

(1972) 08 MAD CK 0025

In the Madras High Court

Case No : Civil Revision Petition No's. 1696 etc. of 1970

Melur G. Venkatappa and Sons

APPELLANT

Vs

T.V.R. Ramalingam Pillai and Sons

RESPONDENT

Date of Decision : 31-08-1972

Acts Referred:

Central Sales Tax Act, 1956 — Section 9, 9(2)

Limitation Act, 1908 — Article 64

Limitation Act, 1963 — Article 24

Citation : AIR 1974 Mad 186 : (1973) 32 STC 274

Hon'ble Judges : V. Ramaswami, J;Ramanujam, J

Bench : Division Bench

Judgement

Ramanujam, J.—These revision petitions arise out of suits filed by the various plaintiffs, respondents in each of the revision petitions for

recovery of amounts collected from them by the defendants in each of the suits as Central sales tax in respect of certain sales of arecanuts effected

by the defendants to the plaintiffs who are dealers at Thiruvavur, Madras State. As all the above revision petitions raise the same question of law,

they have to be dealt with together.

2. The defendant in each of the suits is dealer in arecanuts at Shimoga in Mysore State. They have been selling arecanuts to the plaintiffs during the

years 1961 to 1964. the defendants as sellers have been charging and collecting Central sales tax from the plaintiff on their sales of arecanuts on

the basis that the transactions were inter-State sales attracting the levy of sales tax under the Central Sales Tax Act, 1956. The tax thus collected

has been shown separately in the various invoices issued by the defendant in each of the suits. The sales tax collected by the defendants from the

plaintiffs had been originally remitted by the defendants to the Mysore Sales Tax Authorities. Subsequently, the Supreme Court on 10-11-1964,

held in *State of Mysore Vs. Yaddalam Lakshminarasimhaiah Setty and Sons*, , that though Section 6 of the Central Sales Tax Act is the charging

section, the liability to pay tax is subject to the other provisions of the Act, that Section 9(2) provides that tax shall be calculated at the same rates

and in the same manner as would have been done if the sale had in fact, taken place inside the appropriate State, that, the tax under the Central

Act, shall be levied in the same manner as the tax on the sale or purchase of goods, under the general sales tax law of the State is assessed, paid

and collected, and that, therefore, if no tax was exigible in respect of the same transactions under the Mysore Sales Tax Act, no tax was payable

under the Central Act. Relying on the said decision, the sales tax authorities of Mysore State refunded the tax collected on inter-State sales of

arecanuts to the defendants in or about 1967. The plaintiffs who became aware of the said refund of the tax have filed various suits in the year

1969 for recovery of the amounts paid by them as sales tax from the defendants. According to them the Central sales tax has been paid by them

under a mistaken impression that the Central sales tax was leviable on the inter-State sales of arecanuts by the Mysore dealers. However, with a

view to get over the decision of the Supreme Court referred to above, the ""Central Sales Tax (Amendment) Act, 1969"" (Central Act 28 of 1969)

had been enacted by the Parliament under which Section 9 of the Principal Act was amended with retrospective effect, so as to enable the levy of

tax on inter-State sales whether such sales are exigible to tax in the concerned State or not, and all the assessments made already had been

validated notwithstanding any decree or order of any court to the contrary.

3. The defendants had resisted the suit on various grounds. One of the grounds raised was that they did not get any refund of the tax from the sales

tax authorities. But the trial court did not accept that plea but held that on consideration of the evidence the defendants had got refund of the sales

tax paid by them from the sales tax authorities in pursuance of the decision of the Supreme Court referred to above. In these revisions the factum

of refund of tax was not disputed before us.

4. The other defences taken were (1) that the suits are barred by limitation as

they have been filed more than 3 years after the payment of the tax;

(2) that the trial court had not jurisdiction to try the suits and (3) that in any event, the suits are not maintainable in view of Central Act 28 of 1969.

These defences were considered by the trial court in detail but were rejected. We, therefore, proceed to consider the said contentions seriatim.

