

In Re: Narasingamuthu Chettiar

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Court : Chennai

Decided On : Apr-08-1948

Reported in : 1949CriLJ1118; (1948)2MLJ93

Judge : Govinda Menon, J.

Appellant : In Re: Narasingamuthu Chettiar

Judgement :

ORDER

Govinda Menon, J.

1. The petitioner in these revision petitions, who is the same, was prosecuted in the Court of the joint Magistrate of Tuticorin for failure to submit the 'A' return, as required by K. 11 (1), Madras General Sales Tax (Turnover and Assessment) Rules 1939, an offence punishable under Section 15 (a) and (c), Madras General Sales Tax Act. The proceedings before the joint Magistrate were summary in nature and except for a tabulated statement no judgment or a reasoned order was pronounced. The petitioner was convicted of the offence complained of and sentenced to pay a fine of es. 200, or in default to suffer simple imprisonment for a period of six months. Against this conviction and sentence, Cri App, NO. 65 of 1946 was filed by him before the Sessions Judge of Tinnevely and the learned Judge holding that under Section 414, Criminal P. C, no appeal lay from the conviction and sentence of a First Class Magistrate exercising summary powers,

rejected the appeal. Against that order of rejection, the petitioner filed Cri, E. c. NO. 1215 of 1946 which came before me on 22nd September 1947. As the petitioner sought to revise the order of rejection of the appeal by the learned Sessions Judge, which order was perfectly correct, he had perforce to file criminal provision case no. 1021 of 1947, to revise the order of the joint Magistrate itself under Sections 435 and 439, Criminal P. C. On both these revisions I passed an order on 22nd September 1947 directing the Sub-Divisional Magistrate of Tuticorin to record evidence and submit the same to this Court on the various points referred to in that order in extenso which was in the following terms:

The question for decision has narrowed down after hearing the arguments to the simple point as to whether the accused is a person who brings together the seller and the purchaser acting as a broker without having any dominion or right 'Over the goods sold. According to the petitioner all that he does is to bring together the owners of the goods and the intending purchasers and receive percentage of the price of the goods as commission; he does not handle the goods himself, nor can he direct the delivery of possession to the purchasers. It is conceded by the learned Special Public; Prosecutor that if these are the only facts, then the accused may not be a dealer as defined in the Madras General Sales Tax Act. But, on the other hand according to him, the accused is a person who effects a sale of the goods as the word 'dealer' is defined in Section 2, cl, (h). Unfortunately during the progress of the trial which was summary in the Court of First Instance the parties did not seem to have concentrated their attention on the real facts which ought to have been proved; and, therefore, I think that the provisions of Section 428, Criminal P, C, should be availed of in this revision. It is necessary in the interests of justice That fresh evidence should be taken as to -

Firstly: the nature of the transactions entered into by the petitioner and the way in which he earns his commission, viz., is he only a person who brings the seller and the purchaser together without in any way concerning himself with the details of the transaction, the delivery of the goods, the prices and the various other things?

Secondly: Has he got any dominion over the goods or is he has direction or order necessary for the purchaser to get possession of the goods purchased by him and

Thirdly: What exactly is the role played by the owners of the goods; do they hand over possession to the accused so that he might find out purchasers, fix the prices with such purchasers, negotiate with them, and finally sell the goods, receive the payment and after deducting his commission pay only the balance amount to the owners.

These are questions which have to be clarified. The Sub-Divisional Magistrate of Tuticorin will record evidence let in by the prosecution as well as by the defence and submit the evidence to this Court before 31st October 1947. The Criminal Revision Cases will be posted after the fresh evidence is received. All the other questions raised by Mr. Bamamurthi Aiyar and the Special Public Prosecutor will be reserved.

2. Accordingly on the side of the prosecution five witnesses were examined and the recorded evidence taken before the Sub-Divisional Magistrate, Tirunelveli, has been submitted to this Court. Lengthy arguments have been addressed to me both by Mr. Eamamurthi Aiyar for the petitioner and by Mr. V. E. T. Chari, the learned Special Public Prosecutor on behalf of the Crown.

3. On these materials, the point for decision is whether the petitioner is a 'dealer' as defined in Section 2 (b), Madras General Sales Tax Act, 1989, his contention being that he is a person who brings together the seller and the purchaser acting as a broker without any dominion or right over the goods sold. The role played by him is only to bring together the vendor and the vendee and receive a percentage of the price of the goods sold as commission for his labours; there is no handling of the goods by him nor does he deliver possession of the same to the purchaser. On the other hand, the contention on behalf of the Crown is that it is the petitioner who effects the sales and thereby carries on the business of selling the goods. The exact position has not been very much clarified even after the examination of the witnesses as a result of the order of this Court.

