Titaghur Paper Mills Co. Ltd. and Another

Vs

State of Orissa and Others

Special Leave Petitions (Civil) Nos. 4513-4514 of 1983 And Writ Petitions (Civil) Nos. 3363-3364 of 1983

(R. B. Misra, E. S. Venkataramiah, A. P. Sen JJ)

13.04.1983

ORDER

A. P. SEN, J. -

These two special leave petitions are directed against an order of the Orissa High Court dated March 18, 1983 dismissing the writ petitions filed by the petitioners in limine challenging the two orders of assessment passed by the Assistant Sales Tax Officer, Cuttack II Circle, Cuttack dated February 16, 1983. The connected petitions under Article 32 of the Constitution are by an officer of the Company challenging the two orders of assessment.

2. By one of the writ petitions, the petitioners challenged the validity of the order of assessment under the Central Sales Tax Act, 1956 for the assessment year 1980-81 passed by the Assistant Sales Tax Officer, Cuttack II Circle, Cuttack dated February 16, 1983 under Rule 15 of the Central Sales Tax (Orissa) Rules, 1957 treating the gross turnover of Rs. 7,13,94,903.63 as returned by the petitioners to be their taxable turnover and the tax payable thereon at 10 per cent at Rs. 71,39,490.36. By the other, the petitioners challenged the validity of an order of assessment under the Orissa Sales Tax Act, 1947 for the assessment year 1980-81 passed by the Assistant Sales Tax Officer, Cuttack II Circle, Cuttack dated February 16, 1983 under sub-section (4) of Section 12 of the Orissa Sales Tax Act, 1947 treating the gross turnover of Rs. 2,02,07,852.65 as returned by the petitioner to be their taxable turnover and the tax payable thereon at 7 per cent at Rs. 14,14,549.71.

3. It appears from the impugned orders of assessment that proceedings under Rule 12 (5) of the Central Sales Tax (Orissa) Rules, 1957 ('Rules' for short) and under sub-section (4) of Section 12 of the Orissa Sales Tax Act, 1947 ('Act' for short) were initiated against the petitioners for the assessment year 1980-81 in relation to assessment of tax on sales in the course of inter-State trade and commerce under the Central Sales Tax Act, 1956 and inside sales effected during the year in question under the Orissa Sales Tax Act, 1947. The provisions contained in Rule 12 (5) of the Rules and in sub-section (4) of Section 12 of the Act enjoin the affording of reasonable opportunity to the dealer for completion of assessment. The learned Sales Tax Officer observes that he gave repeated opportunities to the petitioners to get themselves ready for the assessment of tax and to produce their account books and other documents but they sought adjournments on one pretext or another. Eventually on February 16, 1983 the learned Sales Tax Officer refused to grant any further adjournment holding that the petitioners had sufficient opportunity and accordingly proceeded to best judgment under Rule 15 of the Rules and sub-section (4) of Section 12 of the Act. In the absence of any material, the learned Sales Tax Officer made an assessment under Rule 15 of the Rules treating the gross turnover of sales in the course of inter-State trade and commerce amounting

to Rs. 7,13,94,903.63 as returned by the petitioners under the Central Sales Tax Act, 1956 to be their taxable turnover and the tax payable thereon at 10 per cent at Rs. 71,39,490.36. After allowing an adjustment of Rs. 27,88,388.47 paid by the petitioners along with the quarterly return, the learned Sales Tax Officer has raised a demand for payment of a sum of Rs. 43,51,101.89. He disallowed their claim for deduction of Rs. 6,74,99,085.65 representing sales to registered dealers and departments of Government as well as of Rs. 28,24,224.42 claimed as deduction on account of tax collected from purchasers as the requisite declarations in Form 'C' were not forthcoming. He also disallowed the concessional rate of tax at 4 per cent. Similarly, while making an assessment under sub-section (4) of Section 12 of the Orissa Sales Tax Act, 1947, he treated the gross turnover of inside sales amounting to Rs. 2,02,07,852.65 as returned by the petitioners to be their taxable turnover and the tax payable thereon at 7 per cent at Rs. 14,14,549.71. After allowing an adjustment of Rs. 1,08,480.11 paid by the petitioners along with the quarterly return, the learned Sales Tax Officer has raised a demand for payment of a sum of Rs. 13,06,069.60. It would thus appear that by the impugned orders of assessment the petitioners are faced with a total demand of Rs. 56,57,171.49 for the assessment year 1980-81. The petitioners instead of preferring appeals under sub-section (1) of Section 23 of the Act filed petitions before the High Court under Article 226 of the Constitution challenging the validity of the two orders of assessment.

4. The only contention raised before the High Court was that the impugned orders of assessment being a nullity, the petitioners were entitled to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution, but the High Court was not satisfied that this was a case of inherent lack of jurisdiction. The High Court while dismissing the writ petition observed :

Having heard the learned counsel for both the parties and having gone through the records, we are not inclined to interfere with the impugned order (s) in exercise with our extraordinary jurisdiction since there is a right of appeal against the same. It is contended on behalf of the petitioner that the impugned order being a nullity is entitled to invoke our extraordinary jurisdiction. We are not satisfied that this is a case of inherent lack of jurisdiction. There is no violation of principles of natural justice.