5. The learned counsel for the revision petitioners contends that the sales tax amounts refunded to the defendants by the Mysore sales tax

authorities are not moneys had and received for the plaintiffs' use and that therefore, the plaintiffs cannot rely on Art. 24 of the limitation Act of

1963. According to the learned counsel the suits should have been filed within three years from the actual date of payment of the tax and that the

suits having been filed in 1969, long after the said period of three years, they are barred by time. Therefore, the first point for consideration is

whether Art. 24 applied to the facts of these cases. That Article provides a period of three years from the date when the money is received for suit

of the description "'for money payable by the defendant to the plaintiff-for money received by the defendant for the plaintiffs; use'". In *Royal Bank of*

Canada v. R., 1913 AC 283 Viscount Haldane has laid down the legal principle thus :

It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs

to another, under circumstances which rendered the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for

money had and received to this use.

6. The above principle has been adopted in this country also-Vide *Md. Wahib v. Md. Ameer*, ILR (1905) 32 Cal 527 and *A. Venkata Subba*

Rao Vs. State of Andhra Pradesh, . In *Johari Lal and Another Vs. The Bihar State Co-operative Bank Ltd.*, , it has been held that where money is

received by the defendant from a third person directly or impliedly for and on behalf of the plaintiff that will be a clearest case for the application of

Art. 62 of the Limitation Act of 1908. In *State of Andhra Pradesh Vs. Isukapalli Gangaraju and Others*, , the court has observed--.

Therefore, I hold that to the present case which is a suit for money illegally collected by the Government from the plaintiff, Art. 62 of the first

Schedule to the Indian Limitation Act, applies. The cases, which are binding on

me have pointed out that when the money was received by the defendant, it need not have been in fact received for the plaintiffs use. When the exaction is illegal, the court applies a fiction that the defendant received the money for the plaintiff's use, because the defendant in justice and equity is bound to refund it to the plaintiff and has no right to retain it.

In *A. Venkata Subba Rao Vs. State of Andhra Pradesh*, , their Lordships of the Supreme Court have held that in order to attract Art. 62 of the Limitation Act, 1908, which corresponds to Art. 24 of the Limitation Act, 1963, it is not necessary that at the moment of the receipt of money the defendant should have actually intended to receive it for the use of the plaintiff and that it is sufficient if the receipt is in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded. In the light of the principle enunciated in the above decisions we cannot agree with the contention put forward on behalf of the petitioners that the refund of the tax by the sales tax authorities to the defendants cannot be said to be for the benefit of the plaintiffs. It is not in dispute that Central sales tax was collected by the petitioners under a mistake of law. If really the plaintiffs are not liable in law to pay tax in respect of their purchase of arecanuts from the defendants, collection of the amounts by the defendants should be held to be unauthorised and the plaintiffs are entitled to get back the same. The fact that the sales tax authorities refunded the amount to the defendants cannot mean that they are entitled to the benefit of these amounts. The trial court finds specifically that the refunds have been actually made by the sales tax authorities to the defendants in November-December, 1967 and there is no contra evidence on the side of the defendants. Therefore, the suits having been filed in 1969 well within the period of three years from December, 1967, when the defendants got the refunds, they are within time.

7. Then we come to the question of jurisdiction. While the plaintiffs would state that the cause of action for the suits arose within the jurisdiction of the trial court, the defendants would state that it was the court at Shimoga in Mysore State that would have the exclusive jurisdiction to entertain and try the suits in question. On the facts it is seen that the Shimoga merchants have sent the goods in question by lorry and the goods have been

taken delivery of by the plaintiffs at Thiruvavarur after honouring the hundies sent by; the Shimoga merchants through the bank and retiring the lorry

receipt at Thiruvavarur. Though it is said that there was prior offer or acceptance had been produced before the court. But from the invoices marked

in evidence it is seen that the purchases have been made by one broker and that brokerages had been included in the invoices. In the reverse of the

invoices there is a printed clause to the effect that all claims and disputes arising out of the transactions are subject to the jurisdiction of the court at

