(1985) 10 RAJ CK 0053

In the Rajasthan High Court

Case No : Civil Sales Tax Reference No. 11 of 1981

Commercial Taxes Officer APPELLANT

Vs

G.C. Malpani RESPONDENT

Date of Decision : 31-10-1985

Acts Referred:
Rajasthan Sales Tax Act, 1954 — Section 14(4A), 9(3)

Citation : (1987) 65 STC 92 : (1986) 1 WLN 508

Hon'ble Judges : S.S. Byas, J;S.K. Mal Lodha, J

Bench : Division Bench

Advocate : K.C. Bhandari, for the Appellant; Dinesh Maheshwari, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mal Lodha, J.—The Board of Revenue for Rajasthan, Ajmer ("the Board"), has referred the following question, for the opinion of this Court:

Whether under the facts and circumstances of the case and while dealing with rectification matter, the Board of Revenue was justified in remanding the cases for reassessment under the provisions of Section 9(3)(b) of the Rajasthan Sales Tax Act and also when the non-applicant assessee had not preferred any appeal or revision against the assessment orders dated 16th September, 1966 ?

2. Facts first. The assessment of the firm M/s. Sushil Kumar Kamal Kant, Bhadra, was made by the Commercial Taxes Officer (C.T.O.), Hanumangarh, on September 16, 1966, in respect of the assessment years 1961-62,1962-63 and 1963-64 under the Central Sales Tax Act, 1956 (for short "the CST Act") and a demand for Rs. 24,739.58 was created against the firm. As the amount of the demand was not paid, the recovery proceedings were started against Gulab Chand Malpani, one of the partners of the firm M/s. Sushil Kumar Kamal Kant, Bhadra. Gulab Chand Malpani''s properties were attached and they were proclaimed for sale. He, therefore, filed objections before the assessing authority

that as the firm M/s. Sushil Kumar Kamal Kant, Bhadra, had already been dissolved, the assessment dated September 16, 1966, of the dissolved firm was a nullity and so, the recovery proceedings should be dropped. The C.T.O. vide his order dated December 2, 1972, overruled the objections. He opined that since no appeal or revision against the assessment order has been filed, the assessment order could not be challenged before him. Aggrieved, Gulab Chand Malpani filed a revision before the Board, which was registered as Revision No. 5/73. In that revision, an application for staying the recovery was filed. On January 15, 1973, an interim order was passed in his favour. The single Member of the Board, by his order dated February 15, 1973, vacated the ad interim order and rejected the application for stay. A special appeal u/s 14(4A) of the Rajasthan Sales Tax Act, 1954 ("the Act" herein), was filed, which was registered as Special Appeal No. 40/73 S.T. That special appeal was rejected on October 16, 1973. Gulab Chand Malpani did not remain satisfied with the order of rejection of the special appeal. He submitted an application for rectification u/s 17 of the Act of the order dated October 16, 1973. The Division Bench of the Board accepted the application, vide its order dated October 4, 1974 and set aside its order dated October 16, 1973 and directed that Special Appeal No. 40/73 be restored to its original number and be listed for regular hearing before a Division Bench. Being dissatisfied, the C.T.O. filed reference application No. 5/75 u/s 15(1) of the Act on March 5, 1975 praying that the Board be directed to refer the following question of law to this Court:

Whether under the facts and circumstances of the cases, the Board of Revenue was justified in remanding the cases for reassessment under the provisions of Section 9(3)(b) of the Rajasthan Sales Tax Act specially when the non-applicant assessee did not prefer any appeal or revision against the assessment orders ?

3. The Board did not dispose of the application for reference within the prescribed time under Sub-section (1) of Section 15 of the Act. This led the C.T.O. to move this Court u/s 15(3A) of the Act. This application was registered as Reference Application No. 31/76. Special Appeal No. 40/73 was heard by the Division Bench of the Board and the Board by its order dated August 11, 1975, allowed the special appeal ; set aside the order dated February 15, 1973, of the Single Member of the Board and directed the assessing authority to hold an enquiry as to whether the firm had been dissolved and if so, proceed u/s 9(3)(b) of the Act. He also gave a direction that in the meanwhile, the attachment, if any, shall remain. Aggrieved by the order dated August 11,1975, the C.T.O. submitted an application u/s 15(1) of the Act on December 5, 1975, requesting the Board to refer the question as stated hereinabove. This application could not be disposed of by the Board within the prescribed time, and, therefore, the C.T.O. moved this Court u/s 15(3A) of the Act, which was registered as Reference Application No. 169/76. Both the applications were heard together. This Court, by its order dated January 13, 1977, opined that so far as the question involved in Reference Application No. 31/76 is concerned, that question was also involved in the Reference Application No. 169/76 and, therefore, the question sought to be

referred in Reference Application No. 31/76 need not be directed to be referred in that case. It, accordingly, rejected Reference Application No. 31/76. The question which was raised in Reference Application No. 169/76 was reframed by this Court with the consent of the parties, which has already been reproduced hereinabove.

