The State of Orissa and Another

Vs

M/s. Chakobhai Ghelabhai and Company

Civil Appeal No. 710 of 1957

(S.K. Das, M. Hidayatullah, K.C. Das Gupta, J.C. Shah, N. Rajgopala Ayyangar JJ)

20.09.1960

JUDGMENT

S. K. DAS J. -

This is an appeal on a certificate granted by the High Court of Orissa. The appellants are the State of Orissa and the Collector of Commercial Taxes, Orissa. The respondent is a partnership firm called Messrs. Chakobhai Ghelabhai and Company dealing in 'bidi' leaves.

The short facts are these. The respondent firm has its headquarters in Bagbehera in Madhya Pradesh. During the years 1948 to 1951 it was engaged in collecting 'bidi' leaves from certain forest areas in Orissa. The leaves so collected were made up into bundles and stored in the respondent's godowns in Orissa. They were then sold and despatched to various destinations outside the State of Orissa. The respondent did not get itself registered as a dealer under the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947), hereinafter called the Act. On July 21, 1950, a notice was issued to the respondent by the Assistant Sales Tax officer, Patna Circle, requiring it to submit a return in Form No. IV showing separately the particulars of its turnover for each of the quarters commencing October, 1947, and upto June 30, 1950. The respondents was also asked to show cause why a penalty should not be imposed on it under s. 12(5) of the Act. To this notice the respondents sent a reply to the effect, substantially, that it carried on no selling business in Orissa and was, therefore under no liability to register itself as a dealer in Orissa or to pay sales tax under the Act. Thereafter, the respondent took no part in the assessment proceedings and made no appearance before the assessing authority except on June 30, 1951, when one of its partners Narvaram Popatbhai appeared and said that the accounts were at Bagbehera and the despatches of 'bidi' leaves from Orissa were mixed up with other despatches and, therefore, he was not in a position to give a correct account of the business in Orissa. It was admitted, however, that the 'bidi' leaves were collected in Orissa, were processed and manufactured for sale and then stored in godowns in Orissa; they were then sold and despatched to different customers outside Orissa. The assessing authority held on the materials before it that the transfer of property in the 'bidi' leaves sold and despatched to customers as aforesaid was completed in Orissa and the respondent wilfully failed to get itself registered and to submit a return of its turnover. The assessing authority then proceeded to assess the tax to the best of its judgment and determined the taxable turnover to be Rs. 61,250 for each of the twelve quarters, the first quarter ending on June 30, 1948, and the last quarter ending on March 31, 1951. It also imposed a penalty of Rs. 500 for each quarter. The orders of assessment were made on two dates - on July 4, 1951, for four quarters and on August 29, 1951, for the remaining eight quarters. Against these orders of assessment the respondent went up in appeal to the Assistant Collector of Sales Tax, Sambalpur. One of the pleas taken before the appellate authority was that the respondent was not a dealer in Orissa inasmuch as the sales of 'bidi' leaves were not effected in Orissa. In the course of

the hearing of the appeal this plea was given up, and it was admitted by the respondent's pleader that "the sales were completed in Orissa." The appeal was then heard on the contentions that (1) the turnover determined was excessive, and (2) that no penalty should have been imposed. These contentions were rejected by the appellate authority. The respondent then moved in revision, but the revision petition having been filed out of time was rejected by the Collector of Commercial Taxes, Orissa.

