Keveyan and Co. Vs. G.S. Bagehal, Additional Assistant Commissioner of Sales Tax and ors.

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Court : Madhya Pradesh

Decided On : Jul-06-1987

Reported in : [1988]68STC308(MP)

Judge : G.G. Sohani and ;P.D. Mulye, JJ.

Appeal No. : M.P. No. 231 of 1987

Appellant : Keveyan and Co.

Respondent : G.S. Bagehal, Additional Assistant Commissioner of Sales Tax and ors.

Advocate for Def. : Kulshreshtha, Government Adv.

Advocate for Pet/Ap. : M.S. Choudhary, Adv.

Disposition : Appeal dismissed

Judgement :

G.G. Sohani, J.

1. By this petition under Article 226 of the Constitution of India, the petitioners have prayed that the order of assessment dated 31st December, 1986 passed by

the Assistant Commissioner of Sales Tax, Indore, be quashed. The petitioners have also prayed for issuance of an ad interim writ restraining the respondents from recovering the tax and the penalty imposed by the impugned order.

2. A preliminary objection is raised on behalf of the respondents that the petitioner has a right to prefer an appeal before the prescribed authority under the provisions of the Madhya Pradesh General Sales Tax Act, 1958 (hereinafter referred to as 'the Act') and as the Act provides for a complete machinery to challenge an order of assessment, the impugned order of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. Before we proceed to appreciate the contentions raised by the parties in this behalf, it would be useful to refer to the material facts giving rise to this petition.

3. The petitioners are registered dealers under the Act. The petitioners have their head office in the State of Kerala and a branch at Indore. The petitioner deal in betel-nuts and black pepper. With regard to the business carried on by the petitioners at Indore, the petitioners are liable to pay tax under the Act. The petitioners submitted returns under the Act for the assessment year 1983-84 and disclosed a total turnover of . Rs. 92,88,728.49. In exercise of powers conferred by the Act, a search was carried out by the Flying Squad of the Sales Tax Department at the business premises of the petitioners and also at the premises taken on rent by the petitioners for the residence of their employees. During the search, incriminating documents showing evasion of sales tax on a very large scale was detected and incriminating documents were seized. During investigation, it was revealed that four bank accounts were opened in fictitious names and that transactions amounting to Rs.1,50,47,853.90 had taken place through those bank accounts. The return furnished by the petitioners, however, had disclosed total turnover of Rs. 92,88,728.49 only. Hence, for the purpose of framing assessment under the Act, a notice was issued to the petitioners on 5th April, 1986 by respondent No.1, the Additional Assistant Commissioner of Sales Tax, requiring them to appear before him on 14th May, 1986. As none appeared on that date, another notice was issued on 14th May, 1986 directing the petitioners to appear on 2nd July, 1986. When none appeared on behalf of the petitioners on

2nd July, 1986, another notice was issued fixing the date of hearing on 28th July, 1986. On 28th July, 1986, the petitioners appeared through their authorised representative and sought adjournment. At their instance, respondent No.1, adjourned the hearing to 28th August, 1986. The period of limitation for making an order of assessment was to expire on 31st December, 1986 and respondent No.1 had to frame assessment latest by 31st December, 1986, before the expiry of the period of limitation prescribed therefor. On 22nd September, 1986, the full report of the investigation made by the Flying Squad was read over to the petitioners. On 6th October, 1986, the petitioners submitted an application for obtaining a certified copy of the report of the Flying Squad. Incorporating the material portions of that report, further notice was issued to the petitioners on 12th December, 1986 and on 22nd December, 1986, respondent No.1 directed that the hearing would take place from day to day till completion. Ultimately, the hearing came to an end on 31st December, 1986 when the impugned order was passed. Aggrieved by that order, the petitioners have filed this petition and sought an ad interim writ.

4. Now in dealing with a petition under Article 226 of the Constitution from an order, of assessment under a taxing statute, it is useful to note the following observations of the Supreme Court in Titaghur Paper Mills Co. Ltd. v. State of Orissa AIR 1983 SC 603. In that case, while dealing with the powers of the High Court under Article 226 of the Constitution in dealing with a petition directed against an order of assessment passed under the Orissa Sales Tax Act, the Supreme Court observed as follows:

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.

