

(2012) 07 GUJ CK 0035

In the Gujarat High Court

Case No : Special Civil Application No. 11151 of 2001

Chhayaben Mahendrakumar Shah

APPELLANT

Vs

Sales Tax Officer (III)

RESPONDENT

Date of Decision : 20-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1993 — Section 17, 17(6)
Gujarat Sales Tax Act, 1969 — Section 26, 37, 41, 41(4), 42
Income Tax Act, 1961 — Section 149, 150

Citation : (2012) 3 GLH 213

Hon'ble Judges : R.M. Chhaya, J; Harsha Devani, J

Bench : Division Bench

Advocate : Varsha Brahmbhatt for Ms. K.J. Brahmbhatt for Petitioner 1, for the Appellant; Maithili Mehta, Assistant Government Pleader for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under Article 226 of the Constitution of India, the petitioner has challenged the assessment order dated 21st March, 2001 passed by the respondent u/s 41(4) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act"). The petitioner's husband namely, late Shri Mahendra Kumar Himmatlal Shah was dealing in resale of iron scrap, furnace oil etc. and was also manufacturing soaps. On 12th March, 2001, the respondent issued a notice in the name of M/s. Menka Soap Factory which was served on the petitioner as a legal heir of late Shri Mahendrakumar Himmatlal Shah. In the said notice, the petitioner was asked to produce all books of accounts and necessary evidence with regard to the assessment of M/s. Menka Soap Factory for the assessment years 1992-93, 1993-94, 1994-95 and 1995-96. The petitioner was also asked to remain present on 20th March, 2001 alongwith the said details failing which it was stated that ex parte assessment order would be passed

2. In response to the said notice, the petitioner gave reply on 20th March, 2001

wherein it was specifically stated that the petitioner's husband had expired on 2nd February, 2001. A copy of his death certificate was also produced alongwith the said letter. It was further stated by the petitioner that she was not aware of the business transactions of her husband and that the notice in Form No. 36 for the assessment years was not given to the petitioner even as legal heir and as successor of late Shri Mahendrakumar Himmatlal Shah. The petitioner also clearly stated in the said letter that the assessment for the said years is time barred and no assessment can be made now. The petitioner had lastly requested the respondent to consider these submissions before taking any decision in the matter.

3. Subsequently, the respondent passed an ex parte order dated 21st March, 2001 u/s 41(4) of the Act, determining the tax liability of the concern, namely M/s. Menka Soap Factory at Rs. 4,47,100/-, which comprised of sales tax of Rs. 1,53,116/-, penalty of Rs. 1,87,740/- u/s 45(6) of the Act and Rs. 1,10,244/- u/s 47(4)(c) of the Act. While making the assessment, the respondent made addition of 4% on all sales and purchases and treated all the sales as taxable and all the purchases were treated as U.R.D. purchases.

4. It is the case of the petitioner that the aforesaid reply dated 20th March, 2001 had been duly received by the respondent and necessary acknowledgement was also issued. However, the respondent did not make any mention about the said letter in his assessment order. The petitioner, therefore, wrote a letter dated 27th March, 2001 raising a grievance that the assessment order was not passed against the petitioner as legal heir and successor, but the said order was passed in the case of the petitioner's husband and was served on the petitioner at C/o. address with demand notice of Rs. 4,47,100/- in Form No. 35 dated 21st March, 2001. The petitioner also drew the attention of the respondent to other irregularities and illegalities committed by him while passing the said order.

5. In response to the said letter, the respondent gave a reply stating that the assessment order was binding on the legal heirs of the deceased. It was further stated that after the death of the proprietor of the proprietary concern namely, M/s. Menka Soap Factory, the information as regards the legal heirs of the proprietor was not conveyed to the office of the respondent. Being aggrieved, the petitioner has filed the present petition challenging the impugned assessment order dated 21st March, 2001 in respect of the assessment year 1992-93.

6. In response to the averments made in the petition, the respondent has filed his affidavit-in-reply denying the averments made and contentions raised in the petition.

7. Ms. Varsha Brahmbhatt, learned Advocate for the petitioner submitted that the respondent was not justified in passing the assessment order ex parte u/s 41(4) of the Act and that the impugned order is violative of the principles of natural justice as the reply dated 20th March, 2001 filed by the petitioner has not at all been considered while passing the assessment order against the petitioner.

