
(1973) 05 AHC CK 0027

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No's. 3476, 3997, 3998, 3999, 4000 and 4001 of 1972

Modern Industries

APPELLANT

Vs

The State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 02-05-1973

Acts Referred:

Central Sales Tax Act, 1956 — Section 14
Constitution of India, 1950 — Article 226, 286, 301, 32
Contract Act, 1872 — Section 72

Citation : (1973) 32 STC 555

Hon'ble Judges : R.L. Gulati, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : R.R. Agarwal and Bhartji Agarwal, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

C.S.P. Singh, J.—These group of petitions are between the same parties and raise common question of law and as such we propose to dispose them of by a common judgment.

2. The assessee is a Hindu undivided family and manufactures railway wagons. During the period covered by the assessment years 1961-62 to 1966-67, the Government of India through the Ministry of Railways placed orders for the manufacture of railway wagons, on various dates. These wagons were to be manufactured by the assessee on terms and conditions and stipulations contained in the Indian Railway Standard Conditions of Contract A5-51 (Revised), in so far as they were not inconsistent with the special conditions of contract, attached as per annexure A to the petition, The conditions of contract in each of the assessment years were substantially the same. During the assessment year 1961-62, the assessee received payment from the Government to the extent of Rs. 3,34,631. This amount was included in the turnover of the assessee and was

subjected to tax by the order of assessment dated 14th June, 1965. The amount of tax imposed on this amount came to Rs. 6,692.62. In the year 1962-63, the turnover in respect of payment received for the supply of railway wagons was assessed at Rs. 36,74,055 and the tax imposed by the assessment order dated 19th June, 1965, was Rs. 73,481.10. In the year 1963-64, the turnover assessed was Rs. 93,90,376 and the tax assessed by the order dated 30th March, 1966, was Rs. 1,87,607.52. In the year 1964-65, the turnover was assessed at Rs. 1,34,43,604 by the assessment order dated 31st October, 1966 and the tax imposed came to Rs. 2,68,872.08. In the year 1965-66, the turnover was taxed at Rs. 1,33,72,816 and the tax assessed came to Rs. 2,67,456.32 as per assessment order dated 30th September, 1967. In the year 1966-67, the turnover in respect of this item was Rs. 93,54,422 and the tax assessed by the assessment order dated 23rd January, 1968, amounted to Rs. 1,87,088.44.

3. The assessee did not prefer any appeal against these orders. It appears that the sales tax paid by the assessee had been recovered by it from the railways. On the 7th June, 1968, a letter was sent to the assessee by the Deputy Director Stores (Wagons), Railway Board, intimating that in view of the judgment of the Mysore High Court in the case of Hindustan Aeronautics Ltd. v. Commissioner of Commercial Taxes, Mysore (delivered on 15th March, 1967), it appeared that the contracts for the manufacture of railway coaches were works contracts and as such no sales tax was payable thereon. It was asserted that inasmuch as the sales tax that had been paid by the railway to the assessee was paid under a mistake of law, the amounts paid would be recovered from the assessee. The assessee by this letter was advised to take appropriate proceedings for recovery of sales tax from the State Government, but this was without prejudice to the railway's right to recover from the assessee the entire amount of sales tax. The assessee thereafter moved applications for the rectification of the assessment order on the ground that the orders were apparently erroneous, inasmuch as they sought to bring the tax payments received by the assessee in respect of works contracts. A prayer for refund was also made in these applications. The applications for rectification and refund were moved on the 15th June, 1968, for the years 1961-62, 1962-63, 1963-64, 1964-65 and 1966-67, while for the year 1965-66, it was moved on 12th June, 1968. All these applications were consolidated and disposed of by a common order dated 30th October, 1968, by which they were dismissed. The Sales Tax Officer while dismissing the applications gave the following reasons:

- (1) That the assessee had treated himself to be a dealer in respect of these sales and had realised sales tax and also deposited the same.
- (2) That he raised no objection in the course of assessment that no sales were effected by him and as such there was no error apparent in the order of assessment.
- (3) That the stand taken up by the assessee that the facts of his case were similar to that of Hindustan Aeronautics Ltd. could not be accepted inasmuch as

no such plea had been taken by the assessee in the course of the assessment proceedings.