4. P. W. I, a dealer in onions and dried chillies deposes that he used to send commodities to Tirunelveli or Tuticorin for sale there in the name of the petitioner accompanied by him-self or his men usually. On other occasions the goods were being sent to the petitioner without any one following it. According to this witness,

when nobody accompanied the transport of the goods to the town for sale, the responsibility of receiving and storing the goods was on the petitioner who was also responsible for finding out the correct market value and effect sales. In such cases the owner of the goods would not know the names or identity of the purchasers; and the petitioner, after the transactions were effected, was bound to render accounts to the owners of the goods by chitta submitted by him to such owner. Exhibit D-7 series, eight in number, were such chittas produced in Court. These were transactions entered into by the petitioner independently regarding the goods sent by P. W. 1. P. W. 2 is a similar producer of onions and chillies, belonging to Surandai; who sells his goods in Tuticorin and Tirunelveli through the petitioner. In essential details his evidence resembles that of the previous witness and the substance of it is that when goods were sent to the petitioner he himself found the purchasers, effected the sales and sent the chittas to the owner. P. W. 8 is an accountant of a merchant in Tuticorin who purchased the goods of P. WS. 1 and 2 and p, w. 4 is an accountant of one B. S. V. Nallasivan Pillai, a dealer in onions, chillies, etc., in Tuticorin and an exporter to Colombo. According to him, Nallasivan Pillai used to purchase the goods from the petitioner, when Nallasivan would stipulate and settle the price with the petitioner himself; and on such occasions, when the petitioner alone came to dispose of the commodity the purchaser would not know who the owner of the goods was, the price also being paid to the petitioner himself. He further deposed that Nallasivan Pillai did not correspond or find out who the real owners of the goods were. To all intents and purposes, the petitioner was taken to be the seller of the goods. The evidence of P. W. 5 is merely formal indicating that the petitioner used to store his articles in a building owned by one Philip Machado, whose agent the witness was.

5. It is clear from the evidence outlined above, that the petitioner on various occasions acted as if he alone was selling the goods. There Were other occasions when he accompanied the owners of goods to intending purchasers and acted only as a broker. From the documentary evidence it is not possible to find out what exactly the turnover was or the aggregate amount for which the goods were sold by the petitioner when he was playing the role of a seller. Exhibit p. 7 series and Ex. P. 8 together show that a sum of Es. 9429 is the turnover regarding those chittas alone. Neither the petitioner's counsel nor the learned Special Public

Prosecutor has been able., to ascertain exactly the turnover contained in pp. 50 and 88 of Ex. p-9. Unless it is proved that the dealer has an annual turnover of over be. 10,000 there is no obligation cast upon him to submit the return or to pay the sales tax.

6. Such being the case, the burden of proof has become a matter of importance. According to the petitioner's counsel as the proceedings before the lower Court were criminal in nature and governed by the Criminal Procedure Code the complaining authority should affirmatively prove beyond reasonable doubt that the petitioner was a dealer liable to submit a return as he had a net turnover of not less than Rs. 10,000 in the year of taxation; and therefore no duty is cast upon him to show what his turnover is, In effect the argument comes to this; that the assessing authority has to prove affirmatively the net turnover of the assessee. There are provisions in the Act and Rules by which the Commercial Tax authorities are enabled to inspect the books of a dealer and thereby ascertain the exact amount of the turnover, Either resorting to that method or by giving independent evidence, the prosecution, according to the petitioner's argument, should prove the net turnover to the satisfaction of the Court. What is contended for on behalf of the taxing authority is that under Section 105, Evidence Act, the assessee should prove the exact amount of his turnover because that is a matter peculiarly within the knowledge of the assessee; in this case the officers of the Commercial Tax Department have, by the proceedings contemplated by the Act and Rules, to ascertain and fix the net turnover under s. 11 (3) and (4), Madras General Sales Tax (Turnover and Assessment) Rules, 1939, let in evidence about such ascertainment or fixation, and thereafter it is incumbent upon the assessee, if he disputes the amount of the turnover, as alleged by the prosecution to prove the incorrectness of it by the production of his accounts and through witnesses. Otherwise, the learned Special Public Prosecutor argues, a very onerous and impossible task is assigned to the prosecution to prove a thing which is peculiarly within the knowledge of the other party.

