State of Bombay

Vs

M/s. Jagmohandas and Another

Civil Appeals Nos. 219 and 273 of 1964

(V. Ramaswami – I, K. Subba Rao, K. N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

19.10.1965

JUDGMENT

SIKRI, J. –

These are two appeals on certificates granted by the High Court of Bombay and raise the same questions of law. It is, therefore, only necessary to give the facts in Civil Appeal No. 219 of 1964, which are as follows. M/s. Jagmohandas Masruwala, a registered dealer under the Bombay Sales Tax Act, 1946 (Bombay Act V of 1946) filed Original Suit No. 10 of 1956 against the State of Bombay for recovery of Rs. 31,852/8/3 which they had paid as advance sales-tax on various dates when submitting returns for the period January 26, 1950 to March 31, 1951, and interest thereon at 4%, viz., Rs. 3,998. The suit was filed on the allegations that the amount was paid as advance tax in respect of sales of goods effected outside the State of Bombay. These sales were taxable under the Bombay Sales Tax Act, 1946 (hereinafter referred to as the Act). It was further alleged that the Act became void by virtue of art. 286(1)(a) of the Constitution on January 26, 1950, and this amount was paid under a mistake of law and that the mistake was discovered when the Governor of Bombay promulgated Bombay Ordinance No. 2 of 1952.

The State of Bombay raised various pleas, but we are concerned with two : (1) that the suit was barred by ss. 13 and 20 of the Bombay Sales Tax Act, 1946, and ss. 19 and 29 of the Bombay Sales Tax Act, 1952; and (2) that the suit was barred by limitation. The Second Joint Civil Judge, Senior Division, Surat, held that the suit was not barred under the statutory provisions above mentioned and that it was filed within limitation. He passed a decree in favour of the plaintiff for a sum of Rs. 35,850/8/3 with future interest from the date of the suit at 4% per annum on Rs. 31,852/8/3, together with the costs of the suit.

The State of Bombay appealed to the High Court. It was urged before the High Court, as has been urged before us, that the Act was a complete code and the issue of law relating to non-maintainability of the suit was, for all practical purposes, answered by the conclusions reached by their Lordships of the Privy Council in Raleigh Investment Co. Ltd. v. Governor-General in Council ((1947) 74 I.A. 50.), in examining the provisions of s. 67 of the Income-tax Act which are very similar to those of s. 20 of the Sales Tax Act, 1946. The High Court held that the present case must be governed by the opinion expressed by this Court in The State of Tripura v. The Province of East Bengal ([1951] S.C.R. 1.). On the question of limitation, the High Court held that the case fell within the purview of art. 96 of the Limitation Act and the terminus quo of that article is the date on which the mistake becomes known to the plaintiff. It expressed agreement with the Court below that the mistake of law became known to the plaintiff on a date which brings the suit within the period prescribed by the Law of Limitation. The High Court further held that the trial Court was in error in

allowing interest as damages. In the result, the High Court varied the decree by omitting the directions as regards the payment of interest as damages, but otherwise affirmed the decree. Having obtained the certificate of fitness from the Bombay High Court, the State of Bombay has now come up on appeal to this Court.

The learned Solicitor-General has raised two points on behalf of the appellant : First that the suit was either expressly barred by s. 20 of the Bombay Sales Tax Act, 1946, or was impliedly barred by virtue of s. 13 of the Bombay Sales Tax Act, 1946; and (2) that the suit was barred by limitation. We are unable to appreciate how s. 20 expressly bars the suit. It is admitted that no assessment has been made under the Act and the plaintiff has not in his suit called into question any assessment or order made under the Act. In our opinion, this part of the argument is covered by the decision of this Court in the Tripura case, and the High Court was right in so holding.

The learned Solicitor-General then attempted to distinguish the Tripura case by saying that there was in the Bengal Agricultural Income Tax Act, 1944, no section like s. 13 and no reliance was placed by this Court in that case on the existence of adequate machinery as was done by this Court in Kamala Mills case ([1966] 1 S.C.R. 64.). In effect he seemed to suggest that the Tripura case ([1951] S.C.R. 1.) was inconsistent with the decision of this Court in Kamala Mills case ([1966] 1 S.C.R. 64.). We are unable to accede to this contention. The judgment of Fazl Ali J., who dissented in the Tripura case, clearly shows that the Court was fully aware of the existence of the machinery in the Act enabling an assessee to challenge an eventual assessment. But this Court, in spite of the existence of that machinery, gave effect to the plain words of s. 65 of the Bengal Agricultural Income Tax Act, 1944. There is nothing in Kamala Mills case ([1966] 1 S.C.R. 64.), which is inconsistent with the Tripura case ([1951] S.C.R. 1.). Further Mr. Pathak, learned counsel for the respondent, pointed out that a section similar to s. 13 existed in the Bengal Agricultural Income Tax Act, 1944.

Another point raised by the learned Solicitor-General was that when a registered dealer files a return and calculates and pays tax on the basis of the return, he is effect makes a self assessment and, therefore, brings himself within s. 20 of the Act. We are unable to read the word 'assessment' in s. 20 to include a mere filing of return and payment by a registered dealer. In our opinion, the word 'assessment' has reference to assessments made under ss. 11 and 11A of the Bombay Sales Tax Act, 1946. Therefore, we must overrule the contention of the learned Solicitor-General that s. 20 expressly bars the present suit.

