
(1978) 04 OHC CK 0007
In the Orissa High Court
Case No : Second Appeal No. 39 of 1976

The State of Orissa

APPELLANT

Vs

Laxminarayan Lal

RESPONDENT

Date of Decision : 25-04-1978

Acts Referred:

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

Citation : (1978) 45 CLT 638 : (1979) 43 STC 364

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : The Additional Government Advocate, for the Appellant; R.C. Patnaik and P.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—The State of Orissa, defendant in a title suit, has carried this appeal against the reversing judgment and decree of the learned Additional District Judge of Dhenkanal.

2. The plaintiff instituted the suit on 26th June, 1974, asking for declaration that an assessment made under the Orissa Sales Tax Act (hereinafter referred to as the "Act") and the acceptance of the requisition for realisation of the assessed tax and penalty by the certificate officer were without jurisdiction, illegal and inoperative and the amount for which the certificate proceeding had been initiated was not collectible from him. The plaintiff alleged that he carried on business in cotton cloth and was a registered dealer under the provisions of the Act and had been assigned registration number CU-II/ 1948. For the quarter ending 31st December, 1957, he had duly submitted his return along with evidence showing payment of admitted tax. No order of assessment or notice of demand as provided in Section 13(4) of the Act had ever been served on him and though the plaintiff was not a defaulter, proceedings were taken to recover the amount as a public demand from him. He came to know that an assessment had been made and penalties had been levied only when he was served with

notice under the provisions of the Orissa Public Demands Recovery Act by the certificate officer. He filed an objection before the certificate officer and against the rejection of the objection he preferred an appeal before the Additional District Magistrate, but obtained no relief. He ultimately filed this suit on the allegation that no notice of demand had been served as provided in Section 13(4) of the Act and, as such, the alleged demand had not become recoverable as an arrear of land revenue. The certificate officer had no jurisdiction to entertain the certificate and the amount was not collectible as a public demand.

3. The sole defendant in defence pleaded that no suit lay for cancellation of an assessment in view of the clear bar u/s 22 of the Act. The suit was also hit by sections 42 and 45 of the Public Demands Recovery Act. It was pleaded that a valid assessment had been made and the plaintiff had defaulted in making payment and, as such, penalty had been levied and, in due course, steps had been taken to collect the demand as provided by the statute.

4. At the trial, the plaintiff examined himself and produced certain documents. Two witnesses were examined on behalf of the defendant, being an employee of the sales tax department, who produced certain records, and the peon in the employment of the sales tax department, who is said to have served the notice. Certain documents were also exhibited.

The learned Subordinate Judge, who tried the suit, came to hold that:

- (i) The suit was not maintainable in the present form ;
- (ii) The civil court had no jurisdiction to try the suit in view of the provisions in Section 22 of the Sales Tax Act;
- (iii) The suit was also not maintainable in view of Section 42 of the Orissa Public Demands Recovery Act;
- (iv) The assessment was legal and valid and the notice of demand and the copy of the order of assessment had been duly served on the plaintiff. Accordingly, the certificate proceeding was not assailable.

5. On the plaintiff's appeal, the learned Additional District Judge held that the notice of demand along with a copy of the order of assessment had not been served on the appellant as provided by Section 13(4) of the Act and the amount was, therefore, not recoverable as arrears of land revenue. Accordingly, he allowed the appeal, reversed the decree of the trial court and held that the certificate proceeding was not tenable. This reversing decree is assailed in appeal.

6. Before me, the learned Additional Government Advocate does not challenge the finding of fact and, in my opinion, rightly, that the plaintiff had not been served with the notice contemplated u/s 13(4) of the Act. Before I proceed further, I think it appropriate to refer to that provision and the effect of non-service of notice has on the matter. Section 13(4) of the Act provides :

The amount of-

(a) tax due where the returns are furnished without receipt showing full payment thereof, or

(b) tax assessed under Sub-sections (1), (2), (3) and (4) of Section 12 or u/s 12-A or 12-B less the sum, if any, already paid by the dealer in respect of the said period, or

(c) tax assessed under Sub-section (5) or Sub-section (8) of Section 12 together with the penalty directed to be paid under any of the said sub-sections and the penalty, if any, imposed under Sub-section (3) of Section 11, or

(d) composition money payable under the third proviso to Sub-section (1) of Section 5, less the sum, if any, already paid by the dealer, or

(e) penalty directed to be paid under Sub-section (3) of Section 9-B, or

(f) interest charged under Sub-section (4-a) of Section 12,

shall be paid by the dealer into a Government treasury within thirty days from the date of service of the notice issued by the Commissioner for the purpose.

