Gyanchand Dharamchand Vs Additional Member, Board of Revenue

Court: Calcutta High Court

Date of Decision: May 14, 1973

Acts Referred: Constitution of India, 1950 â€" Article 226

Citation: 77 CWN 916

Hon'ble Judges: Debiprasad Pal, J

Bench: Single Bench

Advocate: B.C. Mitra, Molay Kumar Bose and Partha Dutta, for the Appellant; R.C. Banerjee, for the Respondent

Judgement

Debiprasad Pal, J.
In this application the petitioner has challenged the order made by the Additional Member, Board of Revenue, u/s

20(3) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the Act), which in effect would enhance the assessment of the

amount of tax. The petitioner is a registered partnership firm and at all material time is dealing in agency business of readymade garments, hosiery

goods, etc. on commission basis. The petitioner is a registered dealer, the registration certificate being No. RJ|764A. On or about 7th January,

1959, the petitioner submitted a return before the Commercial Tax Officer, Raja Katra Charge, for the period of 22nd October, 1957 to 10th

November, 1958. The Commercial Tax Officer, Rajakatra Charge on 27th September, 1962 made an exparte assessment u/s 11(1) of the Act,

on an estimated gross turnover at Rs. 5,00,000/-. The taxable turnover was again broken up and was determined at Rs. 20,000/- upto 31.12.57

and Rs. 60,000/- thereafter. The petitioner thereafter preferred an appeal against the said order before the Assistant Commissioner, Commercial

Tax, Burrabazar Charge, u/s 20(1) of the Act. The Assistant Commissioner of Commercial Tax, Burrabazar Circle, reduced the taxable turnover

to Rs. 60,000/- in the computation of its taxable turnover. The appellate authority further directed that the tax was to be paid at 5% of the taxable

turnover. The petitioner thereafter moved the Commissioner of Commercial Taxes, West Bengal, in revision u/s 20(3) of the Act. The Additional

Commissioner, Commercial Tax, West Bengal, by an order dated 30th December, 1967, reduced the taxable turnover further to Rs. 40,000/-, as

in his opinion the estimate of Rs. 60,000/- was excessive and unreasonable and also that the textiles in which the petitioner carried on his main

business were declared exempt with effect from 13.12.57. The petitioner thereafter moved the Board of Revenue, West Bengal, in revision u/s

20(3) of the Act. On 19.6.68 the revision case was fixed for hearing on the preliminary point of limitation. It is alleged that the; petitioner''s

advocate duly appeared on that date and the preliminary point was decided in his favour. As the petitioner was advised thereafter not to proceed

with the said revision case before the Board of Revenue, the petitioner filed a petition for withdrawal of his application on 8th May, 1968. The

petitioner''s case is that the office of the Board of Revenue received the said application on 8th May, 1968 and a receipt was granted to the

petitioner to that effect. The petitioner''s revision case was also fixed for hearing on that date. As the petitioner had withdrawn his case by filing a

petition to that effect, the petitioner did not make any representation before the Board of Revenue under the impression that the case would be

dismissed in view of the petition of withdrawal already filed. The; petitioner however received an order of the Additional Member, Board of

Revenue, made on 8th August, 1968. It appears from the said order that the Additional Member, Board of Revenue, did not consider the

application for withdrawal of the revision petition and in view of the fact that nobody appeared for the petitioner on that date even at 13.00, the

Additional Member, Board of Revenue, passed an exparte order and dismissed the revision application. The Additional Member, Board of

Revenue, not only dismissed the application of the petitioner but took the view that the estimate of the gross turnover at Rs. 5,00,000/- made by

the Commercial Tax Officer was reasonable. He did not however agree with the Commercial Tax Officer that any deduction could be allowed u/s

5 (2) (a) of the Act. The effect of his order is that there would be an increase in the taxable turnover and an enhancement of the assessment of the

amount of tax.