(4) That the case of Hindustan Aeronautics Ltd. was inapplicable to the case of the assessee, inasmuch as while Hindustan Aeronautics Ltd. held the works at Bangalore for and on behalf of the President of India and the property in trust for him, there was no similar provision in the contract of the assessee. The assessee thereafter preferred revisions against the orders of the Sales Tax Officer. These revisions were dismissed by a common order dated 22nd December, 1972. It was urged before the revising authority that the assessee had filed copies of the contract and indemnity bond relating to the contract and as such there was an error apparent on the face of the record, which required rectification. The revising authority found as a fact that the contract and indemnity bond were not filed during the course of assessment proceedings, but were filed during the proceedings u/s 22 of the Act. It, accordingly, held that, in view of this, it could not be said that there was any error apparent on the face of the record as contemplated by Section 22 of the Act and as such the application was rightly rejected. None of these two authorities gave any reasons for rejecting the claim for refund. The petitioner, thereafter, filed the present petitions and has prayed for quashing of the assessment orders in so far as they relate to the imposition of sales tax on payments received in respect of the supply of railway wagons and also for a direction for refund of the tax imposed on such transactions.

4. Counsel for the State has taken an objection to the maintainability of the writ petition, inter alia, on the following grounds :

(1) That the petition mainly being for refund, such a petition does not lie under Article 226 of the Constitution.

(2) That there bring no error in the order of assessment, the same cannot be quashed by way of a writ of certiorari and the petitioner as such cannot claim any refund so long as the assessment order remained untouched.

(3) That the proper forum for contending that the assessment order was invalid, was by way of an appeal to the appellate authority and inasmuch as the petitioner has not availed of such a remedy, it is disentitled to the relief under Article 226 of the Constitution.

(4) That the petition is delayed, inasmuch as it has not been filed within a reasonable time from the date of the passing of the assessment order.

(5) That the petitioner should be deemed to have knowledge of the decision of this court in the case of Kays Construction Company v. The Judge (Appeals) Sales Tax, Allahabad [1962] 13 S.T.C. 302 and inasmuch as the petitioner paid the tax without any demur after that decision, it could not be said that the tax in question was paid under a mistake of law and that being so, the petitioner cannot claim refund of an amount which has been paid voluntarily. These contentions have been vehemently refuted on behalf of the petitioner. The

circumstances and the conditions under which a refund can be directed to be made under Article 226 of the Constitution has been considered by their Lordships of the Supreme Court in a large number of cases. It is now necessary to advert to these decisions.

5. In *Burmah Construction Co. Vs. The State of Orissa and Others*, , the assessee had paid tax under the Orissa Sales Tax Act. It does not appear that any appeals, etc., were taken against that assessment order. Subsequently, a writ petition under Article 226 of the Constitution was filed before the Orissa High Court for a declaration that a certain provision of the Orissa Sales Tax Act authorising the imposition of sales tax on a turnover of "works contracts" and "repair works" was ultra vires the State Legislature and also for refund. The Orissa High Court allowed the petition, but directed refund only of such amounts as were not barred u/s 14 of the Orissa Sales Tax Act. That provision is in pan material with Section 29 of our Sales Tax Act and imposes a limitation of twenty-four months for claiming refund of tax. Before the Supreme Court, it was contended that Section 14 of the Act which imposed a period of limitation for refund of tax was ultra vires. This contention was repelled. It was, however, held that the High Court can in a petition under Article 226 of the Constitution direct payment of money against the State, or against an officer of the State, to enforce a statutory obligation and inasmuch as in the petition, the assessee had claimed for the enforcement of a statutory obligation imposed u/s 14 of the Act, the petition was maintainable, but it could only be allowed subject to the restriction or the limitation contained in Section 14 of that Act. The question as to whether the assessee had a right to recover the balance of tax, which was barred by limitation under statute, by way of suit was left unanswered.

