
(1969) 03 AP CK 0003
In the Andhra Pradesh High Court
Case No : Tax Case No. 44 of 1965

State of Andhra Pradesh	Vs	APPELLANT
Godavarthi Kasiviswanadham		RESPONDENT

Date of Decision : 18-03-1969

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 5
Andhra Pradesh General Sales Tax Rules, 1957 — Rule 23(1)

Citation : AIR 1970 AP 80 : (1970) 25 STC 1

Hon'ble Judges : P. Jaganmohan Reddy, C.J.; Venkatesam, J.; Sambasiva Rao, J

Bench : Full Bench

Advocate : Acting Advocate General, for the Appellant; P. Rama Rao, for the Respondent

Judgement

Sambasiva Rao, J.—Godavarthi Venkateswarlu was a dealer in pulses. The Sales-tax Officers inspected his business premises on 4-3-1958. They detected in the course of that inspection, certain discrepancies in his accounts. Venkateswarlu, however, died on 17-5-1958. His son, Kasiviswanatham, the respondent in the Tax Revision Case, as the legal representative of his deceased father, who was the dealer, submitted to the Deputy Commercial Tax Officer, Tenali, the return for the year 1957-58 (i.e. from 1-4-1957 to 31-3-1958) for the purpose of sales tax assessment. He also produced all the accounts maintained by the deceased dealer. The net turnover reported in the return was Rs. 32,324-13-0. The Deputy Commercial Tax Officer, however, did not accept this turnover, as the accounts maintained were found to be not correct. Therefore by his proceedings dated 15-12-1958, the Officer assessed the deceased dealer to the best of his judgment assessment. Later, in his proceedings dated 18-12-1961, the officer also levied a penalty of Rupees 1879 u/s 14(2) of the Andhra Pradesh General Sales Tax Act 1957 (hereinafter called the Sales Tax Act). The respondent preferred an appeal against this before the Assistant Commissioner. The respondent carried the matter in Second Appeal to the Sales Tax Appellate Tribunal . The Tribunal allowed the appeal and set aside the levy of penalty

holding that the alleged concealments had occurred prior to the death of the respondent's father (i.e. the dealer), that the respondent was not conscious of them and the respondent could not be held responsible for them and could not be penalised for the acts of his father. The principle of Actio Personalis Moritur Cum Persona was invoked by the Tribunal to the aid of the respondent-appellant. The State has filed this revision case against the said order of the Tribunal raising the contention "whether the legal heir of a deceased dealer, who succeeded to the business of his father, is not liable for the penalty u/s 14 (2), particularly when the return which gave rise to the best judgement assessment was filed by him"

2. The revision case originally came up before a Division Bench consisting of Basi Reddy, J. and one of us viz., Sambasivarao, J. The learned Advocate for the respondent contended before the Divisional Bench, that Rule 23 (1) of the Rules framed under the Sales Tax Act, under which penalty was levied against the respondent, is ultra vires, in that, whereas section 39(2)(o) of the act speaks of the assessment and recovery of tax only and there is no reference there in to penalty, Rule 23 (1) which purports to have been framed under the powers conferred by the aforesaid Section 39 (2) (o) seeks to impose not only tax, but also penalty in respect of business of the deceased person. In view of this important question, the Division Bench referred the matter to the Full Bench. Thus the matter has come up before us.

3. The important question that arises, thus, for consideration by us is, whether Rule 23 (1) of the Rules is ultra vires the power of the rule-making authority. Section 39 of the Sales Tax Act confers on the State Government power to make rules. Portions of that section which are relevant for the present consideration are as follows:

39 (1):-The State Government may make rules to carry out the purposes of this Act.

(2):-In particular and without prejudice to the generality of the foregoing power, such rules may provide for-

(a) to (n)

(o) the assessment and recovery of tax under this Act in respect of a business which is discontinued or the ownership of which has changed or in respect of a business of a deceased person.....

Rule 23, under which the impugned penalty was levied, is in the following terms :-

"23. (1):- Where any dealer doing business in prospect of which tax is payable under this Act, is dead, the executor, administrator, successor in title or other legal representative of the deceased dealer shall, in respect of such business, be liable to submit the returns due under these rules,

23 (1):-and to assessment u/s 5,5-A, 6 or 11 or any notification u/s 9(1) and to pay out of the estate of the deceased dealer, to the tax and/or any penalty assessed or levied as payable by the deceased dealer.

