CIVIL WRIT.

Before Falshaw and Kapur, JJ.

M/S KANDHARI OIL MILLS AND OTHERS,—*Petitioners.*

versus

THE EXCISE AND TAXATION COMMISSIONER, PUNJAB AND ANOTHER,—*Respondents.*

1953

April, 28th

Civil Writ No. 390 of 1952.

Constitution of India, Article 226—Relief provided under the machinery of a statute (The Punjab Sales Tax Act) not sought—No fundamental right infringed—Whether High Court can be moved under Article 226, without exhausting the remedies provided under the Act.

Held, that the petitioner must proceed in accordance with the provisions of the Act and cannot come direct to the High Court under Article 226 without any sound ground for short circuiting the procedure provided by the East Punjab General Sales Tax Act, XLVI of 1948.

Petition under Article 226 of the Constitution of India, praying that directions or orders in the nature of writs of certiorari, mandamus and prohibition or such other order or direction as this Hon'ble Court may deem fit be issued in the circumstances of the case to the respondents prohibiting them from levying the Sales Tax on the edible oils, manufactured by Ghanis of Kohlus run by electric power, further praying that a writ of prohibition or injunction may be issued to the respondents restraining them from recovering the sales tax in question till the final disposal of this petition.

K. L. GOSAIN, for Petitioners.

S. M. SIKRI, Advocate-General, for Respondents.

JUDGMENT

KAPUR, J. These are four rules issued against the Excise and Taxation Commissioner, Punjab, and another to show cause why a writ of mandamus should not issue against them. The petitioners in all these applications are different but the point raised is the same. The petitions are Writ Applications (Civil) Nos. 135 of 1953, 20 of 1953, 36 of 1953 and 390 of 1952. Kapur, J.

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The facts disclosed in each one of the petitions are that the petitioners are manufacturers of edible oils and are using electric power for crushing of oil from different kinds of seeds—*sarson, toria and til.* The petitioners in the various cases applied under section 18 of the East Punjab General Sales Tax Act of 1948 as to their liability to pay sales tax but in each one of the cases they were told by the Excise and Taxation Commissioner, Punjab, by letter, dated the 6th of February, 1952 "that the intention of Government underlying the exemption contained in item 57 of the Schedule appended to the Punjab General Sales Tax Act, 1948, is to exempt '*ghanis*' worked by human or animal power only and not by electric power."

In each one of these petitions the allegation is that the Excise and Taxation Commissioner, Punjab, or the officers under him are threatening to levy sales tax on edible oils manufactured by *kohlus* run by electric power and have called upon the various petitioners on various dates to pay the tax. It is not alleged that they have made use of the machinery provided under the Punjab Sales Tax Act, but they have come to this Court on the ground that there is no other remedy as efficacious and as expedient as given to them by Article 226 of the Constitution.

The liability to pay sales tax is attacked on several grounds:—

(i) that edible oils manufactured in oil extractors worked by electricity are covered by item 57 of the Schedule attached to the Act;

(ii) that the East Punjab General Sales Tax Act, 1948, is *ultra vires* as the Act fixes no limit for taxation and delegates the power to fix the rate to the provincial Government which is an illegal delegation of legislative power; and;

(iii) that in 1952 the Punjab Legislature passed an Act, being Act XIX of 1952, fixing a limit of two-pice per rupee as being the ceiling of

the tax and that this Act is unconstitutional on the ground that it is contrary to the provisions of the Parliamentary Act LII of 1952, the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 1952, which came into force on the 9th August, 1952, and it also contravenes the provisions of Article 286(3) of the Constitution of India.

The learned Advocate-General on behalf of the opposite party has taken a preliminary objection that in this case there is no allegation that any contravention of the fundamental rights arises and that the only ground for the petitioners' coming to this Court direct without seeking relief under the machinery provided by the Sales Tax Act of 1948 is that the article taxed is not within the Act of 1948, that there is unconstitutional delegation of legislative power and that there is contravention of the Parliamentary Act LII of 1952 and therefore he should have proceeded in accordance with the provisions of the Act and not come direct to this court.

The petitioner's reply to this is that there is no other remedy which is equally appropriate, efficacious or expeditious as the remedy given by Article 226 of the Constitution, but I am unable to agree with this. Nor is there any sound ground for short circuiting the procedure provided by the East Punjab Sales Tax Act XLVI of 1948. Section 4 of that Act is the charging section. Section 5 deals with the rates and section 6 with what are tax-free goods. Sections 7, 8 and 9 deal with registration and publication of names of dealers. Section 10 deals with payment of tax and returns, section 11 with assessment of tax and section 14 with production and inspection of accounts and documents. By section 18 it is provided that the Commissioner can determine any one of the five points which are there mentioned. Section 19 bars proceedings in Civil Courts. Section 20 provides for appeals, section 21 for revisions against appellate orders and section 22 for statement of a case to the High Court. These provisions are not very different from those of the

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Indian Income-tax Act, and in *Raleigh Investment Co., Ltd.* v. *The Governor-General in Council* (1), which was a case under the Income-tax Act, a similar question (though not of a prerogative writ) arose as the one now before us and it was held by their Lordships of the Privy Council that jurisdiction to question assessment otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation under section 45 to pay the tax arising by virtue of the assessment. There also the *ultra vires* nature of certain provisions of the Income-tax Act were raised.