6. In the case of *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , sales tax was imposed by the State of Madhya Pradesh on the basis of notification issued u/s 5 of the State Sales Tax Act. The Supreme Court held that the imposition in question contravened Article 301 of the Constitution. Considering the question as to whether a refund could be ordered under Article 226 of the Constitution, their Lordships held that in a case where sales tax assessed and paid by a dealer is declared by a competent court to be invalid in law, the payment of tax is one under a mistake and the Government which has received the payment must repay it. In such a case, the High Court can grant consequential relief by ordering repayment of money realised by the Government, without authority of law. Their Lordships, however, held that the remedy provided under Article 226 of the Constitution was not intended to supersede the other modes of obtaining relief by an action in a civil court, or to deny defences legitimately open in such an action and that the right to give relief was discretionary. It was also held that where the petition was unduly delayed or where the authority raises a prima facie triable issue, as regards the availability of such relief on the merits, on the ground like limitation, the court would ordinarily refuse to exercise its discretion and leave the party to seek his remedy by the ordinary mode of action in a civil court.

7. In *Suganmal Vs. State of Madhya Pradesh and Others*, , the assessee was subjected to tax under the Indore Industrial Tax Act, 1927 and the Indore Excess Profits Duty Order, 1944. On appeal being preferred, the assessment order in respect of tax imposed under the Indore Industrial Tax Act was set aside. There was, however, no direction by the appellate authority for the refund of the tax which had been realised from the assessee. On being approached by the assessee for refund, the State Government subsequently adjusted certain amount towards excess profits duty, but refused to return Rs. 62,809-5-2, which had been realised from the appellant before coming into force of the Constitution. The writ petition against the refusal to refund the tax was dismissed. When the matter came up before the Supreme Court, two questions arose, firstly, whether a petition under Article 226 of the Constitution claiming only refund of money alleged to be illegally collected by the State was maintainable under Article 226 of the Constitution; and secondly, whether a writ of mandamus could issue for refund of money collected prior to coming into force of the Constitution. The court considered its two earlier decisions in *Sri Satya Narain Singh Vs. District Engineer, P.W.D. and Another*, and *Burmah Construction Co. Vs. The State of Orissa and Others*, and observed on page 1742 as under:

(6) On the first point, we are of opinion that though the High Courts have power to .pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a ? writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but. all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the courts were moved by a petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and, therefore, could take actions under Article 226 for the protection of their fundamental right and the courts, on setting aside the assessment orders, exercises their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

8. The Supreme Court also repelled the contention based on Section 72 of the

Contract Act by observing on page 1744 of the report as under:

(15) Reference is made to Section 72 of the Contract Act for the contention that the State is duty bound to return the amount to the appellant. Whether the case of the appellant falls under the provisions of that section would be a point for decision in a regular suit and not in the proceedings under Article 226. In the circumstances of the case already narrated, there may be such defences, as urged by the State in its reply, open to it to urge against the appellant, one of the main defences being that the claim could be time-barred. It would be a moot point to consider whether the payment of tax made by the appellant can be said to be under a "mistake" within the meaning of that expression u/s 72 of the Contract Act.

9. In *State of Kerala v. Aluminium Industries Ltd.* [1965] 16 S.T.C. 689 (Ker.) the assessee was assessed to tax by an assessment order passed under a mistake. Subsequently, petitions were filed claiming refund on the ground that the sales on which the tax had been levied were exempt from tax in view of Article 286(1) (a) of the Constitution. The petitioner had based his claim for refund on a "mutual mistake" and had filed the petition when the State Government refused to make refund. It was held that inasmuch as the assessee during the assessment had not raised the question as to whether the sales in question were exempt under Article 286 of the Constitution, the Sales Tax Officer had no occasion to consider the point and as such, the tax levied by the authority was under a mistake of law and it was ordinarily the duty of the State, subject to any provision in the law relating to sales tax to refund the tax and that the assessee's remedy by way of a petition is subject to the same restrictions and also the same period of limitation as in a suit, namely, three years from the date when the mistake became known to the person who has made the payment under a mistake. Reliance for this view was placed on two decisions of the Supreme Court, the cases of *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, and *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, . The Supreme Court, in the circumstances, directed the Sales Tax Officer to return a finding on the question whether the sales in respect of which the tax had been levied were outside sales and, therefore, exempt under Article 286(1)(a) of the Constitution and further whether the petition was within three years of the date when the mistake first became known to the respondents. It will be noticed that although the only claim in this case was for refund of the tax, the petition was not thrown out on the ground that such a petition was not maintainable.

