
(1975) 04 DEL CK 0023
In the Delhi High Court
Case No : Civil Writ No. 54 of 1967

S.B. Gurbax Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-04-1975

Acts Referred:

Citation : (1976) 37 STC 300

Hon'ble Judges : S.I. Rangarajan, J

Bench : Single Bench

Advocate : Randhir Chawla, for the Appellant; R.C. Chawla, for the Respondent

Final Decision : Allowed

Judgement

S. Rangarajan, J.—This petition under Articles 226 and 227 of the Constitution has been filed for quashing the notice dated 25th November, 1966, (copy of which is annexure C to the petition), issued by the Sales Tax Officer, W-27, Vikas Bhawan, New Delhi, that the petitioner should produce the relevant documents to arrive at a correct calculation for the purpose of making a fresh assessment.

2. A few facts which have led to the filing of this writ petition may alone be noticed. The petitioner, a building contractor who was registered as a dealer under the Bengal Finance (Sale Tax) Act of 1941, as extended to the Union Territory of Delhi (hereinafter called the Act), was assessed to sales tax for the assessment year 1954-55. He filed a writ petition (Civil Writ No. 540-D of 1959) challenging the assessment; the writ petition was accepted by S.K. Kapur, J., by his order dated 29th April, 1966 (reported in S.B. Gurbaksh Singh v. Sales Tax Officer [1966] 18 S.T.C. 500. The contention of the petitioner, which was accepted, was that the assessment had been made in accordance with Rule 28 of the Delhi Sales Tax Rules, 1951, which was held to be ultra virus for excessive delegation. After quashing the assessment the following observations were made:

It will, however, be open to the respondents to make fresh and/or proper assessment in accordance with law.

3. The petitioner in this case had applied for refund of a sum of Rs. 3,170.25, which he had deposited as sales tax for the year involved by means of an application dated 31st August, 1966. In respect thereto the above said notice dated 25th November, 1966, was issued to the petitioner placing reliance on the above said observations of S.K. Kapur, J. An objection was raised by the petitioner to the issue of the said notice on the ground that the said notice was on its face beyond four years after the expiry of the period of assessment year ending 31st March, 1955, and that there would not be any notice issued in respect of the assessment year ending 31st March, 1955, beyond 31st March, 1959, and that it would not be possible to rely on any observation of S.K. Kapur, J., to get over the period of the said limitation; S.K. Kapur, J., had not by any means given any positive direction to make de novo assessment.

4. To appreciate the point that is thus raised in this writ petition, the following provisions of the Act have to be read:

11. Assessment of tax.--(1) If no returns are furnished by a registered dealer in respect of any period by the prescribed date, or if the Commissioner is not satisfied that the returns furnished are correct and complete, the Commissioner shall, within eighteen months after the expiry of such period, proceed in such manner as may be prescribed to assess to the best of his judgment the amount of the tax due from the dealer and in making such assessment shall give the dealer a reasonable opportunity of being heard; and in the case of failure by a registered dealer to submit a return in respect of any period, a return accompanied by a receipt from a Government treasury or the Reserve Bank of India as required under Sub-section (3) of Section 10, by the prescribed date, the Commissioner may, if he is satisfied that the default was made without reasonable cause, direct that the dealer shall pay by way of penalty in addition to the amount of the tax so assessed a sum not exceeding one and a half times that amount.

(2) ...

(2a) No assessment under Sub-section (1) shall be made after the expiry of four years and no assessment under Sub-section (2) shall be made after the expiry of six years from the end of the year in respect of which or part of which the assessment is made.

With effect from 1st October, 1959, the following proviso was added to this section:

Provided that where such assessment is made in consequence of or to give effect to any order of an appellate or revisional authority or of a court, the period of four years or six years, as the case may be, shall be reckoned from the date of such order.

5. In the affidavit of Shri J.N. Prasad, Sales Tax Officer, dated 18th July, 1967, filed in opposition to this writ petition, it was contended that the notice dated

25th November, 1966, was not issued beyond limitation since the assessment order could be passed within four years of the judgment of S.K. Kapur, J., dated 29th April, 1966 (that is, till 29th April, 1970). It was claimed further that the amendment, which added the above proviso to Section 11(2a) with effect from 1st October, 1959, by Section 10(a) of the amending Act, 1959, had retrospective operation; the order of S.K. Kapur, J., itself having been passed within four years of the said amendment the issue of the notice was in time and could not be questioned. It was also pointed out that it was immaterial that the proviso was enacted after 31st March, 1959, that is, beyond four years of the expiry of the assessment year on 31st March, 1955.

