

(1976) 09 AHC CK 0046

In the Allahabad High Court

Case No : Civil Miscellaneous Application No. of 1975, Spl. Appeal No. 662 of 1963

COMMISSIONER OF SALES TAX

APPELLANT

Vs

RAMJI PRASAD AGARWAL.

RESPONDENT

Date of Decision : 10-09-1976

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1977) 6 CTR 7(1)

Hon'ble Judges : N. D. Ojha, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

N. D. Ojha, J. - M/s. Bhawani Prasad Girdhar Lal were doing some business. For the assessment year 1952-53 they deposited sales tax alongwith returns which was subject to a final order of assessment being passed. An order of assessment was passed by The Sales Tax Officer on 28th of July, 1955. Against that order an appeal was filed by the assessee. This order was set aside by the Judge (Appeals), Sales Tax, by his order dated 29th September, 1955, and the case was remanded to the Sales Tax Officer for making a fresh assessment. In pursuance of that order the Sales Tax Officer passed a fresh assessment order on 29th December, 1955. This order, was again challenged in appeal and was set aside on 5th on January, 1957, with a direction for passing a de novo assessment order. In between the order passes by the Sales Tax Officer dated 29th December, 1955, and the appellate order dated 5th 1957 one of the partners of the firm, viz., Madan Mohan died on 7th of August, 1956 so that the firm stood dissolved. Respondent Ramji Pd. Agrawal was one of the other partners of the firm. In pursuance of the order dated 5th January, 1957 the Sales Tax Officer passed another order of assessment on 27th of March, 1957. An appeal was filed against his order too and was allowed by the Judge (Appeals), Sales Tax, on 7th December, 1957 on the ground that no assessment could have been made against a dissolved firm.

By the same order the amount of tax, of any, realised from the assessee was directed to be refunded. Since the amount was not refunded an application was made for refund on 7th March, 1960, by Ramji Prasad Agarwal. The application was ultimately rejected by the Sales Tax Officer on 7th February, 1963. Ramji Prasad Agarwal thereupon instituted writ petition No. 1133 of 1963 with a prayer that a mandamus be issue directing the Sales Tax Officer to refund the amount of tax in pursuance of the appellate order dated 17th December, 1957. The writ petition was allowed by a learned Single Judge of this court on 30th of July 1963. Against the Judgment of the learned Single Judge the Sales Tax Officer filed special appeal No. 662 of 1963. The special appeal was dismissed by a Bench of this court on 10th of December, 1971. The present application has been made for review with a prayer that the order passed by this Court on 10th December, 1971, be reviewed in view of the amendment made in the U.P. Sales Tax Act by U.P. Act 38 of 1975.

2. Before dealing with the submission made by counsel for the parities, it is necessary to point out that by U.P. Act No. 7 of 1959 a new section being S. 29 was added in the U.P. Sales Tax Act with effect from 1st April, 1959. This S.29 was amended from time to time and one such amendment in this section was made by the U.P. Sales Tax (Amendment and Validation) Act, 1975 (U.P. Act No. 38 of 1975). S. 29 of the Amending Act provides :

"29. Amendment of S. 29. In S. 29 of the principal Act -

.....

(c) after sub-section (2), the following sub-section shall be inserted and be deemed always to have been inserted, namely :-

"(3) Notwithstanding any judgment, decree or order of any Court or authority, no refund shall be allowed of any tax or fee dues under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceeding under this Act."

It is a pursuance of this newly added sub-S. (3) to S. 29 that the present application has been made as already pointed out above.

3. It has been urged by the learned Standing Counsel that in view of the newly added Sub-S. (3) notwithstanding the order passed by the Judge (Appeals) Sales Tax, in appeal directing the refund of the tax the Sales Tax Officer was under a duty not to refund such tax, the liability in respect of which had been admitted by the dealer in returns filed by it. According to the Standing Counsel in the returns for the relevant assessment year the assessee had admitted its tax liability for the amount in respect of which application for refund had been made. It was urged that since the amendment had been made retrospective in its operation it will be deemed to have been in existence in the Act right from 1st of April, 1959, when S. 29 was inserted in the Act. In this view of the matter it was submitted that no mandamus could have been issued directing the Sales Tax

Officer to refund the amount of tax in contravention of the provisions of sub-section (3) of S. 29.