7.1 Next, it was submitted that the impugned order is absolutely illegal and unlawful as it has been passed against a dead person. It was submitted that it is settled legal position that no order can be passed on a dead person and that the respondent is not right in stating that the information with regard to the death of the petitioner's husband was not conveyed. Inviting attention to the letter dated 20th March, 2001 addressed by the petitioner to the respondent, wherein it was specifically stated that her husband had expired on 2nd February, 2001 and the death certificate was also produced, it was submitted that apart from the above, the notice dated 12th March, 2001 issued by the respondent was served on the petitioner as legal heir of late Shri Mahendrakumar Himmatlal Shah. Hence, it is incorrect to state that knowledge regarding the death of the proprietor of the proprietary concern was not made available to the respondent.

7.2 The main plank of the submissions advanced by the learned Advocate for the petitioner was that the assessment was barred by limitation inasmuch as Section 42 of the Act which deals with "time limit for completion of assessments" as it stood at the relevant time provided that no order of assessment shall be made under sub-Section (3) or sub-Section (4) of Section 41 at any time after the expiry of two years from the end of the year in which the last monthly, quarterly or as the case may be, annual return is filed. Under the proviso thereto, the State Government and the Commissioner are empowered to extend, either generally or specially, the period specified in clause (a). Reference was made to rule 37A of the Gujarat Sales Tax Rules, 1970 (hereinafter referred to as "the Rules") which makes provision for "Conditions subject to which the Commissioner may grant extension" to submit that in the facts of the present case, there is no order of extension and that even if it is assumed that such order of extension was passed by the respondent, the period of five years as contemplated under clause (i) of rule 37A came to an end much earlier.

7.3 Reliance was placed upon the decision of the Supreme Court in the case of Fag Precision Bearings Vs. Sales Tax Officer (I) and Another, , wherein the effect of the provisions of Section 42A read with the proviso and rule 37A was considered by the Supreme Court and the assessment order was set aside. It was submitted that the present case is also governed by the said decision and as such, the impugned order deserves to be quashed and set aside.

8. On the other hand, Ms. Maithili Mehta learned Assistant Government Pleader appearing on behalf of the respondent vehemently opposed the petition. It was submitted that the impugned order had been passed after affording ample opportunities of hearing to the petitioner and as such, there is no breach of the principles of natural justice as alleged. Referring to Section 42 of the Act, it was pointed out that the provisions prescribing a time limit for completion of assessments as contained u/s 42 of the Act came to be deleted with effect from 31st March, 1994 and that subsequent to 31st March, 1994 no limitation was prescribed for completion of assessment. It was submitted that in the case of the petitioner, on the date when the amended Section 42 came into force, the period

of two years for completion of assessment was not yet over and as such, the provisions of the substituted Section 44 would be applicable to the facts of the present case. The period of limitation as prescribed by Section 42 of the Act prior to its substitution with effect from 31st March, 1994 would, therefore, not be applicable. In support of her submissions, the learned Assistant Government Pleader placed reliance upon the decision of the Kerala High Court in the case of *Geo Seafoods Vs. Additional Sales Tax Officer IV and Another*, the decision of the Allahabad High Court in the case of *Commissioner, Sales Tax, U.P., Lucknow v. Government of India Press*, 97 STC 226 as well as the decision of the West Bengal Taxation Tribunal in *Assistant Commissioner of Commercial Taxes and Another*. It was submitted that the legislature having consciously removed the limitation for completion of assessment, the contention that the assessment was time barred does not merit acceptance.

8.1 As regards the contention that the impugned order had been passed against a dead person, attention was invited to the assessment order to point out that the same had been made C/o. the petitioner. Prior to the passing of the order, the petitioner as legal heir of deceased Mahendrakumar Shah had been issued several notices and after affording ample opportunities, the assessment order came to be passed u/s 41(4) of the Act. Reference was made to Section 26 of the Act which bears the heading "Special provision regarding liability to pay tax in certain cases" and more particularly to clause (b) thereof which provides that where a person who is or has been a dealer, liable to pay tax under the Act, dies, then if the business carried on by the dealer is discontinued, whether before or after his death, his legal representative shall be liable to pay out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax (including any penalty) due from such dealer under this Act or under any earlier law, whether such tax (including any penalty) has been assessed before his death but has remained unpaid or is assessed after his death. It was submitted that in the light of the aforesaid provision, the contention that the order has been passed against a dead person does not merit acceptance. It was, accordingly, urged that the impugned order being just, legal and proper does not warrant interference by this Court.

