

(2015) 07 SHI CK 0064

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 415 of 1992

State of Himachal Pradesh and Others

APPELLANT

Vs

Vidya Vati and Others

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Himachal Pradesh General Clauses Act, 1968 — Section 14(2)(4)
Partnership Act, 1932 — Section 72

Citation : (2015) 07 SHI CK 0064

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Parmod Thakur, Addl. AG., for the Appellant; P.S. Goverdhan, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sharma, J—This regular second appeal is directed against the judgment and decree of the learned District Judge, Mandi, H.P., dated 1.6.1992, passed in Civil Appeal No. 67 of 1988.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of proforma respondents-plaintiffs, namely Suraj Singh and Vidya Vati (hereinafter referred to as the plaintiffs) instituted a suit for declaration that they were not partners of a firm namely, M/S United Himachal Motors and Industries, Mandi, H.P. and they have retired from this partnership firm since December, 1971. The public notices were issued on 17.3.1972. These were duly published in daily edition of The Tribune. The information to various banks and other commercial establishments with which the firm was dealing was also sent. They no longer were liable to pay any sales tax. On 25.6.1986, they received notices from Recovery Tehsildar, Mandi, requiring them to pay Rs. 10.1797.34 as sales tax otherwise the property was to be attached. They were not afforded any opportunity of being heard, thus there was fundamental breach

of principles of natural justice. The sales tax sought to be recovered belong to assessment years 1971-72, 1972-73, 1973-74 and 1974-75.

3. The suit was resisted by the appellants-defendants (hereinafter referred to as the defendants). According to them, the plaintiffs were liable to pay the sales tax. The issues were framed by the learned Sub Judge, Ist Class, Court No. II, Mandi, H.P. The learned Sub Judge, Court No. II, Mandi, dismissed the suit on 1.9.1988. The plaintiffs, feeling aggrieved, preferred an appeal before the learned District Judge, Mandi, H.P. The learned District Judge, Mandi, allowed the same on 1.6.1992. It was barred by limitation. The delay was condoned by this Court on 10.9.1993.

4. The RSA was admitted on the following substantial questions of law on 10.9.1993:

"1. Whether Civil Court has jurisdiction to try Civil Suit in view of bar created under Section 29 of the General Sales Tax Act, 1968?

2. Whether the provisions of Section 84 of the H.P. Land Revenue Act, 1954 are mandatory and without depositing even under protest, the arrears of sales tax after declaring the same amount as an arrears of Land Revenue, the Civil Suit is not maintainable?

3. Whether the retirement from the partnership after incurring the liability will absolve that partner from the liability?"

5. The regular second appeal was dismissed by this Court on 4.9.1998. The defendants filed Civil Review No. 11 of 2001. It was allowed on 11.4.2002. The plaintiffs preferred SLP before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court disposed of the SLP on 12.8.2002. Thereafter, the learned Single Judge passed the following order on 29.8.2002:

"When this appeal is taken up for hearing learned counsel for the respondents has placed on record a copy of the order dated 12.8.2002 passed by the Supreme Court in SLP(Civil) No. 12143/2002. The order of the Supreme Court is as under:

"Learned counsel for the petitioner contends that he has not been heard while condoning the delay. But from the record we notice that on that question notice had been issued, therefore, that issue is still open to the petitioner to argue as also on the question of the maintainability of the review petition. On that ground we do not find reason to entertain this SLP. The special leave petition is dismissed."

In view of the order of Supreme Court the application for condonation of delay in filing the review petition and the review petition are restored to their original numbers in which learned counsel for the respondents will be heard.

In future the matter may be listed before another Bench."

6. The issues were framed in CMP(M) No. 259 of 2000 on 19.5.2003. The statement of AW-1 Dhian Singh was recorded. The delay was condoned by this Court on 9.12.2014. Civil Review was allowed on 30.6.2015 and RSA was ordered to be reheard on 13.7.2015, after recalling the judgment rendered on 4.9.1998. Smt. Vidya Vati had died on 13.6.2011. CMP(M) No. 945 of 2014 for bringing on record her LRs was allowed by this Court in CR No. 11 of 2001 on 9.12.2014. Accordingly, LRs of late Smt. Vidya Vati are permitted to be brought on record in RSA No. 415 of 1992, as per details given in CMP(M) No. 945 of 2014. The Registry is directed to carry necessary correction in the cause title.