Rule 32(1) of the Orissa Sales Tax Rules provides :

In respect of any amount found payable by a dealer under Sub-section (4) of Section 13, the Commissioner shall serve on the dealer a notice of demand in form X with a direction to the dealer to pay the amount within thirty days from the date* of service of the notice and to produce before him the receipted chalan in proof of payment of such amount within 7 days from the date of payment.

Section 13(7) of the Act provides :

The amount which remains unpaid after the due date of payment in pursuance of the notice issued under Sub-section (4) or Sub-section (5) together with the interest payable under Sub-section (6) shall be recoverable as an arrear of land revenue.

Section 2(g) of the Orissa Public Demands Recovery Act defines "public demand" to mean "any arrear or money specified in Schedule I...".

Item (ix) in Schedule I reads thus :

Any money which is recoverable under any law, custom or usage for the time being in force as an arrear of revenue or land revenue....

There is no dispute that unless the amount is a public demand, its recovery proceeding under the Public Demands Recovery Act would not be tenable. Arrear dues under the Orissa Sales Tax Act as provided in Section 13(4) of the Act would become arrear of land revenue in terms of Sub-section (7) of Section 13 only when the amount remains unpaid after the due date of payment in pursuance of a notice u/s 13(4) of the Act. The undisputed finding of the lower appellate court being that a notice u/s 13(4) of the Act has not been served, it

would follow that the amount had not become a public demand and, therefore, the certificate proceeding for its recovery was not maintainable under the Orissa Public Demands Recovery Act. Section 5 of the Public Demands Recovery Act provides:

On receipt of any such requisition, the Certificate Officer, if he is satisfied that the demand is recoverable and that recovery by suit is not barred by law, may sign a certificate, in the prescribed form....

It is the plaintiff's case that since the amount was not recoverable, the satisfaction of the certificate officer as recorded in exhibit 1 was without any basis.

7. In the lower appellate court, the plaintiff had conceded that the imposition of assessment and penalty under the Act was not open to challenge in the suit. In view of the language of Section 22, the concession is absolutely well-founded. That section provides;

Save as is provided in Section 24, no assessment made or purporting to have been made and no order passed or purporting to have been passed under the provisions of this Act and the Rules made thereunder by the Commissioner, Tribunal or Additional Tribunal, as the case may be, or any person appointed u/s 3 to assist the Commissioner shall be called in question in any court and save as is provided in Section 23, no appeal or application for revision shall lie against any such assessment or order as the case may be.

Therefore, the civil court has no jurisdiction to entertain a challenge against the assessment or even imposition of penalty. As Mr. Patnaik for the plaintiff has reiterated the concession, it is unnecessary to examine that question. In fact, the lower appellate court has not granted any such relief to the plaintiff.

8. The learned Additional Government Advocate has argued before me that the suit even for the other reliefs is not maintainable, inasmuch as Section 42 of the Public Demands Recovery Act does not contemplate of such a suit, and in what circumstances a certificate is open to challenge before the civil court having been provided by the statute, the civil court has no residuary jurisdiction. I am not inclined to accept such a submission. Section 42 is a built-in provision within the statute for challenge of the certificate on certain specified grounds. The civil court has admittedly a wider jurisdiction as indicated by the Judicial Committee of the Privy Council in the case of *Secretary of State v. Mask and Co.* (1940) 67 I.A. 222 at 236 Lord Thankerton, speaking for the Law Lords, stated:

...It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. "It is also well-settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure....

This dictum has been approved on several occasions by the Supreme Court.