9. In rejoinder, Ms. Brahmabhatt drew the attention of the Court to the provisions of Section 42 of the Act as existing during the relevant period for which the assessment was made namely, the period 1st April, 1992 to 31st March, 1993. It was pointed out that the amendment on which reliance has been placed by the learned Assistant Government Pleader came into force with effect from 31st March, 1994, however, prior thereto, Section 42 provided for time limit for completion of assessments and postulated that no order of assessment for a year or a part of a year shall be made under sub-Section (3) or (4) of Section 41 at any time after the expiry of two years from the end of the year in which the last monthly, quarterly or as the case may be, annual return is filed. It was submitted that in the facts of the present case, the assessment pertains to the period 1st April, 1992 to 31st March, 1993. Under the circumstances, the time limit for the

said period would be from 1st April, 1993 to 31st March, 1995. It was submitted that the extended period would be for a maximum period of five years, that is, up to 31st March, 2000, whereas, the assessment order has been passed on 21st March, 2001 which is much beyond even the extended period contemplated u/s 42 of the Act. Under the circumstances, as the assessment was not made within the prescribed period of limitation, the same was clearly time barred.

9.1 Next it was submitted that the amended Section 42 came into force with effect from 31st March, 1994 and was not made retrospectively effective and as such, would not apply to assessments for the period prior thereto. In support of her submissions, the learned Counsel placed reliance upon the decision of the Supreme Court in the case of K.M. Sharma Vs. Income Tax Officer, Ward 13(7), New Delhi, for the proposition that a fiscal statute regulating period of limitation must receive strict construction. The law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure : to risk of litigation to litigants for an indefinite period on future unforeseen events. Proceedings, which have attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. In the facts of the said: case, the Court held that the provision in subsection (1) of Section 150 of the Income Tax Act can have only prospective operation to assessments, which have not become final due to expiry of the period of limitation prescribed for assessment u/s 149 of the Act.

9.2 The learned Counsel also relied. on the decisions of the Supreme Court in the case of Commissioner of Income Tax Vs. Patel Brothers and Company Ltd., and in the case of State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, . Reliance was also placed upon the decision of the Supreme Court in the case of Commissioner of Income Tax Vs. Varas International (P.) Ltd., , wherein it was held that it has been consistently held by the Supreme Court that for the amendment of a statute to be construed as being retrospective, the amended provision itself should indicate, either in terms or by necessary implication, that it is to operate retrospectively and that there was no conflict of decisions which required resolution. It was, accordingly, urged that the provisions of the amended Section 42 which came into force with effect from 1st April, 1994 cannot be given retrospective effect and be made applicable in respect of assessments for the period prior thereto. Reliance was also placed upon the decision of the Kerala High Court in the case of K.N. Falgunan and Another Vs. State of Kerala and Others, , wherein by the amendment by Finance Act, 1998 with effect from 1st April, 1998, the time limit for initiation of reassessment proceedings u/s 19 of the Kerala General Sales Tax Act, 1963 was enlarged to five years, as against four years under the provisions existing earlier. The Court held that for the year 1993-94, the petitioner's liability for being subjected to a revised assessment u/s 19 had come to a close by 31st March, 1998. The amendment of the provision by the Finance Act (14 of 1998) came into force

only with effect from April 1, 1998 and not from April 1, 1994. Therefore, by the time the provision was introduced in the statute book, the petitioner's assessment for 1993-94 was out of reach of the Department as the four year period had expired on the date the said amendment was introduced. Therefore, the proceedings initiated thereafter u/s 19 for reopening the assessment of 1993-94 were void.

10. In the light of the facts and contentions noted hereinabove, the core question that arises for consideration before this Court is as to whether the assessment for the period under consideration, viz., 1st April, 1992 to 31st March, 1993 is barred by limitation. Before advertng to the merits of the case, it may be necessary to refer to the relevant statutory provisions. By virtue of Section 9 of the Gujarat Sales Tax (Amendment) Act, 1994, Section 42 of the Act came to be substituted. A perusal of clause 9 of Statement of Objects and Reasons explaining the important provisions of the Bill shows that by virtue of the said clause Section 42 was; sought to be substituted by a new Section so as to remove the time limit for completion of assessment in certain cases. The amended Section 42 which was brought into force with effect from 31st March, 1994 reads thus :-

42. Time limit for completion of assessment.

(1) No order of assessment for a year commencing on the 1st day of April, 1998, or part of such year or any year thereafter or part of such year shall be made under sub-Section (3) or (4) of Section 41 at any time after the expiry of three years from the end of the year in which the last monthly, quarterly or, as the case may be, annual return is filed.