Shimoga. From this clause it is sought to be contended by the petitioners that it is only the court at Shimoga that will have jurisdiction. Reliance is

placed on a decision of a Division Bench of this court in Hoosen Kasam Dada (India) Ltd. Vs. Motilal Padampat Sugar Mills Co. Ltd., by the

learned counsel for the petitioners. That was a case where the contract contained this clause ""All disputes in respect of the contract shall be settled

by arbitration, failing which shall be settled in court of the seller's jurisdiction, where the contract shall be deemed to have been entered into"". In

construing that clause the court held that--

Where there are two competent Courts which can deal with the subject matter of a litigation, it is open to the parties to a contract to agree that

disputes in respect thereof should be adjudicated upon by one of the two competent Courts and such an agreement is perfectly legal and not

contrary to the provisions of the Contract Act.

That was a case where there was a specific mention in the contract itself that one court shall have jurisdiction and the other court shall not have

such a jurisdiction. In this case there is no contract forthcoming and we are not in a position to say whether there was a specific agreement

between the parties excluding the jurisdiction of the court at Thiruvavarur and conferring the exclusive jurisdiction on the courts at Shimoga. From the

facts set out above, there cannot be any doubt that part of the cause of action has arisen at Thiruvavarur, and normally the court at Thiruvavarur will

also have jurisdiction to entertain the suits, unless by agreement of parties the jurisdiction of that court is specifically excluded. It is true that there is

a printed clause in the back of the invoices to the effect that all claims and disputes arising thereunder are subject to the jurisdiction of the court at

Shimoga. But there is no evidence in this case as to whether the plaintiffs were

made aware at all of the existence of this clause in the invoices, and whether the plaintiffs really agreed to exclude the jurisdiction of the Thiruvarur court in respect of the transactions in question.

8. In *Patel Bros. Vs. Vadilal Kashidas Ltd.*, , Ramachandra Iyer, J. (as he then was) dealt with a similar case. There the bill issued by the defendant to the plaintiff with the words at the top "subject to Bombay jurisdiction" was produced. On the question whether that clause excluded the jurisdiction of the court within whose jurisdiction the buyer resided, the court held that mere printing of the words "subject to Bombay jurisdiction" in a bill could not amount to a contract that both parties agreed to have Bombay as the only venue for the settlement of the disputes, that the mere recital on the top of the bill could be incorporated as a term of the contract and that ouster of jurisdiction of a court to which a person is entitled to resort to under the CPC or any other statute cannot be a matter of assumption or presumption but one to be proved by express words contained in the contract or atleast by necessary or inevitable implication. The learned Judge in that case distinguished the earlier decision in *Hoosen Kasam Dada (India) Ltd. Vs. Motilal Padampat Sugar Mills Co. Ltd.*, on the ground that there was a specific term in that contract excluding the jurisdiction of the court and that clause specifically excluded all other courts except the court within whose jurisdiction the seller resided. with respect, I am inclined to follow the reasoning of Ramachandra Iyer, J. (as he then was) and hold that in this case a printed clause in the invoices has not been shown to be a term of the contract between the parties and that, in any event, the clause does not expressly or by necessary implication exclude the jurisdiction of the courts other than the courts at Shimoga.

9. The leaned counsel for the petitioners places considerable reliance on the following passage in Chitty on ""Contracts"" 23rd Edn. Volume I, at page 277:

Course of dealing, Conditions will not necessarily be implied into a contract by reason of a previous course of dealing, which has been subject to similar conditions, between the parties. But they may be implied where each party has led the other reasonable to believe that he intended that their rights and liabilities should be ascertained by reference to the terms of a

document which had been consistently used by them in previous transactions.

