(1976) 10 RAJ CK 0021

In the Rajasthan High Court

Case No : Civil Writ Petition No''s. 1812 and 1813 of 1972

M.H. Shah APPELLANT

Vs

The State of Rajasthan RESPONDENT

Date of Decision : 12-10-1976

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 32, 369
Contract Act, 1872 — Section 230

Citation : (1976) RLW 620 : (1976) WLN 759

Hon'ble Judges : M.L. Jain, J;A.P. Sen, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.L. Jain, J.—This judgment will dispose of the above mentioned two writ petitions.

2. The petitioner was appointed as the authorised auctioneer of the Western Railway for conducing the auction of coal and, half burnt coal and scraps (sic) the Union of India under the supervision of the District Controller of Stores, Western Railway, Ajmer during the years 1962, 63 and 1963-64 under an agreement dated 7th April, 1962 Condition No. 17 of this agreement was that the auctioneer will be responsible to recover from the purchasers sales tax and other charges, if any, leviable on such sales conducted by him or obtain necessary licence or permission from the concerned Government. The assessee collected sales tax firm, the buyers in pursuance of this arrangement and also deposited the amount with the Government, but of course under a protest that he was not a dealer and that he was entitled to refund of the tax paid by him.

3. In the year 1963, the petitioner worked as a sole proprietor in the name of Messers. M.N. Shah Contractors. He was assessed to tax by the Sales Tax Officers Ajmer, in respect : of the auctions conducted by him by two separate orders dated 3-12-1968 at the rate 2%. One order relates to the period 1-4-1962 to March 31, 1963 and the amount assessed was Rs. 22,762 90/- paise

against which Rs. 23,000/- had been deposited on 25-9-1963. Second order relates to the period from 1st Apri1 1963 to 2-10-1963 and the amount of tax assessed was Rs. 17,139.70 paise. This amount was deposited on 28.11.1963 and 13.12.1963. Upon an objection raised by the Accountant General regard-ing the rate of tax, notice u/s 12 of the Rajasthan Sales Tax Act, 1954, (hereinafter called ''the Act'') was issued for re-assessment. The petitioner was re-assessed by due order of the same authority dated 10-9-1965 for the aforesaid two periods of assessment. The rates of tax now applied were 5% and 6% respectively. Since tax bad already been levied at 2%, it was re assessed at 3% and 4% more respectively and an amount of Rs. 63.423.75 paise was found was payable against which no deposit was made. An appeal was filed against the re assessment order to the Deputy Commissioner, Commercial Taxes Department, which was rejected by him on 19-6-1966.

4. For the period 21-4-1963 to 31st March, 1964 the business seems to have been converted into a partnership business in the name of Messrs. M.H Shah & Company. The petitioner M.H. Shah functioned as a partner. For this period the firm was assessed on 1-10-1964 at 2% instead of 6%. The amount of tax payable was determined at Rs. 21, 25494 paise. This amount was paid on two different dates, namely, 15-9-1984 and 22-12-1984. The assessee was re-assessed on 10-1-1985 and she revised demand was raised at Rs. 24, 067/64 paise more at the rate of 4%. Against this, an amount of Rs. 10,000/-was deposited on 5-2-1986. An appeal was filed against the re assessment order which was rejected by the Deputy Commissioner, Commercial Taxes Depart-merit on 19-5-1956.

5. The petitioners then filed two revisions Nos. 273 and 274 of 1966 in the Board of Revenue. Ajmer, The revision No. 273 related to the re-assessment for the year 1962-63 and the revision No. 274/1966 related to re-assessment for the year 1963-64. One more revision No. 275/1986 was filed but that is not relevant for our purpose. The Board of Revenue by its order dated 28-4-1967 held that the petitioners were not dealers and the re-assessment proceedings were not justified. The Board accepted the revision petitions, set aside the orders of the subordinate authorities on that ground and directed that the tax may be realised from the actual owner of the goods namely, the Western Railway.

6. The Commercial Taxes Officer, Ajmer, filed applications under Sub-section (1) of Section 15 of the Act for reference but the Board of Revenue failed to dispose of those applications within the then prescribed period of 120 days. The said Commercial Taxes Officer then filed two applications u/s (sic) of the Act before this Court which by its judgment dated 17-4-1969 refused to direct the Board to state a case as the Court agreed with the view that the petitioners were not a dealer within the meaning of Section 2(f) of the Act no as to make them liable to payment of sales tax.

7. The petitioner then applied to the Commercial Taxes Officer, Ajmer on 2-2-1970 for the refund of the entire amount or tax deposited by the petitioner.

