P.P. Sons Vs. Assistant Commissioner (Assessment) of Sales Tax and ors.

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Court : Kerala

Decided On : Jan-13-1994

Reported in : [1994]95STC69(Ker)

Judge : P.K. Balasubramanyan, J.

Acts : Kerala General Sales Tax Act, 1963 - Sections 23, 23(3) and 36; Kerala General Sales Tax Rules, 1963 - Rules 21(7) and 31

Appeal No. : O.P. No. 6435 of 1989-N

Appellant : P.P. Sons

Respondent : Assistant Commissioner (Assessment) of Sales Tax and ors.

Advocate for Def. : T. Karunakaran Nambiar, Special Government Pleader (Taxes)

Advocate for Pet/Ap. : Jose Joseph, Adv.

Disposition : Petition dismissed

Judgement :

P.K. Balasubramanyan, J.

1. The petitioner-firm is an assessee under the Kerala General Sales Tax Act, 1963. For the assessment year 1978-79 the assessment was completed on March

28, 1980. Against the said order of assessment the petitioner filed an appeal, according to it, disputing the liability to pay tax for the sum of Rs. 46,639. The petitioner also moved an application for stay before the appellate authority, the Deputy Commissioner (Appeals) at Calicut. Since no stay was granted by the appellate authority, the petitioner approached this Court by way of O.P. No. 546 of 1983 essentially praying for a direction to the authorities to stay the collection of the disputed tax pending disposal of the appeal. This Court disposed of the said original petition by judgment dated January 24, 1983, with a direction to the authorities to keep in abeyance the recovery of the disputed tax on condition that the petitioner deposited a sum of Rs. 25,000 within three weeks of the date of the said judgment. The petitioner did not deposit the sum of Rs. 25,000 as directed in O.P. No. 546 of 1983 within time. The Assistant Commissioner (Assessment), Sales Tax, thereupon issued the notice exhibit P1 dated March 2, 1983 to the petitioner informing him that he has failed to comply with the directions issued by the High Court in O.P. No. 546 of 1983 and calling upon him therefore to pay the entire arrears for the assessment year 1978-79 with penal interest before March 10, 1983, threatening coercive process on his failure to pay the entire arrears. Meanwhile the petitioner sent exhibit P2 letter to the Assistant Commissioner of Sales Tax along with a cheque for Rs. 25,000 stating that the payment was in compliance with the directions of the High Court in O.P. No. 546 of 1983 and further informing the authority that the petitioner has filed a petition for extension of time and orders were being awaited oh that application. It was also stated that an order in that behalf will be produced before the authority as soon as such an order was obtained. The petitioner had filed C.M.P. No. 6400 of 1983 in O.P. No. 546 of 1983 for extension of time as indicated in exhibit P2 communication. By order dated March 14, 1983, this Court extended the time by three weeks up to and inclusive of March 8, 1983. The petitioner's case therefore is that he must be taken to have complied with the directions of this Court in O.P. No. 546 of 1983 and if that be so, the recovery of the balance tax due from him for the assessment year 1978-79 stood stayed until the disposal of the appeal he had filed before the appellate authority against that order.

2. Certain goods of the petitioner were detained at the check-post, Feroke under Section 29 of the Act. The petitioner thereupon deposited a sum of Rs. 23,364 on