7. Mr. Parmod Thakur, learned Addl. Advocate General, on the basis of the substantial questions of law framed, has vehemently argued that the Civil Court has no jurisdiction to try the civil suit in view of the bar created under Section 29 of the General Sales Tax Act, 1968. He then contended that the partners were not absolved from payment of the sales tax. He further contended that the provisions of Section 84 of the H.P. Land Revenue Act, 1954 were mandatory. On the other hand, Mr. P.S. Goverdhan, Advocate, has supported the judgment and decree passed by the learned District Judge, Mandi, H.P on 1.6.1992.

8. Since the substantial questions of law are interconnected, they are being discussed together to avoid repetition of discussion of evidence.

9. I have heard the learned Advocates for the parties and gone through the judgments and records of the case carefully.

10. Section 14(2)(4) and (5) of the H.P. General Sales Tax Act, 1968, read as under:

"14. Assessment of tax.--(2) If the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.

(4) If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2), the assessing authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment the amount of the tax due from the dealer.

(5) If a dealer does not furnish returns in respect of any period by the prescribed date, the assessing authority shall, within five years after the expiry of such period, after giving a dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax, if any, due from the dealer."

11. It is, thus evident that as per Section 14(2), if the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or

production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns. If a dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2), the assessing authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment, the amount of the tax due from the dealer under Sub-section (4) of Section 14. If the dealer does not furnish returns in respect of any period by the prescribed date, the assessing authority shall, within five years after the expiry of such period, after giving a dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax, if any, due from the dealer under Sub-section (5) of Section 14 of the Act. Thus, notice is required to be issued to the dealer before the proceedings are initiated.

12. Ext. A-1, order pertains to assessment of financial year 1971-72. The return in respect of the goods sold during the financial year 1971-72 was required to be filed within 30 days of the expiry of each quarter. Thus, the return in respect of the last quarter was to be filed by 30.4.1972. According to the recital in the order, the dealer could not produce the account books and the relevant record and alleged that the records and the books were lying with the Income Tax Officer for the last several years. It appears that the return had been filed within the period prescribed but the assessing authority was not satisfied about its correctness and required the dealer to produce the account books and other papers as evidence in support of the facts and figures stated in the return. However, this exercise was to be undertaken within 5 years of the expiry of the date prescribed for filing returns i.e. 30.4.1972. The order Ext. A-1 is dated 30.6.1980. It is not evident from the record as to when the proceedings for passing of this order were initiated. The defendants were given opportunity to lead evidence in rebuttal. However, they did not avail the opportunity. It was for the defendants to prove that the proceedings were initiated, which led to the passing of the order Ext. A-1 within 5 years. Thus, the first appellate Court has rightly drawn the adverse inference against the defendants. The proceedings were to be initiated within a period of 5 years.

13. Order Ext. A-2, pertains to the assessment year 1972-73. The return for the last quarter of this year was required to be filed on 30.4.1973. The firm was required to produce account books which means that the assessing authority was not satisfied with the correctness of the returns filed by the firm. No evidence has been led by the defendants to show as to when the proceedings for the assessment of the tax for the assessment year 1972-73 were initiated. This was also required to be done within a period of 5 years. Similarly, Order Ext. A-3 deals with the assessment year 1973-74. It is dated 30.9.1981. In this case also, the defendants have failed to prove as to when the proceedings were initiated for the assessment year 1973-74. The learned first appellate Court has rightly come

to the conclusion that the proceedings in fact were initiated in the year 1981.

14. Now, the Court will advert to Ext. A-4, copy of assessment year 1974-75. It is dated 30.9.1981. The returns were filed after due date and the assessing authority was not satisfied as to the correctness of the figures. No evidence has been led by the defendants as to when the proceedings which led to the passing of the order dated 30.9.1981 were initiated. Rather, the proceedings, it appears, were initiated in the year 1981. The learned first appellate Court has rightly come to the conclusion that the orders were passed after the expiry of 5 years period prescribed under Sub-sections (4) and (5) of Section 14 of the H.P. General Sales Tax Act, 1968.