The Commercial Taxes Officer did make no order and the petitioner filed another application with a similar request on 29-6-70. Reminders were also given on 16-3-71 & 5-8-71. Eventually the Commercial Taxes Officer made an order on 19-1-1972 that the tax cannot be refunded on account of the provision of Section 23B of the Act which had been inserted with effect from 4-5-1964 and according to which the tax can be refunded only to the persons from whom it was recovered by the assesses and not to the assessee.

8. Thereupon, two writ petitions were filed on 20-10-1972 in the court; (1) by Messrs M.H. Shah which is Writ Petition No. 1812/1972 and (2) by M.H. Shah and Co., which is Writ Petition No. 1813/1972, praying that Section 23B of the Act be declared ultra vires the Constitution and the order of the Sales Tax Officer dated 19-1-1972 be quashed and the respondents be directed to refund the amounts deposited by the petitioners as sales tax under the Act.

9. Arguments for the petitioners were addressed by Mr. N.M. Kasliwal mainly but Mr. S.M. Mehta, who has a similar point to urge in another case, was also allowed intervene and address the court. The learned Counsel for the revenue raised a preliminary objection that the writ petitions were belated and should be rejected on the ground of laches as having been filed after the period of limitation had expired. This period according to Article 113 of the Limitation Act is three years from the date when the right to sue accrued that is when the mistake was known. The mistake came to be known to the petitioner at least on 17-4-1869 when the High Court rejected the reference applications which petitions were filed on 20-10-1972. He relied in this connection upon State of Madhya Pradesh Vs. Bhailal Bhai and Others, . In this case, it was observed:

The provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. However, the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be brought, may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The Court may consider the delay unreasonable, even if it is lees than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period it will almost always be proper for the court to bold that it is unreason able.

10. In the State of Kerala v. Aluminium Industries Ltd. (1965) 16 STC 689 , M.K. Krishnaswamy, etc. Vs. The Union of India (UOI) and Another, and D. Cawasji and Co. and Others Vs. State of Mysore and Another, the Supreme Court appears to have endorsed the rule laid down in Bhailal Bhai''s case.

11. The learned Counsel for the petitioner on the other hand submitted that the remedies under Articles 32 and 226 of the Constitution are extraordinary remedies provided by the Constitution, and the rule of limitation cannot be applied to each petitions, though while granting or refusing relief''s, the courts may consider whether such powers be exercised or not in cases which are fairly belared. He referred us to Tilokchand and Motichand and Others Vs. H.B. Munshi

and Another, . In this case the Supreme Court was dealing with the writ petitions under article 32 Sikri and Hegde JJ. were of the view that the decision in the aforesaid two cases could not be applied to petitions under Article 32. Bachawat and Mitter JJ. held that the measure of delay shall be the same whether the petition is under Article 32 or Article 226. Hidayatullah C.J; however, struck a middle course. He observed that the question is one of discretion for the court to follow from case to case. There is no lower limit and there is no upper limit.

12. In Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, also the court was dealing with a petition under Article 32 of the Constitution. It observed that the rule is not a rule of law but a rule of practice and there is no inviolable rule that whenever there is delay the Court must necessarily refuse to entertain the petition.

13. We have considered this matter and it appears to us that if a petition is filed beyond time within which a suit could be brought, then ordinary the delay would be considered unreasonable and almost always it should be so held. But at the same time, it is more a rule of prudence than of law as the court cannot go into the niceties of the provisions of the Limitation Act because then it will be called upon to enter into controversies which cannot conveniently be decided in writ proceedings. The statue of limitation applies not in terms but by analogy to such a petition The State Legislatures are not empowered to circumscribe the powers under Articles 32 and 226 by laying; down a limitation of time during which case such petitions could be brought. The period of limitation prescribed by the Limitation Act will usually be applied in the absence of special circumstances and only where the remedy sought is akin to a relief which can be claimed in a suit. That it to, say that the statute or limitation is strictly not applicable to all the cases coming under Article 226 of Article 32 of the Constitution. There may be cases in which the relief claimed under a petition under Article 226 or 32 of the Constitution may not correspond to a remedy available in a suit and even in cases where the remedy so corresponds, special circumstances may justify a departure from the provisions of the Limitation Act. That being so, it is not possible to adopt any hard and fast line in this matter. Indeed in Surajmal v. State of Rajasthan RLW 1973 635 a Division Bench of this Court stated the rule in the following manner:

Save in exceptional cases, if a petitioner comes to a court of law after the period of limitation prescribed by particular relief the court would ordinarily decline to grant it on the ground of delay and it does not make any difference whether the relief claimed is claimed in regard to fundamental rights or otherwise.