6. Reliance was placed for the revenue before me on the decision of D.K. Kapur, J., in *Hari Mal Dharam Vir v. Union of India* C.W. No. 160 of 1967 decided on 27th July, 1973 (Delhi High Court). In the case of *Hari Mal Dharam Vir* C.W. No. 160 of 1967 decided on 27th July, 1973 (Delhi High Court) also, S.K. Kapur, J., had quashed the assessment for the period 1st October, 1956, to 31st December, 1956, by his order dated 20th July, 1966, because in that case also (as in *Gurhaksh Singh* [1966] 18 S.T.C. 500 the assessment was based on Rule 28, which had been struck down. In that case also, S.K. Kapur, J., had made observations similar to what he had made in *S.B. Gurbaksh Singh* [1966] 18 S.T.C. 500, that it was open to the assessing authority to make a fresh assessment with respect to the above period if and to the extent permissible by law.

7. It may be noticed that in the case of *Hari Mal Dharam Vir* C.W. No. 160 of 1967 decided on 27th July, 1973 (Delhi High Court), the assessment pertained to 1st October, 1956, to 31st December, 1956, and the four years period of limitation would expire only on 31st December, 1960, or even later, 31st March, 1961, whereas the assessment year concerned in the present case was 1954-55 ending 31st March, 1955, and no notice could have been issued beyond four years. Therefore on the basis of the amendment which brought the above said proviso on the statute book with effect from 1st October, 1959, long after 31st March, 1959, did not fall for consideration before D.K. Kapur, J. The question whether the amendment had any retrospective operation did not arise. I shall, however, revert to this decision again after noticing a few decisions of the Supreme Court under the Sales Tax Act itself which were not brought to the notice of D.K. Kapur, J., and other cases having bearing upon the retrospectivity of the above amendment.

8. In *Jaipuria Brothers Co. Vs. State of Uttar Pradesh and Others*, , Shah, J. (speaking on behalf of Subba Rao and S.M. Sikri, JJ., who constituted the Bench), was concerned with Section 21 of the U.P. Sales Tax Act, 1948, before it was amended by Act 19 of 1956, under which there could be no order of assessment or reassessment either by the Sales Tax Officer suo motu or pursuant to the direction of the appellate or revising authority after the expiry of a period of three years prescribed by this statute. u/s 21, as amended, the

power may be exercised by the Sales Tax Officer suo motu within four years from assessment or reassessment. That power could be exercised under the first proviso within a further period of One year if a notice under Sub-section (2) was served within four years of the end of the year of assessment and without limit of time when it was made in consequence of, or to give effect to, any finding or direction contained in an order of the appellate or revisional authority or under an order of the High Court u/s 11. It was held that Section 21, as amended during the pendency of the proceedings in the High Court, was retrospective from the date on which the principal Act came into operation and the amended section must be deemed to have been on the statute book on the date on which the revising authority passed this order. The assessing authority, Therefore, had power under the amended section to proceed with the assessment of the assessed for the year 1948-49. The further facts of that case were that the Sales Tax Officer had made a best judgment assessment of a public limited company on 31st March, 1952, in respect of the assessment year 1948-49, which was set aside by the Judge (Appeals), Sales Tax, on the ground that the appellant-company was not a dealer. But this order was set aside by the Judge (Revisions), Sales Tax, on 28th March, 1955, and it was remanded to the Sales Tax Officer for fresh assessment. Then notice was issued by the Sales Tax Officer for production of account books, etc., on 23rd July, 1955, for the purpose of the assessment year 1948-49. A single Judge of the Allahabad High Court, on being moved for the issue of a writ under Article 226, held that the assessment sought to be made was clearly barred by time u/s 21 of the U.P. Sales Tax Act. But this order was reversed by a Division Bench on appeal, which held that in view of the order of remand, which ordered a fresh assessment the period of limitation did not apply. There was a further appeal by special leave to the Supreme Court which confirmed the decision of the Division Bench, but on different grounds. It would be important to notice the reasoning of Shah, J., after referring to a decision of the Judicial Committee of the Privy Council under the Income Tax Act in (1938) 6 ITR 414 (Privy Council) , which had decided that once a final assessment had been made it could not be reopened by the Income Tax Commissioner either by his own motion or at the direction of the Commissioner exercising powers u/s 33 of the Income Tax Act of 1922, except as provided by the Act. Shah, J., was of the view that issue of notice in Jaipuria Brothers Co. Vs. State of Uttar Pradesh and Others, would have been barred by limitation but for the fact that Section 21 of the U.P. Sales Tax Act had been amended explicitly during the pendency of the writ proceedings before the High Court, the legislature having given a clear retrospective operation to the amended Section as from the date on which the principal Act came into operation. Care was taken to point out that before Section 21 was amended there could be no order of assessment or reassessment suo motu, or pursuant to the direction of the appellate or revising authority after the expiry of the period of three years prescribed by the statute, but the power may be exercised by the Sales Tax Officer suo motu within four years from assessment or reassessment. It was not felt necessary to decide, in that case, whether in pursuance of a direction given by the Judge (Revisions), Sales Tax, to