10. In *Gill & Co. Private Ltd. v. Commercial Tax Officer, Hyderabad III* [1968] 22 S.T.C. 524 S.C.), the Sales Tax Officer concerned made several assessments on the petitioner in respect of a number of years. After the assessments had been completed, a petition under Article 226 of the Constitution was filed claiming a refund of the tax on the ground that the assessee had paid the tax in question under a mistake and that the mistake had been discovered during the course of proceedings for a particular assessment year, as a result of the mistake being

pointed out by the attorneys. The petition was dismissed by the High Court on the ground that it was filed after a considerable delay and further that the question when the mistake was discovered was a question of fact which had to be enquired into and the appellant had a remedy by way of suit which was a more convenient and effective remedy and the extraordinary jurisdiction under Article 226 of the Constitution should not be appropriately exercised in such a case. The decision of the High Court was reversed by the Supreme Court, with the following observations on page 526 of the report :

In our opinion, the High Court was not justified in disposing of the writ petitions in the above manner. Of course the High Court had a discretion under Article 226 of the Constitution to refuse to admit the petitions if it thought that they were frivolous or that they had been presented after the lapse of a period for which there was no justification. It had however to examine the question as to whether the appellant had paid the taxes under a mistake of law as also when the appellant came to discover its mistake. The taxing authorities could not very well be asked to quash the assessment orders already made by them. It is now well settled by this court in the *State of Kerala v. Aluminium Industries* [1965] 16 S.T.C. 689 (S.C.), that "in such a case where tax is levied by mistake of law it is ordinarily the duty of the State subject to any provision in the law relating to sales tax...to refund the tax. If refund is not made, remedy through court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely, three years from the date when the mistake had become known to the person who has made the payment by mistake (see *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, .

The court further pointed out that it was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if mistake was proved and the claim was made within the period of limitation.

In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , this court held that "the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law". It was further pointed out in that case that the High Courts had to take into consideration in the exercise of that discretion the delay, if any, made by the aggrieved party in seeking this special remedy and also the nature of controversy of facts or law to be decided as regards the availability of consequential relief. It was observed that "whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances...It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation, the court should ordinarily refuse to issue the writ of

mandamus for such payment".

The High Court did not examine the merits of the case at all as it could not before admitting the petitions and hearing the sales tax authorities against the cases urged in the writ petitions. Whether the case of the appellant was true, namely, that it discovered the mistake only in January, 1967 and that the assessments were illegal were all matters which the High Court had to examine after affidavits had been filed. It was open to the High Court to give a hearing to the parties on these questions and then come to its conclusion as to whether it would not use its discretion under Article 226 of the Constitution. But the petitions could not be rejected summarily as was done by the High Court in these cases.

11. In *State Trading Corporation of India Ltd. Vs. State of Mysore*, sales which were inter-State sales and were taxable under the Central Sales Tax Act were brought to tax under the State law by the assessing authorities of Mysore. Petitions under Article 32 of the Constitution were filed challenging the assessment orders. One of the questions that was canvassed was as to whether a petition under Article 32 of the Constitution was maintainable for quashing the assessment orders. It was contended on behalf of the respondents that inasmuch as the taxing officer had the jurisdiction to decide whether a particular sale was an inter-State sale or not, even if there was an error committed in exercise of such jurisdiction, it did not offend the fundamental rights of the petitioner and as such the petitions were not maintainable. Reliance for this proposition was placed on the case of *Smt. Ujjam Bai v. State of Uttar Pradesh* AIR 1962 S.C. 1621. Their Lordships on page 550 of the report, distinguished that case with the following observations :

(12) But we think that that case is clearly distinguishable. Das, J., there stated that "if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, a question of enforcement of that right arises and a petition under Article 32 will lie". He also said that where a statute is intra vires but the action taken is without jurisdiction, then a petition under Article 32 would be competent. That is the case here. There is no doubt that the taxing officer had no jurisdiction to tax inter-State sales, there being a constitutional prohibition against a State taxing them. He could not give himself jurisdiction to do so by deciding a collateral fact wrongly. That is what he seems to have done here. Therefore, we think the decision in *Ujjam Bai's case* AIR 1962 S.C. 1621 (W. P. No. 79 of 1959) is not applicable to the present case and the petitions are fully competent.

12. It will be noticed that this case deals with the question as to whether an order of assessment without jurisdiction can be questioned by a petition under Article 32 of the Constitution.

