
(1955) 02 MP CK 0005
In the Madhya Pradesh High Court
Case No : C. Rev. No. 25 of 1954

Gwalior Sugar Co. Ltd.

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 05-02-1955

Acts Referred:

General Clauses Act, 1897 — Section 3(8)(b)(II)

Citation : (1957) JLJ 4

Hon'ble Judges : Khan, J;Dixit, J

Bench : Division Bench

Advocate : Veda Vyas and Dubey, for the Appellant;

Final Decision : Dismissed

Judgement

Dixit, J.—This is a petition for a review of our order in Civil Miscellaneous Case No. 9 of 1953. By that decision we held that an order passed by the Gwalior Durbar on 27th July 1946 imposing on the petitioner-company a cane cuss of one anna per maund on all sugarcane purchased by the company was an executive order and not a law under Article 265 of the Constitution and that the said order could not justify the imposition of the cess on the company after 26th January 1950. We issued an order restraining the State of Madhya Bharat from realizing from the petitioner-company any cess due from it after 26th January 1950.

2. This review-petition is founded on the ground that we omitted to consider the question whether the State of Madhya Bharat could at all recover from the petitioner after 26th January 1950 any amount of cess in respect of a period prior to 26th January 1950. It was said that if, as has been held by us, the Durbar order was an executive order and not a law, then under Article 265 no cess in respect of a period before 25th January 1950 could be recovered from the petitioner and that we should have, therefore, made an order restraining the State from making such recovery. It was urged that this Court had jurisdiction to review its order under Article 226. Leaving aside the question whether the provisions of Order 47 Rule 1 apply to an order made under Article 226, on which

I express no opinion and assuming that they do, and we have jurisdiction to review the order, the question for consideration in this case is whether there has been in this case an error apparent on the face of the record so as to entitle the applicant to have his case reviewed. It is true we did not consider the point now urged by the petitioner and passed no order with regard to it. The reason was that the point was not pressed before us by Mr. Veda Vyas learned counsel who appeared for the petitioners in civil Miscellaneous Case No. 9 of 1953. On the other hand at the time of the hearing of that petition Mr. Veda Vyas said before us that he was not challenging the validity of the cess and its recovery from the company before 26th January 1950. I have made the observation in para 6 of my judgment that "Mr. Veda Vyas learned counsel for the petitioners frankly and rightly said before us that he was not contesting the validity of the cess and its recovery from the applicant company before 26th January 1950. He confined himself to the question of its validity after the coming into force of the Constitution. "Mr. Veda Vyas does not dispute the correctness of the above statement. He says that the concession was made in so far as the question of the validity of the levy being repugnant to Article 14 and 19 of the Constitution was concerned and that no concession was made regarding the point that a case levied under an executive order could be collected after the coming into force of the Constitution. I do not mean any disrespect to the learned counsel, when I say that no such reservation was made by him and no arguments were addressed to us on the question whether if the Durbar Order was an executive order any cess amount in respect of a period before 26th January 1950 could be recovered after that date. After making the concession that he did, Mr. Veda Vyas concentrated his attention in showing that order of the imposition of cess on the company after 26th January 1950 could not be justified. The arguments of the learned Advocate General in reply were also restricted to the question of the validity of the cess after 26th January 1950. It cannot, therefore, be maintained that our omission to consider the question raised by the petitioner is an error apparent on the face of the record sufficient to justify a review of the order. Relying on *Mst. Jamana Kuar vs. Lal Bahadur* (AIR 1950 FC 131); *Satya Dev Bushahri Vs. Padam Dev and Others*, and other cases, learned counsel for the petitioner urged that whether the error occurred through court's oversight or counsel's mistake is not a circumstance which can affect the exercise of jurisdiction of the Court to review its decision. These cases only hold that there is an error apparent on the face of the record, then it should be corrected whether it crept through Court's oversight or counsel's mistake. They do not lay down that the omission to raise a point by a party who had an opportunity of raising it or its abandonment in argument is in itself an error apparent on the face of the record. In AIR 1950 FC 131 the error lay in the fact that the High Court had omitted to notice all the items of property included in the printed record regarding which relief had been claimed. In that case counsel had omitted to point out all the items. In *Satya Dev vs. Padam Dev* one of the grounds on which review was sought was that the court's attention was not drawn to the definition of "Central Government" in section 3 (8) (b) (II) of the General Clauses Act,

