

(1970) 04 PAT CK 0022
In the Patna High Court
Case No : Civil Rev. No. 200 of 1969

Special Officer, Sasaram Municipality

APPELLANT

Vs

Bhagwan Patwa

RESPONDENT

Date of Decision : 09-04-1970

Acts Referred:

Bihar Municipal (Amendment) Act, 1953 — Section 2
Provincial Small Cause Courts Act, 1887 — Section 25

Citation : (1970) 04 PAT CK 0022

Hon'ble Judges : N.L. Untwalia, J;A.N. Mukherji, J

Bench : Division Bench

Advocate : Ramji Saran and Vijoy Nandan Sahay, for the Appellant; Jagdish Pandey, for the Respondent

Judgement

N.L. Untwalia, J.—This application in revision u/s 25 of the Provincial Small Cause Courts Act at the instance of the special Officer, Sasaram Municipality, has come before us for hearing on reference by a learned Single Judge of this Court. The petitioner's suit for realisation of a certain amount of professional tax from the defendant-opposite party has been dismissed by the learned Small Cause Court Judge on the basis of my decision given sitting singly in (1) Mahabir Singh and Others Vs. Commissioner of Arrah Municipality and Others, ; the correctness of which has been doubted by the learned Single Judge in his order of reference. Since many points were raised by the defendant in the court below and almost all of them except one have been decided against him and since many of them have been raised in this Court, for the disposal of the points raised it is necessary first to state the relevant facts of the case. In the Bihar and Orissa Municipal Act, 1922 (Bihar and Orissa Act 7 of 1922), hereinafter called "the Act", Clause (ff) was introduced in Sub-section (1) of Section 82 of the Act by Section 2 of the Bihar Municipal (Amendment) Act, 1953 (Bihar Act XXXII of 1953), whereby it was provided that the Commissioners may, from time to time, at a meeting convened expressly for the purpose and with the sanction of the State Government, impose within the limits of the Municipality a tax on the trades,

professions, callings and employments specified in the Fourth Schedule at such rates not exceeding the rates specified therein as may from time to time be determined by the Commissioners at a meeting. Under the proviso to the said clause, the rates determined by the Commissioners at a meeting are subject to the approval of the State Government and subject to such modification, of the rates of taxes and exemptions of clauses of professions, trades and callings to be taxed as the State Government may direct. Chapter IVA was also introduced in the parent Act by Section 3 of the amending Act of 1953.

2. At the relevant time, Sasaram Municipality was under supersession and was functioning through the Special Officer exercising the powers of the Commissioners. In Paragraph 2 of the plaint, it was pleaded that professional tax on the professions, trades, callings and employments, specified in the Fourth Schedule of the Act at the maximum rate specified therein had been imposed in the Municipality after performing all the legal formalities, and sanctions of the State Government had been duly obtained. According to the case of the petitioner, the opposite party was engaged in the trade as he was running a box shop in the Municipality Market. He has been assessed to the professional tax for the period from the 1st of April 1962 up to the 31st of March, 1968, for a total sum of Rs. 100/-, which he has not paid. An account has been given in Schedule "A" appended to the plaint; according to which he was assessed to tax amounting to Rs. 7.50 paise for every half of the years 1962-63, 1963-64, 1964-65 and 1965-66. The amount of half-yearly tax assessed for the two halves of 1966-67 and 1967-68 was at the rate of Rs. 10/- per half year. Thus, a claim of Rs. 100/- for the total amount of tax due was made in the plaint. Every statement in the plaint was controverted by the defendant in his written statement. He asserted that the tax had not been validly imposed, nor could it be imposed. He also denied that he was running a business of box shop. He asserted that no notice of any proceeding of assessment of tax was served on him.

3. The learned S.C.C. Judge considered the objections raised by the defendant and held that tax was validly imposed by the Sasaram Municipality. The notices of the assessment proceeding were given to the defendant, but he failed to take out a licence as required by law, and, hence, in view of the decision of this Court in (1) Mahabir Singh and Others Vs. Commissioner of Arrah Municipality and Others, , no decree for realisation of professional tax can be passed in favour of the Municipality as the defendant had not taken but any licence for his business. The objection of the defendant's counsel that the tax ought to have been assessed half-yearly and not annually was overruled by relying upon a decision of mine reported in (2) Commissioner of Gaya Municipality V. Badri Narain and another (1964 B.L.J.R. 801), followed by G.N. Prasad, J. in (3) Municipal Commissioner of Arrah Municipality V. Ram Sakal Ram alias Ram Sakal Sah (1967 B.L.J.R. 176). A somewhat contrary observation of mine to the effect that the tax had to be assessed half yearly, made in the decision of (4) Commissioner of the Samastipur Municipality Vs. Randhir Kumar Singh, , in view of the other

two decisions was not given effect to. The plea of limitation raised by the defendant was also decided against him; and, since the ultimate decision was one of dismissal of the suit, the Special Officer of the Municipality has preferred this revision u/s 25 of the Provincial Small Cause Courts Act.