May 6, 1978, as a condition for getting the goods released. Though a penalty was imposed by the original authority, in appeal by the petitioner, the Appellate Assistant Commissioner held the imposition of penalty unsustainable and directed the refund of the sum of Rs. 23,364 collected by way of penalty. Consequent on the decision of the Appellate Assistant Commissioner in that behalf dated September 2, 1978, the Sales Tax Officer (Enquiry) passed an order exhibit P3 dated July 6, 1982 to refund the amount of Rs. 23,364 to the petitioner immediately. The petitioner requested the assessing authority by letter dated March 7, 1983 to refund the sum of Rs. 23,364 in terms of the order exhibit P3. The petitioner also sent a communication exhibit P4 dated March 15, 1983 to the Assistant Commissioner (Assessment) submitting that the High Court had extended the time for complying with the direction in O.P. No. 546 of 1983 and further submitting that the direction of the High Court had been complied with. At this stage, the Sales Tax Officer, respondent No. 3, by the order exhibit P5 ordered adjustment of the sum of Rs. 23,364 due by way of refund to the petitioner towards the balance tax due from the petitioner for the assessment year. 1978-79. This order, as can be seen, was passed on March 19, 1983, five clays after this Court extended the time for deposit on March 14, 1983. The adjustment was obviously on the basis that the petitioner had failed to comply with the direction of the High Court in O.P. No. 546 of 1983 to deposit a sum of Rs. 25,000 in time so as to enable him to have the benefit of a stay of recovery of the disputed tax for the assessment year 1978-79 pending the appeal. The petitioner protested at this and wrote exhibit P6 letter dated March 21, 1983 to the Assistant Commissioner of Sales Tax (Assessment). It pointed out that the High Court had extended the time for deposit and the amount having been deposited within the extended time, the balance tax due for the assessment year 1978-79 could not be recovered before the disposal of the appeal relating to the year 1978-79. It was, therefore, submitted that the adjustment ordered under exhibit P5 on the basis that the entire amount of tax for the assessment year 1978-79 could be recovered since there was no stay of recovery was erroneous and requesting the Assistant Commissioner of Sales Tax (Assessment) to refund the sum of Rs. 23,364 which had been adjusted. It was pointed out that the authority had no right to adjust it as done in the light of the High Court decision. In reply, the petitioner received exhibit P7 dated March 25, 1983, informing the petitioner that the Sales Tax Officer, IV Circle, Calicut, had been given instruction to refund the sum of Rs. 23,364 thus accepting the stand adopted by the petitioner in his communication, exhibit P6.

3. Meanwhile the petitioner filed his return for the month of September, 1983. Since the amount ordered to be refunded has not yet been received by him, he proceeded to adjust the sum of Rs. 23,364 towards the tax due for the month of September, 1983 and when the return was filed he only remitted the admitted tax less the sum of Rs. 23,364. The petitioner alleges that this was done after a discussion the managing partner of the petitioner had with the first respondent. The petitioner also issued the letter exhibit P8 in that regard. The petitioner has produced the return in form No. 9 filed by him as exhibit P9. The petitioner submits that there was no objection from any quarter to the adjustment he had made as per exhibit P9.

4. The final assessment for the assessment year 1983-84 was completed by the order exhibit P10 dated June 22, 1985. In the said order the Assistant Commissioner (Assessment) did not give credit to the sum of Rs. 23,364 sought to be adjusted by the petitioner towards his liability for the month of September, 1983 and which had earlier been directed to be refunded on condition that the penalty imposed in that behalf was not proper. Having not given credit to the sum of Rs. 23,364 the assessing authority issued a demand notice to the petitioner calling upon him to remit a sum of Rs. 23,403.82 as tax and surcharge and directing the adjustment of the excess surcharge amount paid by the petitioner for the assessment year 1984-85. The petitioner was also called upon to pay Rs. 10,898.75 as penal interest for the short payment of Rs. 23,183.85. The notice in that behalf under Rule 31 of the Kerala General Sales Tax Rules, 1963 is produced by the petitioner as exhibit P11. Exhibit P11 indicated that penal interest was for the short payment of tax of Rs. 23,183.85 for the month of September, 1983. This was followed by a note on the reverse as follows :

'Note : You have not paid the entire tax and surcharge due for the month of September, 1983. You are therefore liable to pay penal interest on the balance amount of Rs. 23,183.85 as worked out below : Balance amount Rs.

23,183.85Delay since the issue 25 months at 47 per centof demand noticePenal interest due Rs. 10,898.75.'

Against this notice the petitioner purported to file a revision before the 2nd respondent under Section 36 of the Act. The petitioner contended that the levy of penal interest was illegal and unwarranted and since he had prayed for adjustment of the amount admittedly due to him by way of refund, it cannot be taken that he has not paid the admitted tax along with his return for the month of September, 1983. The 2nd respondent took the view that against the notice in form No. 24 issued to the petitioner in terms of Section 23(3) of the Act no refund would lie under Section 36 of the Act. On the facts the 2nd respondent took the view that it was not open to the assessee to suo motu adjust the sum of Rs. 23,364. But it is seen that no definite finding as such was entered by the 2nd respondent in that behalf since the 2nd respondent proceeded to decide the question of the maintainability of the revision first and on finding the revision not to be maintainable, dismissed the same. It is this decision of the 2nd respondent that is challenged by the petitioner in this original petition.

5. Section 23 of the Act deals with the payment of tax and the recovery thereof. Section 23(3) of the Act as it stood at the relevant time read as follows :

'If the tax assessed or any other amount due under this Act or any instalment thereof is not paid by any dealer or other person 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 or within the time specified therefor in this Act or in any rule made thereunder, the dealer or other person shall pay, by way of penal interest, in the manner prescribed, in addition to the amount due, a sum equal to--

(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 ;

(b) two per cent of such amount for each month or part thereof subsequent to the first three months aforesaid.'