14. We are in respectful agreement with this view as we are unable to find any reason to differ. It therefore, appears to us that the claim of she petitioners cannot be thrown out right on the ground that a suit was barred by time on the date when these petitions were made.

15. Learned Counsel for the Revenue next submitted that even if the rule of

limitation were not applied, the claim of the petitioners was at leas so state that the court should refuse to entertain it. The party has all along been guilty of unreasonable laches. As observed by Hidayatullah C.J. in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, law presumes that the petitioner knew the ground of unconstitutionality because everybody is presumed to know the law. The provisions of Section 23B of the Act the constitutionality of which is being now challeaged shall be persumed to be known to the petitioners from the very beginning & they should have straight away filed the writ petitions in this Court under Article 226 of the Constitution challenging the vires of Section 23B as they knew when they applied for refund on 2-2-1970 that Section 23B will come in their way. The learned Counsel for the petitioners has successfully met this argument by referring to D. Cawasji and Co. and Others Vs. State of Mysore and Another, wherein Mathew J, had to pay as follows:

It Is sometime said that every man is presumed to know the law but this is only a solvenly way of stating the truth that ignorance of the law is not in general an excuse. (Sec Frederick Pollock, "Juris prudence and Legal Essays" p. 89)". There is no presumption in this country that every person knows the law, it would be contrary to common sense and reason if it were so" (See Maule J. in Martindale v. Valkner (1846) 2 CB 719.

16. We respectfully agree with the view stated by Hegde J in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, that mere impression of a party that a provision of law may be ultra vires the Constitution cannot be equated to knowledge that the provision is invalid. Hope and desire are not the same things as knowledge. A law passed by a competent legislature is bound to be presumed to be valid until it is struck down by a competent Court.

17. Another ground taken by the learned Counsel for the Revenue is that apart from the constitutionality of Section 23B of the Act, it is clear that at least as late as 17-4-1969 when the reference applications made by the Sales Tax Department were rejected by the High Court, the petitioner because aware that tax was not eligible yet the application for refund which they made on 2-2-1970 was made without caring to affix proper stamps. The stamps were affixed as late as 20-6-1970. That itself will show that the petitioners were guilty of laches & unreasonable delay which has not been explained.

18. The learned Counsel for the petitioners has met this argument successfully by urging that the authorities did not reject the application for refund on the ground that it was not properly stamped. The delay shall be presumed to have been condoned and moreover, this has not been urged as a ground in the reply filed by the State.

19. He further contended that in a case of writ of mandamus it is the requirement of law that the patty before invoking the jurisdiction under Article 226 must make a demand for justice. That was done on 2-2-1970 and the authority rejected the application almost 2 years after, taking shelter u/s 23B of

the Act When this application was refused, then within another 10 months the parties were before this Court. Out of these ten months, three months were taken in obtaining the copies of the relevant orders. It was urged that in these circumstances, the delay cannot be considered unreasonable and the petition cannot be thrown on a preliminary objection.

20. We have considered the rival submissions and it appears to us that this is a case, the special circumstances of which, do not entitle us to reject the application on the ground of laches. Now to merits.

Section 23B of the Act is as follows:

Section 23. Refund of tax in special cases:

Notwithstanding anything contained in this Act or in any other law for the time being in force, where any amount is either deposited by any persons under the provisions of this Act or paid as tax by a dealer but such amount or any part thereof is subsequently found to be not payable by such person or dealer, a refund of such amount or any part thereof on be claimed only by the person from whom such person or dealer had actually realised such amount whether by way of tax or otherwise and the period of limitation provided in the proviso to Sub-section (1) of Section 23 shall apply to the aforesaid claims.

21. It was contended that this provision was ultra vires the State Legislatures because refusal to refund a tax to a person from whom it was recovered though not due, is not covered by Entry 51 of the List II of the seventh Schedule which is as follows:

54. Tax on the sale or purchase of goods other than the newspapers subject to the provisions of Entry 92 A of List 1.

22. It was urged that it was also not covered by Entry No. 6 relating to transfer of property, Entry No. 7 relates to contracts, Entry No. 10 relates to trust and trustees, in list III, namely, concurrent list of the same schedule. Another ground on which the validity of the said section was assailed, was that it violated Article 14 of the Constitution because no machinery or procedure was prescribed as to how the amount will be paid and how an inquiry in the matter will be held. It conferred unbridled and unguided powers on the Assessing Authorities in declining or agreeing to make the refund.