(2) Where the Commissioner issues a notice under sub-Section (6) of Section 41, to any dealer for assessment of tax in respect of any period, no order of assessment shall be made for such part of the period, if any, as is prior to -

(a) a period of eight years ending on the last date of the year immediately preceding the year in which such notice is issued, in a case where the Commissioner has reason to believe that such dealer has failed to apply for registration with intention to defraud Government revenue; and

(b) a period of four years ending on the last date as aforesaid, in any other case :-

Provided that for the purpose of this Section if it is considered necessary so to do, the State Government may, subject to such conditions as it may deem fit, and the commissioner may, subject to such conditions as may be prescribed by a general or special order, extend, either generally or specially, the period specified in sub-Section (1).

Section 42 as it stood at the relevant time prior to its substitution with effect from 31st March, 1994 reads as under :-

42. Time limit for completion of assessments -

(a) No order of assessment for a year or part of a year shall be made under sub-Section (3) or (4) of Section 41 at any time after the expiry of two years from the end of year in which the last monthly, quarterly or, as the case may be, annual return is filed.

(aa) Notwithstanding the expiry of the period specified in clause (a), an order of assessment for Samvat Year 2038, calendar year 1982 or as the case may be, financial year ending on the 31st March, 1983 or part of any such year may be made under subsection (3) or (4) of Section 41 at any time not later than the end of Samvat Year 2042, calendar year 1986 or, as the case may be, financial year ending on the 31st March, 1987

(b) Where the Commissioner issues a notice under sub-Section (6) of Section 41 to any dealer for assessment of tax in respect of any period, no order of assessment shall be made for such part of the period, if any, as is prior to :-

(i) a period of eight years ending on the last date of the year immediately preceding the year in which such notice is issued, in a case where the Commissioner has reason to believe that such dealer has failed to apply for registration with intention to defraud Government revenue; and

(ii) a period of four years ending on the last date as aforesaid, in any other case :-

Provided that for the purpose of this Section if it is considered necessary so to do, the State Government may, subject to such conditions as it may deem fit, and the Commissioner may, subject to such conditions as may be prescribed by a general or special order extend either generally or specially the period specified in clause (a).

Provided further that in computing the period of limitation for the purpose of this Section, any period by which the period of limitation is extended under the first proviso or any period during which assessment proceedings are stayed by an order or injunction of any Court or Authority shall be excluded :-

Provided further that where a fresh assessment is required to be made in pursuance of any order under Sections 65, 67 or 69 or in pursuance of any order of any Court or Authority such fresh assessment shall be made at any time within three years from the date of such order.

11. On a perusal of the unamended Section 42, it is apparent that the same makes provision for time limit for completion of assessments and postulates that no order of assessment for a year or part of a year shall be made under sub-Section (3) or (4) of Section 41 at any time after the expiry of two years from the end of the year in which the last monthly, quarterly or as the case may be, annual return is filed. Thus, u/s 42 as it stood at the relevant time, an order of assessment was required to be passed within a period of two years from the end

of the year in which the last monthly, quarterly or as the case may be, annual return is filed. In the present case, the relevant period is 1st April, 1992 to 31st March, 1993. According to the learned Counsel for the petitioner, the last quarter would be 31st March, 1993 and hence, the time limit prescribed for that period would be from 1st April, 1993 to 31st March, 1995. The time for completion of assessment under the unamended Section 42 insofar as the period under consideration is concerned, would, therefore, expire on 31 March, 1995.

12. However, before the said period was over and the assessment could be closed, Section 42 of the Act came to be substituted and the limitation for completion of assessment came to be removed. After its substitution with effect from 31st March, 1994, Section 42 of the Act makes provision for "Time limit for assessment in certain cases" and lays down that where fresh assessment is required to be made in pursuance of any order under Sections 65, 67 or 69 or in pursuance of an order of any Court or Authority, such fresh assessment shall be made within three years from the date of such order. Thus, the amended Section 42 applies only to the categories of cases mentioned therein. The said Section no longer prescribes a period of limitation for completion of assessment. In the facts of the present case, undisputedly, prior to the period for completion of assessment for the period under consideration coming to a close, the Section came to be amended and the period of limitation came to be removed.