The scope of this said section came up for consideration before this Court in the decision reported in V. Haridas v. Assistant Commissioner, Sales Tax [1979] 44 STC 26. After noticing the earlier Division Bench decision of this Court reported in Burmah Shell Oil Storage and Distributing Co, of India Ltd. v. Sales Tax Officer [1973] 32 STC 429 the Division Bench held that 'the liability to pay penal interest is automatic and there was no provision to pass a separate order imposing penal interest'. It was brought to my notice by the learned counsel for the petitioner that the scope of Section 23(3) of the Act came up for consideration before a Division Bench in W.A. No. 16 of 1988 and that question was referred to a Full Bench in the light of certain observations in Joy Varghese v. State of Kerala . In that reference a Full Bench of this Court has now spoken on the scope of Section 23(3) of the Act in the decision reported in P.C. Abdulla v. Sales Tax Officer [1992] 86 STC 259 ; 1992 KLJ 259. After an elaborate discussion of the question the Full Bench has held that the decision in Joy Varghese's case does not lay down the correct law. The Full Bench held thus :

'In this case the assessees had opted for Rule 21 assessment. By filing the return, they had made their own assessment. The tax so assessed should have been paid by the dealer along with the returns as enjoined in Rule 21(7) of the Rules. If there is any default and non-payment of the tax so assessed, as enjoined by the rule, the liability to pay penal interest automatically arises. The dealer need not be served with any demand notice. Even without receipt of a notice, the dealer shall be liable to pay the penal interest. This, in short, is the effect of Section 23(1) read with Section 23(3) and Rule 21(7) read with Rule 31 of the Rules. Form No. 14D, as also form No. 24, provided by the Rules to the extent they militate against the statutory provisions, Section 23(1) read with Section 23(3) of the Act, and Rules 21(7) and 31 of the Rules should bow down to the parent provisions. The implication sought to be made out, by a reference to form No. 14D and form No. 24, that the service of a notice of demand is a pre-requisite for levy and recovery of penal interest under Section 23(3) of the Act, is not acceptable. It will be contrary to Section 23(1) read with Section 23(3) of the Act and also Rules 21(7) and (10) and 31 of the Rules. Such statutory provisions should prevail in preference to the entries in the statutory forms.'

This Court also proceeded to hold that a notice of demand is not an essential pre-requisite for the levy and collection of penal interest. Thus, the principle laid down in Haridas case was affirmed. In the order exhibit P12 the 2nd respondent has followed the decision in Haridas case and has distinguished the decision in Joy Varghese's case on the ground that what fell for decision in that case was whether penal interest was leviable without the issue of a notice as contemplated in Sub-rule (3) of Rule 18 and that the provision of Rule 18(3) was different from that contained in Rule 21(7) of the Rules.

6. In the light of the Full Bench decision referred to above, it has now to be held that the liability to pay penal interest arises automatically on non-payment of the tax and it is not either necessary to pass an order imposing the liability for penal interest or to make a demand in that behalf. It is in the light of this position that the question whether a notice issued to the assessee under form 24 in terms of Rule 31 of the Rules is capable of being challenged by way of revision under Section 36 of the Act has to be considered. Section 36 of the Act provides that any person objecting to the order passed or proceedings recorded under the Act for which an appeal has not been provided under Section 34 or under Section 39 may file an application for revision of such an order or proceeding to the Deputy Commissioner. The learned Special Government Pleader (Taxes) submits that in the light of the decision in Haridas case and P.C. Abdulla's case [1992] 86 STC 259 (Ker) ; 1992 KLJ 259 it can no longer be postulated that there is any order passed or proceeding recorded by the concerned officer while issuing the notice under form No. 24 to an assessee. He therefore submits that the decision of the 2nd respondent rejecting the revision as not maintainable is perfectly justified. The learned counsel for the petitioner Sri Jose Joseph submitted that the non-necessity for notice or a proceeding arises only in a case where the assessee does not dispute his liability to pay the tax or demand the deficiency in payment of the tax and cannot cover the case like the present one where the assessee was claiming that he had remitted the entire tax along with his return by way of adjustment of the amounts admittedly due to him and hence he is not liable to pay any penal interest in terms of Section 23(3) of the Act. He submits that in a case where the assessee resists the liability to pay penal interest, there has to be a proceedings to fix the liability on him. The learned counsel relies on the case of