4. The only ground on which the suit of the petitioner has been dismissed by the court below is undoubtedly erroneous. The question which fell for decision in Mahabir Singh's case was one with reference to the licence fee which is to be charged for licensing the markets and shops for sale of certain articles u/s 276 of the Act. Under that section, it is obligatory for a person who wants to use any place within the limits of a municipality, other than a municipal market, as a market or shop for the sale of a certain kind of commodity to take out a licence for the establishment in accordance with the by-laws. The penalty has been provided in Section 277 for the owner or occupier of any land who wilfully or negligently permits the same to be used as a market without such licence as may be required by a by-law made u/s 291 of the Act. The power to close unlicensed places has also been engrafted in Section 278 of the Act. Just like the platform fee, which has been provided in Section 180 of the Act which fee is to be charged on the taking out of a licence without which the platform cannot be constructed, the principle decided by me in Mahabir Singh's case following a Bench decision of this Court in (5) Commissioner, Purnea Municipality V. Fateh Chand Ranka (I.L.R. 36 Pat. 989) was to the effect that no licence fee can be realised if the person "in violation of the by-law and the provision of law in Section 276 of the Act carries on a business without a licence. Fee can only be realised when licence is taken. If in violation of the requirement of law, a platform is constructed without a licence, or, business is carried on without a licence, the penal provision may be resorted to. The platform may be demolished, the business may be closed, but nobody can be compelled to pay a licence fee for which he has not taken out any licence. The charge of professional tax, however, is entirely on a different footing. The learned S.C.C. Judge has committed an error of law in not appreciating this distinction. The fee charged for a platform licence and for taking out a licence for carrying on a business in accordance with Section 276 of the Act is a "Fee", but the professional tax is a "tax". The difference between "tax" and "fee" has been very elaborately, if I may say so with respect been explained by Mukherjee, J., as he then was in (6) The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., . His Lordship has been pleased to point out there that although there is an element of compulsion in fee also, but the other tests are different. The professional tax is a "tax" imposed in exercise of the legislative power of the State Legislature under entry no. 60 of List II of the Seventh Schedule of the Constitution. A Bench of this Court in (7) S.S. Sahai and Others Vs. The Bhagalpur Municipality, has held that the requirement of taking out a licence for the payment of the professional tax is a mere machinery or a device for collection of the tax. It is not a licence in the strict sense of the term to enable a person to carry on his profession, trade or calling. It is noteworthy that if a

person carrying on any profession, trade or calling within the municipal limits does not take out a licence as required by Section 150A of the Act on payment of professional tax assessed on him he can neither be prosecuted as there is no such provision in the Act, nor can he be asked to stop the carrying on of his profession or trade. The licence required to be taken under the said revision of law is not a trading licence to enable the trader to carry on the business, but, as pointed out by the bench in the case aforesaid it is a mere device for the collection of the professional tax. In such a situation, it is plain that a suit for realisation of the tax is maintainable irrespective of the fact whether the person on whom tax has been imposed has taken out a licence or not. If he takes out a licence, he pays the tax as licence cannot be given without the payment of the tax. If he fails to pay the tax and does not take out a licence, two courses are open to the Municipality for realisation of the professional tax; one is to serve a demand notice u/s 123 of the Act and then to take recourse to the provisions contained in Section 124 or 129A and 129B of the Act, or, to file a suit for realisation of the tax amount u/s 130 of the Act. Just like machinery provided for realisation of the income tax dues, a machinery has been provided in the Act for realisation of the professional tax. The suit is thus undoubtedly maintainable.