(2):-The provisions relating to appeals and revision shall be applicable to assessments made under sub-rule (1) as if the Executor, Administrator, successor in title or other legal representative were himself the dealer.

(3):-The provisions of sub-rules (1) and (2) shall apply mutatis mutandis to a partnership firm of which the managing partners have died".

4. The contention put forward on behalf of the respondent is that the Rule 23 (1) was obviously framed under the powers conferred by Section 39 (2) (o). It should, therefore, be strictly limited to and confined within the power conferred by the said clause (o) refers only to "the assessment and recovery of tax under this Act". Rule 23 (1), however, travels beyond this scope and provides for the levy of penalty also, which does not come within the amplitude of the power conferred. The omission of any reference to penalty in Section 39 (2) (o) is said to be for the obvious reason that the legal representatives cannot be held responsible for the irregularities committed by the deceased dealers. It is, therefore, contended that Rule 23(1) is ultra vires the powers conferred on the rule-making authority. simply stated, this is the argument of the respondent on this part of the case.

5. Sri P. Ramachandra Reddy, the learned Principal Government Pleader appearing for the State seeks to sustain Rule 23(1) and the power to levy penalty thereunder on the basis of three arguments. In the first place, he argues that levy of penalty is incidental to the assessment proceedings. It is part of the machinery adopted for assessment of a dealer and to levy tax on him. Penalty is nothing but an additional tax imposed on the dealer, when he tries to evade tax. He seeks to invoke, in aid of this argument, the decision of the Supreme Court in C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, . That is a case, which arose under the Travancore Income Tax Act and the Indian Income Tax Act 1933. A partnership firm was assessed to Income Tax. One of the partners died and the surviving partner submitted returns of the income of the firm. In the course of the assessment proceedings, it was discovered that the firm had carried on transactions in different commodities in fictitious names and had failed to disclose them. After giving imposed penalty upon the firm. The surviving partner then applied in a writ petition to the High Court of Judicature praying to High Court rejected. He, therefore, carried the matter in appeal before the Supreme Court. It was urged before the Supreme Court, that a proceeding for imposition of penalty and a proceeding for assessment of income-tax are matters distinct, and Section 44 may be resorted to for assessing tax due and payable by a firm, business where of has been discontinued, but an order imposing penalty u/s 28 of the Act cannot by virtue of Section 44 be passed.

6. Repelling this contention, Shah, J. who spoke for the Court observed:

"The expression "assessment" as has often been said, is used in the Income Tax Act with different connotations..... A review of the provisions of Chapter IV of the Act sufficiently discloses that the word "assessment" has been used in its widest connotation in that Chapter is "Deductions and Assessment". After a review of the different Sections in that Chapter the learned Judge proceeded to observe at page 612.

"The expression "assessment" used in these sections is not used merely in the sense of computation of income and there is, in our judgment, no ground for holding that, when by Section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income u/s 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, all the professions of Chapter IV shall apply so far as may be, to such assessment a restricted content: in terms it says that all the provisions of Chapter IV shall apply so far as may be to assessment of firms which have discontinued their businesses. By Section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. It is true that this liability arises only if the Income Tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the Taxing Authorities; but it is imposed as a part of the machinery for assessment of tax liability". Then, refuting the contention of the appellant that, if the process of assessment includes taking steps for imposing penalties, the legislature has inadvertently left a lacuna in the Act, the learned Judge laid down: "This plea may be accepted only if the court is compelled, in view of unambiguous language to hold that such was the intention of the Legislature. Here the language used does not even tend to such an interpretation. In interpreting a fiscal statute the Court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in case of doubt in a manner favorable to the tax-payer. But whereas in the present case, the use of words "capable of comprehensive import," provision is made for imposing liability for penalty upon tax-payers guilty of fraud, gross negligence or contumacious conduct, an assumption that the words were used in a restricted sense so as to defeat the avowed object of the Legislature qua a certain class will not be lightly made". This decision which is based upon the provisions of the Income Tax Act has no bearing on the instant case which arises under the Sales Tax Act. Their Lordships of the Supreme Court, after a review of Chapter IV of the Income Tax Act 1922 stated that by the use of the words "capable of comprehensive import" provision is made therein for imposing penalty along with tax upon assesses guilty of fraud etc. But the position is different under the sales Tax Act. Sections 11, 14, 15, 17, 18, 21(4) (a)(i) and (ii) 30(1)(a) use tax and penalty in juxtaposition and keep them

distinct and separate. Imposition of tax does not always include levy of penalty. section 14 maintains this distinction in clear terms. In fact, this is the provision under which assessment of tax and levy of penalty are made. Subsection (1) of the section makes provision for the assessment on the basis of the return submitted u/s 13 and also provides for making a best judgment assessment itself can be made only after giving Authority deems necessary. It is very important to note the language of sub-section (2) in this context. It reads:

