
(1976) 01 CAL CK 0022
In the Calcutta High Court
Case No : Civil Rule No. 855 of 1968

Sudhir Chandra Mukherjee

APPELLANT

Vs

Additional Commissioner of Commercial Taxes

RESPONDENT

Date of Decision : 20-01-1976

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 11, 11(2), 13, 14, 15
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 141, 19, 227, 265

Citation : (1977) 1 ILR (Cal) 290

Hon'ble Judges : N.C. Mukherji, J; B.C. Ray, J

Bench : Division Bench

Advocate : Gopal Chakravorty, Rathindra Nath Bhaduri, Debdas Banerjee, Amalendu Mukherjee, Arun Mukherjee and Monika Chakravarti, for the Appellant; P.K. Sengupta and Samarendra Nath Datta, for the Respondent

Judgement

B.C. Ray, J.—This Rule is directed against an order of revision passed by the Additional Commissioner of Commercial Taxes, West Bengal, confirming the appellate order of the Assistant Commissioner, Commercial Taxes and the order of assessment of the Commercial Tax Officer, Taltola Charge.

2. The Petitioner and his brother Probhat Chandra Mukherjee had been carrying on the business of florist under the name and style of S.C. Mukherjee and Sons, a partnership concern. The Petitioner used to grow flowers and also to purchase flowers from the markets and resell the same and also garlands and bouquets-by making them according to the taste and desire of the customers. The Petitioner's turnover never exceeded the taxable quantum and as such, he did not get the firm registered under the Bengal Finance (Sales Tax) Act, 1941. The Petitioner was not an importer nor a manufacturer. The Petitioner, it was stated, maintained a tohcha khata-wherein daily purchases and sale of goods were kept in normal course of business.

3. In pursuance of a notice u/s 14 of the said Act the Petitioner produced his

books of accounts before the Commercial Tax Officer, Taltola Charge, who fixed his liability u/s 4(2) of the said Act and completed assessments u/s 11(2) of the Act for 1360 B.S. The said order fixing the date of liability and order or assessment on its basis were, however, set aside on appeal with direction to make the assessment afresh after determining the date of liability. The Commercial Tax Officer again determined the liability on and from Agrahayan 1361 B.S. and completed assessments for the years 1361 B.S. and 1362 B.S. and these assessments were again Set aside on appeal and the Commercial Tax Officer was directed to make their assessment after fixing the date of commencement of liability. On October 4, 1963, the Commercial Tax Officer determined the liability of the Petitioner to pay tax on and from jaistha 30, 1363 B.s. Thereafter, three assessments were made for the years Jaistha 30, 1936 B.S. to Chaitra 31, 1365 B.s. In making the, assessments the jabeda khata (tokcha book) produced by the Petitioner was rejected and assessments had been made on estimating the turnover without recording any reason for or the basis of such estimate. The Appeal Cases Nos. 8, 9 and 10 of 1964-65 filed before the Assistant Commissioner, Commercial Taxes, Calcutta (South) Circle, were dismissed on the grounds that the order determining liability being not challenged in revision (sic) could not be questioned in the appeal and that the estimates of turnover as made were reasonable and the orders of assessment could not be interfered with. Revision Cases Nos. 312, 313 and 314 of 1965-66 filed against the said order were also dismissed by the Additional Commissioner of Commercial Taxes, West Bengal who held that the Petitioner was a manufacturer and the assessments made on estimating the turnover were reasonable and proper. The orders of assessments were affirmed.

4. On March 1, 1966, the Commercial Tax Officer completed assessment for the periods from Baisakh 1, 1364 B.S. to Bhadra 13, 1370 B.S. (September 3, 1963). Appeal Case No. 94 of 1966-67 against the order of assessment was dismissed by the Assistant Commissioner, Commercial Taxes, Calcutta (South) Circle, holding that the question of dealer's liability had been already decided by the Additional Commissioner.

5. Flower has been included in the first column of Schedule 1 to the said Act and it has been exempted from sales tax from May 10, 1963.

