(2009) 10 KAR CK 0003

In the Karnataka High Court

Case No : S.T.R.P. No. 5 of 2009

Hukumchand and Co. APPELLANT

Vs

State of Karnataka and Another RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Citation : (2011) 37 VST 341

Hon'ble Judges : L. Narayana Swamy, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : K.G. Kamath for M/s. Kamath and Kamath, for the Appellant; Geetha Menon, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—This revision petition u/s 23(1) of the Karnataka Sales Tax Act, 1957 (for short, "the Act") directed against the order dated October 31, 2008 in S. T. A. Nos. 39 of 2008 and 40 of 2008 passed by the Karnataka Appellate Tribunal, Bangalore, which is an order in the series of second round orders invoking the jurisdiction u/s 25A of the Act through an application dated September 17, 2007 which was an application enabled by the observations made by the Karnataka Appellate Tribunal at Bangalore as per its order dated April 30, 2007 before whom the assessee-dealer had tried its chance by a like application u/s 25A of the Act.

2. The rectification application was filed in respect of an ex parte assessment order dated February 25, 2000 which was affirmed in the first appeal by the Joint Commissioner, suffered the same fate in the second appeal before the appellate Tribunal and was also unable to get over these orders as the dealer''s revision petition S. T. R. P. No. 76 of 2005 was dismissed as per order dated December 7, 2005 passed by this court.

3. With all these failed attempts, the matter should have seen its end, but the enterprising, undaunted assessee chanced its arm by filing an application u/s

25A of the Act before the Karnataka Appellate Tribunal, contending that the original assessment order passed by the assessing authority determining the liability of the assessee in respect of inter-State sales turnover which had been taxed at ten per cent was not correct; that the assessing authority had passed the order under the mistaken impression that it was at ten perent whereas in reality in terms of the Government Notification No. FD 32 CSL 86(5), Bangalore, dated March 26, 1986, the rate of tax in respect of sale of cardamom to a situation covered under clause (b) of sub-section (2) of section 8 of the Act, was four per cent and the assessee claiming that its case was covered under this notification, mistake was required to be rectified and further as the Tribunal was the highest fact finding authority in the hierarchy of the assessment procedure and the appeals, the application had been filed before the Tribunal.

4. The Tribunal dismissed the application as per the order dated April 30, 2007 (copy at annexure E) passed in ST (Rectification) Petition Nos. 2 and 3 of 2006 in S. T. A. Nos. 516 and 517 of 2002, inter alia, observing that the applications were not maintainable, but it would be more appropriate or apt for the dealer to take his chances by filing such an application before the assessing authority himself and not to trouble the appellate Tribunal.

5. It is thereafter the assessee had gone through before the assessing authority with an application which came to be dismissed, etc., and has come up to this court now invoking jurisdiction of this court u/s 23(1) of the Act.

6. Submission of Sri Kamath, the learned counsel for the petitioner, is that the petitioner-dealer is entitled to claim the benefit of section 25A of the Act for the simple reason that the merits of the claim of the petitioner had never been examined by any of the appellate authority and even by this court in the revision petition in the earlier round; that the assessment order had not been affirmed on the merits to attract the principles of merger, but the appeals, revisions have all been dismissed only on the ground of limitation and therefore it was still open to the dealer to seek for rectification of the mistake that had occurred in the passing of the ex parte assessment order if the assessing authority had proceeded on the erroneous premise that the rate of tax applicable to the assessee was ten per cent whereas actually in terms of the notification referred to above it was only four per cent and therefore the order eminently merited rectification even u/s 25A of the Act.