4. Having heard counsel for parties we are of opinion that the application deserves to be allowed. In Mohammed Azmat Azim Khan vs. Raja Shatranji & Ors. it was held by a Full Bench of this Court that a judgment based on the law as it stood on that day the judgment was pronounced may be correct. But where that law is altered subsequently by an amending Act, which is brought into force with retrospective effect, the judgment pronounced is rendered "erroneous on the face of the record" and an application for review would be maintainable. A similar view was taken by the Supreme Court. In M. K. Venkatachalam, I.T.O. vs. Bombay Dying & Mfg. Co. Ltd. It was held :-

If a mistake of fact apparent from the record of the assessment order can be rectified under S. 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. Prima facie it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If as a result of the said fiction we must read the subsequently inserted proviso as forming part of S. 18-A(5) of the principal Act as from 1-4-1952, the conclusion is incapable that the order in question is inconsistent with the provisions of the said proviso and must be deemed to suffer from a mistake apparent from the record."

This view was affirmed by the Supreme Court in a subsequent decision in The Inspecting Asstt. Commissioner of Agricultural Income Tax and Sales Tax vs. V. M. Ravi Namboodiripad.

In view of these decisions, it is clear that if an order has been passed which is inconsistent with a statutory provision even though brought on statute book subsequently but with retrospective effect such an order would suffer from an error apparent on the face of the record. The question which arises for consideration, however, is whether on such a ground it would be open to this court to review its order passed in the special appeal. The order of the learned Single Judge against which special appeal has been filed was passed in a writ petition made under Article 226 of the Constitution. The Division Bench while hearing the special appeal necessarily exercised the same jurisdiction which had been exercised by the learned Single Judge merged in the order passed by the Division Bench. This order had been passed in the exercise of this court's jurisdiction under Article 226 of the Constitution. In Shivdeo Singh vs. State of Punjab, it was held :

It is sufficient to say that there is nothing in Article 226 of the constitution to preclude a High Court from exercising the power of review which is inherent in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

5. It is settled law that a writ of mandamus is issued directing a subordinate court, tribunal or authority to do a particular thing which in law it is bound to do but is refraining from doing it. A mandamus cannot be issued directing a person to do a certain act in violation of a statutory provision. Since sub-S. (3) of S. 29 has been made retrospective in its operation there can be no manner or doubt that this sub-section was there in the Act even on the date when the mandamus was issued by this Court. In view of the specific provision contained in sub-S. (3) of S. 29 no mandamus could have been issued directing the Sales Tax Officer to refund that part of the sales tax liability in respect of which had been admitted by the assessee in its returns. Since a mandamus was issued notwithstanding the aforesaid statutory provision we are of opinion that the said order can be reviewed in view of the decision of the Supreme Court in *Shivdeo Singhs* case.

6. We accordingly allow this review application and recall the order passed by this court dated 10th of December, 1971 in Special Appeal No. 662 of 1963.

Since in view of the statutory provisions contained in section 29(3) of the U.P. Sales Tax Act the assessee was not entitled to any refund, the judgment of the learned Single Judge allowing the writ petition cannot be sustained.

7. It was urged by learned counsel for the respondent that in view of Rule 71 of the U.P. Sales Tax Rules, the Sales Tax Officer was under a statutory duty to refund the tax in view of the order of the Judge (Appeals) Sales Tax dated 17th December mandamus could be and was rightly issued requiring him to perform his statutory duty. If that be the import of Rule 7 it would be inconsistent with S. 29 (3) in so far as it relates to refund of tax liability in respect of which stood admitted in the returns filed by the assessee. A statutory rule cannot enlarge the meaning of the section; if a rule goes beyond what the section contemplates, the rule must yield to the statute. See *Central Bank of India vs. Their Workmen*, and *Chandra Kumar vs. District Judge*.

8. In the result the special appeal is allowed, the judgment of the learned Single Judge dated 30th July, 1963 is set aside and the writ petition is dismissed. In the circumstances of the case the parties will bear their own costs.