Commissioner of Sales Tax, Madhya Pradesh, Indore and Others

Vs

Radhakrishan and Others

Criminal Appeal No. 78 of 1972

(Jaswant Singh, P. S. Kailasam, A.D. Koshal JJ)

06.10.1978

JUDGMENT

KAILASAM, J. -

1. This appeal is by Commissioner of Sales Tax, M.P., Indore and three others by certificate of fitness granted by the High Court of Madhya Pradesh from the judgment and order dated March 16, 1971 in Miscellaneous Petition 85 of 1969, whereby the High Court allowed the petition filed by the respondents and quashed (a) the sanction for criminal prosecution of the respondents accorded by the Commissioner of Sales Tax by his memorandum dated April 29, 1966 and (b) the proceedings before the criminal Court started under Section 46(1)(c) of the Madhya Pradesh General Sales Tax Act, 1958, in criminal Case 4344 of 1968.

2. The three respondents are the three partners of a firm known as M/s. Ramakrishna Ramnath. It is a registered partnership firm. The firm was engaged in business of sale of bidis and during the relevant period used to purchase tendu leaves from the dealers. The firm failed to file any return and get itself registered under the State of Madhya Pradesh. The firm was treated as unregistered dealer and was assessed to sales tax on the basis of the best judgment. There were three assessment orders. The first was for the period November 1, 1956 to October 23, 1960 by an order dated December 26, 1964, assessing the firm at Rs. 16,380 and imposing a penalty of Rs. 5000. The second order related to the period October 21, 1960 to November 8, 1961 and was dated December 20, 1964. The firm was assessed to Rs. 8080 and a penalty of Rs. 2000 was imposed. The third order was dated December 20, 1964 and was for the period November 9, 1961 to October 28, 1962. The assessment against the firm was for Rs. 8000 and a penalty of Rs. 2000 was imposed. The demand notices were issued in the forms prescribed in the name of the firm by the Sales Tax Officer. The firm failed to pay the tax and by the impugned order dated April 29, 1966 the Commissioner accorded sanction for criminal prosecution of the three respondents, who partners of the firm under Section 46(1)(c) of the Act. A challan was filed on December 9, 1968 and a criminal Case 4344 of 1968 was registered and the respondents were asked to appear on February 20, 1969. On February 17, 1969 the respondents filed writ petition out of which the present appeal arises for quashing the order of sanction for criminal prosecution dated April 29, 1966 given by the Commissioner of Sales Tax and of the proceedings before the criminal Court in criminal Case 4344 of 1968.

3. By its judgment dated March 16, 1971 the High Court allowed the petition and quashed the sanction for criminal prosecution given by the Commissioner of Sales Tax and the criminal proceedings. The High Court considering the general and legal importance of the question, granted a certificate of fitness to the Commissioner of Sales Tax and the present appeal is thus before this Court.

4. Two questions that arise in this appeal are - (i) whether the three partners can be held liable for the tax assessed against the firm; (ii) whether the sanction given by the Commissioner for prosecution under Section 46(1)(c) is sustainable in law.

5. Regarding the first question the High Court held that the result of non-payment of tax against a firm cannot be visited on individual partners of the firm. It was only the firm that was assessed for liability for tax for all the three periods. In spite of repeated notices the firm did not pay the assessment or the penalty that was imposed. The notice of demand in Form 19 prescribed under M.P. General Sales Tax Act, 1958 (hereinafter to be referred as Act) was sent to the firm demanding payment of the tax and penalty with a direction that the whole sum should be deposited in the Government treasury within 30 days from the receipt of the notice of the demand and the treasury receipt in proof of payment of the sum should be produced before the Sales Tax Officer. The dealer received a notice on January 6, 1965, but failed to deposit the sum as directed. On these facts the Inspector of Sales Tax came to the conclusion that the dealer had committed an offence under Section 46(1)(c) of the Act and accorded sanction under Section 46(2) of the Act for prosecuting the three surviving partners of the firm who are the three respondents herein. The question arises whether under the circumstances the partners can be prosecuted for the default of payment of tax and penalty by the firm. The 'Dealer' is defined in Clause 2(d) of the Act. It includes under Section 2(d)(1) a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carried on such business. This definition makes it clear that the firm is a separate entity and is a dealer for the purposes of the Act. The firm under Section 7(2) of the Act was deemed to be a registered dealer. Section 18 provides that the amount of tax due from a registered dealer shall be assessed separately for each year. Accordingly the dealer, which is a firm in this case, was assessed and notice given to the firm.