13. In *Kamala Mills Ltd. Vs. State of Bombay*, the assessee had been assessed

to sales tax by the tax authority of the State of Bombay. The tax had been assessed in respect of goods sold within the State of Bombay and also in respect of goods sold outside Bombay. It appears that the assessee did not take proceedings for setting aside these orders by having recourse to the machinery provided in the statute. Subsequently, after the decision of the Supreme Court in the case of *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, , a suit was filed for recovery of certain amounts of tax on the ground that it had been illegally levied. Section 20 of the Bombay Act contained a bar to the institution of a suit in the civil court, challenging orders of assessment made under that Act. The Bombay High Court dismissed the suit on the ground that it was barred by Section 20 of the Act and the civil court had no jurisdiction to entertain the same. Their Lordships of the Supreme Court upheld that decision of the Bombay High Court and held that the taxing authorities constituted under the Act were competent to decide all questions pertaining to the liability of the dealer to pay the tax, as also whether a particular transaction is taxable under the provisions of the Act. It also held that the decision on the question, whether a transaction is liable to tax or not, is not a collateral activity and repelled the contention that the appropriate authority can be said to have validly exercised its jurisdiction to levy sales tax, only in case its finding is correct that the transaction is taxable. It doubted the correctness of the decision in *State Trading Corporation of India Ltd. Vs. State of Mysore*, . Although the Supreme Court in this case held that the jurisdiction of the civil court was barred on account of Section 20 of the Bombay Sales Tax Act, it added that this decision was not concerned with the question as to whether such a relief can be obtained by way of a petition under Article 32 or Article 226 of the Constitution. To make this position clear, it was observed on page 1949 as under :

(24) Whilst we are referring to the decision of this court in *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, , we would hasten to add that we are not dealing with the scope and effect of our powers under Article 32 or with the powers of the High Courts under Article 226. Our object in referring to the majority decision in *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, is merely to show that the tenor of the opinion expressed by the learned Judges in the said case is in support of the view that a finding recorded by a taxing authority as to the taxability of any given transaction cannot be said to be a finding on a collateral fact, but is a finding on a fact that the decision of which is entrusted to the jurisdiction of such authority.

14. And then again on page 1953 of the report, as under:

(39) What then is the ultimate position in this case ? The Act under which tax was recovered from the appellant is valid and so is the charging section valid; the appropriate authorities dealt with the matter in regard to the taxability of the impugned transactions in accordance with the provisions of the Act and in consequence, the tax in question was recovered on the basis that the said transactions were taxable under the Act. The appellant contends that the

transactions were outside sales and they did not and could not fall under the charging section because of Article 286 and it argues that the tax was levied because both the appellant and the appropriate authorities committed a mistake of fact as well as law in dealing with the question. Assuming that such a mistake was committed, the conclusion that the transactions in question fell within the purview of the charging section cannot be said to be without jurisdiction or a nullity and the assessment based even on such an erroneous conclusion would claim the protection of Section 20. If, after discovering the mistake, the appellant had moved the appropriate authorities under the relevant provisions of the Act, its claim for refund would have been considered on the merits. Having failed to take recourse to the said remedy, it may have been open to the appellant to move the High Court under Article 226. Whether or not in such a case, the jurisdiction of the High Court could have been effectively invoked, is a matter on which we propose to express no opinion. As we have pointed out during the course of this judgment, we are not dealing with the scope and effect of the High Courts' jurisdiction under Article 226 as well as the scope and effect of this court's jurisdiction under Article 32 vis-a-vis such claims for refund of tax alleged to have been illegally recovered.