The respondent then moved the High Court of Orissa by means of a writ petition in which it was contended that (1) the respondent was not a dealer in Orissa; (2) that the sales of the post-Constitution period were sales within the meaning of the Explanation to Art. 286(1)(a) as it then stood and Orissa could not tax them; (3) that the notice under s. 12(5) of the Act was bad on various grounds; (4) that the fees levied under the 59 of the Orissa Sales Tax Rules, 1947, on the respondent's memorandum of appeal and revision application were not justified in law; and (5) that the assessment was illegally made and so also the penalty under s. 12(5) of the Act. On these contentions the respondent asked for a writ quashing the assessment proceedings and the notices of demand and for a direction for a refund of the fees paid. The High Court allowed the petition by its judgment and order dated September 5, 1955. It set aside the assessment orders, directed a refund of the fees paid and further made an order that the respondent shall be directed "to furnish a return of its transactions under s. 11 for the period for which it had been served with a notice under s. 11(1) of the Act". In support of its orders the High Court came to the following findings : (1) that the assessment orders were bad because of the repeal of the second proviso to s. 2(g) of the Act defining "Sale", by the Adaptation of Laws Order, 1950; (2) that the levy of fees on a graded scale amounted to the imposition of a tax which was unwarranted and beyond the rule making power of the State Government : and (3) that the notice issued under s. 12(5) was not in accordance with law.

On behalf of the appellants it has been contended that the High Court was in error in respect of all the three findings at which it had arrived. As to the finding of the High Court that the assessment orders were bad because of the repeal of the second proviso to s. 2(g) of the Act, we think that the High Court was clearly in error. In view of the admission made on behalf of the respondent, it was quite unnecessary to deal with the second proviso s. 2(g) of the Act or to consider the effect of its repeal by the Adaptation of Laws Order, 1950, or the effect of the saving clause in paragraph 20 thereof. The admission on behalf of the respondent, made in very clear terms as recorded by the appellate authority, was that the sales were completed in Orissa. Section 2(g) of the Act States :

> "S. 2(g) - "sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge."

The admission made in this case clearly brings the sales of 'bidi' leaves within s. 2(g) of the Act; and as the sales were completed in Orissa, they were liable to tax under the Act. It was quite unnecessary to go to the second proviso to s. 2(g) in view of the admission of the respondent.

Learned Counsel for the respondent suggested that the admission made by the respondent's pleader was an admission on a question of law and, therefore, not binding on the respondent. We do not agree, The question where a sale is completed depends on facts and is not a pure question of law. Its worthy of note that at no stage subsequent to the admission did the respondent repudiate it or challenge its correctness. Even in the writ petition it was not stated that a wrong admission had been made; on the contrary the appellate authority's order in which the admission was set out was an

annexure to the writ petition. It is indeed true that is paragraph 13(a) of the writ petition a contention was raised with regard to the sales of the pre-Constitution period and a reference was made to the Explanation to Art. 286(1)(a) as it then stood. But the necessary averments to attract the Explanation were not made, and nowhere was it stated that the goods were despatched outside Orissa for the purpose of consumption in the delivery State. In other words, no foundation was laid for making a distinction between the pre-Constitution and post-constitution sales, and with regard to all of them it was admitted that they were completed in Orissa - an admission which was never repudiated or challenged. We are, therefore, of the opinion that the High Court was clearly in error in its first finding as to the unconstitutionality of the assessment orders made.

We think that the High Court was also in error in its findings to the legality of the fees levied on the memorandum of appeal and the application in revision. Section 29 of the Act deals with the rule making power. It states :

> "S. 29(1) - The State Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe -
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> #.....##
>
> (s) the procedure for and other matters (including fees) incidental to, the disposal of appeals and application for revision and review under s. 23."

Rule 59 of the Orissa Sales Tax Rules, 1947, so far as it is relevant for our purpose says :-

> "R. 59. Fees - Subject to the provisions of rule 60 the following fees shall be payable :-
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> #(i)..... .....(ii) On a memorandum Five per cent of theof appeal against an order amount in disputeof assessment or penalty or calculated to the nearestboth or an application for rupee subject to a minimumrevision or review of such of one rupee andorder. maximum of one hundred rupees.(iii)..... .....(iv) on an application One rupee."for revision.##