6. A counter to the Petitioner concerned (sic) by Sri P. Sengupta, Respondent No. 3, has been filed on behalf of the Respondents Nos. 1 to 3. In para. 6 it has been stated that the Petitioner did not show to the Respondents any jabeda, khatian or vouchers in support of purchases or sales. Only rough statement of sales in plain papers without any supporting document were produced and no reliance could be placed on the said statements. In para. 7 it has been stated that the order fixing the liability from Jaistha 30, 1964 B.S. as passed on October 4, 1963, has not been challenged by the Petitioner and the assessments have been made on the basis thereof. In para. 8 it has been stated that the Petitioner did not produce any authentic evidence upon which reliance could be placed and as such, the

best judgment of assessment had to be made. It is submitted that the estimates are valid and lawful. In para. 13 it has been stated that the order passed by the Respondents in respect of fixation of liability of the Petitioner since Jaistha, 30, 1963 B.S. and all subsequent, orders on the basis of the said fixation of the liability are valid, lawful, proper and in consonance with the principles of natural justice and are not in breach of Article 19 or 265 of the Constitution. It has been submitted that the Petitioner had enough remedy under the Statute and this application under Article 227 of the Constitution was not maintainable in the facts and circumstances of the case. An affidavit-in-reply has been affirmed by the Petitioner reiterating the statements and contentions made in the petition. The assessments and certificate proceedings are illegal and void since their inception as the Petitioner had no statutory liability either to be registered under the Act or to comply with any of the provisions of the Act. The Petitioner was not liable to pay any tax.

7. Mr. Gopal Chandra Chakravorty, learned Advocate for the Petitioner, has contended that the order dated October 4, 1963, under Section 4(2) of the Act determining the liability of the Petitioner to pay tax for sale of garlands and bouquets from Jaistha 30, 1363 B.S., as made by the Commercial Tax Officer, Taltola Charge, the Respondent No. 3, prior to the initiation of assessment proceeding u/s 11(2) of the Act is a nullity and is without jurisdiction and the assessments made on its basis are also illegal and void. Reference has been made to the Bench decision in 32 S.T.C. 601.

8. Mr. Samarendara Nath Datta, learned Advocate appearing on behalf of the Respondents, urged that the order u/s 4(2) of the said Act being not challenged in revision as provided under the said Act could not be challenged in this application. He also submitted that the power u/s 4(2) is ancillary to Sections 7 and 11 and as such, the Commercial Tax Officer was competent to fix the liability of a dealer whose turnover though exceeded the taxable quantum did not get himself registered under the Act before initiating any proceeding u/s 11(2) of the said Act and for this purpose no separate delegation of the power under Section 4(2) by the Commissioner to the Commercial Tax Officer is necessary. Mr. Datta also submitted that u/s 7 of the Act when a dealer applied for registration the Commercial Tax Officer is competent to see whether the information given in the application for registration regarding the turnover of the dealer was correct or not and in determining the same the Commercial Tax Officer can fix the date of liability of the dealer or, in other words, the date when the turnover of the dealer exceeded the taxable quantum.

9. Mr. P.K. Sengupta, learned Advocate subsequently appearing on behalf of the Respondents, also contended that Section 4(2) of the said Act automatically created the liability of a dealer whose gross turnover in any year exceeds the taxable quantum to get himself registered under the Act in the manner prescribed and Section 7 enjoins that unless such a dealer registered itself (sic) cannot carry on business as a dealer. Mr. Sengupta, therefore, contends that it

