

M. Appukutty Vs. the State

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Court : Kerala

Decided On : Sep-25-1958

Reported in : AIR1959Ker16; [1958]9STC710(Ker)

Judge : K.T. Koshi, C.J.,; M.S. Menon and; Varadaraja Iyengar, JJ.

Acts : Madras General Sales Tax Act, 1939 - Sections 11, 12 and 12(2); Madras General Sales Tax Rules, 1939 - Rules 14(2), 17, 17(1) and 17(1A)

Appeal No. : T.R.C. No. 11 of 1957

Appellant : M. Appukutty

Respondent : The State

Advocate for Def. : Govt. Pleader

Advocate for Pet/Ap. : R. Krishnaswami, Adv.

Disposition : Petition allowed

Judgement :

M.S. Menon, J.

1. The Deputy Commercial Tax Officer, Kozhikoda II, assessed the petitioner to sale-tax on a net turnover of Rs. 12,56,178-14-0 for 1952-53 by his order dated 27-3-1954 (Ext. A). The assessee appealed to the Commercial Tax Officer,

Malabar (South). The appeal was dismissed by an order dated 24-5-1954 (Ex. B.).

2. By an order dated 31-3-1956 the Deputy Commissioner of Commercial Taxes, Coimbatore Division, ordered as follows:

'In exercise of the powers vested in me under the M. G. S. T. Act and Rules, I revise the order of the C. T. O. Malabar (South) dated 24-5-1954 and redetermine the net turnover at Rs. 14,99,561-4-0 as detailed below and order the levy of tax thereon for 1952-53.

1.

Turnover fixed by the D. C. T. O. and confirmed by the C. T. O., Malabar South...

Rs. 12,55,178--14--0

2.

Sugar imports in other names (Sales turnover estimated)

Rs. 1,67,952--7--9

3.

Malda and sugar imported (Sales turnover estimated)

Rs. 46,610--0--0

4.

Purchase through N. C. Shenoy, Kozhikode, (Rs. 2364--9--7). (Sales turnover estimated)

Rs. 2,500--0--0

6.

Value of gunnies not previously included and assessed

Rs. 26,319-14--7

Net turnover determined

Rs. 14,99,561--4--4

(Ex C.)'

3. The assessee challenged the correctness of this order before the Kerala Sales Tax Appellate Tribunal, Trivandrum, but without success. The order of the Sales Tax Appellate Tribunal is dated 23-3-1957 (Ext. D). It is the correctness of the said order that is challenged before us by this petition under Section 12-B of the Madras General Sales Tax Act, 1939.

4. Section 12(2) of the Madras General Sales Tax Act, 1939, provides that the Deputy Commissioner may, suo motu, or on application in the cases specified

'call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit.'

5. Rule 14 (2) of the Madras General Sales Tax Rules, 1939, provided for a revisional jurisdiction in similar terms and in dealing with that provision Krishnaswami Nayudu, J., said:

'The Commercial Tax Officer has only revisional jurisdiction as it is commonly understood of examining the record of any order and deciding as to its legality or propriety. It is not open to him to go beyond the order or the record and act upon further information or evidence placed before him so as to disturb the order originally passed and hold that it was not proper'. (Louis Dreyfus and Co., Ltd, v. Province of Madras, (1952) 3 STC 19 (Mad) (A), (Headnote, paragraph 2).

There was an appeal from the said decision and in dealing with certain questions of law referred to a Full Bench, Rajamannar, C. J., said in State of Madras v. Louis Dreyfus & Co. Ltd., (1955) 6 STC 318 (330): AIR 1956 Mad 659 at p. 665 (B), . -

'Now what exactly is the meaning to be attached to the expression 'the record of any order passed'. The records which the revising authority calls for are the records of the assessment. They would include the assessment order as well as the other files of the assessing authority which would furnish the basis upon which the assessment order is passed. If in the assessment order the turnover which a dealer has returned or which has been gathered from his books is treated as not taxable or subject to any exemption and the revising authority is of the opinion that the order in this behalf is erroneous, the Commercial Tax Officer would have satisfied himself that such an order was not legal or proper.'

6. It is common ground that fresh evidence forms the foundation of Ext. C and it was not contended -- quite correctly -- that if (1955) 6 STG 318; (AIR 1956 Mad 659) (B), lays down the proper ambit of the revisional jurisdiction -- as we respectfully think it does Section 12 (2) of the Act will justify the action taken by the Deputy Commissioner of Commercial Taxes.

7. What we are concerned with in this case is not an 'escaped assessment' but 'an escaped turnover' and the further contention of the Department in support of Ext. G Was based on Rule 17 of the Madras General Sales Tax Rules 1939. Sub-rule (1) of that Rule provides:

'If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to the tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority, as the case may be, subject to the provisions in Sub-rule (1-A) may, at any time within three years next succeeding that to which the tax or licence fee relates, determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable in such turnover or levy the licence fee, after issuing a notice to the dealer or licensee and after making such enquiry as ho considers necessary.'

Sub-rule (1-A):

'Where in respect of the turnover referred to in Sub-rule (i) an order has already been passed under Section 11 or 12, the assessing authority shall make a report

to the appropriate appellate or revising authority, as the case may be, which shall thereupon after giving the dealer concerned reasonable opportunity of being heard, pass such order as it deems fit'; and

Sub-rule (3-A):

'The powers conferred by Sub-rules (1) and (3); on the assessing authority or licensing authority may also be exercised by the appellate authority referred to in Section 11; or as the case may be, by the revising authority referred to in Section 12, at any time within a period of three years next succeeding that to which the tax, or as the case may be, the licence fee relates, provided that such authority shall give the dealer concerned ' a reasonable opportunity of being heard before passing orders under this sub-rule.'

8. In this case action was taken by the Deputy Commissioner of Commercial Taxes. It is clear from the sub-rules extracted above that he would have had the power to do so only if his revisional jurisdiction under Section 12 of the Act had been sought or exercised. There was only an appeal under Section 11, there were no proceedings under Section 12, and in these circumstances we must hold that, Ext. C was clearly without jurisdiction and Ext. D, the order of the Appellate Tribunal affirming the same, was incorrect and has to be reversed. Judgment accordingly.

9. As we have taken the view that the petitioner is entitled to succeed even on the assumption that Rule 17 is intra vires of the provisions of the Act we have not dealt with in this judgment his further contention that the said Rule is ultra vires and should be struck down on that ground.

10. According to the Government Pleader even if the Deputy Commissioner of Commercial Taxes can function under Sub-rule (1-A) only in cases where there had been proceedings under Section 12, the position is different under Sub-rule (3-A), and under that sub-rule he can take action whether there had been proceedings under Section 12 or not. We see no force in this submission. The words 'or as the case may be' between the words 'by the appellate authority referred to in Section 11' and 'by the revising authority referred to in Section 12' in

Sub-rule (3-A) make the position identical.

11. The Department will pay the costs of the assessee, advocate's fee Rs. 100.

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