
(1967) 08 KAR CK 0014
In the Karnataka High Court
Case No : S.T.R.P. No. 48 of 1966

Sri Venugopalaswamy and Co.

APPELLANT

Vs

The State of Mysore

RESPONDENT

Date of Decision : 16-08-1967

Acts Referred:

Mysore Sales Tax Act, 1957 — Section 13, 13 (3), 22 (6) (a), 23 (1)
Mysore Sales Tax Rules, 1948 — Rule 38

Citation : (1967) 2 MysLJ 395 : (1968) 21 STC 86

Hon'ble Judges : B.M. Kalagate, J;A.R. Somnath Iyer, J

Bench : Division Bench

Advocate : B.V. Katageri, for the Appellant; P. Vasudeva Reddy, for E.S. Venkataramaiah, High Court Special Government Pleader, for the Respondent

Judgement

Somnath Iyer, J.—In respect of the assessment year 1961-62 the Commercial Tax Officer commenced proceedings before a Magistrate u/s 13(3) of the Mysore Sales Tax Act, 1957, for the recovery of the tax still due and a penalty of Rs. 11,565.95. The petitioner unsuccessfully prosecuted a revision petition in respect of the penalty before the Deputy Commissioner of Commercial Taxes, and so, presented an appeal to the Sales Tax Appellate Tribunal, in which, the Tribunal at one stage made an order on 29th December, 1964, directing a fresh disposal of the matter by the Commercial Tax Officer in accordance with law. Although the ground on which the order of remand thus made by the Tribunal rested is not very clear, we are able to gather that the Tribunal was of the opinion that the commencement of the proceeding for the recovery of penalty should have been preceded by a hearing afforded to the petitioner. On behalf of the State, a review was sought of this order made by the Tribunal, and, that review ended in an order made by the Tribunal on 29th December, 1964, by which, the earlier order made by it was reversed and the petitioner's appeal was dismissed. This is the effect of the order made by the Tribunal, although the Tribunal does not say so in so many words. Although the Tribunal stated no more than that it allowed the review petition, it is plain that it revoked its earlier order and affirmed that of the

Deputy Commissioner of Commercial Taxes.

2. The only ground on which the Tribunal so reversed its own previous order was that when that order was made, decision of this Court was not brought to its notice. That decision according to the Tribunal made an elucidation that the petitioner was not entitled to the opportunity which was directed by the earlier order.

3. In this revision petition Mr. Katageri placed before us a restricted submission that the Tribunal did not have the competence or power to review its own decision on any such ground, and, we think that, to this submission there can be no answer.

4. Section 22(6)(a) of the Mysore Sales Tax Act which will be referred to as the Act constitutes a complete code on the subject of a review by the Tribunal and it reads :-

"The Appellate Tribunal may, on the application either of the appellant or of the respondent review any order passed by it under sub-section (4) on the basis of facts which were not before it when it passed the order :

Provided that no such application shall be preferred more than once in respect of the same order."

5. The earlier order which was made by the Tribunal under sub-section (4) could be reviewed, as provided by this clause of sub-section (6), only on the basis of facts which were not before it when it passed its first order. The new material on which a review could be founded should consist of new facts and those facts, it is obvious, should be facts pertaining to the merits of the controversy which the Tribunal had before it. We do not accede to the argument that the fact that the person appearing for the State omitted to cite a decision of this Court when the matter was argued before the Tribunal on the first occasion, is a "fact" within the meaning of sub-section (6)(a). That fact which may be a fact in one sense is not a fact in the sense in which the word "fact" occurring in the sub-section should be understood. The facts to which that sub-section refers are facts germane to the decision of the appeal as distinguished from the law which may be applied by the Tribunal on the basis of those proved facts in a given case.

6. In a case like the one before us in which the petitioner was accused of being a defaulter, the basic fact which could entail the penalty statutorily imposed by section 13, is a default after the tax became due under the Act. There may be other facts from which such default could be proved, or the default may be an admitted default. But, notwithstanding proof of default, or an admission that there was default, it may be possible for a dealer to depend upon a legal provision to escape from the penalty which otherwise would become payable. While the question whether there was or was not a default is a question of fact, the other question whether, even if there be default the penalty is not payable is a question of law.

7. Now sub-section (6)(a) of section 22 authorises a review only on the basis of new facts. The only new fact in the present case, which could have conferred power on the Tribunal to review its own decision, was a fact which concerned the question of default. But, if what was depended upon in support of the application for a review was not such question of fact, but was the omission on the part of the person who appeared on behalf of the State, to state a proposition of law supported by a decision of this Court, and that decision of this Court is depended upon at the stage when an application for a review is made, it would be doing violence to the language of sub-section (6)(a), to think that the decision brought before the Tribunal at that stage was a new fact which was not before it when it rendered its earlier decision. It was not asserted on behalf of the State that a new fact appertaining to the question whether the petitioner was or was not a defaulter was not before the Tribunal on the earlier occasion but become available to it from the evidence. The ground on which the review petition was founded was an existing precedent of this Court which was by inadvertence not cited. In fact the ground stated was that the law had not been properly explained to the Tribunal.

8. The decision of this Court to which there was an appeal in support of the review application was an elucidation of what the law was. Such elucidation does no more than to explain what the law all along has been, and the Tribunal which should be presumed to know the law in the same way in which those who appeared before it on behalf of the State must be presumed to have known it cannot with any justification think that the decision of this Court which was subsequently brought to its notice is a new fact which was not before it before.