5. In support of these petitions, the submissions advanced by learned counsel for the petitioners rest purely on procedural irregularities or touch upon the merits of the assessments. Broadly speaking, the contentions were that : (1) The learned Sales Tax Officer had no authority or jurisdiction while making an assessment under Rule 15 of the Central Sales Tax (Orissa) Rules, 1957 to treat the gross turnover as returned by the petitioners to be their taxable turnover. (2) He was not justified in disallowing the claim for deduction of Rs. 6,74,99,085.65 representing sales to registered dealers and departments of Government as well as of Rs. 28,24,224,42 on account of tax collected from the purchasers from the gross turnover of sales in the course of inter-State trade and commerce amounting to Rs. 7,13,94,903.63. (3) He wrongly denied the petitioners the benefit of the concessional rate of tax at 4 per cent merely because they failed to furnish the requisite declarations in Form 'C'. (4) He could not, for similar reasons, while making an assessment under sub-section (4) of Section 12 of the Orissa Sales Tax Act, 1947 treat the gross turnover of inside sales amounting to Rs. 2,02,07,852.65 as returned by the petitioners to be their taxable turnover nor was he justified in disallowing their claim for deduction of Rs. 1,80,65,167.66 representing sales to registered dealers merely because they failed to produce the prescribed declarations from registered dealers. (5) And the learned Sale Tax Officer had acted in flagrant violation of the rules of natural justice as the petitioners were deprived of an opportunity to place their case for the assessment year in question. We are afraid, these contentions cannot prevail. It is not for us to say whether or not the learned Sales Tax Officer was justified in proceeding to best judgment under Rule 15 of the Central Sales

Tax (Orissa) Rules, 1957 and under sub-section (4) of Section 12 of the Orissa Sales Tax Act, 1947 or whether he was justified in treating the gross turnover as returned by the petitioners to be their taxable turnover or whether he was wrong in disallowing the deductions claimed for the assessment year in question. In the very nature of things, these are the questions which the petitioners should raise in appeals preferred before the prescribed Appellate Authority under sub-section (1) of Section 23 of the Act.

6. We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-section (3) (a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. In Raleigh Investment Company Limited v. Governor-General in Council (1947) 74 IA 50 : AIR 1947 PC 78 : 231 IC 1), Lord Uthwatt, J. in delivering the judgment of the Board observed that in the provenance of tax where the Act provided for a complete machinery which enabled an assessee to effectively raise in the courts the question of the validity of an assessment denied in alternative jurisdiction to the High Court to interfere. It is true that the decision of the Privy Council in Raleigh Investment Company case ((1947) 74 IA 50 : AIR 1947 PC 78 : 231 IC 1), was in relation to a suit brought for a declaration that an assessment made by the Income Tax Officer was a nullity, and it was held by the Privy Council that an assessment made under the machinery provided by the Act, even if based on a provision subsequently held to be ultra vires, was not a nullity like an order of a court lacking jurisdiction and that Section 67 of the Income Tax Act, 1922 operated as a bar to the maintainability of such a suit. In dealing with the question whether Section 67 operated as a bar to a suit to set aside or modify an assessment made under a provision of the Act which is ultra vires, the Privy Council observed :

> In construing the section it is pertinent, in their Lordships' opinion, to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income Tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to inquire into the same subject-matter.

7. We are not oblivious of the fact that this Court in K. S. Venkataraman & Co. v. State of Madras((1966) 2 SCR 229 : AIR 1966 SC 1089 : (1966) 1 SCJ 515 : (1966) 17 STC 418 : (1966) 60 ITR 112), in a five-Judge Bench by a majority of 3 : 2 has dissented with the view expressed by the Privy Council in Raleigh Investment Company case, and held that an assessment made on the basis of a provision which is ultra vires is not an assessment made under the Act. It was observed that the entire reasoning of the Judicial Committee was based upon the assumption that the question of ultra vires can be canvassed and finally decided through the machinery provided under the Income Tax Act. The majority observed that the hierarchy of authorities set up under the Act being creatures of statute were not concerned as to whether the provisions of the Act were intra vires or not. If an assessee raises such a question, according to the decision of the majority in Venkataraman case ((1966) 2 SCR 229 : AIR 1966 SC 1089 : (1966) 1 SCJ 515 : (1966) 7 STC 418 : (1966) 60 ITR 112), the Appellant Tribunal can only reject it on the ground that it has no jurisdiction to entertain such objection or render any decision on it. As no such question can be raised or can even arise out of the order of the Appellate Tribunal, the High Court cannot possibly give any decision on the question of ultra vires because its jurisdiction under Section 66 is a special advisory jurisdiction and its scope is strictly limited. It can only decide questions of law that arise out of the order of the Appellate Tribunal and that are referred to it. Further, an appeal to this Court under Section 66-A (2)