6. In State of Punjab v. M/s. Jullundur Vegetables Syndicate ((1966) 2 SCR 457 : AIR 1966 SC 1295 : (1966) 17 STC 326) this Court held that the firm which was assessed to sales tax under the East Punjab General Sales Tax was a separate entity under the Act. The firm was assessed to sales tax in 1953. The order was set aside by the Financial Commissioner, and proceedings were started for fresh assessment but by that time the firm was dissolved. The Sales Tax Officer made the assessment even though the firm had already been dissolved. The High Court on a reference held that the firm being a separate entity under the Act, there was no machinery provided under the Act for assessing a firm after its dissolution in respect of turnover of business before the dissolution. This Court held that though under the partnership law a firm is not a legal entity, for the purpose of sales tax under the Act, it is a legal entity, and, therefore, on dissolution the firm ceases to be a legal entity and there is no provision in the Act as it stood in 1953 expressly empowering the assessing authority to assess the dissolved firm in respect of the turnover before its dissolution. There was no further scope for assessing the firm which ceases to have legal existence.

7. In Kapurchand Shrimal v. Tax Recovery Officer, Hyderabad ((1969) 1 SCR 691 : AIR 1969 SC 682 : 72 ITR 623), a case arising out of the Income Tax Act, this Court held that the Legislature having treated a Hindu undivided family as a taxable entity distinct from individual members constituting it, proceedings for assessment and recovery of the tax having been taken against the Hindu undivided family, it was not open to the tax recovery officer to initiate proceedings against the manager of the Hindu undivided family for his arrest and detention. These two cases clearly establish that a firm in a partnership and a Hindu undivided family are recognised as legal entities and as such proceedings can only be taken against the firm or undivided family as the case may be. Neither the partners of the firm nor the members of the Hindu undivided family will be liable for the tax assessed against the firm or the undivided Hindu family. It may be noted that Section 276(d)

of the Income Tax Act specifically includes all partners within the definition of the word 'firm' and a company includes directors. In Bombay Sales Tax Act, 1959 under Section 18 it is specifically provided that where any firm is liable to pay tax under the Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment. In the absence of a specific provision as found in Section 18 of the Bombay Act the partners of the firm cannot be held liable for the tax assessed on the firm. On this point we agree with the High Court that the partners cannot be made liable for the tax assessed on the firm.

8. The second question that arises is whether the sanction given by the Commissioner is sustainable in law. The validity of the sanction is questioned on the ground that under the Sales Tax Act the Commissioner is entitled to pursue two different procedures for enforcing and realizing the assessment made but as there is no guidance as to the circumstances in which he should resort to either of the two procedures, the provision regarding grant of sanction is invalid. The two procedures that are available are under Sections 22(4-A) and 46(1)(c) of the Act. Section 22(4-A) runs as follows :

> (4-A) If the tax assessed under this Act or any of the Acts repealed by Section 52 or any other amount due under this Act or any instalment thereof is not paid by any dealer or other person liable to pay such tax, other amount due or any instalment thereof within the time specified therefor in the notice of demand or in the order permitting payment in instalments or within the time allowed for its payment by the appellate or revising authority, the Commissioner may, after giving the dealer or other person a reasonable opportunity of being heard, direct that such dealer or person shall, in addition to the amount due, pay, by way of penalty, a sum equal to -
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> (a) one per cent of such amount for each month or part thereof for the first three months after the date specified for its payment; and
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> (b) one and half per cent of such amount for each month or part thereof subsequent to the first three months aforesaid.