15. This case too is indicative of the fact that in appropriate cases, a petition under Article 226 of the Constitution can be entertained for quashing an assessment order and obtaining refund. These decisions of the Supreme Court clearly establish that in a petition under Article 226 of the Constitution, an order for refund can be made. The decision in *Suganmal Vs. State of Madhya Pradesh and Others*, on which strong reliance has been placed by the respondents does not, in our view, lay down an inflexible rule of law that a claim for refund cannot be granted in a petition under Article 226 of the Constitution. The decision of their Lordships of the Supreme Court that a petition which prays for a refund under Article 226 of the Constitution is not ordinarily entertainable, has to be read in the context of the facts of that case. It will be noticed that the Indore Industrial Act under which the assessment had been made did not contain any statutory provision for making a refund and neither was such an order passed by the appellate authority. This being so, the State or its officers were under no statutory liability to make a refund of the tax and no mandamus against the State or its officers to do something which they were not bound by the statute to do, could be issued. We are of the view that this is the only reasonable way of reading that decision, for to construe it otherwise, would be to bring it in conflict with the other decisions of the Supreme Court which have already been noticed and in, which it has been clearly laid down that a writ can issue, in appropriate cases, directing the State or its officers to fulfil their statutory duty of making a refund. This apart, there is another reason which impels us to hold that the ratio of the case, *Suganmal Vs. State of Madhya Pradesh and Others*, cannot be appropriately applied to the facts of the present case. In the present case, there is a prayer for the quashing of the assessment order, as also the order passed by the Sales Tax Officer and the revising authority refusing to rectify and directing a

refund. This fact clearly takes out the present case from the scope of *Suganmal Vs. State of Madhya Pradesh and Others*, , as in *Suganmal Vs. State of Madhya Pradesh and Others*, the only relief claimed was for refund and nothing else.

16. The first contention regarding the maintainability of the petition must, therefore, be rejected. The second, third and fourth contentions are inter-linked and may be considered together.

17. The respondents have relied on these decisions in support of these contentions, viz., *State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada, , G. S.G.A. & Co. and Ors. v. State of Andhra Pradesh and Ors.* [1972] 30 S.T.C. 120 and *Parry & Co. Ltd., Madras v. State of Madras and Ors.* [1972] 30 S.T.C. 168. In the case of *State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada, ,* the assessee was assessed on his turnover from business in yarn. The assessment order became final, as it was not challenged by the assessee. Thereafter, the assessee applied u/s 13 of the Sales Tax Act, which is a provision for refund of tax, for return of the amount paid under the assessment order, on the ground that the dyeing charges which had been included in the turnover were not taxable under the Act and which since the assessment orders were made had been held by the Board of Revenue to be not taxable. This application was rejected by the Assistant Commissioner and the order was confirmed by the Commissioner, Sales Tax, on appeal. The Board of Revenue, Madhya Pradesh, set aside the order. Thereafter, the State of Madhya Pradesh moved the Board for a reference to the High Court u/s 23 of the Act. The High Court returned answers on the question referred which were substantially in favour of the assessee. The matter thereafter went up before the Supreme Court. The Supreme Court took the view that an assessment order, till such time that it is not set aside by appropriate proceedings has to be given full effect to and that an assessee cannot get a refund till such time that the order is quashed. In *G.S.G.A. & Co. and Ors. v. State of Andhra Pradesh and Ors.* [1972] 30 S.T.C. 120, the assessee claimed exemption in respect of the turnover relating to "green ginger" and "garlic" on the ground that they were exempt under a Government Order passed u/s 9(1) of the Andhra Pradesh General Sales Tax Act, 1957. The assessee paid the tax and allowed the assessment orders to become final. Some other assessee in whose case a similar point had been decided against them by the Sales Tax Officer filed appeals which were allowed. Thereafter, the petitioner filed petitions under Article 226 of the Constitution on the ground that it had been paid under a mutual mistake. It was admitted by the State that the tax had been assessed and collected under a mutual mistake, but the petition was resisted on the grounds analogous to those taken up by the respondents in the present case. The Andhra Pradesh High Court drew a distinction between the cases where refunds were claimed where the assessment order is void and those in which the assessment order is merely erroneous. It was observed on page 128 of the report as under:

All the decisions which the learned counsel for the petitioner has cited are cases

in which the imposition of tax was held to be either beyond the competence of the State Legislature or otherwise opposed to statute. In other words, the assessments were under void enactments. The authorities had no jurisdiction to levy the tax. In these circumstances, the assessment orders could be deemed to be void ab initio and, therefore, the State had no authority to collect the tax. The collection of such tax would be without the authority of law. Civil suits could always be filed for refund of the amounts so collected. In order to get refund of such tax it was not necessary for the petitioners to get the assessments quashed. Such assessment orders which were made under void enactments could be ignored and suits for refund could be straightaway filed. But in cases where the assessments were made under a valid legislation and turnover which was not subject to tax was held to be assessable turnover upon an erroneous view of law, could it be said that the assessing authority was acting without jurisdiction. Such assessment orders were only erroneous in law but not without jurisdiction and so long as the assessment order stood, it could not be contended that the collection of the tax was without jurisdiction.