13. At this stage, it may be germane to refer to the various decisions on which reliance has been placed by the learned Counsel for the respective parties. Reference may first be made to the decisions on which reliance had been placed on behalf of the petitioner. In *K.M. Sharma v. Income Tax Officer* (supra), the Supreme Court was dealing with a question as to whether the provisions of sub-Section (1) of Section 150 of the Income Tax Act, 1961 as amended could be availed of for reopening assessments, which have attained finality and could not be reopened due to bar of limitation that was attracted at the relevant time to the proposed reassessment proceedings under the provisions of Section 149 of the Act. It was held thus :-

A fiscal statute more particularly a provision such as the present one regulating period of limitation must receive strict construction. The law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation to litigants for an indefinite period on future unforeseen events. Proceedings, which have attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. The amendment to sub-Section (1) of Section 150 is not expressed to be retrospective and, therefore, has to be held as only prospective. The amendment made to sub-Section (1) of Section 150 which intends to lift the embargo of period of limitation u/s 149 to enable the Authorities to reopen assessments not only on the basis of orders passed in proceedings under the income tax Act but also on the order of a Court

in any proceedings under any law has to be applied prospectively on or after April 1, 1989, when the said amendment was introduced to sub-Section (1). The provision in sub-Section (1) therefore can have only prospective operation to assessments, which have not become final due to expiry of the period of limitation prescribed for assessment u/s 149 of the Act.

To hold that the amendment to sub-Section (1) would enable the Authorities to reopen assessments, which had already attained finality due to bar of limitation prescribed u/s 149 of the Act as applicable prior to April 1, 1989, would amount to giving sub-Section

(1) a retrospective operation which is neither expressly nor impliedly intended by the amended sub-Section.

14. Thus, what is held in the said decision is that proceedings which have attained finality under the existing law due to bar of limitation, cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. The provisions of sub-Section (1) of Section 150, therefore, can have only prospective operation to assessments, which have not become final due to expiry of the period of limitation prescribed for assessment u/s 149 of the Act.

15. Examining the facts of the present case in the light of the aforesaid decision, admittedly, the assessment for the period under consideration had not attained finality under the existing law. The period for completion of assessment had not yet come to a close and as such, the assessment not having attained finality, the provisions of the amended Act would clearly be applicable.

16. In Commissioner of income tax v. Patel Brothers and Co. Ltd. and others (supra), the question involved related to deduction of expenditure incurred in providing ordinary meals and refreshments to outstation customers according to the customary hospitality and trade usage satisfying the general test of commercial expediency. The relevant assessment years were 1969-70, 1970-71 and 1971-72. With effect from 1st April, 1976 the Explanation 2 came to be introduced below sub-Section (2A) of Section 37 of the Act which provided that "entertainment expenditure" includes expenditure on provision of hospitality of every kind by the assessee to any person, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade, but does not include expenditure on food or beverages provided by the assessee to his employees in the office, factory or other place of work. The issue which arose was whether for the assessment years under consideration the expression "entertainment tax" was required to be construed in terms of Explanation 2. The Supreme Court observed that the definition in Explanation 2 is not the ordinary meaning of the words is "entertainment expenditure", but the enlarged meaning given for the purpose of the Act with effect from April 1, 1976

and held thus :-

11. The object of sub-Section (2-A) is to disallow any lavish expenditure in the form of business expenditure. This is obvious from the several amendments made in the provision from time to time. It is so understood even in the circular issued by the Board. The object of the provision clearly is to allow deduction of the essential business expenditure incurred due to commercial expediency and according to the trade usage excluding the lavish expenditure. The dispute in the present cases relates only to the amount which has been held to be essential business expenditure of this kind incurred in providing ordinary meals as bare necessity. In the view taken by us, such expense did not come within the meaning of "entertainment expenditure" prior to 1-4-1976 when Explanation 2 was brought in by a retrospective amendment made in 1983 of sub-Section (2-A) of Section 37. The finding of fact in all cases, therefore, satisfies this test to allow deduction of the expenditure incurred by each assessee and claimed under this head for the period prior to 1-4-1976.