The first question is if s. 29(2)(s) in so far as it empowers the State Government to make a rule prescribing fees for appeals and applications in revision was within the legislative competence of the Provincial Legislature. The Act was enacted in 1947 and the source of legislative power must be found in the Government of India Act, 1935. Item 48 of list II (Provincial Legislative List) in the Seventh Schedule of the said Act related to "Taxes on the sale of goods" and item 54 read : "Fees in respect of any of the matters in this list, but not including fees taken in any court." Item 1 related inter alia to "constitution and organisation of all courts except the Federal Court, and fees taken therein." The High Court held that the assessing authorities including the Assistant Collector of Sales Tax and the Collector of Commercial Taxes, Orissa, were not course in the strict sense of the term "Court", though they exercised quasi judicial functions under the Act. We think that is a correct view. But it does not necessarily follow that the fees imposed under r. 59 read with s. 29(2)(s) are illegal. Under items 48 and 54 the then Provincial Legislature had power to Make a law for taxes on the sale of goods and for fees in respect thereof. Even with regard to Court-fees, the provincial Legislature had power to make a law under item 1. We do not think that s. 29(2)(s) can be held to be

bad on the ground of legislative incompetence. Nor do we think that r. 59 goes beyond what is permitted under s. 29(2)(s). The fees imposed are not taxes; they come within the expression "other matters (including fees) incidental to the disposal of appeals and applications for revision etc". We are unable to agree with the High Court that the word 'incidental' has reference to a matter of casual nature only. The procedure for disposal of an appeal includes as a necessary incidental matter the filing of an appeal on a proper fee. The distinction between a tax and a fee was considered by this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri. Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ([1954] S.C.R. 1005) and it is unnecessary to repeat what was said there. We consider that the fees imposed by r. 59 are for services rendered by a Governmental agency and though ordinarily fees are uniform, there may be various kinds of fees and it is not possible to formulate a definition that would be applicable to all cases.

Now, the last finding of the High Court is that the notice under s. 12(5) was not in accordance with law. Here again we think that the High Court was in error. The notice was issued in Form no. VI, which is a combined form for the purpose of ss. 11 and 12. A foot-note appended to the form required the assessing authority to score out unnecessary words. The High Court points out that this was not done. We are, however, unable to agree with the High Court that the failure to score out unnecessary words made the notice bad in law. The respondent sent a reply Orissa. Obviously, the respondent had no difficulty in understanding that the notice was one under s. 12(5) of the Act. The notice stated in terms that the respondent should under show cause why a penalty should not be imposed under s. 12(5) of the Act. Section 12(5) as it stood at the relevant time was in these terms :

> "S. 12(5). If upon information which has come into his possession, the Collector is satisfied that any dealer has been liable to pay tax under this act in respect of any period and has nevertheless wilfully failed to apply for registration, the Collector shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and the Collector may direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum not exceeding one and a half times that amount." It has been argued before us that one notice was made for each quarters and an assessment was made for each quarter separately - four quarters on July 4, 1951, and eight quarters on August 29, 1951. This, it is contended, was illegal. We are unable to accept this contention as correct. Section 12(5) talks of a period, and the period may consist of more than one quarter. The return has, however, to be submitted in Form IV which read with r. 20 of the Orissa Sales Tax Rules, 1947, requires the assessee to furnish details of his turnover for each quarter. The assessment must, therefore, be made on the taxable turnover of each quarter.

Lastly, it has been argued that there was no notice under s. 12(5) for the last three quarters and, therefore, for those quarters the assessment orders must be held to be bad. The appellate authority has pointed out that even for the last three quarters the assessing officer, after he had made his orders of assessment in the first five quarters, had directed the respondent to produce his account, but no accounts were produced. Section 12(5) enables the assessing authority to make a best judgment assessment for "all subsequent periods" after giving the dealer a reasonable opportunity of being heard. Such an opportunity was given in the present case even in respect of the last three quarters, and we are unable to hold that the assessment or the last three quarters was bad.

For the reasons given above, we must allow this appeals, set aside the judgment and order of the

High Court dated September 5, 1955, and dismiss the writ petition of the respondent. The appellants will be entitled to their costs of the proceedings in the High Court and in this Court.

Appeal allowed.

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