23. Upon a consideration of the several cases that were cited before us in this respect, it appears to us that they fall into two distinct categories. One comprises cases in which a person has collected tax on goods from the purchaser but the person so collecting tax was liter on found not assessable to sales tax end the legislation provided that such collection shall be deposited by the dealer with the State. In case he does not so deposit, the jaw provides that shall be recovered by the State The purpose of compelling a deposit of such kind is that the dealer should not be allowed to retain the money which he was not entitled to recover from his customer. The other form of legislation dealt with cases where the

dealer collects tax from the purchasers and voluntarily deposits is either in advance or after the assessment, which it is subsequently discovered, the dealer was not liable to pay. In such cases, the State Legislature provided that the money shall not be refunded to the dealer or the person collecting the tax but refund shall be made only to the persons from whom it was in fact recovered by him.

24. In all the cases of the first category decided by the Supreme Court, it was held that such provisions of recovery were not covered by Entry 54 of List II or by any of the entries in List III of the Seventh Schedule of the Constitution In R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, it was observed that the heads of legislation in the various lists of the Seventh Schedule should be interpreted widely so as to take in all meters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative ensures in the various lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation and do not extend to cases where the legislation under the relevant entry proceeds on the basis that the amount concerned is not assessable under the law made under that entry, but even so lays down that though it is not exigible in law, it shall be paid over to the Government merely because some dealer by mistake or otherwise has collected it as tax. If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser and the purchaser may be entitled to recover the amount from the dealer, but unless the money so collected is due as tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 64 of List II, nor can the State Legislature under the guise of ancillary or incidental power do it indirectly. Same was the view taken in Mangal Chand v. State of U.P. AIR 1968 SC All 193 , Kanti Lal Babulal Vs. H.C. Patel, , Sales Tax Officer, Special Circle, Ernakulam and Another Vs. The Tata Oil Mills Co. Ltd., , Ashoka Marketing Ltd. Vs. State of Bihar and Another, Annapurna Biscuits Manufacturing Co. Kanpur and Anr. v. The State of Uttar Pradesh and Anr. 1972 (29) STC 118 , State of Uttar Pradesh and Another Vs. Annapurna Biscuit Mfg. Company, , Rameswar Prasad v. Sales Tax Officer (1973) 32 STC 332, and State of Mysore v. S.V. Pagadi (1975) 35 STC 439.

25. In respect of the second category, the Supreme Court in the The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, has upheld the constitutional validity of exactly a similar provision in the Orissa Sales Tax Act as is contained in Section 23B of the Act. It was held that the said section deprives the assessees of the common law right to claim refund of the amounts paid as tax under an error of law that it was recoverable by the Taxing Authority. The diverse heads of legislation in the Schedule to the Constitution demarcate the periphery of legislative competence and include all matters which are ancillary or subsidiary to the primary head, such as the matter of granting refund of tax improperly and

illegally collected. If competence to legislate for granting refund of sales tax improperly collected be granted, then there is no reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales tax, or otherwise. The question is one of legislative competence and there is no restriction either express or implied upon the power of the legislature in that behalf.

26. An argument was also made before the Supreme Court that the provision offended against Article 9(1)(f) of the Constitution but the Court negatived the contention. It observed that the amount collected by the assesses primarily belonged not to the assessee but to the purchaser. If with a view to prevent the assessee, who bad no beneficial interest in those amounts from making profit out of the tax collected, the legislature enacted that the amount so deposited shall be claimable only by the person woo bad paid the amount to the dealer and not by dealer, it must be held that a restriction on the right of assesees to obtain refund was lawfully circumscribed in the interest of the general public.

27. In Burmah Construction Co. Vs. The State of Orissa and Others, it was clearly stated that granting refund of tax improperly, or illegally collected and the restriction on the exercise of that right are both ancillary or subsidiary matter relating to the primary head of tax on sale of goods. Oar attention was be were pointedly drawn by the learned Counsel for the petitioners to the concluding lines of para 8 of the report of Ashoka Marketing Ltd. Vs. State of Bihar and Another, wherein the Supreme Court observed that the The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, does not support the plea that the State Legislature is competent to legislate for demanding payment of or retaining amounts recovered by registered dealers but which are not due as sales tax to the State. It was urged that these observations marked a suit in the view which prevailed in the The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, We are unable to read in these observations any such change of view. It appears to us that the Supreme Court took the view that under no entry of legislative heads can the State Legislature enact a provision compelling the dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that be is entitled to recover it to recoup him self for payment of tax, to pay over that amount to the State. It cannot be regarded as necessarily incidental to Entry 64. But Ashoka Marketing Ltd. Vs. State of Bihar and Another, is no authority for the proposition that the State cannot legislate as to the manner in which the amount lying deposit with it shall be refunded to persons who were actually entitled to its refund. We therefore, hold that the argument that the State Legislature was not competent to enact Section 23B of the Act is not well founded and we reject the same.

