

(1984) 11 OHC CK 0014

In the Orissa High Court

Case No : Original Jurisdiction Case No. 515 of 1978

Sri Krupasindhu Behera

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 28-11-1984

Acts Referred:

Constitution of India, 1950 — Article 265

Orissa Sales Tax Act, 1947 — Section 12(4), 12(8), 13(4), 13(6)

Citation : (1985) 59 CLT 66 : (1985) 1 OLR 27 : (1985) 59 STC 269

Hon'ble Judges : S.C. Mohapatra, J; R.C. Patnaik, J

Bench : Division Bench

Advocate : A. Pasayat, for the Appellant; J.K. Patnaik, Standing Counsel, Commercial Taxes, for the Respondent

Judgement

S.C. Mohapatra, J.—The petitioner has challenged the initiation of a recovery proceeding under the Orissa Sales Tax Act, 1947 (hereafter referred to as the "Act") in this writ application under Arts. 226 and 227 of the Constitution of India and has prayed to quash the notice issued to him for that purpose.

2. The undisputed facts are that the petitioner was carrying on business of sale and purchase of goods as a partner in a firm registered as a dealer under the Orissa Sales Tax Act. There was an assessment u/s 12(4) of the Act for the year 1967-68 making a demand of Rs.2103.21 paise by order dated 30.5.1969 which was not paid. After dissolution & the firm, it was detected that some turnover has escaped assessment. A proceeding was initiated u/s 12(8) of the Act and by assessment order, dated 24.2.1970 the amount of tax levied on that account was Rs. 1555)/-, Though the order of assessment was challenged in appeal, the same was confirmed. The total tax due was thus Rs.3,658. 21 paise. On 7.9.1974, the Sales Tax Officer issued a notice giving a last chance to deposit the amount of Rs.3,658.21 paise failing which it was intimated that the maximum penalty would be imposed. At the demand was not satisfied, the process of recovery under the Schedule to the Act as incorporated by the Orissa Sales Tax (Amendment.) Act,

1975 (Orissa Act 3 of 1976) by issue of a certificate signed by the Tax Recovery Officer on 20.2.1978 demanding Rs. 3,653.31 paise as tax for the year 1967-68, Rs. 2,000/- as penalty and Rs. 3106.00 as interest, the total amount being Rs. 8,759.31 paise, was taken. In spite of it the Sales Tax Officer issued a notice on 27.2.1978 calling upon the petitioner granting time till 8.3.1978 to pay a sum of Rs. 8,753.31 paise being the tax, penalty and interest demanded for the period 1967-68.

3. Though various grounds were taken for challenging the recovery proceeding, Mr. A. Pasayat, the learned counsel for the petitioner ultimately confined his submissions for challenging the recovery proceeding" relating to penalty and interest and submitted that in view of the stringent financial condition of the petitioner, he should be allowed to pay the arrear tax only amounting to Rs. 3,653.21 paise, as indicated in the impugned notice by instalments. Mr. J. K. Patnaik, the learned standing counsel for the Commercial Taxes Department submitted that the imposition of penalty and interest is valid in law and there should be no interference in this writ application for the collection of arrear tax which is long due since 1970.

4. Under the scheme of the Act, a registered dealer is to pay the tax as admitted by him along with the return. Thereafter, the taxing authorities assess the dealer under the various provisions indicated in Section 12 were the return filed is not accepted u/s 12(1). u/s 23 right of first appeal and second appeal is provided and u/s 24 reference can be made to this Court. Subject to the appeals and reference, the assessment becomes final. Section 13 provides for collection and recovery of tax and consequences of failure to pay the tax due, u/s 13(4) it is provided that on assessment being completed, a demand notice is to be served on the dealer and the demanded amount is to be paid within such time as fixed in the notice. There is no dispute in this Court that the amount reflected in the impugned notice towards tax was to be paid much prior to 1.1.1971 which remained unpaid.

5. Under Article 265 of the Constitution not only the levy but also the collection of any tax is prohibited unless authorised by law, The power of levy and collection of sales tax has been given under the Act and the manner of levy and collection has been provided for. The taxing authorities under the Act, being creatures of the statute are to exercise powers as provided under the Act and are to collect the tax in the manner provided therein and not otherwise.