"14(2):-When making an assessment to the best of judgment under sub-section (1), the assessing authority may also direct the dealer to pay in addition to the tax so assessed a penalty as specified in sub-section (8) on the turnover that was not disclosed by the dealer in his return".

Similarly sub-s. (3) also provides for making best judgement assessment and imposition of penalty "in addition" to the tax in certain cases, where a dealer fails to submit the return or fails to produce the accounts etc. before the date prescribed in that behalf, or when he submits a return subsequent to the date of inspection. Sub-ss. (2) and (3) clearly state that penalty is in addition to the tax assessed under the Act. Sub-section (8) lays down the limits within which the penalty can be levied under sub-sections (2) and (3). It is, thus, clear that penalty is clearly separate and distinct from tax, under the Sales Tax Act. The usual proceedings taken for the assessment of the tax are not sufficient for the levy of penalty also. There is thus, no doubt that under the Sales Tax Act, penalty is not merely incidental to assessment proceedings, as the learned Government Pleader contends. The word "tax" as used in the Act does not include "penalty". The two are treated therein as distinct and separate. Gopal Rao Ekbote, J.expressed the same view in *Morisetty Bhadracharya and Others Vs. The Sales Tax Appellate Tribunal*, while dealing with Section 21(6) of the Andhra Pradesh General Sales Tax Act 1957 and the Amending Act 26 of 1959. We have, therefore, no hesitation in repelling this argument advanced for the State.

7. The second contention of the learned Government Pleader is that, though the return submitted relates to the business done by the deceased dealer, since the respondent himself has submitted it he should also be liable for the penalty. According to him, the respondent must be held responsible for all the defects in the return. This theory cannot be countenanced even for a single minute, because the respondent was obliged to file a return under Rule 23(1). It is not in dispute that the return is based upon the accounts maintained by the deceased dealer. It is not anybody's case that the respondent has manipulated the accounts. Obviously, the deceased dealer himself was their author. In fact, the Sales Tax Officers inspected the accounts and found the irregularities, when the dealer was alive. It is, therefore, futile to argue that the respondent himself is responsible for the return and the defects therein. Moreover, it should be noted that Rule 23(1) does not make the legal representative personally liable to pay penalty or the tax. They are levied on and recoverable from the estate of the deceased dealer. There is, therefore, no justification in making the respondent

liable for anything in the return, simply because he had discharged the duty of submitting the return, cast on him under law.

8. There remains the third contention advanced by the learned Government Pleader. According to him, Rule 23(1) has been made by the Government, as much u/s 39 (1) confers a general power. The various items enumerated in sub-section (2) are only illustrative cases, but not exhaustive or restrictive of the general power to make rules, conferred under R. 23 (1). The learned Government Pleader contends that, in exercise of the general power conferred under R. 23(1), the State Government can make such a rule in exercise of the general power under sub-section (1), because imposition and collection of penalty is one of the purposes of the Act.

9. We are satisfied that this contention has considerable force and it must be accepted. The two sub-section 39 are not mutually exclusive. Having laid down the general power of rule-making under sub-section (1), the Legislature proceeded to give in sub-section (2) several illustrations of that general power. In fact, it is clear from the reading of the two Sections that it is sub-section (1) that confers rule-making power that is conferred under sub-section (1). It has to be noticed that every item included in sub-section (2) is only an instance of the several purposes of the Act, for which rules can be made. In other words, they are only illustrative cases of the general power referred to in sub-section (1). Nor could it be said that the instances enumerated in sub-section (2) exhaust all the purposes and subjects on which rules can be made. The very language of the first portion of sub-section (2) makes this position clear. It states: "In particular and without prejudice to the generality of the foregoing power, such rules may provide for". Thus the language of sub-section (2) specifically declares that the several subjects enumerated therein are only particular or illustrative instances of the general power conferred under sub-section (1) and that they are without any prejudice and not restrictive of that power. It cannot, therefore, be said that, simply because a particular subject is not included in the illustrative list contained in sub-section (2), the State Government cannot make a rule in regard to it, even though it is one of the purposes of the Act.

