

(1976) 03 AHC CK 0055

In the Allahabad High Court

Case No : Sp. A No. 362 of 1974 in CMW No. 2127 of 1970

Nagar Mahapalika and Another

APPELLANT

Vs

Sri Ram Mahadeo Prasad

RESPONDENT

Date of Decision : 12-03-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72

Citation : (1976) AWC 282

Hon'ble Judges : N.D. Ojha, J;G.C. Mathur, J

Bench : Division Bench

Advocate : N.D. Pant, for the Appellant; V. Swarup, for the Respondent

Final Decision : Dismissed

Judgement

G.C. Mathur and N.D. Ojha, JJ.—The Municipal Board, Kanpur, had been levying from before coming into force of the Constitution, terminal tax upon the import or export of certain commodities at specified rates. From January 1, 1960, the Municipal Board was replaced by the Nagar Mahapalika, Kanpur. By a notification dated January 15, 1960, published in the U.P. Gazette dated January 16, 1960, the Nagar Mahapalika enhanced the rates of terminal tax. On May 18, 1970, the Respondent filed a writ petition in this Court challenging the notification enhancing the rates of terminal tax on the ground that after the coming into force "of the Constitution it was no longer permissible for the Nagar Mahapalika to impose terminal tax, as under the Constitution the jurisdiction to levy this tax had been given to the Union of India. The writ petition was allowed by Gulati, J. on October 11, 1971. The operative part of his judgment reads thus:

The Petitioner has also prayed for a refund. There is no doubt the the Petitioner is entitled to the refund of the Terminal Tax which it has paid in excess. The Petitioner shall, however, apply to the Nagar Maha Ralika for the refund of the excess payment made by it towards the Terminal Tax and the Nagar Mahapalika

would refund the excess amount subject to such objections as regards limitation etc., as may be open to it under the law. The Nagar Mahapalika will dispose of the claim for refund expeditiously.

2. Thereafter the Respondent applied to the Nagar Mahapalika for a re-fund of the excess amount paid by it. The Nagar Mahapalika refunded a sum of Rs. 67,500.23, but declined to refund the balance of Rs. 2,50,000/-, admittedly paid by the Respondent in excess in pursuance of the impugned notification. The reason given by the Nagar Mahapalika for declining to refund the balance amount was that the recovery of this amount was barred by limitation. The Respondent then moved an application for taking proceedings for contempt against the Nagar Mahapalika. During the course of these proceedings the Respondent was advised to file an application for review of the judgment of Gulati, J. dated October 11, 1971, -and it did so. After [hearing the "parties, Gulati, J. by order dated October 9, 1974, allowed the review, application holding that no question of limitation really arose in the case and even if it arose, no part of the claim for refund was barred by time. He, accordingly, deleted the following words from his judgment dated October 11, 1971:

subject to such objections as regards limitation as may be open to it under the law.

Against this order of review the Nagar Mahapalika has filed this appeal.

3. Two questions have been canvassed before us in this appeal, namely:

(i) Whether the question that a claim for refund is wholly or partly barred by limitation under the ordinary law can arise in a writ petition or not? and

(ii) If such a question can arise, whether the Nagar Mahapalika was right in declining to pay the balance to the Respondent on the ground that it was barred by limitation?

4. In the counter-affidavit filed by the Nagar Mahapalika in the writ petition it was stated in paragraph 7:

That the question as to the amount if any to which the Petitioner may be entitled by way of refund can only be determined in regular suit. Several disputed questions will have to be decided viz. whether the claim of refund is within limitation and also as to whether proper notice has or has not been given in accordance with law.

In reply to this defence it was stated in the rejoinder-affidavit that the claim for refund was not beyond time. Thus, the question of limitation had been specifically raised in the writ petition and the learned Single Judge is not right in his observation in the review order that no question of limitation was really raised in the writ petition and that he should have given no directions in that regard. In our opinion, a plea of limitation can legitimately be raised even in writ petitions where claims for refund are made. In *Burmah Construction Co. Vs. The*

State of Orissa and Others, the question regarding limitation for the refund of Sales Tax illegally levied on worries contracts, arose for consideration. The Supreme Court observed:

The High Court normally does not entertain a petition under Article 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under Article 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation. The petition in the present case for enforcement of the liability of the Collector imposed by statute to refund a tax illegally collected and it was maintainable; but it can only be allowed subject to the restrictions which have been imposed by the Legislature. It is not open to the claimant to rely upon the statutory right and to ignore the restrictions subject to which the right is made enforceable.

5. The right which the Respondent sought to enforce was a right u/s 72 of the Contract Act to a refund of the amount paid by it under a mistake of law. This civil right was subject to the restriction that a suit for such recovery could only be filed within three years of the date on which the party became aware of the mistake. Therefore, if the High Court enforced this right, it could do so subject to the restrictions.

6. In State of Madhya Pradesh Vs. Bhailal Bhai and Others, the question that arose before the Supreme Court was whether a writ should be issued directing refund where it is opposed on the ground that the claim is barred by limitation. The Supreme Court observed:

Whether repayment should be...ordered in the exercise of this discretion will depend in each case on its own facts and circumstances.

It is not easy nor is it desirable to lay down any rule for universal application. 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.