make a fresh assessment, a fresh assessment could be made u/s 21 before it was amended.

9. In *Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad*, , Bhargava, J. (speaking for J.C. Shah and V. Ramaswami, JJ., who were also in the Bench), held that in a case to which the provisions of the Central Provinces and Berar Sales Tax Act, 1947, applied the period of limitation for reopening the assessment dated 23rd May, 1959, on the ground of turnover escaping assessment was three years as prescribed u/s 11A(1) of the Act of 1947; it was not held to be five years as prescribed in the main part of Section 19 of the Act of 1959. The original assessment, Bhargava, J., pointed out on page 89, was in respect of a period when the new Act had not come into force. The actual order of assessment was made on 23rd May, 1959, shortly after the new Act had come into force (page 90). The mere enforcement of that Act by the time the order of assessment was passed by the Sales Tax Officer cannot lead to the conclusion, it was observed, that the assessment of the respondent was made under the new Act and not under the repealed Act. When the new Act came into force (on 1st April, 1959) all rights, title, obligation or liability already acquired, accrued or incurred under the repealed Act by the respondent remained unaffected and were intact. The rights and liabilities having to be determined under the old Act the period of limitation was only three years for making a reassessment on the ground of under-assessment, escapement or wrong deduction (sic) had to be done only within three years and not five years as laid down by the new Act. The amending Act had not come into force when the High Court decided the above case and, consequently, there was no occasion to consider its effect. The decision of the High Court would remain unaffected even after the amendment, the decision being to the effect that the limitation applicable to the case was under the old repealed Act.

10. In *Swastik Oil Mills Ltd. Vs. H.B. Munshi*, Deputy Commissioner of Sales Tax, Bombay, , Bhargava, J. (speaking for J.C. Shah and V. Ramaswami, JJ., who comprised the Bench), held that there was no period of limitation for the exercise of revisional powers u/s 22 of the Bombay Sales Tax Act of 1946 or Section 31 of the Act of 1953 and no such limitation had to be necessarily read into those two Acts. The repeal of the Act of 1953 by the Act of 1959 was held not to affect the rights and liabilities of the assessed to tax under the Act of 1953 or the Act of 1946; the Deputy Commissioner had the power to revise the order u/s 22 of the Act of 1946 and hence the proceedings initiated by him were held to-be within jurisdiction. Reference was made to the earlier decision of the same court in *State of Kerala Vs. K.M. Charia Abdullah and Co.*, Bhargava, J., was unable to affirm the view that the revisional powers were governed by any period of limitation laid down in Section 11A for proceedings for reassessment of escaped turnover.

11. In the absence of clear indication in the statute, either expressly or by necessary implication, it would not be permissible to treat it as having

retrospective operation to impair an existing right or obligation otherwise than as regards matter of procedure. Statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective. But a sovereign legislature has the competence to initiate legislation with retrospective effect. When a law is altered during the pendency of an action substantive rights of the parties are to be decided according to the law as existed when the action began unless the new statute shows a clear intention to vary it. These are well-accepted general principles. (Craies on Statute Law, 17th Edition, pp. 389-402).