A.V. Fernandez v. State of Kerala : [1957]1SCR837 to explain the scheme of the Act and the three stages contemplated by the statute. He also contends that in this case somebody had to determine while seeking to recover the penal interest as to whether the petitioner was really liable to pay the penal interest in terms of Section 23 of the Act and in a case where there is such a determination or there is an implied adjudication to support the issuance of a notice in form No. 24, it has certainly to be construed as a proceeding so as to enable the assessee to file a revision before the revisional authority. On the facts of this case he submits that the note contained in exhibit P11 itself amounts to a proceeding within the meaning of Section 36 of the Act and hence the revision before the 2nd respondent-authority was perfectly maintainable. He also points out that the word 'proceeding' is not defined as such and seeks support from the decision of the Federal Court reported in Governor-General in Council v. Shiromani Sugar Mills Ltd. (in Liquidation) and also the decision reported in E.K. Ibrahim v. Joseph Joseph 1975 KLT 167.

7. I find some substance in the contention that in a case where a question may arise as to whether the liability for penal interest has accrued or not, there has necessarily to be an adjudication and consequently such an adjudication may be amenable to a revision under Section 36 of the Act. In the present case, according to counsel the question is whether the assessee was entitled to adjust the refund due to him towards the admitted tax payable by him for the month of September, 1983. But in the light of the decision in Burmah Shell Oil Storage and Distributing Company's case , Haridas case and in P.C. Abdulla's case [1992] 86 STC 259 (Ker) ; [1992] KLJ 259, I do not think that I will be justified in proceeding to accept the argument raised on behalf of the petitioner that the notice exhibit P11 issued to him, in law would amount to a proceeding or an adjudication which he can seek to challenge by way of revision under Section 36 of the Act. Following the ratio of the decision in P.C. Abdulla's case [1992] 86 STC 259 (Ker) ; [1992] KLJ 259 I hold that exhibit P11 does not amount to an order or proceeding within the meaning of Section 36 of the Act. In that view I find that the view taken in exhibit P12 by the 2nd respondent is perfectly justified and the revision before the 2nd respondent was not maintainable.

8. Coming to the facts of this case, I find that the entire problem arose because of the failure of the petitioner originally to comply with the directions of this Court in O.P. No. 546 of 1983. Though no doubt he had subsequently obtained an extension of time, the amount of refund due to him had been adjusted by the concerned authority towards the tax due from the assessee for the assessment year 1978-79. No doubt, this aspect was brought to the notice of the concerned authority and it was directed that the said sum should be refunded to the petitioner. Instead of seeking the refund the petitioner proceeded to adjust the amount by himself towards the tax liability for the month of September, [983. It is this adjustment which was refused to be accepted by the authority who proceeded to claim penal interest from him under Section 23(3) of the Act. Rule 21(7) of the Rules would indicate that in a case like the present, the petitioner along with the return has to submit a receipt from the Government treasury for the full amount of tax payable on the taxable turnover or that the return should be accompanied by a crossed cheque or crossed draft for the full amount of tax payable on the taxable turnover for the month to which the return related. It is therefore not possible to accept the contention of the petitioner that the petitioner was entitled to adjust by itself the amount of Rs. 23,364 due to it by way of refund on another head. It has to be remembered that there was no order permitting him to adjust the amount towards the tax due for the assessment year 1983-84 or in respect of any particular month of that year. No doubt there was an order of refund to him and the amount was in fact due to him. But considering the scheme of the Act as explained in P.C. Abdulla's case [1992] 86 STC 259 (Ker) ; 1992 KLJ 259 and the wording of Rule 21(7) I am of the view that the stand adopted by the learned Special Government Pleader (Taxes) cannot be said to be unreasonable. In this context it has also to be remembered that the adjustment of the amount towards the tax due for the year 1978-79 had been effected in view of the failure of the petitioner to comply with the directions of this Court in O.P. No. 564 of 1983. Though he obtained subsequently an extension of time, it appears to me that it was the failure of the petitioner to comply with the directions of this Court that resulted in the present situation being created. In my view that the action of the authority in issuing exhibit P11 notice cannot be said to be illegal or without jurisdiction. I must also observe that the petitioner has not shown as to what happened to his appeal

relating to the assessment year 1978-79 and what is the final liability of the petitioner determined for that year. In view of all these circumstances, I am satisfied that the petitioner is not entitled to any relief in this original petition. Consequently, I dismiss this original petition. I make no order as to costs.