2. The petitioner has come against the order of the Additional Member under Art. 226 of the Constitution and obtained a rule nisi. The main

contention urged by the Learned Counsel on behalf of the petitioner is that before the order of revision is made by the Additional Member, Board

of Revenue which had the effect of enhancing the tax, the petitioner should have been given an opportunity of being heard. In my opinion the

grievance of the petitioner on this ground is justified. u/s 20(3) the power of revision has been conferred upon the Commissioner and also the

Board of Revenue. Such power can be exercised either on an application by a dealer or suo motu. In my opinion, the scope of the revisional

power which can be exercised under Sec. 20 of the Act fails into two board categories. When a dealer makes an application for revision, the

revising authority on such application may either reject the application or may grant such relief as it thinks fit. The revising authority in such an

application cannot enhance the assessment. By making a revision application the dealer is not placed in a position worse than what he would have

been if he would not have made such an application. This does not necessarily mean that in the exercise of the revisional power, the Commissioner

or the Board of Revenue cannot increase or enhance the assessment under any circumstances. Such power can be exercised by the Commissioner

on his own motion. Even when an application for revision is filed by a dealer, if the Commissioner on perusal of the records considers that the

assessment requires a revision so as to enhance the tax liability of the dealer he can exercise his power of revision, but such an exercise of his

power, will be on his own motion or suo motu. In such a case before any order is made enhancing the assessment, in my opinion, the dealer must

be given an opportunity of being heard on the enhancement of assessment proposed to be made. In the present case the petitioner made an

application against the order of the Additional Commissioner of Commercial Taxes. Without entering into the controversy as to whether the

Additional Member, Board of Revenue, could dismiss the application exparte when the petitioner has filed petition for withdrawing the revision

application, the Additional Member, Board of Revenue acted in gross violation of the principles of natural justice when he suo motu exercised his

power of revision by enhancing the It is true that the petitioner was not present when his application for revision was fixed for hearing. The only

consequence he may suffer is the dismissal of his application for non-prosecution. He was never informed at any stage that the Additional Member

while dealing with his application for revision proposed to enhance the assessment suo motu. The scope of the revisional power on an application

by a dealer and suo motu at the instance of the revising authority is different. The subject-matter of the decision of the revising authority moved by

an assessee is in no way affected by the potential power of that authority to take action suo motu if it thinks fit. But before such a power is invoked

the dealer who is affected by such an order must be given reasonable opportunity of being heard. This requirement is given a statutory recognition

u/s 20(5) of the Act which requires that before any order is passed u/s 20, which is likely to affect any person adversely, such person shall be given

reasonable opportunity of being heard. In my opinion an order which is passed in revision on an application by an assessee is different from an

order which passed in revision suo motu at the instance of the revising authority. The view which I am taking is supported by the scheme of the

Act. The contrary view is likely to lead to certain anomalous position. A dealer who has made an application for revision appears before the

revising authority and presents his case in support of his application, the revising authority after hearing him passes an order which not only

dismisses his application but enhances his tax liability on a different ground, but he was never informed of such proposed enhancement at the time

of the hearing. It can hardly be contended that before the order of revision was passed the dealer was given a reasonable opportunity of being

heard and hence the order is not vitiated by any breach of the principles of natural justice. Such a construction of Section 20(5), in my opinion, is

patently untenable.

3. The requirement of a reasonable opportunity of being heard which has been given statutory recognition is based upon certain fundamental

principles of natural justice. The rules of natural justice are not rigid norms of immutable content. Ideas about justice have changed by reflective

understanding of human affairs in different settings and in all their endless complexities. There is no one code of natural justice which is

automatically imported into any procedure of a judicial nature (See observation of Lord Parker, C.J. in (1) R. v. Registrar of Building Society,

(1960) 1 W.L.R. 676). What is imported by way natural justice depends entirely on the Tribunal in question, the nature of its function, the exact

words of the Statute by which the Legislature may provide for a procedure. Each case, therefore, depends upon the nature of the function and the

exact words of the Statute. But the aim of all rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice (2) (

A.K. Kraipak and Others Vs. Union of India (UOI) and Others,). One of the pillars on which the concept of natural justice is founded is that a

person against whom an order is made or an action is sought to be taken and whose right or interest is being affected by such an order or action

should be given a reasonable opportunity of being heard. It is true that there is no fixed standard of reasonableness of opportunity of being heard.