A Constitution Bench of the Supreme Court in the case of Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh, stated :

The question about the exclusion of the jurisdiction of the civil courts to entertain civil actions by virtue of specific provisions contained in special statutes has been judicially considered on several occasions. We may in this connection refer to two decisions of the Privy Council. In *Secretary of State v. Mask and Co.* (1940) 67 I.A. 222 at 236, the Privy Council was dealing with the effect of the provisions contained in Section 188 of the Sea Customs Act (8 of 1878). The relevant portion of the said section provides that every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final. Dealing with the question about the effect of this provision, the Privy Council observed that it is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. Lord Thankerton, who delivered the opinion of the Board, however, proceeded to add that

It is also well-settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taxing statute, its validity can* be challenged by a suit on the ground that it is incorrect on the merits and, as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute. In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on the merits, the decision of the assessing authority was wrong, cannot be the subject-matter of a suit because Section 18-A clearly bars such a claim in the civil courts.

Even keeping the modification in the ratio laid down by the Privy Council by the

Supreme Court in view, the jurisdiction of the civil court would still be available to entertain the present suit. A reference to some more cases cited at the Bar may now be made.

In the case of *The Provincial Government of Madras Vs. J.S. Basappa*, , the court approved of the ratio in *Mask's case* (1940) 67 I.A. 222, and referring to the earlier decision reported in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, , observed:

...the exclusion of the jurisdiction of the civil court is not to be readily inferred and that even if a provision giving the orders a finality was enacted, civil courts still have jurisdiction to interfere where fundamental provisions of the Act are not complied with, or where the statutory tribunals do not act in conformity with the fundamental principles of judicial procedure....

In the case of *Lala Ram Swarup and Others Vs. Shikar Chand and Another*, , a similar question came up for consideration before the Constitution Bench. Referring to an earlier authority in the case of *Secretary of State v. Jatindra Nath Choudhury* AIR 1924 P.C. 175, the learned Chief Justice spoke for the court thus :

...This decision shows that if the special statute prescribes certain mandatory conditions subject to which the orders in question can be passed, and the said mandatory provisions are violated, the validity of the said orders can be challenged in a civil proceeding. Similarly, if principles of natural justice are not complied with, the orders passed in violation of the said principles would be wholly inoperative in law and their validity can be impeached in civil proceedings.

The court also approved of the ratio in *Mask's case* (1940) 67 I.A. 222. In the case of *Musamia Imam Haider Bax Razvi Vs. Rabari Govindbhai Ratnabhai and Others*, , *Mask's case* (1940) 67 I.A. 222 was quoted with approval. In the case of *Shri M.L. Sethi Vs. Shri R.P. Kapur*, , *Mathew, J.*, quoted with approval the ratio of the Judicial Committee in the case of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, wherein Lord Pearce had stated:

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry....

9. In the matter before me, as already pointed out, until the demand was served on the plaintiff as required u/s 13(4) of the Act, the amount did not become due and as long as the plaintiff was not a defaulter in compliance with the notice, the provision of the Public Demands Recovery Act was not available for realisation of the dues as indicated in Section 13(7) of the Act. These certainly are mandatory provisions compliance whereof gives rise to one situation and non-compliance leads to a different consequence. The jurisdiction of the certificate officer to entertain the requisition and make the requisition a decree for recovery of the amount in accordance with the procedure laid down under the Public Demands Recovery Act depended upon compliance with the provisions in Section 13 of the

Orissa Sales Tax Act and, without such compliance, the amount was not a "public demand" and the certificate officer had no jurisdiction to collect the amount.

A Bench of the Calcutta High Court in the case of Harendra Kumar Rai Choudhuri v. Secretary of State AIR 1928 Gal, 808 laid down :

Now it is to be observed that in Section 37, the legislature, when limiting the common law right of the subject to seek relief in a court of law, refers to a certificate duly filed under this Act and, in my opinion, it is a condition precedent to the issue of a valid certificate that the public demand should be due and payable by the certificate-debtor and if, at the time when the certificate is signed by the certificate officer, there is no public demand due from the certificate-debtor, the certificate is ultra vires, and all the proceedings founded upon it are null and void....

On the authorities indicated above, there can be no second opinion that the amounts due to the sales tax department were not a "public demand" when the requisition was sent to the certificate officer, inasmuch as the conditions precedent to make the amounts a public demand had not been satisfied and the civil court has, therefore, jurisdiction to entertain the suit and interfere in the matter. The judgment of the lower appellate court is, therefore, unexceptionable. The appeal must accordingly fail and is dismissed with costs throughout.