28. The learned Counsel then submitted that the aforesaid provisions offended against Article 14 of the Constitution, because, the power was unguided, uncanalised and uncontrolled. It provided no machinery or procedure as to how the amount will be paid or how any inquiry in the claim will be held. The State

Legislature has given arbitrary powers to the assessing authority We would not have entered into any disfussion as to violation of Article 14 because the same has been suspended by an order by the President made under Article 369 of the Constitution, but upon further consideration, we find that the argument has absolutely no merit. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Frankly speaking, we are unable to sec how the provisions of Section 23B of the Act the deny to the petitioner equality before the law, or equal protection of the laws. Once it is found that the State Legislature had the competence to enact the provision and that such provision does not offend against Article 19(1)(f), then, the petitioner cannot complain that there is a discrimination inasmush as the State is permitted to refuse to refund to those who have deposited the amount but to allow others to retain the amount if they have not deposited it with the treasury. The discrimination can arise only if the State were to discriminate between one class of claimants and the other similarly situated. Section 23 provides the machinery and procedure bow the amount will be refunded to the persons who are held entitled to receive the same u/s 23B. We therefore, reject this contention.

29. The learned Counsel for the petitioner next submits that the provisions of Section 23B of the Act were introduced on 4-5-1954 and cannot have retrospective operation and the State was bound to refund the amount which was paid by the petitioners before 4-5-1964. That argument in fact property relates to the amounts paid on 25-9-1963, 28-11-1963 and 13-12-1963 in pursuance of the assessments orders dated 3-12-1983 It does not apply to the amounts which are in dispute in writ No. 1813/1972 and were paid after the enactment of the said section. The argument its unsustainable both on facts and on law. On facts, the assessment orders of 3-12-1963 became final because no appeal or revision was filed in respect of them. The party appealed only against the re assessment order of 10-9-1965 by which the demand was increased but no payment of any kind was made. The party lost the appeal. The matter having become final, there is no right in the petitioner to ask for refund because unless it is so held in any appeal, revision or reference, the amount cannot be said to have been subsequently found to be not payable within the provisions of the section. As to law, it appears to us that Section 23B even construed prospectively, has a retrospective operation too in as much as it purports to apply to all payments which were deposited and found not payable, whether before or after the enactment of Section 23B. We are unable to see anything in the provision to hold that these provisions will have no application if the amount were deposited before its enactment. The right to ask for refund accrues to the assessee as a result of the reference to the High Court being answered in favour of the assessee and is not dependent upon the date, when the said section was brought into force. For that reason, we are unable to subscribe to the view adopted by the Board of Revenue in Jaipur Metals and Electricals Ltd. v. State of Rajasthan 1973 RRD 374.

30. The learned Counsel fur the Revenue lastly submitted that the petitioners cannot succeed yet for one more reason because if they could not Have filed a suit for the recovery of the amount being agents of a disclosed principal, much less can they maintains writ petition. According to Clause 19 of the agreement between the petitioners and the Railways the petitioners were simply to knock down the bids but the acceptance of a bid was to be made by the Railway Authorities Tint position attracts the provisions of Section 230 of the Contract Act, Radhakrishna Sivadutta Rai and Others Vs. Tayeballi Dawoodbhai, lays down that an agent of a disclosed person cannot bring a suit, We uphold this contention.

31. Thus the contentions raised on behalf of the petitioners do not succeed and the petitions are therefore, bound to fail.

32. Before parting with this case we may also mention that the claim of the petitioners is founded upon the judgment of this Court that the petitioners being auctioneers were not dealers within the meaning of a dealer given in the Act. But this view no longer holds the field because in Chowringhee Sales Bureau v. Commissioner of Income Tax (21) it was held that it was with in the competence of the State Legislature to include within the definition of the word ''dealer'' an auctioneer who carries on the business of selling goods and who has in the customary course of business authority to sell goods belonging to the principal. In that view of the matter, the petitioners but for the decision of this Court in the reference are not entitled to ask for refund of this amount, The powers under Article 226 of the Constitution are of extra ordinary nature and those powers cannot be exercised for the benefit of the petitioners allowing them a return of any money to which they have no right, and which they had no right to claim. That would result in must enrichment. We must, therefore, decline to exercise these powers in cases like these.

33. Consequently, the Petitions fall and are hereby dismissed. The petitioners shall pay Rs. 500/- as costs to the respondent in each petition.

