(2006) 08 MAD CK 0164

In the Madras High Court

Case No : Writ Petition No. 22777 of 2004 and W.P.M.P. No. 27542 of 2004

N. Jayamurugan APPELLANT

Vs

Commercial Tax Officer and Another RESPONDENT

Date of Decision : 24-08-2006

Acts Referred:

Citation : (2008) 17 VST 416

Hon'ble Judges : K. Raviraja Pandian, J

Bench : Single Bench

Advocate : A. Ravichandran, for the Appellant; M. Udayakumar, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

K. Raviraja Pandian, J.—The writ petition is filed seeking for the relief of issuance of a writ of certiorarified mandamus to call for the records of the first respondent in Rc. 1668/2004/A3 dated July 8, 2004 and quash the same as illegal, unlawful and unconstitutional and direct the second respondent to fix the tax liability on a right person after conducting necessary enquiry and ascertaining the facts.

2. The facts of the case are:

The Himalayan Lottery Centre has been inspected by the Enforcement Wing Officials, Chennai on September 8, 1986 at No. 206, Triplicane High Road, Chennai-5 and found that the said company being a dealer in the lottery tickets had not registered themselves under the Tamil Nadu General Sales Tax Act, 1959. No day to day accounts were maintained. No stock books have been maintained for the lottery tickets available. No purchase bills have been produced for the goods worth Rs. 49,541 available at the time of inspection. On the basis of the inspection report, the assessing officer seems to have been framed assessment for the assessment years 1984-85, 1985-86 and 1986-87, as seen from the letter of the second respondent-Commercial Tax Officer, Ice House Assessment Circle dated May 8, 2001, which is made available at page No. 11 of the typed set of papers. Thereupon there is a series of correspondence between the petitioner Jayamurugan disowning the Himalayan Lottery Centre. The petitioner''s representative seems to have met the Commercial Tax Officer on March 1, 2001 and explained that the petitioner had no connection with the Himalayan Lottery Centre. Thereupon the petitioner by their letter dated July 14, 2001 requested the second respondent to furnish the assessment order copy for the said assessment years for which the second respondent replied that the assessment for the assessment years 1984-85 to 1986-87 were finalised on July 31, 2001 and served on the dealer on August 24, 2001. Thereafter, there is several correspondence between the petitioner and the second respondent. Ultimately, the Commercial Tax Officer, T. Nagar (East) Assessment Circle issued a notice on July 8, 2004 directing the petitioner to pay tax on sale of lottery tickets for the assessment years 1984-85 to 1986-87 within three days failing which the petitioner was informed that the petitioner''s bank account would be attached and movable and immovable properties would be distrained and penal action would be taken against the petitioner.

3. The writ petition was admitted in the year 2004 and interim stay of the recovery notice has also been passed by this court on August 10, 2004.

4. While that being so, a Constitution Bench of the Supreme Court in the case of Sunrise Associates Vs. Govt. of NCT of Delhi and Others, overruled prospectively, the earlier judgment of H. Anraj Vs. Government of Tamil Nadu, which held that the lottery tickets were goods and liable to be taxed by holding that two distinct rights were transferred to the purchaser of lottery ticket, i.e., right to participate in the draw and chance to win. It was held that tax could be levied on the right to participate in the draw which was held to be the goods but not on the chance to win which was held to be actionable claim.

5. The decision of the Supreme Court being declaration of the true and correct position of law became applicable to all the transactions and proceedings which have not become final and concluded. The rendering of a judgment by the Supreme Court is not the same as enactment of a statute. A decision of the Supreme Court does not make the law, but merely explains and puts in proper perspective the true position and effect of the law. The true position of law so declared exists from the very date of making the law and not from the date of declaration by the Supreme Court. When a Legislature enacts a statute, it creates rights and obligations and therefore its operation can be prospective or retrospective depending upon the provisions of the statute. But when the Supreme Court gives a decision declaring the law, it does not create rights and obligations, but merely identifies and declares the pre-existing rights or obligations and declares true or correct position of law. Thus, it is the cardinal principle of construction that every statute is presumed to be prospective unless it is expressly or by necessary implication made retrospective in operation and every decision of the Supreme Court declaring the law as retrospective unless it is expressly by necessary implication restricted to prospective operation.

In the case of Sunrise Associates Vs. Govt. of NCT of Delhi and Others, , while declaring the law, the Supreme Court has observed that the operation of the law declared in that case would be prospective.

6. What would be principle of prospective overruling, is candidly explained by the Constitution Bench of the Supreme Court in the case of Somaiya Organics (India) Ltd. v. State of Uttar Pradesh [2001] 123 STC 623. In the said case in paragraph 41, the Supreme Court observed as follows:

...It is declared that the vend fee realised by the States is not to be refunded to the appellants and, at the same time, the State cannot collect any vend fee for the period prior to October 25,1989 or thereafter notwithstanding that notices of demand may have been issued or recovery proceedings initiated....

The judgment further explains the position as follows (page 644 of STC):

...by prospective overruling, the court does not grant the relief claimed even after holding in the claimant''s favour. In this case, the court held that the statutory provision imposing vend fee was invalid. Strictly speaking, this would have entitled the appellant to a refund from the respondent of all the amounts collected by way of vend fee. But because, as stated in the Synthetics decision Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, itself, over a period of time imposts and levies had been imposed by virtue of the earlier decision and that the States as well as the petitioners and manufacturers had adjusted their rights and their positions on that basis, this relief was denied. The court did not, by denying the relief, authorise or validate what had been declared to be illegal or void, nor did it imbue the Legislature with competence up to the date of the judgment.

8. From the above exposition of law it is clear that neither the Government is liable to refund the tax already collected nor entitled to collect any further tax for the period prior to the date of judgment. So far as the present case is concerned, though the assessment order was stated to have been made and demand notice was issued, which is the subject-matter of the writ petition on the basis that the lottery tickets were goods and the sale of which were liable to be taxed, no amount was collected from the petitioner towards tax and the same is pending consideration before this court. At the time of admission, the court has also granted interim stay of all further proceedings of the first respondent pursuant to the notice dated July 8, 2004.

9. In the light of the decision of the Supreme Court in the case of Sunrise Associates Vs. Govt. of NCT of Delhi and Others, and also the decision of the Supreme Court in the case of Somaiya Organics (India) Ltd. [2001] 123 STC 623 explaining the principle of prospective overruling, I am of the considered view that the writ petition has to be allowed by setting aside the order of demand, which is impugned in this writ petition. The writ petition is accordingly allowed. No costs. The connected miscellaneous petition is closed.