18. And then again on page 129 of the same report, it was observed :

If the assessment order is merely erroneous in law, the assessee cannot claim refund without getting the assessment order quashed by availing himself of the alternative remedy provided under the statute. He cannot invoke the jurisdiction of a civil court for questioning the legality or propriety of the assessment order and if that order cannot be questioned, then the amount paid or recovered pursuant to that order cannot be directed to be refunded by a civil court.

19. It in effect held that the assessment orders passed in that case were not void, but were only erroneous and inasmuch as the petition had been filed after considerable delay and further that the petitioner had not availed himself of the remedy provided under the Act for setting aside the assessment order and as a direction for refund would result in the petitioner's retaining tax illegally collected by it, dismissed the petitions. In *Parry & Co. Ltd., Madras v. State of Madras and Ors.* [1972] 30 S.T.C. 168, orders of assessment were passed against the assessee and the tax was deposited by him. Subsequently, on the basis of the decision of the Supreme Court in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, a petition was filed for quashing the order of assessment and also for refund of the tax. The petition was dismissed on the ground that it was filed after a lapse of a number of years and, as such, the assessee was guilty of laches. Now, in the present case, the ratio of the decision of the Supreme Court in the case of *State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada*, does not appear to be appropriately applicable, inasmuch as the assessment orders have also been questioned in the present petition. This case, however, establishes that the Sales Tax Officer could not have directed a refund of the tax to the petitioner, unless the assessment order on the basis of which the tax had been collected was set aside. The application of the assessee for refund without getting the assessment order set aside was, therefore, wholly

misconceived. The prayer for rectification of the assessment order was also untenable, as the assessee had never contested the matter at the time of the assessment and, as such, it could not be said that there was any error apparent on the face of the record which could be rectified u/s 22 of the Act. In this context, it is now necessary to consider whether the petitioner is guilty of laches in presenting these petitions. The assessment orders in respect of various assessment years were passed on the following dates :

Assessment years	Dates of assessment orders
1961-62	14- 6-1965
1962-63	19- 6-1965
1963-64	30- 3-1966
1964-65	31-10-1966
1965-66	30- 9-1967
1966-67	23- 1-1968

20. The petitions in all these cases were filed on 5th July, 1972, i. e., after a lapse of nearly six or seven years. The normal practice of this court is to ask for an explanation in case a petition is filed beyond a period of three months. Counsel for the petitioner has urged that there has been no laches on the part of the petitioner, inasmuch as he made the applications for rectification of the assessment order and for refund between 12th and 15th June, 1968, as soon as he was apprised of the correct legal position by the Central Government. We are not impressed by this explanation. The applications for refund and rectification, as we have already notified, were totally misconceived. Resort to futile and misconceived remedies, in our opinion, does not provide a good ground for condonation of the delay in filing a writ petition under Article 226 of the Constitution. The Supreme Court as far back as 1966 in the case of State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada, had held that the refund cannot be allowed by the taxing authorities till such time that the assessment order subsisted and if in spite of this decision, the petitioner persisted in resorting to futile and misconceived applications for refund, it cannot be said that he was not guilty of laches. Thus, the petitioner cannot get advantage of the period spent by him in prosecuting the refund and rectification application before the sales tax authorities for the purposes of this petition. There is also another facet to this. We have already noticed the decision of this court in the case of Kays Construction Company v. The Judge (Appeals) Sales Tax, Allahabad [1962] 13 S.T.C: 302, where in this court had held that construction of passenger bogies for railways was a "works contract" and not liable to tax under the U.P. Sales Tax Act. This view was taken by this court as far back as 1962 and that being so, the assessee should have approached this court as soon as the impugned orders were passed and not waited for the decision of the Mysore High Court, as the correctness of the order of the assessing authority in this State has got to be adjudged with reference to the pronouncement of the law by this High Court.