does not enlarge the scope of the jurisdiction of this Court as this Court can only do what the High Court can under Section 66. It would therefore appear that the majority decision in Venkataraman case ((1966) 2 SCR 229 : AIR 1966 SC 1089 : (1966) 1 SCJ 515 : 1966) 7 STC 418 : (1966) 60 ITR 112), rests on the principle that (i) an ultra vires provision cannot be regarded as a part of the Act at all, and an assessment under such a provision is not "made under the Act" but is wholly without the jurisdiction and is not directed by Section 67 of the Act. And (ii) the question whether a provision is ultra vires or not cannot be decided by any of the authorities created by the Act and therefore cannot be the subject-matter of a reference to the High Court or a subsequent appeal to this Court.

8. No such question arises in a case like the present where the impugned orders of assessment are not challenged on the ground that they are based on a provision which is ultra vires. We are dealing with a case in which the entrustment of power to assess is not in dispute, and the authority within the limits of his power is a Tribunal of exclusive jurisdiction. The challenge is only to the regularity of the proceedings before the learned Sales Tax Officer as also his authority to treat the gross turnover returned by the petitioners to be the taxable turnover. Investment of authority to tax involves authority to tax transactions which in exercise of his authority the Taxing Officer regards as taxable, and not merely authority to tax only those transactions which are, on a true view of the facts and the law, taxable.

9. Emphasis is laid on the following observations made by this Court in State of U. P. v. Mohammad Nooh (1958 SCR 595 : AIR 1958 SC 86 : 1958 SCJ 242):

> If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned.

We find no justification for extending the principles laid down in Mohammad Nooh case, to a case like the present where there is an assessment made by the learned Sales Tax Officer under the Act. In Raleigh Investment Company case, the Privy Council rightly observed that the phrase "made under the Act" described the provenance of the assessment; it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test.

10. The decision in Mohammad Nooh case, is clearly distinguishable as in that case there was total lack of jurisdiction. There is no suggestion that the learned Sales Tax Officer had no jurisdiction to make an assessment. Nor can it be contended that he had acted in breach of rules of natural justice. There is no denying the fact that the petitioner was served with a notice of the proceedings under Rule 12 (5) of the Rules and sub-section (4) of Section 12 of the Act. The impugned orders clearly show that the petitioners were afforded sufficient opportunity to place their case. Merely because the learned Sales Tax Officer refused to grant any further adjournment and decided to proceed to best judgment, it cannot be said that he acted in violation of the rules of natural justice. The question whether another adjournment should have been granted or not was within the discretion of the learned Sales Tax Officer and is a matter which can properly be raised only in an appeal under sub-

section (1) of Section 23 of the Act. All that this Court laid down in Mohammad Nooh case (1958 scr 595 : air 1958 SC 86 : 1958 SCJ 242), is that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than a rule of law; in other words, it does not bar the jurisdiction of the court.

11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rules was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford (1859) 6 CBNS 3336, 356 : 28 LJCP 242 : 141 ER 486 : 7 WR 464) in the following passage :

There are three classes of cases in which a liability may be established founded upon statute.... But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it... the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in Neville v. London, Express Newspapers Ltd.(1919 AC 368 : 1919 All ER Rep 61 : 88 LJKB 282 : 120 LT 299) and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. (1935 AC 532 : 104 LJ PC 82 : 153 LT 441 (PC)) and Secretary of State v. Mask & Co. (AIR 1940 PC 105 : 67 IA 222 : 188 IC 231). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.

12. Furthermore, the Act provides for an adequate safeguard against an arbitrary or unjust assessment. The petitioners have a right to prefer an appeal under sub-section (1) of Section 23 of the Act subject to their payment of the admitted amount of tax as enjoined by the proviso thereto. As regards the disputed amount of tax, the petitioners have the remedy of applying for stay of recovery to the Commissioner of Sales Tax under clause (a) of the second proviso to sub-section (5) of Section 13 of the Act which runs :

Provided further that -

> (a) when the dealer or person, as the case may be, has presented an appeal under sub-section (1) of Section 23, the Commissioner may, on an application in that behalf filed by such dealer or person within thirty days from the date of receipt by him of the notice under sub-section (4), in his discretion, stay the recovery of the amount in respect of which such notice has been issued or any portion thereof, for such period and subject to such conditions as the Commissioner thinks fit; or

13. The petitioners are at liberty to make an application for stay of the disputed amount and the Commissioner will decide whether or not there should be such stay on such terms and conditions as he thinks fit, looking to the nature of the demand raised in the facts and circumstances of the present case.

14. For these reasons, the petitions must fail and are dismissed. We hope and trust that the Appellate Authority will dispose of the appeals as expeditiously as possible. Shri Nariman, appearing on behalf of the State of Orissa fairly stated that he has no objection to the appeal being heard as early as possible without any objection as to limitation.

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