7. Whether proceedings under the provisions of the General Sales Tax Act for the recovery of the penalties for non-compliance with the provisions of the statute by the assessee or persons liable to conform to such rules are purely criminal in

nature necessitating the application of the provisions of the Criminal Procedure Code and the rules of evidence such as proof beyond reasonable doubt incumbent on the prosecution, the giving of a benefit of doubt to the accused, etc., have to be determined in order that a satisfactory conclusion can be arrived at in this case. In *Public Prosecutor v. Ghakka Kondappa*, 1947 1 M. L. J. 817 : A.I.R. 1947 Mad. 397, my learned brother Yahya AH J. in dealing with a prosecution under Section 228 and Sch. iv, E. 31, Madras Local Boards Act, after an exhaustive discussion and survey of various authorities has laid down that where a person is prosecuted for non-payment of profession tax due to a District Board he is entitled to question the legality of the assessment even though he had failed to appeal against it at the proper time thereby allowing the assessment to become final. When such legality or quantum of the assessment is objected to, it is for the prosecution to prove affirmatively that the assessee is lawfully bound to pay the tax. My learned brother did not agree with the contention put forward on behalf of the Crown that the finality reached in the taxation by the revenue authorities under the particular statute is ultimate and that in proceedings in a civil or criminal Court the same cannot be questioned, thereby indicating his view that it is the duty of the prosecution to prove by sufficient evidence to the satisfaction of the Court that the person proceeded against is bound to pay the tax. The earlier cases relating to similar taxation powers under the City Municipal Act, District Municipalities Act and the Local Boards Act, were considered and discussed in extenso in the decision just mentioned and in particular reference has been made to a judgment of Panel Rang Row and Venkataramana Eao JJ. in *Bamaswami Aiyangar v. Sivakasi Municipality* : (1937)1MLJ274 . The observations of Venkataramana Rao J. in that case are pertinent to the circumstances attendant in the present case, At page 276 the learned Judge observes as follows:

Ordinarily where a person is prosecuted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed and if prima facie proof has been let in by the prosecution, it is open to the accused to plead and prove that he has not committed any offence.

I would emphasise the words 'prima facie proof' in contradistinction with 'proof beyond reasonable doubt'. The standard of proof required from the prosecution in

offences under the Penal Code or other enactments of a similar kind is a rigid and a rigorous one quite distinct from what is ordinarily expected from a plaintiff in a civil action where the burden of proof is on the plaintiff. Questions like 'reasonable doubt' cannot occur in civil actions. It seems to me therefore that in *Bamaswami Aiyangar v. Sivakasi Municipality* : (1937)1MLJ274 the learned Judges did not intend to lay down that in prosecutions launched for the recovery of taxes, tithes, and other similar amounts due to the State or public bodies, there should be the same rigidity and rigour in the matter of onus of proof on the prosecution as in the case of an offence under the Penal Code., Adverting to and interpreting the decision in *Bamaswami Aiyangar v. Sivakasi Municipality* 1937 M. L. J, 274 : A.I.R. 1937 Mad. 291: (1937) Cri. L. J. 464, *Kuppuswami Aiyar J. in Public Prosecutor v. Khadar Khan* : AIR1947 Mad321 , held that in a prosecution for an offence under Section 15 (b), Madras General Sales Tax Act, the burden is upon the prosecution to establish affirmatively that the accused was liable to pay the tax and that he failed to pay the same and if the prosecution has not proved it satisfactorily, the Magistrate will be justified in acquitting the accused. On the facts of that case the learned Judge came to the conclusion that except the Assistant Commercial Tax Officer who deposed about the liability of the accused to pay the tax, there was no other evidence before the Court. But the learned Judge did not refer to the passage in *Bamaswami Aiyangar v. Sivakasi Municipality* : (1937)1MLJ274 , where Venkataramana Rao J., refers to the matter of prima facie proof in cases like the one in question there. Probably Kuppuswami Aiyar J. was not satisfied that the evidence of the Assistant Commercial Tax Officer was prima facie proof of the prosecution case. The principle of law deducible from these decisions and especially from *Bamaswami Aiyangar v. Sivakasi Municipality* : (1937)1MLJ274 that though in such quasi-criminal cases it is incumbent upon the prosecution to prove affirmatively that the offence has been committed, it would be sufficient to shift the onus to the assessee, if prima facie proof of the liability of such assessee has been furnished by the prosecution.

