

(1976) 09 AHC CK 0018

In the Allahabad High Court

Case No : Civil Miscellaneous Application of 1975 in Special 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) 40 STC 85

Hon'ble Judges : N.D. Ojha, J; Hari Swarup, J

Bench : Division Bench

Advocate : L.P. Singh, for the Respondent

Final Decision : Allowed

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 along with 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 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 January, 1957, with a direction for passing a de novo assessment order. In between the order passed by the Sales Tax Officer dated 29th December, 1955 and the appellate order dated 5th January, 1957, one of the partners of the firm, viz., Madan Mohan, died on 7th August, 1956, so that the firm stood dissolved. Respondent Ramji Prasad Agarwal 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 March, 1957. An appeal was filed against this order too and was allowed by the Judge (Appeals), Sales Tax, on 17th

December, 1957, on the ground that no assessment could have been made against a dissolved firm. By the same order the amount of tax, if 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 issued 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 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 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 No. 38 of 1975.

2. Before dealing with the submissions made by counsel for the parties it is necessary to point out that by U. P. Act No. 7 of 1959 a new section, being Section 29, was added in the U. P. Sales Tax Act with effect from 1st April, 1959. This Section 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). Section 25 of the Amendment Act provides :

25. Amendment of Section 29.-In Section 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 due 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 proceedings under this Act."

3. It is in pursuance of this newly added Sub-section (3) to Section 29 that the present application has been made as already pointed out above.

4. It has been urged by the learned standing counsel that in view of the newly added Sub-section (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 the 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 has been made retrospective in its operation it will be deemed to have been in existence in the Act right from 1st April, 1959, when Section 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 Section 29.

5. Having heard counsel for the parties, we are of the opinion that the application deserves to be allowed. In *Mohammad Azamat Azim Khan Vs. Raja Shatranji and Others*, , it was held by a Full Bench of this Court that a judgment based on the law as it stood on the 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. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd.*, . It was held :

If a mistake of fact apparent from the record of the assessment order can be rectified u/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 the 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 Section 18-A(5) of the principal Act as from April 1, 1952, the conclusion is inescapable 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.

6. This view was affirmed by the Supreme Court in a subsequent decision in *The Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax and Another etc. Vs. V.M. Ravi Namboodiripad, etc.*, .

7. 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. The order of 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 v. State of Punjab* AIR 1963 S C. 1909, 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 inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave

and palpable errors committed by it.

8. 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-section (3) of Section 29 has been made retrospective in its operation there can be no manner of 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 provisions contained in Sub-section (3) of Section 29 no mandamus could have been issued directing the Sales Tax Officer to refund that part of the sales tax, the 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 the opinion that the said order can be reviewed in view of the decision of the Supreme Court in Shivdeo Singh's case AIR 1963 S.C. 1909.

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

10. 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.

11. It was urged by the 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, 1957 and on his failure to do so a mandamus could be and was rightly issued requiring him to perform his statutory duty. If that be the import of Rule 71 it would be inconsistent with Section 29(3) in so far as it relates to refund of tax, the 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 v. Their Workmen* [1959-60] 17 F.J.R. 57 (S.C.) and *Chandra Kumar Sah and Another Vs. The District Judge and Others*, .

12. 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.