10. This position is well established and beyond pale of controversy and doubt. We will cite only a few instances where the highest Courts have dealt with this problem and laid down the view which we have expressed above. In AIR 1945 156 (Privy Council) the Privy Council construed Section 2 of the Defence of India Act 1939, as amended by the Amending Act 1940. there also, sub-section (2) provided a long list of cases, in respect of which rules could be made. Overruling the decision of the Federal Court, the Privy Council stated the law at page 160 in the following terms:-

"In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules", which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of

sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)". There can be no doubt - as the learned Judge himself appears to have thought - that the general language of sub-section (1) amply justifies the terms of Rule 26 and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2)".

Rule 26 of the Defence of India Rules, impugned in that case, conferred power on the Central or Provincial Government to detain a person, if he was acting, in the view of the Government, of a manner prejudicial to the Government etc.....The Federal Court took the view that Rule 26 was ultra vires, because none of the items enumerated in sub-section (2) clearly included the power to make a rule in regard to detention. It was this opinion of the Federal Court that was set aside by the Privy Council, holding that the rule clearly comes within the general power conferred under sub-section (1) of Section 2.

11. The Supreme Court of India followed this decision in *State of Kerala Vs. Shri M. Appukutty*, . The question there was, whether Rule 17 of the Madras General Sales Tax Rules 1939 was beyond the rule-making power of the State Government, as conferred u/s 19. While holding that Rule 17(1) and (3)(a) ex facie fall u/s 19(2)(f), their Lordships of the Supreme Court went further and observed that in any event they would come within the general power conferred by sub-section (1) of Section 19 of the Madras General Sales Tax Act 1939. Expressing this view, Kapur, J. speaking for the court, observed at p. 246 (of STC) : (at p. 798 of AIR).

"In any event as was said by the Privy Council in AIR 1945 156 (Privy Council) the rule-making power is conferred by sub-section (1) of (2) is merely illustrative and the rules which are referred to in sub-section (2) are authorised by and made under sub-section (1). The provisions of sub-section (2) are not restrictive of sub-section (1) as expressly stated in the words "without prejudice to the generality of the foregoing power" with which sub-section (2) begins and which words are similar to the words of sub-section (2) of Section 2 of the Defence of India Act which the Privy Council was considering. Now sub-section (1) of Section 19 of the Act provides that the state Government may make rules to carry out the purposes of this Act" and the long title of the Act is "an Act to provide for the levy of general tax on the sale of goods in the State Madras". Therefore, in our opinion, Rule 17 and the various clauses there of made u/s 19 are not beyond the rule-making power of the State Government as contained in Section 19".

12. The above statement of law by the Supreme Court was only by way of reiteration of what it had earlier stated in *Santosh Kumar Jain Vs. The State Union Of India (Intervener)*, . There the Supreme Court was considering the scope of Section 8(1) and (2) of the Essential Supplies (Temporary Power) Act 24 of 1946 and the scope of the power conferred thereunder on the Central Government. The question posed therein was one relating to the legality of the order for seizure of sugar in a factory. The contention was raised that seizure was

not one of the powers specifically referred to in sub-section (2) of Section 3, which conferred on the Central Government the power to make rules and therefore the seizure of the appellant company's sugar should be regarded as unauthorised and illegal. The Supreme Court repelled this contention, by holding at page 295 (of SCJ) = (at p. 203 of AIR):

"It is manifest that sub-section (2) of Section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is an order made there under" that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative, as such enumeration is "without prejudice to the generality of the powers referred by sub-section (1), it must be competent for the Central Government, or its delegate, the Provincial Government, to make an order for seizure under that sub-section apart from and irrespective of the anticipated contravention of any other order as contemplated in clause (i) of sub-section (2)".

13. In coming to this view, the learned Judges of the Supreme Court relied on AIR 1945 156 (Privy Council) There is, therefore, no doubt, whatever, that Rule 23(1) clearly comes within the preview of the genera power of rule-making, conferred on the State Government, u/s 39(1).