21. Counsel for the petitioner then contends that inasmuch as the assessment orders are void, it was not necessary for the petitioner to challenge them as they were nonest and the cause of action for the present petition arose after the refund applications were rejected. This contention too is not acceptable. We have

already seen that the refund applications moved by the assessee could not have been allowed by the Sales Tax Officer without the assessment order having been set aside. This being so, the order passed by the sales tax authorities being a valid order, it cannot, in these circumstances, be said that the laches committed by the petitioner has got to be adjudged with reference to the date of disposal of the refund application. The cause of action for filing the petition really arose after the assessment orders were passed and tax collected by the State, but these events have taken place long time back and adjudged with reference to this date, the petition is clearly belated.

22. The contention that the assessment order is void and as such the limitation should be reckoned from the date of the orders rejecting the refund application does not impress us. On the first place, the petitioner has challenged the assessment orders also and that being so, the petition qua the assessment order is clearly belated. Secondly, unless the assessment orders are quashed, it would not be proper to issue directions to the Sales Tax Officer to discharge his statutory duties u/s 29 of the Act, of making refund, till such time that the assessment orders are not quashed. The proper course for the petitioner to adopt was to challenge the assessment orders by way of appeals and apply for condonation of delay in filing the appeals and if sufficient cause was shown by the assessee for not filing the appeals within time, the delay would have been condoned by the appellate authorities.

23. The contention of the State that the petition should not be entertained on the ground that it will result in the petitioner getting a refund of money, which it is not entitled to retain does not appear to be correct. The letter sent by the railway clearly indicates that the railway was contemplating to take action for refund of the sales tax paid by it to the assessee either by way of a suit or by other proceedings. This being so, it cannot be said that the petitioner would make unlawful gain in case the money was refunded to him.

24. There is another reason why we are not inclined to grant refund to the petitioner. It has been noticed that the Supreme Court in the case of State of Madhya Pradesh Vs. Bhailal Bhai and Others, has held that where prima facie triable issues regarding limitation, etc., is raised, it would not be appropriate to grant relief under Article 226 of the Constitution. In the present case, the respondents have urged that the claim for refund is belated. Considering the delay in making the claim for refund, it may be possible for the State to substantiate its defence based on the ground of limitation. This being so, it would not be appropriate to issue direction under Article 226 of the Constitution directing a refund to the petitioner.

25. This would be sufficient to dispose of the matter, but inasmuch as the petitioner may choose to file an appeal before the Assistant Commissioner challenging the assessment order, it is necessary to advert to another question canvassed before us. It has been urged on behalf of the respondents that it is only a bona fide mistake, that is a mistake which could be committed by an

ordinary prudent man, that would entitle an assessee to refund of tax. In this context, it is urged that the assessee should be deemed to have knowledge of the decision of this court in the case of *Kays Construction Company v. The Judge (Appeals) Sales Tax, Allahabad* [1962] 13 S.T.C. 302, wherein it was held that construction of passenger bogies for railways was a "works contract" and not liable to tax under the U. P. Sales Tax Act and that being so, inasmuch as the petitioner paid the tax even after this decision, it could not be said that the tax in question was paid under a mistake of law. Reliance for this view is placed upon a decision of the Calcutta High Court in the case of *Anath Bandhu Deb Vs. Dominion of India*, . The Calcutta decision undoubtedly supports this contention. We are, however, unable to agree with this decision in view of the pronouncement of the Supreme Court in the case of *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, . Their Lordships have on page 143 of the report held that in order to decide as to whether a tax had been paid under mistake of law, the state of mind of the person concerned is the only relevant consideration for deciding this issue. In AIR 1949 297 (Privy Council) , it is held that the mistaken belief is sufficient to entitle him to relief. In view of these decisions, the question as to whether moneys have been paid under a mistake has got to be adjudged with reference to a litigant who claims the refund and has not got to be adjudged by the yard-stick of a prudent and diligent assessee. Thus, in case the petitioners were to establish that there was a mistake of law committed by it at the time when the payments in question were made, the mere fact that it might have been possible for the petitioner, by the exercise of due care and diligence, to have known of the correct position in law, would not disentitle it to the benefit of Section 72 of the Contract Act.

26. The petitions are accordingly dismissed. There shall, however, be no order as to costs. The petitioner may, if he so chooses, now take appropriate proceedings before the sales tax authorities for setting aside the assessment orders and in case sufficient cause is shown, we entertain no doubt whatsoever that the appeals would be entertained and disposed of on merits by the appellate authorities.