12. Sub-Section (2-A) was inserted w.e.f. 1-10-1967 by the Taxation Laws (Amendment) Act, 1967 and Explanation 2 inserted therein by Finance Act, 1983 retrospectively w.e.f. 1-4-1976 while sub-Section (2-B) was inserted w.e.f. 1-4-1970 by the Finance 5 Act, 1970. As earlier stated, these cases relate to the period prior to 1-4-1976 from which date Explanation 2 to sub-Section (2-A) was inserted retrospectively. We have, therefore, to construe sub-Section (2-A) as it existed without the Explanation 2. The meaning of Explanation 2 is quite clear and it has enlarged the meaning to widen the tax net.

13. Learned Counsel for the Revenue contended that Explanation 2 is clarificatory and, therefore, even without Explanation 2 the provision must be understood and construed in the same manner. It appears to us that insertion of Explanation 2 made retrospectively but restricted in its application only w.e.f. 1-4-1976 is itself an indication that its application prior to 1-4-1976 is excluded. If Explanation 2 was merely clarificatory of the ordinary meaning, as contended by learned Counsel for the Revenue, it was unnecessary to restrict its retrospective application in this manner only from 1-4-1976. The construction we have made of sub-Section (2-A) of Section 37 as it existed during the relevant assessment period cannot, therefore, be affected by Explanation 2 to sub-Section (2-A) which was inapplicable during the relevant period.

14. In our opinion, the construction we have made of the provision as it existed during the relevant period flows not merely from the language of the provision but also matches with the object thereof. It means that the expenditure incurred by the assesseees in providing ordinary meals to the outstation customers according to the established business practice, was a permissible deduction in spite of sub-Section (2-A) of Section 37, to which the assesseees were entitled in the computation of their total income for the purpose of payment of tax under the Income Tax Act, 1961 during the relevant period prior to 1-4-1976.

For the reasons that follow the aforesaid decision does not in any manner further the case of the petitioner.

17. In Commissioner of income tax v. Varas International P. Ltd, (supra), the Court held that for an amendment of a statute to be construed as being retrospective, the amended provision should itself indicate, either in terms or by necessary implication that it is to operate retrospectively. Undisputedly, in the facts of the present case the amended Section 42 of the Act has not been brought into effect retrospectively. However, at this stage, it may be germane to refer to the decision of the Supreme Court in the case of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, , wherein the Court after referring to various decisions in respect of the ambit and scope of an amending Act and its retrospective operation culled out the following principles :-

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

18. In Thirumalai Chemicals Limited Vs. Union of India (UOI) and Others, , the Supreme Court held thus :-

23. Substantive law refers to a body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.

24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in *Garikapati Veeraya v. N. Subbiah Choudhry*, *New India Insurance Co. Ltd. v. Shanti Misra*, *Hitendra Vishnu Thakur v. State of Maharashtra*, *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar* and *Shyam Sunder v. Ram Kumar*, has elaborately discussed the scope and ambit of an amending legislation and its retro-spectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.

19. Thus, it is well settled that the law relating to limitation is procedural in nature and, therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute which is merely procedural is to be construed as retrospective and a statute which while procedural in its character. affects vested rights adversely is to be construed as prospective.

20. The facts of the present case, may therefore, be examined by keeping in mind the aforesaid principles. As noticed earlier in the present case the period of completion of assessment for the period under consideration had not come to a close. In other words, the assessment proceedings for the period under consideration had not attained finality when the amended Section 42 came into force with effect from 31st March, 1994. Under the circumstances, it cannot be said that the amended provision adversely affects any vested right of the petitioner so as to construe the same prospectively. Consequently, Section 42 of the Act as substituted with effect from 31st March, 1994 would clearly be applicable to the facts of the present case.