15. Their lordships of the Hon^{ble} Supreme Court in the case of Madan Lal Arora Vs. Excise and Taxation Officer, Amritsar, AIR 1961 SC 1565 : (1962) 1 SCR 823 : (1961) 12 STC 387, have held that Section 11(4) of the East Punjab General Sales Tax Act, 1948 deals with the case of a dealer who has furnished returns in respect of a period and has thereafter been asked to produce evidence to support the returns but has failed to do so. Their lordships have further held that the power to make assessment to the best of his judgment can, however, be exercised only within the three years mentioned therein and not after three years have elapsed. Their lordships have held as under:

"3. Sub-section (4) of s. 11 deals with the case of a dealer who has furnished returns in respect of a period and has thereafter been asked to produce evidence to support the returns but has failed to do so. The subsection provides that in such a case the assessing authority may proceed to make an assessment which to the best of his judgment should be made irrespective of the returns. The reason for this provision is that the correctness of the returns having been doubted by the assessing authority, the dealer has not availed himself of the opportunity afforded to him to remove these doubts. The sub-section however provides that the power can be exercised within the three years mentioned in it. Quite plainly, the power cannot be exercised after these three years have gone by.

4. The question is, how to compute the three years? The sub-section "says "within three years after the expiry of such period". So the three years have to be counted from the expiry of the period mentioned. What then is that period? The words are "such period". The period referred therefore is the period mentioned earlier in the sub-section, and that is the period in respect of which returns had been furnished by the dealer. This is also made clear by sub-s. (1) of s. 11. That deals with a case where the returns are accepted. Both sub-ss. (1) and (4) deal with returns for the same period. Now s. 10(3) provides that every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed" "Prescribed" means prescribed by rules framed under the Act. Under r. 20 of these rules, a registered dealer like the petitioner, had to furnish returns quarterly. The rules define "return period" as "the period for which returns are prescribed to be furnished by a dealer". It would therefore

appear that when sub-sec. (4) of s. 11 talks of "returns in respect of a period", that refers in the case of the petitioner to the quarters in respect of which he submitted the returns. We then come to this that the three years within which the authority could proceed to make the best judgment assessment had to be counted from the end of each quarter in respect of which returns had been filed."

16. Their lordships of the Hon^{ble} Supreme Court in the case of *State of Kerala Vs. Ramaswami Iyer and Sons*, AIR 1966 SC 1738 : (1966) 61 ITR 187 : (1966) 3 SCR 582 : (1966) 18 STC 1, while interpreting the provisions of Travancore-Cochin General Sales Tax Act, 1950, have held that even if the jurisdiction of the Civil Court may be excluded by statute, where provisions of statute have not been complied with or statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, Civil Courts have jurisdiction to examine those cases. Their lordships have held as follows:

"8. It is true that even if the jurisdiction of the civil court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil courts have jurisdiction to examine those cases : *Secretary of State for India v. Mask & Company*(2). Counsel for the respondents urged that the case of the respondents fall within that exception, since the Sales-tax Officer in imposing tax-liability acted in defiance of the mandatory provisions of the Act and in support of the argument he placed reliance upon r. 7 of the Rules framed under the Act and the definition of "turnover" under the Act. Under the Act sales-tax is charged for the year at the prescribed rates on the total turnover of the dealer. The Government of Travancore-Cochin promulgated rules in exercise of powers under s. 24 of the Travancore- Cochin General Sales Tax Act, and r. 7 dealt with computation of "net turnover". In r. 7(1) by cls. (a) to (k) certain exemptions admissible in the computation of the net turnover were set out. By notification No. SRI-1643-51- RD dated March 31, 1951 it was directed that with effect from April 1, 1951, the following clause shall be added :

"(1) all amounts of sales-tax collected by the dealer."

By this amendment in the computation of the taxable turnover, the amounts of sales tax collected by the dealer were not to be included. But this amendment was to have effect only from April 1, 1951, and in the proceeding in this appeal tax-liability for the assessment period ending March 31, 1951 fell to be determined. The exemption was therefore inoperative in the computation of taxable turnover for the assessment year in question."

17. In the case of *Magulu Jal and Others Vs. Bhagaban Rai and Others*, AIR 1975 Ori 219 : (1975) 41 CLT 526, the following principles have been culled out for exclusion of jurisdiction of Civil Courts:

"20. The following principles may be laid down as well settled by the aforesaid authorities :

(i) Exclusion of the jurisdiction of the Civil Court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied.

(ii) Even if jurisdiction is so excluded, Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil Court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary.

(iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it. a remedy provided by the statute must be followed and the Court's jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in Civil suits are prescribed by the statute.