9. There had been subsequent amendments by Act 31 of 1975 but they are not relevant for the purposes of this case. Section 22(4-A) was inserted by the M.P. Act 16 of 1965 and was published in the gazette of April 3, 1965 and by a notification dated April 9, 1965 was brought into force on April 15, 1965. The notice was given by the Commissioner demanding payment of the tax and penalty from the firm within 31 days on January 4, 1965. The period expired on February 5, 1965. The sanction for prosecution was given by the Commissioner on April 29, 1966. Before the High Court as well as before this Court both the counsel for the respondents and the State conceded that Section 22(4-A) is retrospective in operation and, therefore, sub-section is applicable to the facts of the case. The sub-section provides that when the amount due is not paid within the time allowed, the Commissioner may after giving the dealer a reasonable opportunity of being heard direct that such dealer in addition to the amount due pay by way of penalty a sum as specified in sub-clauses (a) and (b) to sub-section (4-A). The procedure prescribed in Section 22(4-A) for collection of the amount is by levy of a penalty, after giving the dealer a reasonable opportunity of being heard

10. The other procedure that is available to the Commissioner is by taking proceedings under Section 46 of the Act. Section 46 enumerates certain offences and penalties for contravention of some of the provisions of the Act. We are concerned with Section 46(1)(c) which reads as follows :

46(1)(c). Whoever, without reasonable cause fails to pay the tax due within the time allowed, shall, without prejudice to the recovery of any tax that may be due from him, be punishable with simple imprisonment which may extend to six months or a fine not exceeding one thousand rupees or with both, and when the offence is a continuing offence, with a further fine not exceeding fifty rupees for every day the offence continues.

11. Sub-section (2) provides that no court shall take cognizance of any offence punishable under this Act or any rule made thereunder except with the previous sanction of the Commissioner. If action is to be taken under Section 46, the Commissioner will have to find that the dealer has failed to pay the tax within the time allowed and without reasonable cause. The submission of the learned Counsel is that the procedure under Section 46 if taken is harsh and more severe than the one contemplated under Section 22(4-A) which enables the Commissioner to levy a penalty and that too only after giving a reasonable opportunity of being heard. Before, initiating prosecution the Commissioner is not under an obligation to give any notice to the assessee. Section 47-A was introduced from January 1, 1964 by M.P. Act 20 of 1964 which provides that no prosecution for contravention of any provision of this Act or of rules made thereunder shall be instituted in respect of the same facts on which a penalty has been imposed under this Act or the said rules, as the case may be. By the introduction of Section 47-A it is seen that when once proceedings are taken under Section 22(4-A) no prosecution under Section 46(1)(c) can be instituted. The position, therefore, is that the Commissioner is at liberty to choose only one of the two remedies and the challenge is that one is harsher than the other and there is no guidance provided to the Commissioner as to which of the procedures he should adopt in a given case.

12. An authoritative statement of the Supreme Court on this point is found in Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay ((1974) 2 SCC 402 : (1975) 1 SCR 1). It was observed that one finds it difficult to reconcile oneself to the position that the mere possibility of sort to the civil Court should make invalid a procedure which would otherwise be valid. It can very well be argued that as long as a procedure does not by itself violate either Article 19 or Article 14 and is thus constitutionally valid, the fact that that procedure is more onerous and harsher than the procedure in the ordinary civil Courts, should not make that procedure void merely because the authority competent to take action can resort to that procedure in the case of some and ordinary civil Court procedure in the case of others. That a constitutionally valid provision of law should be held to be void because there is a possibility of its being resorted to in the case of some and the ordinary civil Court procedure in the case of others somehow makes one feel uneasy and that has been responsible for the attempts to get round the reasoning which is the basis in the decision in Northern India Caterers v. State of Punjab ((1967) 3 SCR 399 : AIR 1967 SC 1581 : (1968) 1 SCJ 475).