9. The interpretation placed by the Tribunal on the provisions of section 22(6)(a) is open to two criticisms. The first is that that decision is not a fact. The second is that, since that decision had been rendered before the Tribunal made its earlier order, it was not new, and, although it was not physically brought before the Tribunal, the Tribunal could not say that it was not before it then. Every Tribunal should be presumed to be conversant with every decision of this Court in the sphere in which it functions. If it is not, and so there is a wrong decision, the matter is one for appeal and not for a review, as explained as long ago as in *Ellem v. Basheer I.L.R.[1875] 1 Cal. 184*, in which Garth, C.J., observed :

"But the case appears to us to depend upon precisely the same principle as the last, and must be decided in the same way. It is less objectionable, no doubt, in one sense, for a Judge to review his own decision than that of his predecessors; but he has no more right to do so without sufficient reason in the one case than in the other; and we cannot consider that the production of an authority to which the attention of the Judge was not called at the first trial, is sufficient ground for demanding a second trial. The parties ought to come prepared with all their materials, both of law and facts, at the first hearing, and if they do not come properly prepared, they ought not to be allowed, upon discovering that they had omitted to bring forward some decided case, to try the case over again upon the

strength of their own omission. If the Judge had decided improperly upon a point of law, that would be a matter for appeal, not for review."

10. It will be observed that the view expressed by the High Court of Calcutta rested upon the construction of section 376 of the old CPC under which, as under the new Code, a review could be sought, among other grounds, either on the discovery of new and important matter of evidence, or for any other sufficient reason. The word "matter" occurring in Order 47, rule (1)(c), of the CPC is, it is plain, more comprehensive than the word "fact" occurring in section 22(6)(a) of the Mysore Sales Tax Act. But, if the discovery of a precedent which had not been cited is not a new matter - and such is the effect of the pronouncements on that question - it can scarcely be a new fact within the meaning of section 22(6)(a) of the Mysore Sales Tax Act.

11. The discussion so far made yields the result that the ground on which the Tribunal made the impugned review was unavailable and that the impugned review was without power.

12. But Mr. Vasudeva Reddy submitted twofold reasons for our refusal to exercise our revisional jurisdiction. The first according to him was that the rectification of an error apparent on the face of the record is permissible under rule 38 of the Mysore Sales Tax Rules, and the second was that if we are satisfied that the order made by the Tribunal on the second occasion is a good order, we can exercise our jurisdiction under Articles 226 and 227 of the Constitution and quash the first order made by it and maintain the second.

13. We do not think that an appeal could be made by Mr. Government Pleader to rule 38. The quality and content of the power exercisable u/s 22(6)(a) are quite distinct from those of the power exercisable under rule 38. While under the Act a review is possible on the basis of a new fact, under that rule what can be rectified is an error apparent on the face of the record. The ground for the exercise of a review is therefore not the same as that on which a rectification is authorised. The Tribunal was very clear in its mind that it could make a review on the ground specified in section 22(6)(a), and, it has already been demonstrated how unfounded its belief was. It did not focus thought on the question whether there was an error apparent on the face of the record which could be rectified under rule 38, and so, it would be impossible for Mr. Vasudeva Reddy to ask us to say that all that was done by the Tribunal was to misdescribe the statutory provision under which it exercised power. If it had been possible for us to say that what was done by the Tribunal in truth was a rectification of an error apparent on the face of the record in the true exercise of the power conferred by rule 38, but that it wrongly proclaimed that it did so u/s 22(6)(a), and if there was nothing else to be said about any other matter such as the validity, scope and ambit of rule 38 and its applicability to an order concerning a penalty, Mr. Vasudeva Reddy might have been on firm ground. But that was not what the Tribunal did, and so, we should not supply a prop to an order to which the provisions of rule 38 were never intended to be applied.

14. The suggestion that we should maintain the second order in the exercisable of our power under Articles 226 and 227 of the Constitution is unacceptable for the obvious reason that we are in this revision petition concerned with the question whether any question of law which was before the Tribunal was or was not erroneously decided. That is the only power which section 23(1) of the Sales Tax Act authorises us to exercise in a revision petition. We cannot, in that proceeding, investigate the possibility of maintaining the impugned order on some other ground.

15. We therefore allow this revision petition and set aside the order made by the Tribunal on review. In consequence the earlier order which was reviewed by it stands restored.

16. We should before concluding make a proper elucidation as to the scope of the first order made by the Tribunal which now stands restored. This elucidation has become necessary by reason of a somewhat obscure language employed by the Tribunal in its preparation. The contention advanced by the petitioner before the Deputy Commissioner was that he was not a defaulter and there were some portions in the Tribunal's first order which may be understood as an admission of default by the petitioner. Mr. Katageri has pointed out to us that one of the contentions advanced before the Tribunal by the petitioner was that the petitioner was not in default since he was granted time by Government to pay the arrears of tax and the grant of such time took the case outside the provisions of section 13 and he submitted that there was a Government circular governing that matter. However that may be, we understand the first order made by the Tribunal as an order by which there was a full remand of the entire matter. That is the proper way of comprehending it.

17. So the Commercial Tax Officer should now proceed to investigate the matter in all its aspects including the question whether the petitioner was a defaulter, and if so, to what extent.

18. The petitioner will get his costs in this revision petition. Advocate's fee rupees one hundred (Rs. 100).

19. Petition allowed.