4. Before we proceed further, it may be stated that in the statement of case, the Board has stated that the question can be divided into two parts :

(i) Whether in the facts and circumstances of the case the Board was justified in remanding the case for reassessment under the provisions of Section 9(3)(b) of the Rajasthan Sales Tax Act, while dealing with rectification matter ?

(ii) Whether in the facts and circumstances of the case the Board was justified in remanding the case for reassessment under the provisions of Section 9(3)(b) of the Act when the non-applicant assessee had not preferred any appeal or revision against the assessment order dated September 16, 1966 ?

5. With regard to the first part of the question, the Board has opined that this question does not survive and so far as the second part of the question is concerned, it was observed that the Division Bench of the Board had decided the second part of the question assuming that the revision filed against the order of the assessing authority dated December 2, 1972, had been disposed of by the learned single Member of the Board by his order dated February 15, 1973, inasmuch as although that order really related to the stay matter, the single Member, had expressed a clear opinion in this order that the revision itself was not maintainable. On these premises, a mention has been made in the statement of the case that the Division Bench of the Board has disposed of the special appeal against the order of the single Member dismissing the revision itself.

6. We find little justification in the said observations of the Board in the statement of the case submitted to this Court in pursuance of the order dated January 17, 1977, by which this Court directed the Board to refer the aforesaid question for our opinion.

7. Revision No. 5/73, filed by G.C. Malpani against the order dated December 2, 1972, was dismissed on merits by the single Member of the Board on November 7, 1974. The Division Bench of the Board, however, allowed special appeal on August 11, 1975, by which the order dated February 15, 1973, of the single Member of the Board was set aside and the case was remanded to the assessing authority for enquiry as to whether the firm had been dissolved and if so, to proceed u/s 9(3)(b) of the Act.

8. This reference was pending on May 1, 1985, when the Rajasthan Sales Tax (Amendment) Act, 1984 (No. 20 of 1984) ("the Amendment Act"), came into force and so, by virtue of Section 13(11) of the Amendment Act, the reference is deemed to be an application for revision u/s 15 of the Act, as substituted by the Amendment Act. We, accordingly, propose to dispose it of as a revision petition.

9. We have heard Mr. K.C. Bhandari, for the assessing authority and Mr. Dinesh Maheshwari, for the assessee non-petitioner G.C. Malpani at some length and have carefully considered the orders enclosed with the statement of the case and, in particular, the order dated August 11, 1975, of the Division Bench of the Board, by which the special appeal was allowed.

10. The only contention raised by Mr. K.C. Bhandari, learned counsel for the assessing authority, is that the Division Bench of the Board, erred in law while hearing the special appeal against the order dated February 15, 1973, of the single Member, by which he vacated the ad interim stay order granted vide order dated January 15, 1973, in revision which was filed by G.C. Malpani against the order dated December 2, 1972, passed by the C.T.O. requesting to stay recovery proceedings, on the application that was filed by G.C. Malpani before him on the ground that the assessment has been made against the dissolved firm, M/s. Sushil Kumar Kamal Kant, Bhadra. In other words, learned counsel appearing for the assessing authority submitted that against the order refusing the interim stay, by a single Member of the Board in a pending revision against the order of the C.T.O. declined to drop the recovery proceedings, was not competent to set aside the assessment order dated September 16, 1966, for the assessment years 1961-62, 1962-63 and 1963-64, by which a demand was created against the firm M/s. Sushil Kumar Kamal Kant, Bhadra, which demand became final, inasmuch as no appeal or revision under the Act was filed against it by the aggrieved party. It was urged that the only subject-matter of the appeal before the Division Bench of the Board was whether the single Member was justified in refusing to pass an ad interim order on February 15, 1973, in the pending revision before him, which was filed by G.C. Malpani against the order dated December 2, 1972, by which he declined to drop the recovery proceedings on the application of G.C. Malpani. This is stoutly opposed by the learned counsel appearing for G.C. Malpani on the ground that as the assessment order was passed against the dissolved firm, M/s. Sushil Kumar Kamal Kant, Bhadra, which in law, was a nullity and as such no recovery of the demand in pursuance of the assessment order could be made from him in his capacity as partner of that firm. The assessment order, contended the learned counsel, against a dissolved firm, being nullity in the eye of law, could be set aside, in special appeal filed by him against the interlocutory order rectifying the stay in revision.