These observations were referred to by the Supreme Court in another decision reported in Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlofi India Ltd. AIR 1985 SC 330, where it was' further observed as follows:

In Titaghur Paper Mills Co. Ltd. v. State of Orissa AIR 1983 SC 603, A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ., held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the prescribed authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

In the light of the aforesaid decision of the Supreme Court, we have to first decide whether this petition can be entertained.

5. Now, the fact that the petitioners are aggrieved by the impugned order, statutory remedies are available to the petitioners under the Act, is not disputed. It is, however, contended on behalf of the petitioner that the remedy of appeal provided

by the Act cannot be held to be an adequate remedy because under the Act, the petitioners are required to pay the amount of tax and penalty, as required by Sub-section (3) of Section 38 of the Act. The Learned Counsel for the petitioner contended that the decision in AIR 1983 SC 603 (Titaghur Paper Mills Co. Ltd. v. State of Orissa) was distinguishable because under the Orissa Sales Tax Act, the recovery of the entire amount of tax could be stayed by the appellate authority, while under the M.P. General Sales Tax Act, 1958, a part of the amount has got to be paid by the appellant as a requisite condition for preferring an appeal. The Learned Counsel for the petitioner also referred to the decision of the Supreme Court in Filterco v. Commissioner of Sales Tax, M.P. [1986] 19 VKN 150 and contended that as a substantial portion of the tax had to be deposited before an appeal or revision could be filed, the petition under Article 226 of the Constitution could not be dismissed in limine.

6. Now the decision of the Supreme Court in [1986] 19 VKN 150 (Filterco v. Commissioner of Sales Tax) is distinguishable on facts. In that case, a petition was filed in the High Court from a decision of the Commissioner on a disputed question referred to him under Section 42-B of the Act. The Supreme Court held that as an appeal from the decision of the assessing authority would be a mere exercise in futility as the Appellate Assistant Commissioner would be bound by the decision of the Commissioner, which was his superior authority, the High Court should have examined the merits of the case. The ratio of the decision in [1986] 19 VKN 150 (SC) (Filterco v. Commissioner of Sales Tax) is not that a petition under Article 226 of the Constitution cannot be dismissed on the ground of an alternative remedy because a substantial portion of the tax is required to be deposited before an appeal or a revision can be filed. In the circumstances of that case, it was held that the remedy of the appeal was illusory and hence entirely ill-suited to meet the peculiar situation arising in that case. To uphold the contention urged on behalf of the petitioner that a petition under Article 226 of the Constitution from an order of assessment cannot be dismissed on the ground of existence of an alternative remedy of an appeal or revision because a portion of the amount of tax is required to be deposited before filing an appeal or revision would mean that against every order of assessment, the assessee can directly approach this Court under Article 226 of the Constitution and this Court is bound to decide the petition on merits.

Such a course of action would be contrary to the decisions of the Supreme Court in AIR 1983 SC 603 (Titaghur Paper Mills Co. Ltd. v. State of Orissa) and AIR 1985 SC 330 (Assistant Collector of Central Excise v. Dunlop India Ltd.). These decisions lay down in unmistakable terms that Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only in extraordinary cases, where the court is satisfied that the statutory remedy will be extremely ill-suited to meet the demands of extraordinary situation that recourse can be had to exercise of powers under Article 226.

7. It was then urged that in the instant case, the petitioners were required to deposit a huge amount of tax and penalty levied on them before filing an appeal or revision. Now as the turnover of the petitioners runs into lakhs of rupees, even according to the return filed by them, the amount of tax and penalty they are required to deposit, is also substantial. The magnitude of that amount will not, however, be decisive of the question as to whether a petition under Article 226 can be entertained. For a petty trader, even a meagre sum imposed by way of penalty or levied as additional tax may be a heavy burden. His petition cannot be thrown out on the ground that the amount that he is required to deposit before filing an appeal is meagre, even if he is able to make out a case that the statutory remedy is entirely ill-suited and will be an exercise in futility in his case. Therefore, the crux of the matter is not whether the amount of tax or penalty is large or small but whether the petitioner is able to make out a case that the statutory remedy is ill-suited to meet the demands of extraordinary situations arising in his case.