21. Reference may now be made to the decisions on which reliance had been placed on behalf of the respondent. In *Geo Seafoods v. Additional Sales Tax Officer (supra)*, the Kerala High Court was dealing with a case where by the Finance Act, 1993, the Legislature amended Section 17 of the Act and included Section 17(6) u/s 17(6), the maximum period of four years was fixed as the time

limit for completing the assessments. But a proviso was added to this that the assessment proceedings which were pending at the commencement of the Finance Act can be completed within four years. Section 17 of the said Act which deals with assessment originally did not contain any time limit for completing the assessment. It was contended on behalf of the petitioner that the respondents could not take protection under the second proviso to sustain the assessments, because even by that time when the Finance Act came into force, the assessments had become illegal and barred in view of the long delay in completing the assessments. The Kerala High Court after reviewing various decisions on the issue came to the conclusion that the second proviso to Section 17(6) of the Sales Tax Act, 1993 would be applicable only to those assessment proceedings, which have been pending before the assessing Authority for a reasonable time. Any assessment proceedings, which were pending before the Authority for an unreasonably long time on the date on which the Finance Act, 1993 came into force will not be saved automatically by the amendment. The learned Assistant Government Pleader is justified in placing reliance upon the aforesaid decision inasmuch as the Court has held that where the assessments were pending for a reasonable time, the amended provision could be applied, whereas in cases where the assessments had become barred because of long delay in completing the same the amended provision would not be applicable. At the cost of repetition it may be noted that in the present case the time limit for completion of assessment was not over when the amended provision was brought into force, under the circumstances, applying the aforesaid decision to the facts of the present case, the amended provision would clearly be applicable.

22. In *Commissioner of Sales Tax, U. P., Lucknow v. Government of India Press* (supra), the Allahabad High Court was dealing with a case where the period of limitation for completing assessments was originally prescribed as four years under sub-Section (2) of Section 21 of the U. P. Sales Tax Act, 1948, but by an amendment of the proviso to sub-Section (2) of Section 21 by U. P. Act No. 4 of 1982. the period for completing assessments or reassessments for 1974-75, 1975-76 and 1976-77 was extended till 31st December, 1982 and the amendment was given retrospective effect from November 1, 1978. The Court held that the Legislature had amended the proviso to Section 21(2) with effect from November 1, 1978 and the case could be treated as dead or closed only if before November 1, 1978, the period of limitation as operative had expired. The Court found that this was not so in the said case because the proceedings related to assessment year 1976-77 and the period of limitation prescribed in the main sub-Section (2) of Section 21 was four years which expired on 31st March, 1981 and hence on November 1, 1978, the case cannot be said to have been closed.

23. Thus, in the said decision also, what has been held is that by the time the provision was introduced in : the statute book, the petitioner's assessment was out of reach of the Department as the four year period had expired on the date when the said amendment was introduced. In the facts of the present case, as noted hereinabove, on the date when the amendment came to be introduced,

the period of two years for making assessment had not yet expired.

24. In *Black Stone Rubber Industries Pvt. Ltd. Vs. State of Rajasthan and Others*, the Rajasthan High Court was dealing with a case wherein it was contended on behalf of the petitioner that notice u/s 12 for the assessment period 1988-89 was barred by time under the provisions of Section 12 of the Rajasthan Sales Tax Act itself as it stood at the relevant time and, therefore, notices issued by the respondents suffer from the inherent lack of jurisdiction on the face of it. The Court placed reliance upon its earlier decision in the case of *Assistant Commercial Taxes Officer v. Shrinath Emporium* rendered in S.B. Sales Tax Revision No. 574 of 1999 on 27th January, 2000 wherein it was held as under :-

Prescribing of period under the taxing statutes are usually not considered as law of repose. That is to say that for all times, in such cases law Authority re-opening of closed assessment is to be looked as on the date power thereunder is to be exercised. It is not a case for enforcement of right but it is a case of exercise of power by the Authority designated under the relevant statute. When the officer takes recourse to the proceedings and exercises his power, it has to be in accord with provision at the time the Authority under the statute seeks to exercise power conferred by statute. It has to be in accordance of conditions under which such power can be exercised. There is no vested right in any Authority to exercise powers in future.

The Court held that in the absence of any saving clause for making any special provision for saving any action which may become barred by time due to prescribing shorter period within which power to initiate action could be exercised, no benefit can be drawn from provisions of General Clauses Act to result in any fruitful proceedings, on expiry of such period.

24.1 Agreeing with the said view, in *Black Stone Rubber Industries Pvt. Ltd.*, the Court held that if sub-Section (2) of Section 12 applies to all the actions initiated after 1st April, 1991, the notice : issued in respect of assessment year 1988-89 was clearly barred by time inasmuch as the proceedings in respect of assessment year 1988-89 could have been initiated latest by 31st March,; 1994 and not thereafter.