(iv) The Legislature may entrust the special tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. The Legislature shall have to consider whether there shall be an appeal from the decision of the tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which exercise of further jurisdiction depends. In the exercise of the jurisdiction the tribunal may decide facts wrongly or if no appeal is provided therefrom there is no appeal from the exercise of such jurisdiction.

(v) Even in a case when the Civil Court would have jurisdiction on a finding that the special tribunal has acted beyond the scope of its authority as in point No. (ii), it cannot substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law."

18. In the case of Smt. Ramkanya Bai and Another Vs. Jagdish and Others, AIR 2011 SC 3258 : (2011) 112 CLT 630 : (2011) 7 JT 515 : (2011) 7 SCALE 50 : (2011) 7 SCC 452 : (2011) 7 SCR 817 : (2011) AIRSCW 4237 , their lordships of the Hon"ble Supreme Court have held that exclusion of jurisdiction of Civil Court is not to be readily inferred. It has been held as follows:

"15. Having regard to section 9 of the Code of Civil Procedure, a civil court can entertain any suit of civil nature except those, cognizance of which is expressly or impliedly barred. In Kamala Mills Ltd. Vs. State of Bombay, AIR 1965 SC 1942 : (1965) 57 ITR 643 : (1966) 1 SCR 64 : (1965) 16 STC 613 this court held :

"13.....The normal rule prescribed by section 9 of the Code of Civil Procedure is that the courts shall (subject to the provisions contained in the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.....

32. Whenever it is urged before a civil court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not."

(emphasis supplied)

16. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, AIR 1969 SC 78 : (1968) 3 SCR 662 : (1968) 22 STC 416 , a Constitution Bench of this Court held that exclusion of the jurisdiction of the civil court is not readily to be inferred with, unless the following, among other conditions apply :

"32. (1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment become necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

19. In the instant case, since the orders passed by the competent authority were beyond the period prescribed, the same were without jurisdiction. Accordingly, the Civil Court had the jurisdiction to adjudicate upon the matter.

20. Mr. Parmod Thakur, learned Addl. Advocate General for the State has also argued that the provisions of Section 84 of the H.P. Land Revenue Act, 1954 are mandatory. Since the orders passed by the competent authority were beyond jurisdiction, as such, the orders of the Collector declaring the arrears of sales tax as arrears of land revenue have rightly been held to be without jurisdiction by the learned first appellate Court. Thus, the bar of Section 84 of the H.P. Land Revenue Act, 1954 would not have come into play.

21. Now, as far as the retirement of the plaintiffs is concerned, the same is dealt with under Section 72 of the Partnership Act. The notice of retirement has been got published by the plaintiffs in daily newspaper "The Tribune", as per Ext. PW-2/A. PW-2 Tarwan Singh has stated that the notice had been issued in the issue dated 17.3.1972. He proved certificate issued by the Advertising Manager to the effect that the notice had been published in the issue dated 17.3.1972 vide certificate Ext. PW-2/B. The Excise and Taxation Officer, Mandi had also been separately intimated by one of the plaintiffs i.e. Suraj Singh through letter dated 11.12.1971 to the effect that he and his wife Vidya Vati have retired from the firm. The same is Ext. PF. The copy was also addressed to Income Tax Officer, Mandi but the copy was endorsed to the Excise and Taxation Officer, Mandi. PW-1 Suraj Singh has proved Ext. PF, writing. The plaintiffs have also proved orders Exts. P-I and P-J rendered by the Income Tax Authorities, according to which, Suresh Kumar and Dinesh Chand, partners of the firm in question, alone were treated as the partners of the firm for the assessment year 1973-74. There is presumption that the Excise and Taxation Officer has also received the copies of these orders. The defendants have not led any evidence to rebut that the copy of letter Ext. PF was not received by the Excise and Taxation Officer, Mandi. The plaintiffs have duly proved that the Excise and Taxation Officer, Mandi was intimated/informed about the retirement of the plaintiffs. Since the plaintiffs have retired as partners, they were not required to pay sales tax after their retirement as per Section 28 of the H.P. General Sales Tax Act, 1968. They have ceased to be the partners of the firm, named M/S United Himachal Motors and Industries, Mandi. The learned first appellate Court, has rightly declared Exts. A-1 to A-4, illegal and void, since proceedings were initiated after the period of 5 years. These orders being void, the Collector has rightly been restrained from recovering the arrears of sales tax from the property of the plaintiffs. The substantial questions of law are answered accordingly.

22. Consequently, there is no merit in this appeal and the same is dismissed.