when the Court held that contract with the Chief Commissioner in a Part C State was not a contract with the Central Government. In the above cases the error existed; it was apparent on the face of the record and the order that was passed was sought to be set aside or varied in review proceedings. In the present case what the petitioner desires is that we should consider a point which was not pressed on his behalf and that consistent with our decision give him further relief arising on the point. It seems to me impossible to hold that an omission to raise a point which, had it been raised might and probably would have given further relief to the party, is a mistake or an error apparent on the face of the record for which a review can be claimed. Order 47 Rule I cannot possibly cover a case where the actual issue has been fully tried by the Court and decided in favour of the party seeking review and afterwards the party discovers from the reasoning of the decision a ground for a relief in respect of a matter which he might have raised and claimed.

3. It was then contended that the order passed by this Court restraining the State from realizing from the petitioner company any cess due from it after 26th January 1950 was wide enough to prohibit the recovery after 26th January 1950 of any cess in respect of a period before 26th January 1950 and that this should be clarified in the review proceedings. If the order has the meaning attributed to it by the petitioner and if the State is collecting from the company any amount of cess for the period before 26th January 1950, then it is open to the petitioner to take appropriate proceedings for challenging the recovery and to contend therein that the order passed by us in Civil Miscellaneous Case No. 9 of 1953 is a bar to the recovery of the amount. Clearly the clarification of an order is not a review of an order. Learned counsel was unable to cite any authority to support the contention that a review-petition is competent for making clear the meaning of an order or a decision.

4. For the above reasons I am of the opinion that no satisfactory reason has been made out for granting this application and it must be refused. As the State intervened without notice of this application, there will be no order as to costs of this petition.

Khan I.

5. This application of review is directed against an order we passed in Civil Miscellaneous Case No. 9 of 1953, in which the petitioner sought a writ in the nature of mandamus under Article 226 of the Constitution of India, for restraining the State of Madhya Bharat from levying a cess on the Sugarcane. We granted partial relief to the petitioner by directing the State Government not to realise the cess after 26th January 1950, because the order under which the cess was being realised was not a law and according to Article 265 of the Constitution, no tax could be levied or collected except by authority of law. In the course of the arguments, Mr. Vyas, the learned counsel for the petitioner had conceded that Article 226 was not retrospective in operation and for this reason he gave up his arguments regarding the levy of the cess that was imposed before the

Constitution came into force. But after we gave our decision in the matter, the petitioner has now thought fit to urge through this application of review that although he conceded that the power to impose tax before 26th January 1950 could not be challenged under Article 226, yet he had argued that collection of such tax was illegal after 1950. So far as we remember the point was not urged or at least the point was not clearly made out. But before we consider the application of review on merits, the first question, which obviously arises for our consideration is whether a review lies of an order passed under Article 226 of the Constitution.

6. My learned brother has not addressed himself to this question and although he has not agreed to the proposition that a review lies, yet assuming that it lies, he is of the opinion that on merits the application is incompetent.

7. But I am quite definite that no application for review of an order under Article 226 of the Constitution can be entertained, and for (his reason I must record my grounds.

8. The learned counsel for the petitioner has urged that applications for the writ under Article 226 are heard under the CPC and because Order 47, Rule 1 of the CPC provides for review, it follows that orders passed in writ applications are revertible. In support of his contention he relies upon AIR 1953 Mad 39 (C. Chenchanna Naidu vs. Praja Seva Transports Ltd). It is true that the Madras High Court has taken view and in doing so they seemed to follow the decision of their own High Court, in Ryots of Garabandho etc. vs. Zamindar of Parlakimadi (ILR 1938 Mad 816). With great respect to the learned judges, I beg to join issue and my reasons in brief are:--