is a liability created by the Act and the Commercial Tax Officer to whom power u/s 7 of the Act has been delegated for considering the application for registration filed by the dealers and for registering the dealer is competent to fix the liability of a dealer to pay tax u/s 4(2) of the said Act and for this no separate delegation is at all necessary.. As such, the order dated October 4, 1963, fixing the date of commencement of the liability of the Petitioner, it has been submitted, is a quite valid and proper order. In support of the submission reliance has been made on an unreported decision in C.R. Nos. 6607 and 6608(W) of 1969 made by Chittatosh Mookerjee J. In order to decide this contention it is necessary to mention the scheme of the Act. Section 3 of the Act vests the Commissioner with all the powers for carrying out the purposes of this Act and in doing so the State Government has appointed other officers, such as Assistant Commissioners, Commercial Tax Officers etc to assist him in this matter. These officers shall exercise such powers as are delegated to them by the Commissioner. Section 15 of the Act has empowered the Commissioner to delegate his powers under the Act to the persons appointed u/s 3 to assist him subject to such conditions and restrictions as prescribed by the rules framed under the said Act. Rule 71 empowers the Commissioner to delegate his powers under Sections 7 and 11 to the Commercial Tax Officer. Section 4 of the said Act provides for determination of the liability to pay tax. Section 4(2) lays down that every dealer, whose gross turnover calculated from the commencement of any year exceeds the taxable quantum at any time, shall be liable to pay tax on the expiry of two months from such date when the gross turnover exceeds the taxable quantum on all sales effected thereafter. Section 11 provides the procedure for assessment of liability fixed u/s 4 of the said Act. Section 11(2) which is applicable to the case of an unregistered dealer is set out hereunder:

If upon information which has come into his possession the Commissioner is satisfied that any dealer who has been liable to pay tax under this Act in respect of any period but has failed to get himself registered or to obtain a special certificate, as the case may be, the Commissioner shall proceed in such a manner as may be prescribed to assess to the best of his judgment the amount of tax due from the dealer in respect of such period and all subsequent periods and in making such assessment shall give the dealer a reasonable opportunity of being heard.

On a scrutiny of the said provision it is evident that upon information received the Commissioner has to determine first that a dealer is liable to pay tax under this Act in respect of a certain period and he has failed to get himself registered or to obtain a special certificate and then the Commissioner shall proceed to assess the dealer in respect of such period and all subsequent periods after giving him a reasonable opportunity of hearing. This provision, therefore, enjoins that the liability to pay tax of a dealer from a certain date has to be fixed in a proceeding for assessment u/s 11(2) of the said Act. The determination of liability to pay tax from a certain date u/s 4(2) of the said Act cannot be made independently of and prior to the initiation of any proceeding u/s 11(2) of the

said Act. It can only be done in connection with a proceeding u/s 11(2) of the said Act and not otherwise. In other words, Section 4 of the said Act is a mere charging section creating the liability of a dealer to pay sales tax after expiry of two months from the date when his total turnover exceeds the taxable quantum, but it does not contemplate the fixation or determination of the date of commencement of the liability which can be made only in a proceeding for assessment as envisaged in Section 11(2) of the said Act. It is convenient to refer in this connection the observation of D. Pal J. in the decision in *Sri Surajmal Jain Vs. Commercial Tax Officer and Others*, :

In fact, Section 4 of the Bengal Act (the corresponding provision being Section 6 of the Central Act) does not envisage the exercise of any power by any Commercial Tax Officer under the Act. That section being a charging section creates the liability to pay. Such liability, as already pointed out, does not depend upon any assessment. If Section 6 of the Central Act or Section 4 of the Bengal Act requires the making of any order or contemplates the exercise of any power under the aforesaid sections, there would have been a delegation of such power to the subordinate authorities as it has been provided for in the case of the making of an assessment u/s 11 of the Bengal Act. Having regard to the scheme of the Central Act, as also the Bengal Act, Respondent No. 1 had no such power for the determination of any such liability independently of any assessment proceeding. The order made by him on 12th May, 1972, fixing such liability is without any jurisdiction.

In the determination (sic) in C.R. Nos. 6607(W) and 6608(W) of 1969 1 on May 12, 1972 made by Chattotosh Mookerjee J. the dealer was admittedly registered under the Bengal Finance (Sales Tax) Act in September 1967. Subsequently, the said registration was cancelled as the authority who granted the registration certificate had no territorial jurisdiction over the area in which the dealer's factory was situated. Thereafter, in July 1962 the dealer submitted a fresh application for registration under the said Act and it was duly registered by the authorities concerned. The order of assessment u/s 11(2) of the said Act was challenged on the ground that he was not a dealer and the application for registration was submitted through mistake and as such, he was not liable to pay tax. It was also contended that the condition precedent for invoking the power u/s 11(2) was absent and as such the order of assessment was wholly without jurisdiction. In that case it has been held:

In deciding whether any assessment should be made in respect of any period for which a dealer was liable to pay tax but failed to get itself registered, the authority concerned is bound to decide the period for which tax should be assessed. Therefore, such decision of the Commercial Tax Officer determining the liability of the dealer is incidental and ancillary to the exercise of the powers u/s 11(2). The exercise of power u/s 11(2) necessarily involves a determination of the period of liability.