7. It is also submitted that the first appellate authority and the second appellate authority, the Tribunal, have overlooked this aspect of the matter and even on the rejection of the application on the ground of limitation, has not examined the contentions on behalf of the dealer that this was a fit case where the benefit of section 5 of the Limitation Act or in the alternative section 14 of the Limitation Act should have been extended to the dealer, particularly, when the dealer was bona fide prosecuting on the merits of the assessment order in the first round and had woken up in the second round only for rectification jurisdiction and even otherwise it is submitted that the concept of condoning the delay in invoking a

statutory provision or remedy when the delay could be bona fide explained as is contained u/s 5 of the Limitation Act should have been extended to the present case, the delay condoned and section 25A application examined on the merits rather than throwing out the application at the threshold without any examination.

8. As notices had been issued to the respondents, Ms. Geetha Menon, the learned Additional Government Advocate has appeared for the respondents. We have given opportunity of hearing to the learned Additional Government Advocate.

9. Submission of Ms. Geetha Menon, the learned Additional Government Advocate appearing for the State, is that the application u/s 25A of the Act had in fact been filed beyond the period of limitation; that the provisions of sections 5 and 14 of the Limitation Act have no application to the statutory provision such as section 25A of the Act.

10. We have examined the rival submissions.

11. We find, in the first instance, that there was no scope for making an application u/s 25A of the Act and we also find that the observations made by the Karnataka Appellate Tribunal before whom such an application had been filed by the petitioner in the first instance and which had come to be dismissed by the Tribunal as per its order dated April 30, 2007 (copy at annexure E) is a most uncalled for, injudicious observation, particularly, when the appellate Tribunal was dismissing the application as not maintainable.

12. We strongly deprecate the impropriety and injudicious manner in which the Tribunal had embarked upon making irrelevant, uncalled for observations in its order dated April 30, 2007.

13. Be that as it may, we find that the present situation is one in respect of which the provisions of section 25A of the Act, i.e., the rectification juris diction, could not have been invoked at all. We say so for the reason that the assessee had carried the matter in the first round up to this court by availing of the first appeal, second appeal and the third revision petition to this court in the very jurisdiction in which the assessee has reached this court in the present round of litigation.

14. All appeals and revision petitions were dismissed and therefore the so-called ex parte assessment order of the assessing authority did not remain independently and available for the assessing authority to rectify assuming that there was any mistake.

15. We secondly find that the contention of the learned counsel for the petitioner that it was a case of mistake is also not correct for the simple reason that if the authority assuming wrongly or incorrectly proceeded to determine the tax liability of the petitioner-dealer in terms of the provisions of section 8(2) (a) of the Act and though Sri Kamath, the learned counsel for the petitioner, would

vehemently urge that it was a clear case to which provisions of section 8(2)(b) of the Act apply that was not the subject-matter for rectification, but is only subject-matter for appeal or revision and such an error of law could not have been sought for being rectified in an application u/s 25A of the Act.

16. We find the application u/s 25A of the Act was clearly barred by limitation and neither section 5 nor section 14 of the Limitation Act can rescue the matter of this nature when an application is filed beyond the period of five years as stipulated in the statutory provision, i.e., u/s 25A of the Act itself which reads as under;

25A Rectification of mistakes.--(1) With a view to rectifying any mistake apparent from the record, the assessing authority, appellate authority or revising authority, may at any time, within five years from the date of an order passed by it, amend such order :

Provided that an amendment which has the effect of enhancing an assessment or otherwise increasing the liability of the assessee shall not be made unless the assessing authority, appellate authority or revising authority, as the case may be, has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :

Provided further that where an application is made by an assessee for rectification of any mistake in an order, as being apparent from the record and, such application has not been rejected by the assessing authority within sixty days from the date of receipt of the application, the order shall be deemed to have been amended rectifying such mistake.

(2) Where an order has been considered and decided in any proceedings by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.

(3) An order passed under sub-section (1), shall be deemed to be an order passed under the same provision of law under which the original order, the mistake in which was rectified, has been passed.

17. We have no doubt in our mind that section 5 or section 14 of the Limitation Act cannot be invoked in respect of the application filed beyond the period of five years invoking the jurisdiction u/s 25A of the Act.

18. There is absolutely no merit even for admission of this revision petition and it is accordingly dismissed.