9. (1) That the Madras decision (I.L.R. 1938 816) was not in respect of a writ under the Constitution, but it was one u/s 45 of the Specific Relief Act. Section 45 of the Act empowered the High Courts of Madras, Calcutta and Bombay to make a specific order in the nature of mandamus "within the local limits of its ordinary original civil jurisdiction" and an order made u/s 45 of the Specific Relief Act was an order that could be "executed and appealed from as if it were a decree made in the exercise of the civil jurisdiction of the High Court". See section 48 of the Specific Relief Act. Thus we see that (1) The power conferred on the High Court to pass an order in the nature of mandamus was embodied in a Civil Act, and (2) The order that was passed by the Madras High Court in 1938, was a decree in the exercise of its original civil jurisdiction. Besides this, the Madras ruling of 1938 was in conformity with the Rules made by the Madras High Court u/s 51 of the Specific Relief Act. Rule 5 of the Madras High Court said that subject to the foregoing rules, the provision of the rules with respect to civil suits and matters, shall apply, so far as may be to all proceedings under the Act." Thus the provisions of the CPC were made applicable to proceedings u/s 45 of the Specific Relief Act and one can appreciate the view taken by Sir Lionel Leach, C.J. in the case.

But a writ under the Constitution is not under any Civil Act and is not issued in the ordinary Civil (sic) of the High Court The (sic) to issue a High Prerogative Writ is granted by the Constitution, which confers on the High Court an extraordinary jurisdiction to issue writs or direction. In its scope it is not confined to" only Civil remedies, but its remedial nature extends to Criminal as well as Revenue matters. And the procedure followed in the applications filed under Article 226 of the Constitution is not one prescribed by the Civil Procedure Code, but all the High Courts have made their own rules under which an application is dealt with. In the circumstances, it is difficult to hold that to the writs issued under Article 226 of the Constitution, it is the CPC which applies.

(2) The High Prerogative writs in India are issued by the High Courts under Article 226 of the Constitution and I find no direction in the Article, which empowers the Court issuing it, to recall its order with a view to cancel it, modify it, alter it or vacate it. The only process known to law by which orders once made are altered, modified or vacated is by way of a "review" or "appeal".

10. This brings us to the question whether the power to review an order is inherent in a Court or must there be some statutory provision for the purpose ?

11. In *Drew vs. Willis* (1891) 1 Q.B. 450, it is said that the right to review is not an inherent power. In ILR 22 Cal 419, it is also held that the power of review is not inherent and that the power of review "is a power expressly given to judicial officers and therefore it cannot be assumed that when not so given, it is inherent in every officer." The same view was taken in ILR 34 Cal 677 (*Bajinath Ram Goenka vs. Nand Kumar Singh*). When this case went to the Privy Council, Lord Atkinson pronounced in explicit terms that the power to review was not inherent in a Court. AIR 1919 Mad 244 is also to the same effect. It is useless to multiply authorities on the point but before I go to the next point I propose to place one more fact for consideration. In support of my view that the right of review is a statutory right (like the right of appeal) and not available unless granted by Statute, I would turn to Article 137 of the Constitution, which expressly empowers the Supreme Court to review its orders and judgments. If the right to review had been inherent, then there was absolutely no need to insert this provision in the Constitution.

12. Since the writs provided in our Constitution are imported from English law, it will not be out of place to consider whether a writ issued in England was ever reviewed by English Courts. In going through English cases reported in Halsbury's law of England, Vol. IX (Hailsham edition) under the heading Crown Practice, which deals with the subject of High Prerogative Writs, we have before us the experience of centuries gained by English case in which the order was reviewed. The law relating to writs is believed to be in existence in England since 1215 A.D. and yet not a single case is traceable on the point.

13. In this connection I would also like to refer to an American text book, known as "Extraordinary legal remedies" by Ferris. It is an American publication by

Thomas Law Book Co., St. Louis, tenth edition. On page 310 of the book, the following passage throws light on the subject under consideration:--

Under the early Common Law, proceedings in Mandamus were not reviewable, but the modern practice and statutes generally in existence, the granting or refusing of the writ is subject to review.

14. This passage shows that there is some statutory provision in American Law for the review of writ. This fortifies me in the view that I take of the matter that unless review is provided for by some statute, orders in writ applications are not subject to review. A similar view has been taken by a Division Bench of this High Court at Indore in Civil Miscellaneous Case No. 7 of 1982 of which I happened to be a member and I adhere to the view expressed in it.

15. As there is no statutory provision for the review of orders under Article 226 of the Constitution, the review application must fail and it is not necessary to consider it on merits.

16. In result the application is rejected and as the State intervened without notice, no order as to costs is made.