10. Relying on the above passage what the learned counsel contends is that the printed clause in the invoices should be treated as a term of the contract between the parties in view of the previous transactions between the parties wherein such invoices have been used leading to the inference that the plaintiffs as purchasers should have been aware of the above clause in the invoices and that the rights and liabilities have to be ascertained with reference to the terms set out in the invoices which have been consistently used by the defendants even in previous transactions. We are not inclined to agree with this contention of the learned counsel that the printed clause in the invoices should be taken to be a term of the contract without any proof of the purchasers being made aware of the said clause before the contracts of sale were entered into. As already stated, the transactions seem to have been arranged by the brokers and there is no knowing as to whether the purchasers have at all noted this clause which is found in the invoices. Therefore, the trial court's view that it had jurisdiction to entertain and try the suits has to be upheld.

11. The learned counsel for the petitioners then argues that the suits are not maintainable in view of the Central Act 28 of 1969. It is contended that as this Act has validated all levies made under the Central Sales Tax Act, 1956 and has also provided that no proceeding shall be maintained or continued in any court for the refund of sales tax paid, the plaintiffs are disentitled from making any claim against the defendants for refund of the sales tax. We are of the view that the above contention is misconceived. By means of the amending Act, sub-section (1A) was added to Section 6 and Section 9 was recast in the principal Act and such incorporation is deemed to have been always there in the principal Act. Section 6(1-A) provides that a dealer shall be liable to pay tax under the Act on sales of any goods effected by him in the course of inter-State trade or commerce notwithstanding that no tax would have been livable (whether on the seller or the purchaser) under the sales tax law of the appropriate State if that sale had taken place inside the State. Section 9 of the amending Act validates assessment, reassessment, levy or collection of any tax made or any action or thing done in relation to such assessment, re-assessment, levy or

collection under the provisions of the principal Act before 9-6-1969, and Section 9(1)(a) provides that all acts, proceedings or things done or taken by the Government or by any officer of the Government or by any other authority in connection with the assessment, reassessment, levy or collection of such tax shall, for all purposes, be deemed to be, and to have always been, done or taken in accordance with law. Clause (b) provides that no suit or other proceedings shall be maintained or continued in any court or before any authority for the refund of any such tax, and clause (c) provides that no court shall enforce any decree or order directing the refund of any such tax. the suits contemplated by clause (b) of Section 9 of the amending Act are suits filed against the State for refund of tax paid and it will not apply to the suits in question where one party claims from another the amount which has been wrongly collected from him.

Therefore, it cannot be said that the suits as such are not maintainable in view of the provisions of the amending Act.

12. Of course, the defendants can successfully resist the suit if it is shown that in enforcement of the provisions of the amending Act there has been

a reassessment of the turnover in question in their hands and that the amounts refunded earlier had been paid back to the State towards the sales

tax liability as re-assessed. Unless the sales tax authorities at Mysore make a reassessment and recall the order of refund, the provisions of the

amending Act will not entitle them to call back the amount which they had refunded to the defendants. The amending Act merely validates

assessments, reassessment, levy or collection of tax already made and that will not enable the authorities to go behind the order of refund unless

there has been a re-assessment bringing to charge the inter-State transactions in question on the basis of the amending Act. In *M. M.*

Muthukaruppan Chettiar v. Dy. Commercial Tax Officer, (1960) 11 STC 220 this court, while construing a similar validating provision in Section

17 of the Madras General Sales Tax (Third Amendment) Act of 1956, had expressed the view that the validating Act will not enable the collection

of the refunded amount unless there are clear words to that effect in the amending Act. In that case, a hotel proprietor was assessed to sales tax for

1953-54 at the enhanced rate of tax of 4 1/2 pies in the rupee under the proviso to Section 3 (1)(b) of the Madras General Sales Tax Act, 1939.