5. But that does not finish the matter and the points involved in this case. Before I proceed to deal with one ticklish question, I would like to dispose of a few other points raised on behalf of the defendant-opposite party in the court below and reiterated here. According to the finding of the learned S.C.C. Judge, tax was validly imposed by the Municipality. The powers of the Commissioners was being exercised by the Special Officer. A certified copy of the Government notification dated the 13th January, 1955 (Ext. 8) was produced to show that the Governor had been pleased to sanction the imposition of professional tax by the Sasaram Municipality at the maximum rate specified in the Fourth Schedule. A resolution of the Special Officer dated the 25th June, 1963 (Ext. 5) was produced to show that the Special Officer in view of the sanction of the State Government had decided to impose a tax on trades, professions, callings and employments as specified in the Fourth Schedule at the rates not exceeding the rates mentioned therein. The wordings of the resolution are not very happy, but reading it with the sanction (Ext. 8) it is clear that tax at the maximum rate provided in the Fourth Schedule was imposed.

6. Thereafter, the findings of the learned S.C.C. Judge on the basis of Exts. 1 series, 2 series and 7 series is that from time to time the defendant was asked to file a return under Sub-section (2) of Section 150B of the Act. Assessment notices were also given to him every year showing the amount of tax imposed for the half year in a particular year on the basis of the assessment orders made every year. The defendant neither filed any return nor objected to the assessment either by filing application for review as provided in Section 150E of the Act or in any other manner. He never asserted before the Municipality that the determination of the amount of tax payable by him was wrong or that he was not liable to be assessed as he was not carrying on any business or the like. It is

true that no demand notice was ever served on the opposite party u/s 123 of the Act. The argument, therefore, was that without the service of the demand notice, the suit could not be instituted and was not maintainable. This argument has no substance as for taking recourse to levy by distress on failure to pay tax as provided in Section 124 of the Act or for recovery of arrears of tax as a public demand in accordance with Sections 129A and 129B of the Act. Service of a demand notice u/s 123 is a condition precedent. But it is not so for the filing of a suit for realisation of tax u/s 130 of the Act when the Municipality decides to realise the amount by suit instead of proceeding by distress or sale. This is the view which has been taken by Dhavle, J. in (8) Municipal Commissioners Vs. Kapur Chand Lall, and Taikeshwar Nath, J. in (9) Commissioners, Buxar Municipality Vs. Kailash Prasad, .

7. Learned Advocate for the opposite party endeavored to support the dismissal of the petitioner's suit by the court below by pointing out that there was no finding in its judgment that the opposite party was carrying on a business of box. The assessment order was vague in that regard. In my opinion, in absence of any objection taken by the opposite party before the assessing authorities at any time either at the time of assessment or by way of review, it is not open to him to attack the assessment order by disputing questions of fact in relation to it. The finding is that the defendant carried on business, and but the value of the place of his business has been determined in the assessment orders passed every year vide Exts. 7 series. On the value of the place of business, the professional tax has been assessed. The matter is not open to be attacked and debated on this question of fact in civil court. The remedy of the defendant was to go in for review u/s 150E of the Act which review application, as provided therein, would have been dealt with and disposed of in accordance with the procedure laid down in Sections 115, 117, 118 and 119 of the Act, as if such an application was an application presented u/s 116. Mr. Pandey further submitted that since a procedure has been laid down for realising the tax after granting a licence, therefore the suit is not maintainable. But he could not answer as to what the Municipality is to do if the assessee does not pay the tax and take out a licence. The obvious answer is as I have given above.

8. The point of limitation also has been rightly decided by the court below. Such a suit for realisation of tax by the Municipality was not covered by any specific article of the Limitation Act, 1908. Under the residuary Article 120, such a suit could be filed within six years of the date when the tax became due vide (10) Mathura Prasad Vs. Special Officer in charge, Gaya Municipality, . There is no specific article in the new Limitation Act of 1963. The residuary Article 113 provides for a period of three years only. It has shortened the period. Section 30 of the new Act, therefore, can be pressed into service in favour of the petitioner, as has been done by the court below. The section was elaborately considered by me sitting in a Division Bench in (11) Mani Devi and Others Vs. Ram Prasad and Others, . The suit for realisation of the tax commencing from the year 1962-63 could be filed before the expiry of six years or five years as provided in Section

30 of the Limitation Act, 1963, whichever period expired earlier. The suit was filed on the 1st April, 1968. It was before the expiry of either of the periods. It has rightly been held by the court below that it was within time.