14. Nevertheless, Sri P. Rama Rao, the learned counsel for the respondent, raised the contention that sub-section (1) confers power to make rules only to carry out "the purposes of the Act," and since levy and collection of penalty are not the purposes of the act, Rule 23 (1) does not fall within the preview of sub-section (1) of Section 39. According to him, there is only one purpose of the Act, namely, to assess and collect sales tax and levy of penalty is not its purpose. We cannot uphold this argument. In the first place, it should be noticed that Section 39 (1) does not use the singular word "purpose". On the other hand, it uses the plural word "purposes". Therefore, it envisages more than one purpose of the Acct. All those purposes are referred to and provided for by the different provisions of the Act. Imposition and collection of penalty also are clearly dealt with in a number of provisions of the Act. It must necessarily be so. In a taxing stature of this nature the Legislature must envisage and provide for cases, where the assesseees attempt to contravene the provisions of the Act and to evade payment of rightful tax levied thereunder. If such contingencies are not visualised and such leaks are not plugged, no taxation law can be effective and satisfactorily implemented. In order to satisfactorily and effectively implement their provisions, penalties are generally provided in all taxation laws. Without such a sanction, there is the danger of evasion of tax. Thus, provision for levy and collection of penalties for contravening their requirements, has become an integral part of such enactment's and one of their purposes. The argument that it is not form part of the purposes of the Act, is thus a wholly untenable one.

15. Even then, Sri Rama Rao argues that Rule 23(1) does not, in terms, apply ot a penalty leviabale u/s 14 of the Sales Tax Act. He relies for this contention, on the language of Rule 23(1), which refers to assessment under Sections 5, 5-A, 6

or 11 or any notification u/s 9(1). He, therefore, seeks to limit the scope of Rule 23(1) to the assessments under these Sections alone. But there is a clear fallacy in this argument. The aforesaid section of the Sales Tax Act are only charging sections. the assessment is actually made u/s 14, either on the basis of the return or according to the best judgment. It is futile to argue that the application of Rule 23(1) is confined only to the tax or penalty levied under the aforesaid sections, because no tax is actually made u/s 14 and the tax is levied under them. The assessment is actually made u/s 14 and the tax is levied, when assessment is made, in accordance with the several charging sections referred to in Rule 23(1). What Rule 23(1) says is that the legal representative of the deceased dealer is liable to submit the returns which are liable to assessment under the charging sections 5, 5-A, 6 or 11 or any notification u/s 9(1), and that the legal representative should pay out of the estate of the deceased dealer, the tax and/or any penalty assessed or levied, as payable by the deceased dealer. Therefore, there is no limitation in Rule 23(1) as contended for by the learned counsel for the respondent.

16. Any tax and/or any penalty assessed or levied under the Sales Tax Act, as payable by the deceased dealer, is payable out of the estate of the deceased dealer. It should be borne in mind that the legal representative is not made personally liable to pay the tax and/or penalty payable by the deceased dealer. Rule 23(1) clearly provides that they are to be paid only out of the estate of the deceased dealer. Such a provision, appears to us to be quite reasonable also. If the deceased dealer had to pay tax and also penalty because of certain irregularities committed, his estate should not be permitted to escape from such liability. Had he been alive, they would have been collected from him and from his estate. It is unreasonable to permit the estate to escape this liability, because the dealer had estate after his death penalty also should equally be recoverable from it. the legal representative is liable to pay the said tax and penalty only to the extent and limit of the deceased dealer's assets in his hands. He is not mulcted with any personal liability. This, in our view, is pre-eminently reasonable.

17. The view of the Appellate Tribunal that the principle *actio personalis moritur cum persona* is applicable to this case is clearly erroneous. That principle has no application, where the law clearly provides for the survival of the liability after the death of the concerned person. the Sales Tax Act and the Rules made thereunder provide for the survival of the liability of the deceased dealer. When that is so, the dealer's liability to pay tax and/or penalty does not disappear with his death. The Appellate Tribunal clearly erred in applying this principle.

18. Thus, we see no force in either of the two objections raised by Sri Rama Rao. We, therefore, hold that Rule 23(1) is not ultra vires the powers of the rule-making authority, but is valid and enforceable. It, therefore, follows that the levy of penalty in this case is valid and in accordance with law. This tax revision case is accordingly allowed with costs. Advocate's fee Rs. 100.

19. Petition allowed.