all the unused declaration forms, if any, issued to you under the Central Sales-tax too. If besides executing works contracts you are also carrying on other business for which you are liable for registration and payment of tax, you are hereby instructed to submit your registration certificate to this office immediately for necessary amendment."

The petitioner, thereafter wrote a letter to the Financial Adviser and the Chief Accounts Officer, Hirakud Dam Project on 13-10-1958 and requested the said authorities to refund all moneys recovered by them from the petitioner's bill towards the sales-tax and kept in miscellaneous deposits with him. He also carried on correspondence with the Administrative Officer of the Project. Two replies were received; (1) from the, Assistant Accounts Officer dated 11th May, 1959 and (2) from the Administrative Officer dated January 24, 1959 (Annexure B and B/1) in reply to the petitioner's letter dated 24-1-1956 and 8-12-1958. The letter relevant for our purposes, is the letter dated 24-1-1959 which is a reply to the petitioner's letter, dated December 3, 1958. I would rather quote the letter here in full.

"No. A.1.31/b/301-02 Government of India. MINISTRY OF IRRIGATION AND POWER. Office of the Chief Engineer, Hirakud Dam Project. Dated the 24th

January, 1959.

To

Sri Sarwan Singh, Contractor, Burla.

Sub: Recoveries made on account of sales-tax.

Dear Sir,

With reference to your letter dated 8-12-1958 to the Financial Adviser and Chief Accounts Officer, Hirakud Dam Project, I am to inform you that as reported by the Financial Adviser and Chief Accounts Officer, Hirakud Dam Project a Sum of Rs. 16,433.63 nP. was recovered from your bills on the advice of the Sales-tax Officer. Out of this sum of Rs. 2491-75 nP. is legally payable by you towards sales-tax for the quarter ending 31-12-51. The balance of Rs. 13,941.88 nP. represents sales-tax assessed on payments relating to earth work and carriage for which no sales-tax is payable.

Since the assessment of sales-tax is against you and the amount has been recovered and kept under deposits on the advice of the sales-tax authorities it is therefore your responsibility to take up the matter with the sales-tax officer for issuing necessary authority to the Financial Adviser and Chief Accounts Officer, Hirakud Dam Project for refund of the balance amount.

Yours faithfully, Sd./- Giridhari Lal. Administrative Officer, For Chief Engineer, Hirakud Dam Project"

From this letter it is fairly clear that the balance of Rs. 13941.88 nP. represents the sales-tax assessed on payments relating to earth work and carriage work for which no sales-tax is payable. It is this amount which is now claimed to be refunded to the petitioner by "the Chief Engineer on whom the prohibitory order under Order 21, Rule 52 C P. C. was passed. Some argument was sought to be made that the amount having been paid cannot be refunded. It would suffice to say that the order of attachment, under Order 21, Rule 52, C. P. C. does not amount to payment of the money to the concerned authority--Under Order 21, Rule 52 only the attachment of property either in the custody of the court, or in the custody of the public officer is made. In fact a prohibitory order was passed by the Tahasildar, Sadar in the Revenue Case No. 4/6-234 of 1955-56. Thus, this order cannot tantamount to payment to the sales tax authorities.

9. The identical question arose before this Court in the case of Orient Paper Mills Ltd. Vs. State of Orissa and Others, . The facts in that case were that the Orient Paper Mills Ltd. paid sales-tax on certain interstate sales. Subsequent to the decision of the Supreme Court in the case of The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, liable to sales tax, the Orient Paper Mills applied for refund of tax u/s 14 of the Orissa Sales Tax Act (Act 14 of 1947). In a carefully considered judgment, a division bench of this Court held that unless the application for refund was time-barred, the tax must be refunded

to the petitioner. The mere fact that the assessment order was not challenged by way of appeal or revision under the other provisions of the Act Was immaterial-- The power of the High Court under Article 226 of the Constitution of India cannot in any way be circumscribed by an Act of a legislature in India and consequently merely because some sort of finality is given to an order under any statute, the jurisdiction of the High Court under Article 226 cannot be curtailed. This decision has direct bearing on the point and we are bound by the same.

A similar view, though in a different form, appears to have been taken by the Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, In that case the Supreme Court held that the term "mistake" used in Section 72 of the Contract Act has been used without any qualification or limitation whatever and comprises within its scope, a mistake of law as well as a mistake of fact. There is no warrant for ascribing any limited meaning to the word "mistake" as has been used therein. There is no conflict between the provisions of Section 72 on the one hand and Sections 21 and 22 of the Contract Act on the other. The true principle is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise, that money must be repaid, subject however, to question of estoppel, waiver, limitation or the like. The mistake lies in thinking that the money paid was due when in fact it was not due and the mistake, if established, entitles the party paying the money to recover it back from the party receiving the same.

Where it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Contract Act. To hold that tax paid by mistake of law cannot be recovered u/s 72 of the Contract Act will not be to interpret the law, but "to make the law by adding some Such words as "otherwise" than by way of taxes after the word paid. In view of this decision whether the amount is paid or in is held in attachment is immaterial. Once it is found that the money is nod legally payable by the petitioner, the amount in the hands of the project authorities are bound to be refunded to him.

Thus, the argument that the assessment order was not challenged by way of appeal, revision or reference under the provisions of the Sales-tax Act, In view of our decision in Orient Paper Mills Ltd. Vs. State of Orissa and Others, , is immaterial. It is unnecessary to refer to the extreme view taken by the Madras High Court in the case of Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others, .

10. In the result I must hold that the petitioner was an earth and carriage work contractor and worked under the Hirakud Dam Project within the relevant period. In view of the Supreme Court decision, the petitioner is clearly not liable to tax for the work done in view of our decision in the Orient Paper Mills" case referred

to above, he is entitled to the refund. There is no question of limitation in this case. The money now under attachment in the hands of the project authorities must be refunded to the petitioner. Accordingly, we direct the Chief Engineer, Hirakud Dam Project, to refund the sum of Rs. 13,941.88 nP. representing the sales-tax in respect of the earth work and carriage work under attachment in his hands to the petitioner.

11. Let a Writ of Mandamus be issued directing the Commissioner of Sales-tax not to require the Chief Engineer, Hirakud Dam Project, to make any payment towards the sales-tax and the Chief Engineer, Hirakud Dam Project, be directed to refund the aforesaid amount Rs. 13,941.88 nP. to the petitioner.

Accordingly the petition is allowed with costs. Hearing fee Rs. 32/-.

Narasimham, C.J.

12. I agree.