It is an elementary requirement of any opportunity of being heard that the person concerned should be given a notice of the action which is

proposed to be taken against him. This notice unless a statute prescribes otherwise, may not be in a particular form. All that is required is that he

must be informed of the action proposed to be taken against him in order that he may get a chance of fair and adequate representation. It is now

well settled that if a person is to be given an opportunity of being heard such opportunity must be a fair and a reasonable one, and should not be a

mere empty formality. What is a fair and effective opportunity is one of substance rather than of form. In otherwords the court"s conscience must

be satisfied that the individual has a fair chance to know the details of the action proposed to be taken against him.

4. In the present case I am of the view that the Additional Member, Board of Revenue, relied more upon the form than upon the substance in

complying with the requirement of giving a reasonable opportunity of being heard. The petitioner was never informed of the proposed enhancement

or of the ground for such proposed action. He could not expect that the revising authority not only would dismiss his application but would pass an

order on the grounds which were never disclosed to him. In such circumstances, the order made by him violates the elementary principles of

natural justice

5. Reliance was placed by the Learned Counsel for the respondents upon Rule 79 of the Bengal Sales Tax Rules (hereinafter referred to as the

Rules). The said rule requires that before any person empowered under Sec. 20 passes any order in appeal, revision or review likely to affect any

person adversely he shall send to such person a notice in Form IX fixing a place and time, ordinarily not earlier than 15 days for hearing any

representation which such person may wish to make. Form IX requires that in the notice which is to be issued, the gist of the order proposed to be

passed is to be stated and the person concerned is called upon to prefer any objection against, such proposed order and may attend either

personally or through an authorised agent. The said rule however makes an exception in the case where such person is the appellant or applicant

for revision or review as the case may be. In other words in a case where the person concerned himself has preferred an appeal or an application

for revision or review, the requirement of sending a notice in Form IX is dispensed with even though an order which may be passed in appeal,

revision or review as the case may be, may affect such person adversely. The Learned Counsel for the respondents relying upon the said exception

provided in Rule 19 contends that as in the present case the petitioner himself has made an application for revision, any further opportunity is not

required to be given even though the Revising Authority in its revisional order enhances the assessment which may adversely affect the petitioner.

The Learned Counsel for the petitioner submits that in that even Rule 79 in so far as it authorises, in a case where the person aggrieved is the

appellant or applicant for revision or review, to pass an order which is likely to affect a person adversely without giving any notice in Form IX or

without giving any opportunity of being heard is inconsistent with Sec. 20(5) of the Act and is therefore ultra vires.

6. Rule 79 has been framed u/s 26 of the Act which empowers the State Government to make rules for carrying out the purposes of the Act.

Under Sec. 26(2) of the Act such rules may prescribe inter alia the procedure for and other matters incidental to disposal of appeal and application

for revision and review under Sec. 20 of the Act. As I have held that on a construction of Sec. 20(5) of the Act, even in a case when a person has

made an application for revision, if the revising authority purports to enhance the assessment which is likely to affect such person adversely, the

requirement of giving a reasonable opportunity of being heard against the proposed enhancement is incumbent under Sec. 20(5) of the Act, the rule

making authority in exercise of its delegated power cannot override the mandatory provisions of the Act. The rules cannot dispense with the

statutory mandate that such person should be afforded a reasonable opportunity of being heard. In fact the basis of the statutory power conferred

by the statute cannot be transgressed by the rulemaking authority which has to act within the limit of the power granted to it. In my view, therefore,

the braketed portion of Rule 79, viz. ""unless such person is the appellant or applicant for revision or review, as the case may be"" in so far as it

authorises the appropriate authority to pass an order likely to affect a person adversely without giving any opportunity of being heard in respect of

the proposed enhancement of tax assessment is in conflict with Sec. 20(5) of the Act and therefore ultra vires the rule-making authority. As the

portion of Rule 79 which is considered by me to be ultra vires is severable from the rest of the said Rule, it is not necessary to declare the entire

Rule to be ultra vires. In the result the order of the Additional Member, Board of Revenue, is quashed by a writ in the nature of certiorari. There

will be also a writ of mandamus commanding the respondents not to give effect to the said order. The respondents however will be at liberty to

proceed in accordance with law, after giving the petitioner an opportunity of being heard. The Rule is made absolute to the extent indicated above.

There will be no order as to costs.