12. The difference between a substantive right and the relief is distinct from the procedure to be adopted in getting relief: this is the specific aspect which falls for decision in the present case. A Full Bench of the Calcutta High Court pointed out this distinction in *Bhobo Sundari Debi v. Rakhal Chander Bose* I.L.R.(1886) Cal. 583. The following observation, which could hardly be bettered either for its sweep or its clarity, occurs on page 590:

There is, I think, a clear distinction between relief and the mode of procedure for obtaining such relief. The relief remains unaffected by the change of the procedure.... The procedure for enforcing a right is no portion of that right, nor does it alter or affect it.

13. The law of limitation being a branch of the law of procedure, what applied to a suit would be the law in force at the time of its institution: vide the Full Bench decisions of the Madras and Allahabad High Courts (*Rajah of Pittapur v. Venkata Subba Row* ILR [1916] Mad. 645 and *Bankey Lal Vs. Babu and Others*, .

14. *Hidayatullah, J.* (as he then was), dealing with the case arising out of Section 34 of the Income Tax Act, 1922, pertaining to a period of limitation similar to the one in question observed as follows in *S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others*, :

Under the scheme of the Income Tax Act a liability to pay tax is incurred when according to the Finance Act in force the amount of income, profits or gains is above the exempted. That liability to the State is independent of any consideration of time and, in the absence of any provision restricting action by a time-limit, it can be enforced at any time. What the law does is to prevent harassment of assesseds to the end of time by prescribing a limit of time for its own officers to take action. This limit of time is binding upon the officers, but the liability under the charging section can only be said to be unenforceable after the expiry of the period under the law as it stands. In other words, though the liability to pay tax remains, it cannot be enforced by the officers administering the tax laws. If the disability is removed or according to a new law a new time-limit is created retrospectively, there is no reason why the liability should not be treated as still enforceable.

And again:

We wish to say a few words about the well-known principle that subsequent

changes in the period of limitation do not take away an immunity which has been reached under the law as it was previously. In this sense, statutes of limitation have been picturesquely described as "statutes of response"...there is no repose till the tax is paid or the tax cannot be collected. What the law does by prescribing certain periods of time for action is to create a bar against its own officers administering the law. It tries to trim between recovery of tax and the possibility of harassment to an innocent person and fixes a duration for action from these two points of views....An assessment can be said to become final and conclusive if no action can touch it but where the language of the statute clearly reopens closed transactions there can be no finality. We would not raise these prescribed periods to the level of those periods of limitation which confer not only immunity but also give titles by the passage of time.

15. The same idea has been put in a slightly different form by the Supreme Court in *The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta, Income Tax Officer and Another*, :

...They (periods fixed for reopening) do not create an exemption in favor of the assessed or grant an absolution on the expiry of the period. The liability is not enforceable but the tax may again become exigible if the bar is removed and the taxpayer is brought within the jurisdiction of the said machinery by reason of a new power.

16. It will be thus seen when there is a period of time fixed for making an assessment from a certain point of time it is a fetter on the power or jurisdiction of the assessing authority; if prior to the expiry of the prescribed period the said fetter is either relaxed or removed by the legislature by amending the Act, it is the period prescribed by the amending Act that would apply. The placing of such a fetter on the jurisdiction of the assessing authority, whether it amounts to a rule of limitation or not, will still be a piece of adjectival or procedural law. Since such a fetter does not create any vested right in the assessed it can always be removed or relaxed by the legislature.

17. The above aspects have been discussed at considerable length in a series of decisions rendered by the Andhra Pradesh High Court. It may be sufficient to refer to the decision of Gopal Rao Ekbote, J., who spoke for a Full Bench of that Court in *Allied Exports & Imports v. State of Andhra Pradesh* [1971] 28 S.T.C. 175. In that case the petitioner-firm was assessed to sales tax for the year 1956-57 by an assessment order dated 30th September, 1958. Subsequently the assessing authority issued a notice to reassess and by its order dated 31st March, 1963, included an additional turnover in the assessment, as escaped turnover. During the assessment year 1956-57 it was the Madras General Sales Tax Act of 1939 that was in force; under Rule 17 of the Rules framed under the said Act, the assessment could have been reopened within three years next succeeding the assessment year. On 15th June, 1957, the Andhra Pradesh General Sales Tax Act of 1957 came into force and had repealed the Madras Act. According to Section 14(4) of that Act, a period of four years was available for