Later the said proviso to Section 3 (1)(b) was held to offend Art. 14 of the Constitution by the High Court. In view of the said decision the

Tribunal held that the assessee was liable to be taxed only at 3 pies in the rupee. On the basis of the order of the Tribunal which became final, a

certain sum was refunded to the assessee in September, 1956. Subsequently the proviso to Section 3 (1)(b) was replaced with retrospective effect

by another proviso and the earlier assessments were validated. Thereafter the assessing authority issued a notice to the assessee requiring him to

repay the sum refunded to him on the ground that by reason of the amendment made retrospectively the refund made was not proper. That

demand was challenged by the assessee before this court, and this court expressed the view that--

When the excess over three pies per rupee was refunded to the petitioner, it was an amount lawfully due to him and was properly paid. The only

question is, whether the payment had become unlawful or could be deemed to have been made under a mistake of law. If exhypothesi the refund

was due it was due because of the judgment of this court upholding the objection of the validity of the charging provision; there could be no

mistake in law in making the refund and the mere fact that the proviso has been re-enacted with retrospective effect cannot have the effect of

rendering the refund then made either illegal, unlawful or one under a mistake of law..... I consider that the demand for the repayment of the

amount refunded is not justified by law, and that the petitioners are entitled to the relief which they seek by these petitions.

A similar view has been taken in *Sundaram Iyengar and Sons v. Dy. Commercial Tax Officer*, (1960) 11 STC 443, in respect of amending Act 17

of 1954. We are, therefore, of the view that the validating Act 28 of 1969 will not enable the collection of the refunded amount straightway.

13. The learned counsel for the petitioners perhaps realising the above position wanted to submit that in all these cases there has been re-

assessments in pursuance of the amending Act bringing to charge the transactions in question and that orders of refund had in fact been recalled

and demands have been issued for payment of the tax as re-assessed. In fact he has filed affidavits enclosing certain re-assessment orders and

correspondence that passed between the defendants and the sales tax authorities at Mysore in support of his statement that there have been re-

assessments bringing to charge the transactions in question had that they have been made liable to pay the sales tax in respect of the said

transactions. The documents filed along with the affidavits show that the assessments of the petitioners in C. R. P. Nos. 1749, 1823, 1824, 1825

and 1826 of 1970 have been reopened for some of the assessment years in question. In C. R. P. Nos. 1937 and 1938 of 1970 more affidavits

have been filed by the assesseees stating that they have received show cause notices from the sales tax authorities requiring them why the

assessments should not be rectified and why the amounts refunded should not be recalled. But the said affidavits do not indicate as to what is the

assessment year to which the proposed re-assessment proceedings and the demands related. It is not, therefore, possible to act on those affidavits

and hold that the defendants have been re-assessed in relation to the transactions in question which took place in the assessment years 1961-62,

1962-63 and 1963-64. In the other cases no material of any kind has been produced to establish that the petitioners have been reassessed in

respect of the transactions in dispute. Therefore, except for the cases in which some materials have been produced to show that re-assessments

have been made and the refunded amounts have been called back by the sales tax authorities. In those cases where no materials have been

produced, the decree and judgment of the trial court have to be upheld. In C. R. P. 1827 of 1970 certain re-assessments orders have been filed

but they show that the assessee is one Moola Rangappa. The petitioner in C. R. P. 1827 of 1970 is one Moolarangappa and Co. Therefore the

above documents are not relevant for establishing that the petitioners in C. R. P. 1827 of 1970 has been re-assessed by the Mysore Sales Tax

Authorities during the relevant assessment years. In respect of the C. R. Ps in which materials have been placed to show that there has been re-

assessments, the matters have to be remitted to the trial court for finding out whether the re-assessment covers the entire period and the

transactions in dispute, and to dispose of the cases in the light of the consideration of the above material. Therefore C. R. Ps. 1749, 1823, 1824,

1825 and 1826 of 1970 are remanded to the trial court for fresh disposal. The documents filed in the above C. R. Ps. Will be sent to the trial court

and the trial court is directed to receive the same and consider the matters afresh in the light of the oral evidence that may be adduced by the

parties in relation thereto. The other civil revision petitions are dismissed. There will be no order as to costs in any of these petitions. This decision

will not prejudice the right of the defendants to get back the amounts decreed as and when they are re-assessed and forced to pay the sales tax on

the transactions involved in any of the suits.

14. Order accordingly.