Thus, in our opinion, there is no conflict in the decisions referred to above. On

the other hand, it has been clearly held that the power of fixation of liability to pay tax from a certain date u/s 4(2) of the said Act is to be determined in a proceeding u/s 11(2) of the said Act. The order dated October 4, 1963, having determined the liability of the Petitioner to pay tax independently of any proceeding u/s 11(2) of the said Act is, therefore, without jurisdiction.

10. It is now well-settled that statutory powers are to be exercised in the mode prescribed by the Statute and not in any other manner. In *Taylor v. Taylor* (1875) 1 Ch.D. 126 it has been held that if the Statute directs that certain acts shall be done in a specified manner or by certain person, their performance in any other manner than that specified or by any other person than one named, is impliedly prohibited. The said decision has been relied on in *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, where it has been held that statutory power has to be exercised in the manner prescribed for exercise of that power and in no other way. The impugned order passed on October 4, 1963, u/s 4(2) of the Act is, therefore, illegal and as such, it is liable to be set aside.

11. With regard to the submission that there was an alternative remedy by way of revision provided in the Statute against the said order determining the liability, which being not availed of, the same could not be challenged in this revisional petition; it appears that the order determining the liability being one without jurisdiction can be successfully challenged in this revisional application. It has been held in the decision in *Paresh Nath Cloth Stores v. N. Pal* 64 C.W.N. 683 that the existence of an alternative remedy by way of appeal is not a bar to the exercise of the High Court's power of superintendence under Article 227 of the Constitution in a case where the order in question is without jurisdiction. In *Durgasree Stores Vs. Board of Revenue, West Bengal and Another*, it has been observed that if an error, be it an error of fact or of law, is such that the erroneous decision has resulted in the subordinate Court or Tribunal exercising jurisdiction, not vested in it by law, or having failed to exercise jurisdiction, vested in it by law, that will come within the scope of Section 115 of the CPC or for the matter of that of Article 227 of the Constitution as the case may be.

12. The next question that arises for consideration is if the Petitioner who made garlands and bouquets of flowers according to the aesthetic tastes of the consumers and sold them is a manufacture liable to be assessed to tax under this Act. Mr. Gopal Chandra Chakraborty, the learned Advocate for the Petitioner, has urged that the Petitioner was not a manufacturer and the assessment orders are illegal and without jurisdiction. It has been submitted that in bouquet or garland there is no change in substance nor a new substance has been brought, only the flowers are arranged according to the method behind which there may be individual artistic mind, skill and aesthetic sense. Garlands and bouquets cannot pass from hand to hand as a commercial commodity as they are not durable and they have also no resale value if once used. Several decisions have been cited at the bar in support of this contention.

13. Mr. P.K. Sengupta, the learned Government Pleader, on the other hand, has contended the garlands and bouquets are different from loose flowers as to make them creepers, leaves, strings or thread etc. are required. Labour, manipulation and treatment are also necessary to prepare garlands and bouquets and as such, it is manufactured. The assessment of the Petitioner as a manufacturer is quite legal, valid and proper.

