

(1968) 07 KL CK 0005

In the High Court Of Kerala

Case No : Writ Appeal No. 119 of 1967 against OP No. 258 of 1961

Sales Tax Officer, 2nd Circle, Ernakulam and another

APPELLANT

Vs

C. S. Menon

RESPONDENT

Date of Decision : 01-07-1968

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1968) KLJ 792

Hon'ble Judges : M.S. Menon, C.J;P. Govindan Nair, J

Bench : Division Bench

Advocate : C.S. Anantha Krishna Iyer, for the Respondent

Final Decision : Dismissed

Judgement

1. The short question raised in this appeal is whether the respondent can seek a direction under Art. 226 of the Constitution for refund of certain amounts paid by him by way of Sales Tax for the years 1950 - 51 to 1959 - 60. The respondent was assessed to Sales Tax for these years on the turnovers pertaining to works contracts as well. The details of the turnover pertaining to works contract and the corresponding Sales Tax on those amounts have been detailed in the affidavit in support of the writ application and there is no controversy regarding the correctness of those amounts. The question only is whether the petitioner can claim a direction for refund of those amounts in an application under Art. 226 of the Constitution. The learned Judge has allowed the application and directed the refund. The respondent has prayed for quashing the assessment orders in addition to the relief for refund. No question therefore arises about the assessment orders standing in the way of any refund being directed. That the transactions in question are not taxable to Sale Tax is well established now and it not disputed before us. There is constitutional inhibition about taxing such transactions and the assessments therefore have to be treated as void being against the provisions of the Constitution. In these circumstances, the only question is whether the impediment-if it is one-provided by Section 23A of the

General Sales Tax Act, 1125, can operate as a bar. It is unnecessary to labor the point for the question involved is covered by more than one decision of the Supreme Court. There has been an exhaustive survey of the rulings in a very recent judgment of the Supreme Court in civil appeals 260 - 263 of the year 1967. The learned Chief Justice after such review has formulated certain conclusions at the end of the judgment. It appears to us that Conclusion No. (4) so formulated must apply to the facts of this case and that conclusion is in these terms:

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the limitation Act but it is not a compulsory remedy to replace a suit.

The cause of action giving the right to approach this Court, can be said to have risen on 13-8-1963, the date on which the Supreme Court pronounced the judgment in the decision in *South India Corporation (P) Ltd., v Secretary, Board of Revenue, Trivandrum* and another reported in (1964) 15 S.T.C. 74 and the writ application was moved before this Court on 21-1-1966. This is within three years and there can be no doubt, on the basis of the principle laid down in the decision of the Supreme Court in *The State of Madhya Pradesh and another v "Bhailal Bhai and others* reported in (1964) 15 S.T.C. 450 that there is no question of limitation. No disputed questions of fact are involved. The transactions, as we indicated, are outside the purview of the statute. The assessments are therefore without the authority of law. They are illegal and void. Tax has been collected pursuant to such assessments. It is said by the Supreme Court in these circumstances, that the State should refund such amounts collected. We therefore think that this is a fit case in which remedy should be granted in proceedings under Art. 226 of the Constitution. This has been done by the judgment under appeal. We see no reason to interfere. We dismiss this appeal but make no order as to costs.