8. A reference to certain observations in Halsbury's Laws of England, Hailsham Edition (second edition) vol. XXVII, page 439 may be useful. The nature of such proceedings discussed therein is instructive in deciding this question. In paragraph 947 occurs the following passage:

Proceedings for the recovery of fines cannot be strictly classified as either civil or criminal; they are in form civil, and the fine is recovered as a debt due to the Crown, but the liability is incurred as the punishment for an offence. The common law rules as to criminal liability are therefore, inapplicable, and a master is liable for fines incurred through the of his servants if his knowledge or authority can be inferred, but the measure of his liability is apparently not, as in the case, of certain acts prohibited by statute, so absolute as to prevent his proving noncomplicity.

In *Attorney General v. Badloff*, (1854) 10 Ex. 84: 156 B. E. 866 : 23 L. J. Ex. 240 Martin B, in an illuminating passage, if I may say so with great respect, considers the nature of such proceedings. That was a case where an information was filed by the Attorney-General for the recovery of penalties for smuggling tobacco under Sections 46 and 82 of 8 and 9 Victoria, ch. 87, and the question was whether the person against whom the information was filed was entitled to give evidence on oath on his behalf as a witness. Alike the law prevalent in India at present, the common law of England at that time was that an accused person was prevented from giving evidence on oath, though that state of the law was altered towards the end of the last century in England. The trial Court disallowed the accused's request for examining himself on oath and on that point, on a new trial application, the question had to be considered whether the proceedings were of a civil or criminal nature. Section 82 of the Statute (8 and 9 Viet. ch. 87) enacted that the penalties sought to be recovered by that statute were recoverable by action of debt, bill, plaint or information in the name of the Attorney-General, or of some other officer or officers of Customs, or by information before two justices of the peace and they were, therefore, recoverable on a summary conviction. On that, the argument before the Court of Exchequer was that the proceedings were criminal in nature where the defendant was charged with an offence punishable on summary conviction and therefore he could not give evidence on oath. The Court was equally divided in opinion. Martin B. came to the conclusion that such proceedings are not criminal in nature in the following words:

But it was argued that this is a criminal proceeding, wherein the defendant is charged with an offence punishable on summary conviction; and we are all agreed that the only question is, whether the information in the present case is a criminal

proceeding within the true meaning of the third section. I think it is not. There are many crimes, properly as called, which are liable to be punished on summary conviction. But there are a vast number of acts which in no sense are crimes which are also as punishable; such, for instance as keeping open public houses after certain hours and a variety of breaches of police regulations which will readily occur to the mind of anyone. The bringing tobacco into this kingdom is of itself a perfectly innocent act; but the requirements of the public revenue, which induce the Legislature to impose a very high duty upon the article, probably render it a matter of necessity that the bringing it into the kingdom with payment of the duty should be subjected to a penalty, But this cannot affect or alter the intrinsic and essential nature of the act itself and it seems to me that it cannot be denominated a 'crime', according to the ordinary and common usage of language and the understanding of mankind. The proper meaning of 'crime' is an indictable offence. The question has frequently arisen, whether an information at the suit of the Attorney-General for penalties for smuggling is a criminal proceeding. I believe it has invariably been considered not to be so.

These observations have been referred to with approval in *Attorney-General v. Bradlaugh* (1885) 14 Q. B. D. 667 : 54 L. J. Q. B. 205 by the Court of Appeal. Brett M. R. observes as follows at p. 688.

Now comes the question whether an information by the Attorney-General on the revenue side of the Court of Exchequer is or is not a criminal proceeding in any sense. In order to answer this question, we must consider *Attorney-General v. Badloff*, (1854) 10 Ex. 84 : 156 E. R. 866: 23 L. J. Ex. 240. It is not binding on this Court; it is a case in the Court of Exchequer, and we are bound to exercise our own judgments upon it. It is a case in which the Judges were equally divided in opinion, and therefore it could not bind any Court, but certainly could not bind this Court. Two of the Judges were of opinion that unless there was something very peculiar in the Act of Parliament, such as that in terms enacted that it was to be a criminal matter, the proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney-General was not a criminal proceeding. The other two were of opinion that it was. I will not go into the reasons; the reasons were given by eminent Judges on both sides, but, to my

mind, if I had been a member of the Court at that time, I should have seen no answer to the reasoning of Martin B. in that case, and I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time unless there were special and clear words in an Act of Parliament Baying it was so, be considered as a criminal proceeding.