In *U. C. Rekhi* v. *The Income-tax Officer, New Delhi* (2), a Bench of this Court after reviewing all the various cases came to the conclusion that the proper remedy of an assessee who felt aggrieved by an action taken by an Income-tax Officer under section 34 was to take an appeal under the Act and then have the case stated to the High Court.

A similar view was taken in another income-tax matter, *Lachhman Das* v. *Commissioner of Income-tax* (3).

A case under the Punjab Sales Tax Act in which an application was made under Article 226 was decided by this Bench in *Dharam Chand-Kishore Chand* v. *The Excise and Taxation Commissioner* (4), and it was held that an application for issuing a writ so as to short-circuit the procedure provided by the East Punjab Sales Tax Act XLVI of 1948 is not to be allowed. Under section 21 of the Act, it is open to the assessee to go in revision to the Financial Commissioner and if he is not satisfied with the decision of the Financial Commissioner he can have the case stated to the High Court under section 22 of the same Act. An appropriate remedy is provided by the Act itself, but if the petitioners did not avail themselves of it, then the High Court would not interfere under Article 226.

(1) A.I.R. 1947 P.C. 78
(2) 52 P.L.R. 267
(3) 22 I.T.R. 418
(4) A.I.R. 1953 Punjab 27

It is not necessary to repeat the reasons given in *Dharam Chand-Kishore Chand* v. *The Excise and Taxation Commissioner* (1), but I may here again refer to the judgment of Lord Phillimore in *Besant* v. *Advocate-General of Madras* (2), where it was observed that *certiorari* according to the English rule is only to be granted where no other suitable remedy exists. It cannot be said that in this case there is no other suitable remedy. Besides as was observed in *Raleigh Investment Co., Ltd.* v. *The Governor-General in Council* (3), the intention of the legislature seems to be that jurisdiction to question assessment otherwise than by use of the machinery expressly provided by this Act is inconsistent with the statutory obligation to pay in this case under section 20 of the Sales Tax Act. The other cases quoted in our previous judgment apply to this case as they did to that.

Mr. Gosain for the petitioner has first of all submitted that there is no other adequate or efficacious remedy, but I am unable to agree with this. The machinery provided under the Act cannot be said to be inefficacious. He then relies on a judgment of their Lordships of the Supreme Court in *Messrs. Hoosein Kasam Dada* v. *The State of Madhya Pradesh* (4). All that their Lordships decided in that case was that an appeal by an assessee was to be governed by the law which existed at the time of the assessment and not by a subsequent amendment of law even if it has retrospective effect. This was decided by their Lordships on appeal from a judgment of the High Court of Nagpur, but they did not hold that the machinery provided under the Sales Tax Act of that State was not to be employed for redress of grievances by assessees but they could go direct to the High Court and make applications under Article 226.

The next case relied upon is *the State of Travancore-Cochin and others* v. *Michael Frederic*

(1) A.I.R. 1953 Punjab 27
(2) I.L.R. 43 Mad. 146
(3) A.I.R. 1947 P.C. 78
(4) A.I.R. 1953 S.C. 221

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and Bros (1), but there all the parties wanted a decision from their Lordships on the question of the *vires* of the Act. That is hardly a case which supports the petitioners.

Mr. Gosain next relies on a Bench decision of the Madras High Court in *V. M. Syed Mohammad and Co. and another* v. *The State of Madras* (2). There the facts were very different. Sales Tax had become due and the assessee was called upon to pay the tax out of which he paid a part and a demand was made for the balance. No appeal was taken against the order of assessment which thus became final and as the tax had not been paid, proceedings were taken against the assessee under section 15(b) of the Act of that State before a Magistrate who could on conviction sentence the petitioner to a fine. It was against these proceedings that an application was made for a writ of *certiorari*. It cannot be said under these circumstances that the rule laid down in this case is different from that laid down by their Lordships of the Privy Council in *Raleigh Investment Co., Ltd.* v. *The Governor-General in Council* (3). As a matter of fact the judgment of their Lordships of the Privy Council does not even seem to have been referred to in the judgment of the Madras High Court.

Another case cited on behalf of the petitioners is *The Cosmopolitan Club, Madras* v. *The Deputy Commercial Tax Officer, Triplicane Division* (4), where Mack, J., issued a writ of mandamus in the case of a social club on the ground that the remedy provided by the Sales Tax Act was a long and tedious avenue. I am unable to derive much assistance from this judgment as it seems to have been decided on its own facts.

One other fact must be mentioned at this stage. When the petitioners' counsel was asked if his clients had been charging any sales tax from their clients we were informed by the client who

(1) 1952 S.C.R. 1112
(2) A.I.R. 1953 Mad. 105
(3) A.I.R. 1947 P.C. 78
(4) 1952 (1) M.L.J. 401

was present that the petitioners had not been doing so, but when asked for an affidavit in support of this, no affidavit was filed for reasons best known to the petitioners.

I would therefore dismiss these petitions and discharge the rules. Counsel fee Rs. 100 in each case.

FALSHAW, J.—I agree.

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