It, thus, appears that it is proper for the High Court, when issuing a direction for refund in a writ petition, to confine its order to that part of the claim for refund which is not barred by limitation under the ordinary law, which applies if such claims were made in a suit. In our opinion, Gulati J., was perfectly justified when in his original judgment dated October 11, 1971, he directed refund of only that amount of the claim which was not barred by limitation.

7. This brings us to the next question whether any part of the claim made by the Respondent was barred by limitation. We have already mentioned that the impugned notification was published on January 16, 1960, and the writ petition was filed on May 18, 1970. There is no doubt that the enhancement of the terminal tax was unconstitutional and that the amount of tax paid in excess under the impugned notification could be recovered u/s 72 of the Contract Act as money paid under a mistake. Admittedly, the limitation for a suit for recovery of an amount paid under a mistake is three years from the date when the mistake is discovered. The real question for consideration is as to when can the mistake, in the present case, be said to have been discovered by the Respondent.

8. In the writ petition the Respondent had stated in paragraph 13 that it had recently come to know that the Nagar Mahapalika had no authority to amend the Schedule of Terminal tax after the coming into force of the Constitution. This assertion was not controverted in the counter-affidavit. The stand of the Nagar Mahapalika is that the Respondent must be deemed to have knowledge of the mistake of law when the Supreme Court in 1964, in *The Town Municipal Committee, Amravati Vs. Ramchandra Vasudeo Chimote and Another*, struck down a similar notification made by the Amraoti Municipality. We do not think that limitation starts running from the date of mere notional knowledge, as is suggested by the learned Counsel for the Nagar Mahapalika, but from actual knowledge of the mistake of law. The learned Counsel has relied upon certain observations made by the Supreme Court that every one is presumed to know the law. These observations were made in different contexts. If this principle were applied to a claim u/s 72 of the Contract Act, then no claim for money paid under a mistake of law would be entertainable, because every one would be presumed to know the law and, as such, there would be no mistake of law. In such cases, in our opinion, the limitation starts running from the date of actual knowledge of the mistake of law.

9. The impugned notification was first challenged in Civil Misc. Writ Petition No. 1290 of 1960 *J.K. Jute Mills Co. Ltd. v. Nagar Mahapalika Kanpur*. This writ petition was allowed on December 15, 1967. This was the first time when the impugned notification was struck down and if, at all, the Respondent could be said to have knowledge of the mistake of law, it could be from the date of the judgment in this case. The present writ petition was filed within three years of the decision in that writ petition. A similar objection was raised by the Nagar Mahapalika in the case of *Elgin Mills Co. Ltd.*, whose writ petition challenging the impugned notification had been allowed, but the Nagar Mahapalika had refused to make the refund on the ground of limitation. The *Elgin Mills Co. Ltd.* moved an application for taking proceedings for contempt of court against the Nagar Mahapalika and therein the Nagar Mahapalika took the plea that the claim for refund should be held as time barred, as the Petitioner in that case should be deemed to have knowledge of the mistake from the date of the decision of the Supreme Court in *Amraoti Municipality's* case. A Bench of this Court turned down this objection observing:

Moreover, the Amraoti Municipality's case did not deal with the notification dated 16th January, 1960. In view of that decision the Petitioner company could not be deemed to have knowledge of the invalidity of this notification. If that were so, the Nagar Mahapalika could also be imputed with the knowledge. It is not the Nagar Mahapalika's case that it continued to act upon that notification and continued to collect the tax on its strength in spite of knowledge of its invalidity.

10. In view of what has been said above, we do not think that the Respondent can be said to have had knowledge of the mistake of law from the date of the decision of the Supreme Court in Amraoti Municipality's case. The earliest it can be said to have knowledge of this mistake is from the date of the decision, on December 15, 1967, of the writ petition filed by J.K. Jute Mills Co. Ltd. The writ petition was filed within three years of that date. Therefore, on the date on which the writ petition was filed no part of the claim for refund was time barred. The learned Single Judge was, therefore, right in holding that the Nagar Mahapalika was not justified in declining to refund the balance of the claim on the ground of limitation.

11. The learned Counsel for the Appellant also raised an objection that the review application filed u/s 151, Code of Civil Procedure, before the learned Single Judge was not maintainable. This objection was raised before the learned Single Judge also and he has effectively dealt with it. It is not necessary for us to add anything more to what he has said. The learned Counsel also complained that the review application was filed very belatedly and during the pendency of the contempt proceedings. There is no justification for this complaint. The review application was filed after the Appellant had refused to refund a large amount of the illegally collected tax on the ground that the refund was barred by limitation. The suggestion regarding the filing of the review application came up during the hearing of the contempt matter. The dispute regarding limitation in this case could only be resolved by this Court either in the contempt proceedings or in the review application. In these circumstances, we do not think that the delay in filing the review application and the circumstances in which it was filed can have any effect on the maintainability of the review application.

12. Though we have held that the learned Single Judge was justified in his original judgment in directing refund of the excess amount of the terminal tax subject to objection as regards limitation, we do not think any interference is now called for with the review order, as we have come to the conclusion that no part of the claim for refund was barred by limitation. On account of the review order the original judgment now directs the refund of the entire claim. Since no part of the claim is time barred, the order is just and appropriate.

13. The appeal is accordingly, dismissed. In the circumstances of the case, we direct the parties to bear their own costs of this appeal.