14. The word "manufacture" has not been defined in the Sales Tax Act. This is derived from the Latin words "manu" which means by hand and "factura" from "facere" means "to make". In Cassell's Compact English Dictionary "manufacture" means "to make or work up for use, produce for fashion by labour or machinery specially on a large scale". According to Shorter Oxford Dictionary "manufacture" means "the action or process of making by hand, the making of articles" or materials (now on a large scale) by physical labour or mechanical power. In Nilgiri Hill Tea Supply Co. v. State of Bombay 10 S.T.C. 501 the question was whether blending of different brands of tea purchased in bulk from the market by a registered dealer according to a formula evolved without the application of mechanical or chemical process can be treated as altered or processed after purchase within the meaning of Section 8(a) of the Bombay Sales Tax Act, 1953, so that the dealer would not be entitled to deduct the value of the purchase of tea from the turnover for purposes of assessment of sales tax. It was held that although some skill was involved in the preparation of tea mixtures that could not be regarded as processing Within Section 8(a) of the Act. The commodity remained in the same condition. There was no alteration in the nature and character of the goods in the preparation of tea mixtures as contemplated by the said Act. In Union of India (UOI) Vs. Delhi Cloth and General Mills, it was held by the Supreme Court that the word "manufacture" generally meant the bringing into existence of new substance and does not mean merely to produce some changes in a substance however minor in consequence the change may be. In this connection reference was made to a passage from an American judgment quoted in the permanent edition of Words and Phrases, vol. 26, which is set out hereunder:

Manufacture implies a change but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation and new and different article must emerge having a distinctive name, character or use.

This decision has been relied on South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, and it has been observed that the word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. These decisions have been followed in a Bench decision of this Court in Eastern Drug Company Limited Vs. The State of West Bengal and Others, where his Lordship Sabyasachi Mukharji J. held that to constitute manufacture there must be transformation or change of the raw

material into a different marketable article. In *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, it was observed by the Supreme Court that the dictionary meaning of "manufacture" is:

transform of fashion of raw materials into a changed form or susi (sic) When oil is produced out of oil-seeds the process transforms the raw material into a different article for use and as such it manufacture. The process whereby scrap iron loses identity and becomes rolled steel sections, a new marketable commodity, is one of manufacture.

15. In the determination made in *Commissioner of Sales Tax, U.P. Vs. Dr. Sukh Deo*, it was held that mixture of different drugs prepared by a medical practitioner or by his employees specially for the use of a patient in the treatment of his ailment or discomfort diagnosed by the medical practitioner by his professional skill and which mixture was normally incapable of being passed from hand to hand as a commercial commodity, the medical Petitioner supplying the medicines could not be said to be a manufacturer of medicines within the meaning of notification issued u/s 3A of the U.P. Sales Tax Act, 1948 and the medical practitioner would not be assessable to sales tax on the turnover of medicines so dispensed. It was tried to be contended on behalf of the Respondents that this decisions of the Supreme Court did not take notice of a Bench decision of this Court in *North Bengal Stores Ltd. v. Board of Revenue Bengal* 1 S.T.C. 157 where it was held by a Division Bench of this Court that preparation of mixture of different drugs by a dispensing chemist according to the prescription of a physician is manufacture. Whatever may be the effect of this decision it cannot override the ratio decidendi of the case *Commissioner of Sales Tax v. Dr. Sukh Deo* (Supra) which is binding on all Courts according to Article 141 of the Constitution.

16. Thus on a conspectus of all the aforesaid decisions the following ingredients are necessary to constitute manufacture (a) that there must be change in substance and different article must emerge having a distinctive character and use from the raw material by the use of physical labour or by mechanical process; (b) the articles produced either by physical labour or by mechanical process will be on large scale and will pass as a commercial commodity from hand to hand.

17. In bouquet or garland there is no change or transformation in substance nor any new article is brought different from flowers. There is no change in the nature and character of the goods. When the thread or string by which flowers are made into garlands are taken out it becomes flowers without any change in substance. Garlands and bouquets are made according to aesthetic tastes of consumers and according to the skill and artistic mind of the florists who make them. As such, garlands and bouquets prepared by different florists cannot be uniform. Moreover, garlands and bouquets once used are not saleable and they cannot pass like any other commercial commodity from hand to hand as they are not durable.