9. Now I come to deal with a somewhat difficult question in this case as to whether the assessment made annually by the Municipality, as seems to have been done in this case, was legal, or, whether under the law it was incumbent upon the Municipality to make the assessment half-yearly. In this regard, I seem to have expressed divergent views in two decisions, in both sitting singly. In (2) Commissioner of Gaya Municipality V. Badri Narain (1964 B.L.J.R. 801), I have observed that the procedure of assessment of professional tax has got to be followed very year and every year the assessee has got to be given an opportunity for filing such objection as he may have in regard to the imposition of tax. Since in that case, without assessment of tax a demand notice was served, it was held by me that without making any assessment and imposition of tax every year, the assessee could not be asked to pay professional tax by mere service of demand notice and without service of assessment notice. A similar observation, following this decision, was made by G.N. Prasad, J. in (3) Municipal Commissioner of Arrah Municipality V. Ram Sakal Ram alias Ram Sakal Sah (1967 B.L.J.R. 176). In (4) Commissioner of the Samastipur Municipality Vs. Randhir Kumar Singh, , I held that giving of notice for two financial years was illegal and unjustified. Assessment has got to be made and its notice has got to be given for each half year, unless the case is covered by the third proviso to Section 150-A (reference to second proviso in that judgment seems to be a mistake). It seems that since in neither of the cases the point directly fell for decision, contrary observations were made by me without a careful consideration and final determination of the point which has fallen for determination in the instant case. In both the cases decided by me earlier, whether the assessment was required to be made half yearly or yearly, the same result would have followed as in neither of the cases the assessment was made either half yearly or yearly. But, in the instant case, assessment have been made yearly, although determining the amount of half yearly tax payable by the assessee. The question of difficulty is whether yearly assessments can be upheld under the law or whether they are likely to be struck down by taking the view that half yearly assessments are mandatory under it.

10. The law as enacted in the Act for imposition of professional tax is defective and not clear at all in respect of the procedure and the period of assessment. Section 82(1)(ff) does not indicate anything. It merely fixes the maximum rate specified in the Fourth Schedule beyond which the rate of tax cannot be fixed by the municipality. In the Fourth Schedule, the rate mentioned is on the half-yearly basis, and it is stated in Clause (1) of the said Schedule that "Every licence shall be granted under one or the other of the clauses mentioned in the second column of the following table and there shall be paid half-yearly from 1st April to 30th September and 1st October to 31st March for the same a tax not exceeding the amount mentioned in that behalf in the third column of the table". Section

150A runs as follows:--

When it has been determined that a tax shall be imposed on professions, trades, callings and employments every person who exercises within the Municipality, either by himself or by an agent or representative, any of the professions, trades, callings or employments specified in the Fourth Schedule and who is liable to pay such tax, shall take out a half yearly licence and pay the tax assessed on him in pursuance of Clause (ff) of Sub-section (1) of Section 82:

Provided that such tax shall be imposed on the income accrued within the municipality during the year next preceding the year for which the tax is imposed:

Provided further that nothing in this section shall be deemed to apply to any person who exercises any such profession, trade, calling or holds any employment within the Municipality, and whose taxable income does not exceed fifteen hundred rupees per annum or the value of whose place of business does not exceed ten rupees per mensem or whose income from employment does not exceed twenty-four hundred rupees per annum:

Provided also that any person liable to pay the tax under this section may, if he so desires, on application to the Commissioners, take cut a yearly licence on payment of the full amount of the tax due for the whole year:

Provided also that the grant of such a licence shall not be deemed to affect the liability of the licensee to take out a licence under any other sections of this Act.

Explanation--(1) the taxable income of any person liable to pay the tax under this section shall be deemed to be the amount computed in accordance with the provisions of the Indian Income Tax Act, 1922, and where any such person is not subject to assessment of income tax under the said Act, his taxable income shall be the amount which shall be computed, so far as may be, in accordance with the procedure laid down in the said Act.

(2) The onus of proving the amounts of the taxable income computed under the said Act shall lie on the person liable to pay the tax under this section.