13. It was further held that if from the preamble and surrounding circumstances as well as provisions of the statute themselves, explained and amplified by affidavits, necessary guidelines can be inferred, the statute will not be hit by Article 14. The provisions in revenue recovery Acts and other Acts creating special tribunals and procedure for expeditious recovery of revenue and State dues are held to be in public interest and do not violate Article 14.

14. Regarding the validity of two remedies for recovery of sales tax, the Supreme Court in State of Kerala v. C. M. Francis & Co. ((1961) 3 SCR 181 : AIR 1961 SC 617 : (1961) 12 STC 119), held that if two remedies are open, both can be resorted, at the option of the authorities recovering the amount unless the statute in express words lays down that one remedy is to the exclusion of the other. The two remedies that were available in the case were, one under Section 13 of the Act which

provided that if the tax is not paid it may be recovered as if it were an arrear of land revenue and the other under Section 19 which provided that any person who failed to pay within the time allowed any tax assessed on him under the Act shall on conviction by the Magistrate of the First Class be liable to pay fine which may extend to one thousand rupees. This Court after observing that the question that arose was whether Section 19 should prevail over Section 13 of the Act stated that "both the section lay down mode of recovery of arrears of tax and as has already been noticed by the High Court, lead to the application of process of recovery by attachment and sale of moveable and immoveable properties belonging to the tax-evader and it cannot be said that one proceeding is more general than the other, because there is much that is common between them, in so far as mode of recovery is concerned". Referring to Section 19 the Court observed that in addition to recovery of the amount, it gives power to the Magistrate to convict and sentence the offender to fine or in default of payment of fine, to imprisonment and expressed its opinion that neither of the remedies for recovery is destructive of the other, because if two remedies are open, both can be resorted to, at the option of the authorities recovering the amount. This decision supports the contention of the learned Counsel for the appellant that when two remedies, one under Section 22(4-A) and another under Section 46(1)(c) are available, both can be resorted to at the option of the authorities recovering the amount but the Section 47-A. In the case referred in State of Kerala v. C. M. Francis & Co. (supra), the two remedies were, one by collection of the amount as an arrear of land revenue and the other by resorting to prosecution before the criminal Court. In Shanti Prasad Jain v. The Director of Enforcement ((1963) 2 SCR 297 : AIR 1962 SC 1764 : (1963) 33 Com Cas 231), the question arose whether discretion left to the executive to choose between two preliminary procedures was discriminatory. Under Section 23-A, the Director of Enforcement may adjudge the matter himself and levy a penalty not exceeding three times the value of the foreign exchange, in respect of which the contravention had taken place or Rs. 5,000 whichever is more or he may send it on to a court if he considers that a more severe penalty than he can impose is called for whereupon on a conviction by a court, the person is punishable with imprisonment for two years or fine. The Court observed that under Section 23-D, the necessary guidance is given in that at any stage of the inquiry the Director of Enforcement is of opinion that having regard to the circumstances of the case the penalty which he is empowered to impose would not be adequate he shall instead of imposing any penalty must make a complaint in writing to the court. As sufficient guidance was given regarding circumstances under which cases can be transferred to the criminal Court, the Court held that power is not unguided or arbitrary. In Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi, ((1969) 2 SCC 412 : (1970) 1 SCR 639) this Court following the Shanti Prasad Jain's case (supra), held that the Director of Enforcement can only file a complaint by acting in accordance with proviso to Section 23-D(1) which clearly lays down that the complaint is only to be filed in those cases where at any stage of the inquiry the Director of Enforcement comes to the conclusion that, having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate. In Shanti Prasad Jain's case (supra) as well as the Royala Corporation's case (supra), there were clear guidelines as to when prosecution can be resorted to and on that basis the Court held that the power cannot be said to be unguided. The decision in state of Kerala v. C. M. Francis & Co. (supra), was not referred to in the two decisions. In Ram Sarup v. Union of India (AIR 1965 SC 247 : (1964) 5 SCR 931 : (1965) 1 Cri LJ 236), the question arose as to whether the power under Section 125 of the Army Act which empowered the officer either to try a case by court material or by an ordinary court or by the criminal Court, was left entirely within his discretion without any guidance, was violative of Article 14 of the constitution. The Court held that the choice as to which court should try the accused is left to the responsible military officer under whom the accused is serving and these officers were to be guided by consideration of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the