It seems to me that when a criminal Court is approached by the revenue, local or public authorities for the enforcement of a penalty for nonpayment of a tax or tithe, the proceedings are not purely of a criminal nature but are quasi criminal. Even in the Criminal Procedure Code there are provisions of a quasi-criminal nature, for example disputes regarding immovable property dealt with by Section 145 and the subsequent sections. Chapter 36 of the Code dealing with the maintenance of wives and children is one such where the proceedings cannot be said to be purely criminal. In such cases, the counter-petitioner is entitled to give evidence and that makes it clear that proceedings under Section 488, Criminal P. C, cannot be termed as purely criminal proceedings. Further illustration on this aspect of the question can be got from certain provisions of the General Sales Tax Act itself. Section 10 of the Act provides for the recovery of the tax as if it were an arrear of land revenue and Section 16 provides for composition of the offence where the offence consists of failure to pay the tax, or the evasion of any tax recoverable under the Act. To my mind all these are circumstances which indicate that such proceedings are not entirely criminal.

9. As stated already counsel on either side have not been able to analyse and present before the Court the exact amount received by the petitioner as remuneration for acting as an agent, i. e., bringing together the purchaser and the seller and assisting in the disposal of the goods, without any kind of dominion, right or control over the goods dealt with but only acting as a medium to bring about an agreement between the two parties and earn a commission for selling the goods owned by others without disclosing or letting know that the ownership of the goods was in a third party. The learned Special Public Prosecutor has rightly conceded that if by 'agency' is understood the action for bringing together the two parties and thereby getting some remuneration for the service rendered, a person

who does that will not be a 'dealer' as defined in the Act. But where even though the ownership in the articles did not vest in such a person, he purported to have possession of the same and transferred such possession to the purchaser for consideration, which the purchaser pays only on the basis that the seller was the owner himself, in such cases the transaction will be the selling of goods and the person who effects the same is a dealer. On the facts of this case, it is not necessary to consider the applicability or the correctness of the recent decision of Chandra-sekhara Aiyar J. in Public Prosecutor v. Nameimha Beddy, Cri, App. No. 131 of 1947 : A.I.R. 1948 Mad. 102: 1948 Cri. L. J. 45 because according to the evidence of p. ws. 1 and 2, when the articles are sent to the petitioner without anyone on behalf of the owner accompanying the transport, the petitioner has full dominion and possession over them and fixes the price himself before they are sold to the customers. Such transactions are those evidenced by Ex. P-7 series and p-8. So far as these transactions are concerned, the petitioner is a 'dealer' within the meaning of the term as defined in the Act. But the real difficulty arises from the fact that apart from Ex. P-7 series and p. 8 under which the turnover comes only to Bs. 9429 the other evidence in the case has not been sufficiently analysed to prove that the turnover amounts to Es. 10,000 or more. It is possible that if the transactions contained in Ex. P-9 are properly analysed and separated the turnover might exceed Es. 10,000. That task has not been attempted by either of the parties, though I would add that under Section 105, Evidence Act the matter is one which is peculiarly within the knowledge of the assessee. By ex. p-1 the prosecution has proved prima facie that the turnover of the assessee was Bs 57,809. Evidently this sum was arrived by the Commercial tax authorities after examining the account books of the assessee. In the circumstances of the case, I would hold that Exs. p-1, v-1 series and p. 8 are prima facie proof of the turnover and the burden is thereafter shifted to the assessee to prove the incorrectness of this account. Moreover under E. 14 (i) of the Turnover and Assessment Rules, the Commercial Tax Officer is empowered to fix the tax to the best of his judgment if the conditions mentioned in that clause have been complied with. On the evidence now let in, of such fixation, it is difficult to say that there is no prima facie proof of the amount of net turnover being below Rs. 10,000. Rule 6 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, provides that a

dealer carrying on business should submit a return for any particular year if the net turnover for the year is not less than Rs. 10,000. As the petitioner has not rebutted the prima facie evidence that his net turnover is more than Es. 10,000 he is bound under the rules to submit the 'a' return; and the failure to do so makes him liable to be proceeded against under the Act as a defaulter.

10. In the circumstances of the case, considering the difficulty of ascertaining the net turnover I would, since the petitioner has already paid the tax, reduce the fine to Es. 50 or simple imprisonment for two weeks.

11. Otherwise these petitions are dismissed.

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