Sub-section (2) of Section 150B is an enabling provision as has been said by me in (4) Commissioner of the Samastipur Municipality Vs. Randhir Kumar Singh, . It lays down that "For the purpose of assessing a tax on professions, trades, callings and employment, it shall be lawful for the Commissioner by notice, to require any such profession, trade, callings or employment within the Municipality to furnish any statement or return or to produce any document mentioned therein within such period as may be specified in the notice." No procedure is clearly provided as to how the assessment is to be made and whether a separate notice of assessment has to be issued. I have pointed out in the case of the Commissioner of the Samastipur Municipality that a better provision is to be found in that regard in Section 177 of the Patna Municipal Corporation Act; but as a matter of construction I have held that the notice of

assessment has to be given without which the assessee will not be able to avail of the remedy of review provided in Section 150E of the Act. Explanation (1) after the provisos to Section 150A and the first proviso would indicate that for the purpose of assessment of professional tax the taxable income of any person liable to pay the tax under the Income Tax Act is relevant or, in absence of that, following the same procedure the income can be determined. On the one hand, therefore, the mention of half-yearly rates in the Fourth Schedule and the provision of taking out half-yearly licence on payment of tax assessed indicate that the assessment has got to be made half-yearly unless under the third proviso to Section 150A a person liable to pay the tax desires on application to Commissioners to take out a yearly licence on payment of the full amount of the tax due for the whole year; while, on the other hand, the basis in certain cases of taking the taxable income as determined under the Income Tax Act or by following the procedure therein indicates that when a return is called for under Sub-section (2) of Section 150B, the assessment of the professional tax has to be made on the annual basis although the amount will be payable half-yearly. In face of such a difficulty, it is no wonder that one is likely to think that the assessment should be half-yearly and another may think that the assessment should be yearly. Both the views find support from the defective language of the Act, but the law cannot be left in an uncertain position. The reasonable view to take in this regard is that the Municipal authorities have got the power to make assessment of the professional tax annually, but the amount of tax can be paid half yearly on taking out a licence every six months until the assessee desires that he should make payment for the whole of the year and take out one licence for that year. The assessment of tax annually, therefore, is not against any express provision of the Act and cannot be held to be illegal. Since the law authorises the assessee to pay the tax assessed on him in pursuance of Clause (ff) of Sub-section (1) of Section 82 and take out a half-yearly licence, at his request, assessments can be made separately for the two halves in a particular year. Generally and ordinarily, it would not be necessary to do so, but if under special circumstances the assessee makes the request to assess the amount of tax for the two halves of a particular year separately, the request will not be unwarranted by law and cannot be rejected. Suppose an assessee in the first half of the year was carrying on a business in a premises, the rental value of which was Rs. 50/- per mensem, he will be assessed to pay professional tax amounting to Rs. 25/- for that half year. But suppose in the next half of the year, he had shifted to a premises, the rental value of which is only Rs. 25/- per mensem, he will be assessed to pay a sum of Rs. 10/- for the second half of the year. This advantage, which can be extended to the assesses on his asking cannot be denied by laying down a rigid rule of annual assessment of the professional tax. In one sense, it may be advantageous to the Municipality also if it is held that under law it is entitled to make half-yearly assessments. If the facts of the example which I have given above are just the other way, the municipal authorities will be entitled to demand Rs. 25/- for the second half of the year although in the first half the assessee was liable to pay Rs. 10/- only. In my

opinion, therefore, it is legitimate under certain circumstances to make half-yearly assessments, but, generally and ordinarily, the assessments should be made yearly. It has to be made clear that the assessments cannot be made at one time for a period less than six months or more than one year, as such assessments will be unwarranted by law. But neither the yearly assessments nor the half-yearly assessments in certain circumstances can be held to be illegal. Some support to the view which I have expressed above can be lent from an observation of the Supreme Court in (12) *Ram Bachan Lal Vs. The State of Bihar*, . While challenging the vires of the enactment introduced by Bihar XXXII of 1953, when an argument was advanced before the Supreme Court that the Act did not lay down proper procedure for assessment and determination of the tax, it was rejected with reference to explanation (1) appended to Section 150A by pointing out the machinery for determination of the income. That suggests that the assessment of professional tax can be made on yearly basis. The validity of this part of the enactment has also been upheld by a Bench of this Court in (13) *Rohtas Industries Ltd., Dalmianagar and others V. State of Bihar* and another (1965 B.L.J.R. 886. In the instant case, the finding is that for all the six years in question, assessment notices were given to the opposite party. He was called upon to file return but did not file any. In my opinion, the assessments made annually in this case must be held to be legal and warranted by the provisions of Chapter IVA of the Act.

In the result, the application in revision is allowed, the decision of the learned S.C.C. Judge is set aside and the suit of the plaintiff-petitioner for the sum of Rs. 100/- is decreed. The plaintiff will also get interest, pendente lite and future, on the said sum at the rate of six per cent per annum from the date of the institution of the suit till realisation. In the circumstances, I shall direct the parties to bear their own costs throughout.