6. In the counter affidavit it is indicated that Rs. 500/- was imposed as penalty u/s 12(8) while assessing the escaped turnover Rs. 1,000/- has been imposed as penalty u/s 13(5) of the Act for non-payment of the assessed amount in due time. The imposition of another Rs. 500/- towards penalty to make a total penalty of Rs. 2,000/-, as indicated in the impugned notice, has not been explained. So far as Rs.1,000/-, it is admitted in the counter affidavit that the service of notice of demand or the order imposing the same is not supported by any documentary evidence.

Notice to pay the penalty u/s 13(5) within a period of thirty days from the date of receipt of the same is mandatory. In the absence of service of notice, the penalty cannot be treated to have remained unpaid.

In the case reported in 1974(1) C. W. R. 642 : M/s. Orissa Corporation Private Ltd. v. State of Orissa and others it was held that the proceeding under the Public Demands Recovery Act is a very strict proceeding and the form prescribed under the statute is of substantial significance. Any mistake in the form particularly in regard to a material particular would certainly vitiate the proceeding. The same principle is applicable to collection under the schedule to the Act. A bare look at the impugned statutory notice in form No. 2 clearly shows that columns 4 and 5 in respect of penalty have been kept vacant. In case the columns had been filled up, the break up of the penalty and the date of receipt of the orders would have been known. It is not known how another Rs.500/- were demanded when only Rs. 1500/- have been explained in the counter affidavit. Out of Rs.1500/- for Rs. 1,000/- admittedly no demand notice has been served on the assessee. In view of the aforesaid irregularity in the notice the penalty as indicated therein cannot be recovered.

7. So far as the amount of interest of Rs. 3,106/-, it is indicated in column 1 of the notice (Annex-2) that the same is u/s 12(8). The column relates to period of assessment and not the provision of law. There is no scope for imposition of interest u/s 12(8). The learned standing counsel for the Department clarified that the interest is levied u/s 13 (6). As the time of initiating the proceeding for recovery in the year 1978, the provision of Section 13(6) was as follows:

"(6) In case a dealer makes default in payment of any amount for the payment of which a notice has been issued under Sub-section (4), by the date of expiry of the period allowed under that Sub-section, he shall pay interest on the said amount at the rate of six percent per annum from the said date for the first three months and thereafter at the rate of twelve percent per annum :

Provided that where any appeal or revision u/s 23 or reference u/s 24 has been preferred, the interest as aforesaid shall be payable from the date specified above on the tax or penalty, if any, ultimately found due from the dealer.

Provided further that in case the tax or penalty, if any, is enhanced in such appeal, revision or reference, the interest on the excess amount shall be payable from the date by which the dealer is required to pay such excess amount.

Provided also that no interest under this Sub-section shall be charged in respect of any amount which remained unpaid at anytime prior to the 1st day of January, 1971."

The last proviso has remained unchanged even now. It is clear from the said proviso that no interest under Sub-section (6) shall be charged in respect of any amount which remained unpaid at any time prior to the 1st day of January 1971. Section 13(4) provides that the tax assessed u/s 12(4) and the tax assessed u/s

12(8) together with penalty directed to be paid shall be paid by the dealer into a Government treasury within thirty days from the date of service of the notice. There is no dispute that the demanded tax and penalty under the orders of assessment remained unpaid prior to the 1st day of January, 1971. Accordingly no interest can be charged in respect of the demanded tax and penalty as they remained unpaid at a time prior to 1.1.1971.

8. In Conclusion the liability of the petitioner for payment of Rs. 3,653.31 paise towards the tax as indicated in the impugned notice (Annex-2) is not disputed. The notice in respect of recovery of penalty of Rs. 2,000/- is bad in law and is liable to be quashed. Apart from the defect in the notice, the arrear of tax and penalty having remained unpaid prior to 1.1.1971 no interest can be charged on the said amount and the notice in respect of Rs 3,106/- is liable to be quashed.

9. The submission of Mr. Pasayat for directing collection of the amount of Rs. 3,653.21 paise by the Tax Recovery Officer in installments is not contrary to any provision in the statute. Taking into consideration the long period for which the tax has remained unpaid and the adverse financial condition of the petitioner, ends of justice would be best served in case the petitioner is allowed to pay Rs.1000/- by the end of December, 1984, Rs.1,000/- by the end of January. 1985 and the balance amount by the end of February, 1985. In case any amount remains unpaid by the end of February, 1985, the same shall be recovered by coercive process as indicated in the schedule to the Act and the rules made thereunder.

10. In the result, this writ application is allowed in part. There shall be no order as to costs.

R.C. Patnaik, J.

11. I agree.