8. It was urged that the assessment order passed against the petitioners was not under the Act because the notice served on the petitioners to show cause was not in the form prescribed by Rule 32 of the Rules framed under the Act but in form XVI. Now Rule 32 itself provides that the notice required by Sub-section (2) of Section 18 of the Act shall, as far as may be in the form prescribed. The real question is whether prejudice, if any, is caused to the petitioners by the notice given to them. Even assuming that the notice was not in the prescribed form, it cannot be held that the assessment of the petitioners was not framed under the Act and hence the statutory remedy provided by the Act is not available to the petitioners.

9. It was then vehemently contended that the impugned order offended the principles of natural justice as no reasonable opportunity was given to the petitioners to meet the case against them. The material allegations of fact in this behalf are set out in para 5(a) of the petition as follows:

The Flying Squad of the respondent raided the premises of the petitioners on 31st December, 1984, in the course of and in connection with the assessment pending proceedings of the petitioners' Indore branch for the period 1st April, 1983 to 31st March, 1984, and seized certain papers. Thereafter, the respondents kept quiet till 22nd September, 1986 when they started assessment proceedings against the petitioners' Indore branch, for enhancement of turnover on the ground of alleged escapement of turnover and for imposition of penalty. It appears that the said proceedings for enhancement of turnover and levy of penalty were based on the report of the Flying Squad raid on 31st December, 1984. It also appears that the said report was of over 150 pages. Based on the said report, the respondent No. 1 issued a show cause notice on the petitioners' Indore branch bearing No. 4364 dated 12th December, 1986.

Now respondent No. 1 has produced on record a copy of the order-sheet, annexure R-7, which shows that the proceedings against the petitioners commenced on 5th April, 1986 and not on 22nd September, 1986, as averred by the petitioners. As the petitioners did not appear despite notices, another notice was again issued on 2nd July, 1986 fixing the date of hearing on 28th July, 1986. On that date, the petitioners appeared for the first time and sought adjournment. The petitioners have suppressed all these material facts in their petition and the petition deserves to be dismissed on that ground alone. That apart, whether in a given case, there was or was not a reasonable opportunity of hearing is a question of fact. The grievance of the petitioners was that the entire investigation report of the Flying Squad was not furnished to the petitioners. The contention urged on behalf of respondent No. 1 was that the petitioners had participated in the investigation carried out by the department; that they were fully aware of the case they had to meet; that the petitioners were anxious to prolong the proceedings so that the assessment could not be completed before the period of limitation fixed therefor; that they deliberately, therefore, abstained from appearing at the earlier

stages of assessment proceedings; that the application for obtaining a copy of the report of the Flying Squad was made after excessive delay and that as the period of limitation for framing assessment was expiring on 31st December, 1986, material portions of that report were incorporated in a further show cause notice issued to the petitioner on 12th December, 1986, so that the petitioners could not have any real grievance in that behalf. As we have already . observed, the question as to whether in the circumstances of a particular case, there was or was not a reasonable opportunity of hearing, is a question of fact. The appellate authorities under the Act shall, if the question is raised, before them, examine that matter and decide whether the case deserves to be remanded for further enquiry. It was urged that respondent No. 1 relied on a statement made by an employee of the petitioners, which was shown to the petitioners on the last date of hearing and that no opportunity to cross-examine that person was given. We were taken through the entire order of assessment passed by respondent No. 1 but it cannot be held that that order is wholly based on the aforesaid statement of the employee of the petitioners. Whether without taking into consideration that statement, the order of assessment can or cannot be sustained, is a matter which can be gone into by the appellate authority and if it is found that no opportunity was given to the petitioners to cross-examine any person, on whose statement the order of assessment is based, then the appellate authority would no doubt remand the case. This is, however, not a case where order of assessment was passed without hearing the petitioners and the order of assessment is a nullity, moreover, we are satisfied in the instant case, that the petitioners were also responsible for prolonging the assessment proceedings. They have suppressed material facts in the petition that the enquiry had commenced prior to 22nd September, 1986. Therefore, this is not a fit case, in our opinion, for exercising the extraordinary powers of this Court under Article 226 of the Constitution.

10. The petition, therefore, fails and is summarily dismissed.