Coming now to the argument that s. 13 impliedly bars the suits, it is necessary to set out s. 13 of the Act. Section 13 reads as follows :

> "The Commissioner shall, in the prescribed manner, refund to a registered dealer applying in this behalf any amount of tax paid by such dealer in excess of the amount due from him under this Act, either by cash payment or, at the option of the dealer, by deduction of such excess from the amount of tax due in respect of any other period :
>
> Provided that no claim to refund of any tax paid under this Act shall be allowed unless it is made within twenty-four months from the date on which the order of assessment was passed or within twelve months of the final order passed on appeal, revision, or reference in respect of the order of assessment, whichever period is later.

> Provided further that the Collector shall first apply the excess paid in respect of any period towards the recovery of any amount in respect of which a notice under sub-section (4) of section 12 may have been issued and shall then refund the balance remaining, if any.

The first part of the section imposes a statutory obligation on the Commissioner to refund any amount of tax paid by a registered dealer in excess of the amount due from him under this Act. The first proviso prescribes the period within which the registered dealer can apply for refund. The period is 24 months from the date on which the order of assessment is passed or within 12 months of the final order passed on appeal in respect of the order of assessment, whichever period is later. It is apparent that the dealer cannot apply for refund under s. 13 till an order of assessment is passed. The prescribed form also shows the same thing. The scheme of s. 13 appears to be that the Sales Tax Officer would make first an order of assessment, arrive at the amount of tax due according to the order and then work out the excess, if any, paid by the dealer and refund that money. It seems to us that s. 13 does not contemplate objections being entertained regarding the constitutional validity of any payment made by the dealer. The Solicitor-General contended that an appeal would lie against an order made under s. 13. Assuming that it is so, the appeal would be only on the ground that the consumption made by the Sales Tax Officer is erroneous and not on the ground that the tax paid by the dealer was not constitutionally payable at all, under the Act. Therefore, if s. 13 is understood in the manner mentioned above, it seems clear to us that no machinery is provided in s. 13 for dealing with the objection that the money paid was paid by virtue of a void provision of the Act.

Further, we have held in K. S. Venkataraman v. The State of Madras ([1966] 2 S.C.R. 229.) that the Sales Tax authorities created by the Madras General Sales Tax Act are not competent to entertain questions as to the ultra vires of a provision of the Act. Similarly, the Commissioner appointed under the Bombay Sales Tax Act would not be competent to go into the question whether s. 6 of the Act under which the transaction were apparently taxable, was ultra vires or not.

Therefore, in our opinion s. 13 of the Act does not create an implied bar and the High Court is right in holding that the suit was competent.

This Court has recently held that art. 96 applies to suit like the present. [See State of Kerala v. Aluminium Industries Ltd. Kunda (C.A. 720 of 1963 Decided on April 21, 1963 (unreported).]

The only point that remains is regarding the date of the knowledge of the plaintiff. Both Courts below have found that the plaintiff came to know of the mistake on December 22, 1952, the date of the promulgation of the Governor's ordinance. This is a concurrent finding of fact and the learned Solicitor-General has not shown us any good ground for disturbing this concurrent finding of fact.

Accordingly, agreeing with the High Court, we hold that the suit is not barred. In the result the appeals fail and are dismissed with costs. One hearing fee.

SHAH, J.

These appeals arise out of suits filed by the two respondents for recovery of sums of money paid by them as advance sales-tax under a mistake of law. The suits were decreed by the Court of First Instance and the decisions were confirmed in appeals by the High Court of Judicature at Bombay.

There were no orders of assessment made by the taxing authorities, but the tax-payers being of the view that the tax on their turnover was payable submitted returns under the Bombay Sales Tax Act,

1946 and paid advance tax. The sales were in respect of goods consigned to purchasers outside the State of Bombay and for consumption outside the State. These sales were apparently covered by the terms of Art. 286(1)(a) before it was amended by the Sixth Amendment Act and could not be taxed under a statute enacted by a State. The tax-payers claimed that they had discovered their mistake when the Governor of Bombay promulgated Bombay Ordinance No. 2 of 1952, after the decision of the Bombay High Court in United Motors (India) Ltd. v. The State of Bombay ((1952) 55 Bom. L.R. 246.). The trial Court and the High Court have rejected the contention raised by the State that the suits were barred by ss. 13 and 20 of the Bombay Sales Tax Act, 1946, which were later replaced by ss. 19 and 20 of the Bombay Sales Tax Act, 1952, and that the suits were barred by the law of limitation.

We agree with the judgment of our brother Sikri J., that the suits were not barred either expressly by the provisions of s. 20 or impliedly by s. 13 of the Bombay Sales Tax Act, 1946. We also agree with him that the suits were not barred by the law of limitation, since the suits were filed within the period prescribed by Art. 96 of the 1st Schedule of the Limitation Act i.e., within three years from the date on which the mistake became known to the tax-payers. We are unable, however, to agree with the observations that before the sales-tax authorities an objection that certain parts of the statute were ultra vires the Legislature could not be raised. As held by this Court in M/s. Kamala Mills Ltd. v. The State of Bombay (([1966] 1 S.C.R. 64.) the question whether a transaction which falls within the Explanation to Art. 286(1)(a) before it was amended by the Constitution (Sixth Amendment) Act does not affect the jurisdiction of the taxing authority : it is merely a question of interpretation of the contract in the light of the statute and the sales-tax authorities are entitled to entertain the objection, if it be raised before them, that the transaction was not taxable because the State had no power to legislate in respect of an Explanation sale. But in this case, that stage was never reached. The taxpayers in the belief that they were liable to pay tax paid advance tax before any orders of assessment were made. Thereafter realising that they had committed a mistake filed suits for refund. Thereby they were seeking to obtain orders of refund of payments made under a mistake of law : they were not seeking to set aside any order of assessment.

We agree thereof that the appeals should be dismissed with costs.

Appeals dismissed.

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