11. We have bestowed our most anxious and thoughtful consideration to the rival contentions of the learned counsel for the parties. A few facts may be recapitulated. The assessment order made on September 16, 1966, was not challenged by filing appeal or revision under the Act. When the recovery proceedings started against G.C. Malpani, one of the partners of the firm M/s. Sushil Kumar Kamal Kant, Bhadra and his properties were attached and proclaimed for sale, he filed objections. The C.T.O. declined to drop the proceedings on the ground that such application containing objections cannot be entertained by him for the assessment orders made by assessing authority can only be set aside by the appellate authority. A revision was filed u/s 14 of the

Act, as it existed then. In that revision, an application for stay was moved and ad interim order was granted by the single Member of the Board. He however, vacated the order of stay and rejected the stay application. The revision filed against the order dated December 2, 1972, was not disposed of at that point of time.

12. Special appeal was filed against the order dated February 15, 1973, refusing to pass the interim stay order during the pendency of the revision. That appeal was also rejected by the Division Bench of the Board by order dated October 16, 1973. It was on the rectification application filed u/s 17 of the Act, that the Division Bench of the Board recalled the order rejecting the appeal dated October 16, 1973 and ordered for the restoration of the appeal. After hearing the special appeal against the order dated February 15, 1973, by which the single Member of the Board vacated the ad interim stay order and rejected the stay application in the pending revision before him, allowed the appeal and set aside the order of the single Member dated February 15, 1973 and gave the directions to the assessing authority, which have already been reproduced hereinabove.

13. Section 13 of the Act, as it existed then, deals with appeals against assessment orders. Section 14 provides for revision. Now, u/s 14(2), the Board in a revision, after calling for the record of the proceedings in which the order complained against, has been passed and after examining the record subject to the provisions of the Act, pass such order, which may not be prejudicial to the assessee, as it thinks fit. Section 14(4A) provides for filing a special appeal against an order of the single Member. Section 14(5) provides that despite an application for revision of an order has been preferred to the Board, the tax shall be paid in accordance with the order against which revision has been filed. There are two provisos appended to Section 14(5) of the Act, according to which, pending disposal of the revision, on furnishing sufficient security to the satisfaction of the assessing authority, the recovery of the disputed amount can be stayed. The second proviso lays down that where recovery of tax has been stayed under the preceding proviso, the amount of tax shall be recoverable with interest at the prescribed rate on the amount ultimately found due ; and such interest shall be payable on such amount from the date the tax first became due. Learned counsel for the C.T.O. is right in contending that when the Division Bench of the Board had already rejected the special appeal on merit against the interlocutory order dated February 15, 1973, passed by the single Member of the Board vacating the stay order and dismissing the pending revision filed by G.C. Malpani; after allowing the rectification application in pursuance of which the special appeal was restored to its original number, it could not direct the assessing authority to hold an enquiry as to whether the firm has been dissolved and if so, to proceed u/s 9(3)(b) of the Act, as that amounted to setting aside of the assessment order dated September 16, 1966, against which no appeal or revision was filed. We may notice relevant cases : State of Orissa v. Lakhoo Varjang [1961] 12 STC 162 (Ori) , Commercial Taxes Officer Vs. Chhaganmal Bastimal, Central Camera Co. (P.) Ltd. v. Government of Madras [1971] 27 STC

112 (Mad) , M.R.M. Periannan Chettiar and Another Vs. Commissioner of Income Tax, Madras, and Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, which we propose to examine.

14. In State of Orissa''s case [1961] 12 STC 162 (Ori) the assessee''s appeal was confirmed to the question* of penalty. While considering Section 23(3) of the Orissa Sales Tax Act (No. 14 of 1947), it was held that the Tribunal had not got any general dispensing power to reopen assessments, which had become final u/s 22 of the aforesaid Act by reason of the conduct of the assessee in not challenging the same at the appropriate time and to revise or modify the same in the light of subsequent development of case law.