reopening the assessment. Since Section 14(4) was also amended with retrospective effect from 15th June, 1957, the amended provision provided a period of six years for reassessment. The contention was that the amended provision did not apply but it was the Madras Act of 1939 which was applicable. This contention was rejected on the ground that the period prescribed for exercising the power to reassess under the repealed Act had not expired on the date when the repealing Act came into force. Since the right to tax and liability to pay were subsisting and were saved and, by virtue of the amendment the period of limitation had been enlarged, the assessing authority had jurisdiction to initiate and conclude the proceedings for assessment within the time prescribed by the amending Act.

18. Once this principle is clearly understood there could be no difficulty in applying it in the present case. It is only necessary to recapitulate that, in the instant case, while the assessment for the year in question, namely, 1954-55, had to be completed before 31st March, 1959, the amendment, which added the above proviso took effect only from 1st October, 1959. It follows on this sole ground that there was no jurisdiction on the part of the assessing authority to issue a notice pursuant to certain observations said to have been made by S.K. Kapur, J., on 29th April, 1966.

19. There is nothing in the above said judgment of D.K. Kapur, J., even to indicate that this question was ever argued. The concentration seems to have been on whether the assessment could be said to be "in consequence of or to give effect to any order" of S.K. Kapur, J. A similar provision [Section 34(3) of the Income Tax Act of 1922] had been construed by the Supreme Court in the Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri, , which construed the words in the above statute containing the words "finding" and "direction", which are missing from Section 11(2a) of the Sales Tax Act. The above said Supreme Court decision was distinguished after observing that but for this "difference", D.K. Kapur, J., would have considered himself bound by the above said decision of the Supreme Court. D.K. Kapur, J., was pressed by the fact that the order passed by S.K. Kapur, J., would become "meaningless" unless Section 11(2a) was read in a "wider" sense, construing it as the equivalent of a "command". If the matter had stood here and it was necessary for me to decide the said question in the present case, I would, with respect, have found it necessary to refer the present case to a larger Bench for decision pertaining to the interpretation of Section 11(2a) on the analogy furnished by the above said decision of the Supreme Court concerning a somewhat similar provision of the Indian Income Tax Act. I am, however, relieved from the necessity of making any such reference in the view that it is sufficient for the purpose of the present case to rest the decision on a ground, not discussed by Dalip Kapur, J., namely, that by the time the amending Act was passed in the present case, the period of limitation for the assessment had run out.

20. The decision rendered by Yogeshwar Dayal, J. (speaking for a Division Bench consisting of himself and V.S. Deshpande, J.) in *Sales Tax Commissioner v. Harbans Motor Stores* [1976] 37 S.T.C. 67 (L.P.A. No. 34 of 1973 decided on 31st March, 1975), which reversed the decision of Hardy, J. (which was followed by Dalip Kapur, J., in the case which went up in appeal before the said Division Bench), only decided the question whether there was any limitation in the matter of the exercise of suo motu power of revision under the Sales Tax Act. The answer was in the negative. The same was the view taken by Dalip Kapur, J., who spoke for a Division Bench (consisting of himself and M.R.A. Ansari, J.), in *Union of India v. Gurbaksh Singh* [1974] 33 S.T.C. 91, and the last proviso to Section 11(2a) bringing in a fresh start (sic) starting from the date of remand order. That is not the case here; we are concerned with the period prescribed for assessment having run out before the said amendment came into effect.

21. In the circumstances, the impugned notice dated 25th November, 1966 (annexure C), has to be and is hereby quashed.

22. A further question was sought to be argued on behalf of the petitioner that in respect of the sum of Rs. 3,170.25 deposited as sales tax for the year in question a direction should be given for refund of the same. To the question put by me--how the petitioner could ask for a refund of an amount which the petitioner had, of his own accord, deposited--Mr. Randhir Chawla, the learned Counsel for the petitioner, fairly replied that without having to decide this question, he was not pressing this relief in respect of Rs. 3,170.25.

23. The writ petition is accordingly accepted and the impugned notice dated 25th November, 1966 (annexure C to the petition), is quashed. In the circumstances, I make no order as to costs.