person against whom the offence is committed. When power is conferred on high and responsible officer they are expected to act with caution and impartiality while discharging their duties and the circumstances under which they will chooses either of the remedies available should be left to them. The vesting of discretionary power in the State or public authorities or an officer of high standing is treated as a guarantee that the power will be used fairly and with a sense of responsibility.

15. It has been held by the Privy Council in Province of Bombay v. Bombay Municipal Corporation (73 IA 271 : AIR 1947 PC 34), that every statute must be supposed to be for public good at least in intention and therefore of few laws can it be said that the law confers unfettered discretionary power since the policy of law offers guidance for the exercise of discretionary power. Applying the principles of this decision to the present case, the guidance will have to be inferred from the policy of the law itself, that is, if on particular facts of a case the Commissioner who is an officer of high standing, in exercise of his discretion comes to the conclusion that more drastic remedy should be taken, the exercise of that option cannot be termed as unconstitutional. In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. For sustaining the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived. It must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds. It is well settled that courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional invalidity. Theses principles have given rise to rule of reading down the sections if it becomes necessary to uphold the validity of the sections. In the present case it is seen, under Section 46 before a prosecution can be launched, it is necessary that the assessee should have failed to pay the tax due within the time allowed without reasonable cause. The duty of the Commissioner is, therefore, so be satisfied that the assessee has failed without reasonable cause and without recourse to prosecution under Section 46(1)(c) the tax due cannot be collected. The provisions of Section 22(4-A) can be read as being applicable to cases in which the stringent step of prosecution is considered not necessary. The option is with the Commissioner and if he think levy of penalty would achieve the purpose of collection of the tax he can have recourse to the provisions of Section 22(4-A). Before levying a penalty under Section 22(4-A), the Commissioner shall give reasonable opportunity of being heard as to why the penalty should not be levied. Reading the two provisions harmoniously, we are of the view that the discretion is given to the Commissioner to resort to one of the two remedies as the facts of the case may require. In graver cause he will be justified in taking the drastic remedy and resorting to prosecution in the criminal Court if he is satisfied that such a course is necessary for the collection of the tax expeditiously. If the discretion is not properly exercised the court may be justified in interfering in such cases but the law cannot be held to be invalid. In the present case, we have no doubt, it is a grave case of failure to pay the tax as repeated reminders went unheeded. The Commissioner on the facts is fully justified in coming to the conclusion that resort to prosecution is necessary. On a consideration of the decisions on the point we are satisfied that there is nothing illegal in conferring different procedures on the authorities.

16. Taking into account the scheme of the Act it can be inferred that a more drastic remedy is to be taken when such a step is found necessary on the facts of the case. Thus construed and validity of the section cannot be questioned, but if the facts of the case do not warrant taking of the graver step and no adequate reasons are found, that order in such circumstances may be found to be invalid.

17. In R. S. Joshi, S. T. O. Gujarat v. Ajit Mills Ltd., Ahmedabad ((1977) 4 SCC 98 : 1977 SCC

(Tax) 536 : (1978) 1 SCR 338), the validity of provisions of the Act which gave the authority a discretion either to proceed under Section 37 or Section 63(1) of the Bombay Sales Tax Act without specific guidelines was considered. It was pointed out that Section 37 provided for levy of penalty and forfeiture while under Section 63(1)(h) the person becomes liable to be criminally prosecuted for contravening the provisions of Section 46 without reasonable excuse and held that there is no contravention of Article 14.

18. In the result we hold that the provisions of the Act conferring different procedures for collection of tax cannot be held to be invalid. But in view of our finding that the partners cannot be proceeded with for collection of arrears of the firm this appeal stands dismissed.

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