15. In Commercial Taxes Officer Vs. Chhaganmal Bastimal, the assessee failed to pay within the time allowed the amount of tax assessed on him and so; the Assistant Commercial and Sales Tax Officer imposed a penalty on him u/s 16(1)(b) of the Act. The assessee did not file any appeal against the order imposing penalty but filed a revision petition before the Board of Revenue u/s 14(2) of the Act. The question arose whether the revision could be entertained by the Board. The Division Bench ruled that the assessee could have appealed u/s 13 and could have agitated in that appeal the question whether the officer had the jurisdiction to impose the penalty and simply because the Board of Revenue was constituted as an authority which can call for the record of any proceedings under the Act, it could not go beyond the powers conferred upon it in entertaining the revision petition. It was further held that the Board had no jurisdiction to revise the order of the Assistant Commercial and Sales Tax Officer.

16. In Central Camera Co.''s case [1971] 27 STC 112 (Mad), while considering the phrase "as it may think fit", in Section 36(3)(a)(iii) of the Madras General Sales Tax Act, 1959, it was held that the said phrase must be understood ejusdem generis and the Tribunal could pass only such further orders as would be necessary and which touch upon the matters in issue in the appeal before them and therefore, the Tribunal was right in not considering the claim given up by the assessee before the Appellate Assistant Commissioner.

17. In M.R.M. Periannan Chettiar and Another Vs. Commissioner of Income Tax, Madras, , it was held that the existence of an appeal which related only to a distinct matter in controversy did not entitle the Tribunal to take up and decide the appeal in favour of the appellant on the basis of a ground not in controversy.

18. Keeping in view the principles laid down in the aforesaid authorities, we are of the opinion that the Division Bench of the Board in the special appeal which was filed against the order dated February 15, 1973 of the single Member of the Board vacating the ad interim stay order and dismissing the stay application filed by G.C. Malpani in a revision against the order dated December 2, 1972 of the C.T.O. by which he refused to drop the proceedings of the recovery against him in respect of the demand created by the assessment order dated September 16, 1966, could not direct the assessing authority to make enquiry whether the

assessment has been made against a dissolved firm or to proceed u/s 9(3)(b) of the Act, as that was not the subject-matter of the special appeal. What could at the most be said with respect to the subject-matter of the appeal was the consideration of the question on merits whether the single Member of the Board was right in vacating the ad interim stay order passed by him in revision, which was filed against the order dated December 2, 1972 of the C.T.O. not to drop the proceedings against the respondent G.C. Malpani on the ground alleged by him. We do not express any opinion on the question whether while deciding the revision on merits against the order dated December 2, 1972, this course could be adopted by the single Member or for that matter in special appeal u/s 14(4A) of the Act.

19. As stated above, the main revision was dismissed on merits by the single Member of the Board on November 7, 1974, much before the order was passed by the Division Bench on August 11, 1975, as is borne out from the writing that was submitted by the learned counsel for the C.T.O. after drawing of the order sheet of that date.

20. Be that as it may, the Board, in special appeal exceeded its jurisdiction when it, while setting aside the order under appeal, had directed the assessing authority to make an enquiry as to whether the firm had been dissolved and if so, to proceed u/s 9(3)(b) of the Act. The order passed in the special appeal cannot be sustained. It is accordingly set aside.

21. The result is that the question of law, which arises out of the order of the Board, is decided by holding that the Board of Revenue was not justified in remanding the case for reassessment under the provision of Section 9(3) (b) of the Act, as no appeals or revisions against the assessment order dated September 16, 1966, passed in respect of the assessment years 1961-62, 1962-63 and 1963-64, were filed.

22. This reference, which is deemed to be an application for revision u/s 15 of the Act, as substituted by the Amendment Act, is, therefore, allowed and the order dated August 11, 1975, passed by the Division Bench of the Board in the special appeal u/s 14(4A) of the Act, is set aside.

23. In the circumstances of the case, we leave the parties to bear their own costs.

24. Before parting with the case, we make it clear that nothing said hereinabove will affect adversely the right or remedy of G.C. Malpani, available to him against the order dated November 7, 1974, by which his revision No. 5/73 was dismissed or any other remedy which may otherwise be available to him under any Act or law against the recovery proceedings for the realisation of the demand raised in pursuance of the assessment order dated September 16, 1966.