18. In accordance with directive of this Court information's were sought for from other States if garlands and bouquets were treated as manufacture and replies to this effect have been received from different States. It appears from the replies received that in Orissa flowers are liable to Sales Tax, but there is no registered dealer in the State to manufacture garlands. In Madhya Pradesh flower is taxable under Madhya Pradesh Sales Tax Act and preparation of garlands and bouquets from flowers is a process of manufacture for the propose of the said Act. In Rajasthan, Hyderabad, Gujarat, Punjab and Madras flowers are exempt from sales tax and making of garlands is not treated as manufacture. In Bihar though flowers and garlands are subject to sales tax yet garlands and bouquets are not treated as manufacture.

19. In the light of the observations made by the Supreme Court in the cases mentioned before we hold that making of garlands and bouquets is not manufacture and the Petitioner is not a dealer assessable to tax as a manufacturer. The order of assessment passed u/s 11(2) of the Act is, therefore, in our considered opinion, illegal and unsustainable. Flower was taxable under the Act till May 9,1963 and thereafter it was exempted from sales tax by its inclusion in col. 1 of Schedule 1 to the West Bengal Sales Tax Act, 1941. The gross turnover of the Petitioner as a dealer in flower being much less than the taxable quantum as specified in Sub-section 5 of Section 4 of the said Act was not liable to registration and payment of tax under the Act.

20. It appears that the Respondent No. 3 completed an assessment of the Petitioner for the period from Baisakh 1370 B.S. to Bhadra 13, 1370 B.S. which corresponds to September 3, 1963. Admittedly, flower was exempted from taxation from May 10,1973, by its inclusion in col. 1 of Schedule 1 to the said Act and as such the assessment made for the period from May 10, 1963, to September 3, 1963, is ex facie illegal and without jurisdiction.

21. The next question that arises for consideration is whether the orders making best judgment assessments rejecting the tokcha book and estimating the turnover are arbitrary and capricious. Admittedly, the Petitioner, who claims to be not a manufacturer and as such not a dealer assessable to tax, did not file the returns of his turnover. Tokcha book containing accounts of daily sale and purchase of goods by the Petitioner was rejected by the Commercial Tax Officer, the Respondent No. 3, on the ground that there was no supporting vouchers and cash memos. The Respondent No. 3 thereafter estimated the turnover of the Petitioner according to the best of his judgment and completed assessments on the basis of such estimated turnover. It was contended that the Respondent No. 3 should not have rejected the tokcha book and if the account was not clear and intelligible, the Commissioner could have directed the Petitioner to keep such accounts and record of sales in the manner prescribed as provided in Section 13of the said Act. This being not done the order rejecting the books of account is unwarranted as contended on behalf of the Petitioner. On a reading of Section 13of the said Act it is apparent that the said provision applies only to the case of

a registered or certified dealer and not to a dealer like the Petitioner. It appears from the order of assessment of the years in question that the Respondent No. 3 after rejecting the books of account produced by the dealer estimated the turnover without recording any reason or basis for arriving at such estimate. Nor is it disclosed in the said order any material on the basis of which he drew his inference. In *Ramdhari Saha Vs. State of West Bengal*, it has been held by this Court that best judgment assessment must necessarily be to some extent arbitrary in all cases where returns were not filed by the Assessee. So long as the assessing authority had acted honestly and not vindictively or capriciously in making a fair estimate of the figure of assessment, the assessment cannot be assailed on the ground that it had been made on surmise. If the assessing authority had proceeded on some material in drawing the inference, 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. In *State of Kerala Vs. C. Velukutty*, it has been observed by the Supreme Court that though there is an element of guess-work in a best judgment assessment, it shall not be a wild one but shall have a reasonable nexus to the available material and the circumstances of each case. In this case as the best judgment assessment was made not on the basis of any material but on a capricious surmise unsupported by any relevant material, the same could not be sustained.

22. For the reasons aforesaid all the contentions raised on behalf of the Petitioners having succeeded this Rule is made absolute. The orders of assessment complained of as well as the Certificate case No. 49 S.T. (TL) 67/68 are set aside. In the circumstances of the case there will be no order as to costs.

23. Oral prayer for stay is refused.

N.C. Mukherji J.

24. I agree.