25. In *Dharappa Vs. Bijapur Co-operative Milk Producers Societies Union Ltd.*, , the Supreme Court. held that statutes relating to limitation are said to be retrospective in nature in the sense that they apply to all proceedings brought after they came into force, even for enforcing causes of. action which had accrued prior to the date when such statute came into force. But they are also prospective in the sense that they do not have the effect of reviving a right of action which was already barred on the day of its coming into operation. Therefore, where the right to file an action had come to an end on expiry of period of limitation prescribed under a law relating to limitation and thus becomes barred by limitation, the right is not revived by a later Limitation Act,

even if it provides a longer period of limitation.

26. From the principles enunciated in the above referred decisions, it is apparent that insofar as statutes relating to limitation are concerned, the same would be retrospective in nature and would apply to all proceedings brought after the same came into force even for enforcing causes of action which had accrued prior to the date when such statute came into force. However, the same would be prospective to the extent that the provision would not have the effect of reviving a right of action which was already barred on the date of its coming into operation.

27. In the facts of the present case, Section 42 of the Act undisputedly is a statute relating to limitation. By virtue of the amended Section 42, with effect from 31st March, 1994, the limitation for completion of assessment has been removed. Under the circumstances, the said provision would be applicable in respect of all assessments which had not come to close prior to the coming into force of the said amendment. As noted earlier, in the present case, the period of limitation would expire only on 31st March, 1995, whereas prior thereto, the amended Section 42 came into force whereby limitation on completion of assessment was removed. Under the circumstances, as discussed earlier, the amended Section 42 would be clearly applicable to the facts of the present case and as such, the contention that the assessment is barred by limitation does not merit acceptance.

28. Coming to the next question, as to whether the order of assessment has been passed without hearing the petitioner and without affording an opportunity of hearing to the petitioner, a perusal of the impugned order of assessment indicates that notice in Form 36 was initially issued and served on 8th December, 1994 and subsequently on various other dates, the last being on 12th March, 2001. However, no one remained present in response to the said notice to produce the accounts and evidences. The respondent had issued notice dated 12th March, 2001 to the petitioner as heir of deceased Mahendra kumar Himmatlal Shah calling upon her to remain present alongwith necessary documents and evidence on 20th March, 2001. In response to the said notice, the petitioner had given her reply dated 20th March, 2001 contending that the assessment was barred by limitation and that she was not aware of the business transactions of her husband and that she had not been served with notice of assessment in Form 36 earlier. In the impugned order, the respondent has observed that despite ample opportunities having been granted to the petitioner, no response was received and as such, ex parte assessment was being made u/s 41(4) of the Act.

29. A perusal of the impugned order shows that none of the contentions raised by the petitioner in her reply dated 20th March, 2001 have been dealt with by the respondent. Though it is true that on earlier occasions in the year 1995 and 1996, notices came to be issued, however, subsequent to the death of the petitioner's husband, the only notice which was issued was on 12th March, 2001

calling upon the petitioner to remain present on 20th March, 2001. Thus, it is apparent that the respondent was aware of the death of the petitioner's husband. Besides, a perusal of the reply filed by the petitioner shows that her husband Mahendrakumar Himmatlal Shah had expired on 2nd February, 2001. Thus, the petitioner received the notice dated 12th March, 2001 calling upon her to remain present with the necessary documents and evidences approximately about a month after the death of her husband. For obvious reasons, it cannot be gainsaid that within a short period after the death of her husband, the petitioner would not have been in a position to remain present before the Assessing Officer with the necessary documents and statements of accounts. Under the circumstances, it is apparent that after the death of her husband, sufficient opportunity had not been granted to the petitioner for representing her case before the respondent. Not only that, in the impugned order, the respondent has not considered any of the contentions raised by the petitioner in her reply dated 20th March, 2001 which admittedly was received by him. Under the circumstances, the impugned order is clearly in breach of the principles of natural justice and as such, cannot be sustained. For the foregoing reasons, the petition succeeds and is accordingly allowed to the following extent. While holding that the assessment is not barred by limitation, the impugned order dated 21st March, 2001 is hereby quashed and set aside and the matter is restored to the file of the Assessing Officer who shall decide the same afresh after giving the petitioner an opportunity of hearing. Considering the fact that the matter relates to the year 1992-93, the Sales Tax Officer shall complete the proceedings within a period of six months from the date of receipt of a writ of this order. Rule is made absolute accordingly to the aforesaid extent with no order as to costs.