

BOMBAY HIGH COURT

Abdul Aziz Ansari

Vs.

State of Bombay

Sales Tax Appln. No. 1 of 1957

(Tendolkar and S.T. Desai, JJ.)

09.09.1957

JUDGMENT

Tendolkar, J.

1. This is a petition under Section 34 of the Bombay Sales Tax Act, 1953. A few relevant dates must be given at the outset. On the 28th of October 1952, proceedings under the Bombay Sales Tax Act, 1946, were initiated against the assessee by two notices and there was subsequently an ex parte assessment. On the 17th April 1956, revision application presented by the assessee to the Sales Tax Tribunal was dismissed by the Tribunal; but it is the assessee's case that this order of dismissal was received by them only on the 15th of May 1956. On the 11th of August 1956, there was an application to the Tribunal to make a reference to the High Court. This application was dismissed by the Tribunal on the 6th of November 1956. The order of dismissal was received by the assessee on the 3rd of December 1956 and the present application was filed on the 7th of January 1957.

2. In answer to this application, a preliminary point has been raised on behalf of the State of Bombay that the application for reference made to the Tribunal on the 11th of August 1956 was barred by limitation and, therefore, there can be no question of entertaining the present application. It is also urged by way of a preliminary objection that, even assuming that the application for reference made to the Tribunal was within time, the present application to this Court is also barred by limitation. But since if the first objection is valid, viz., that the application for reference to the Tribunal was itself barred by limitation, obviously the second preliminary objection does not survive, we will proceed to consider the first objection.

3. On this objection, the first question that we are called upon to determine is : From what date does the period of limitation prescribed for making an application for statement of a case to the High Court begin to run - whether it is from the date when the revision application is dismissed by the Tribunal or whether it is from the date when the party aggrieved by the order has knowledge of the said order or the order is communicated to it? Now, the language used in Section 34 of the Act of 1953, which corresponds to Section 23 of the Act of 1946, is that the starting point for the period of limitation will be " from the passing by the Tribunal of any order

under subsection (2) of Section 30 or sub-section (1) of Section 31." Therefore, prima facie the period begins to run from the date of the order; but Mr. Palkhiwala for the assessee contends that there was an obligation on the Tribunal to communicate the order passed, and where such an obligation arises in law, although the terms of the statute may provide that the period of limitation begins to run from the date of the order, the starting point will be the date when the order is communicated to the party aggrieved. A similar question came up for decision before a Division Bench, of which I was a member, in Spl. Civil Appln. No. 2988 of 1956, D/d. 3-7-1957 (Bom) (A). We were there concerned with Rule 8 of the Payment of Wages (Procedure) Rules, 1937. The proviso to sub-rule (3) of Rule 8 was :

"Provided that an order passed under sub-rule (2) or sub-rule (3) may be set aside and the application re-heard on good cause being shown within one month of the date of the said order

It was urged in that case before us that notwithstanding the provision that the period of limitation was to begin to run from the date of the said order, it should in fact begin to run from the date when the party aggrieved had knowledge of the order. Reliance was placed on a decision of the Allahabad High Court in *Kharak Singh v. Laccham Singh*¹, where their Lordships of the Allahabad High Court had held that where a judgment was signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them, the judgment was not validly pronounced; and we pointed out that this case turned on the specific provisions of Order 20, Rule 1, of the Civil Procedure Code, which require that a judgment shall be pronounced in open Court, and if it was not so delivered, but it was delivered in the absence of parties and without notice to them, it may not be a valid judgment. In other words, if there was an obligation in law to pronounce a judgment in open Court after notice to the parties for the purposes of any rule as to limitation a judgment delivered in the absence of the parties and without notice to them may not be treated as a judgment at all. Therefore, the question that we have to consider in the present case is whether there was any obligation on the Tribunal to communicate their order to the parties concerned, and if there was, in our opinion, until the decision is so communicated, time for applying for a statement of the case to the High Court does not begin to run.

4. Now, Mr. Palkhiwala has relied on Rule 42 of the Bombay Sales Tax (Procedure) Rules, 1954, which is in these terms:-

"Supply of copy of order to the appellant or applicant and the officer concerned.' - A copy of the order passed in appeal or revision shall be supplied free of cost to the appellant or applicant or the person affected thereby and another copy shall be sent to the officer whose order forms the subject-matter of the appeal or revision proceedings."

It appears to us that this rule does cast an obligation when an order is passed in appeal or revision to supply a copy to both the parties; and since the decision is not given in the presence of parties, there being a requirement that the order shall be communicated to the parties, time for presenting an application for a reference to the High Court does not begin to run until the copy is supplied to the party aggrieved. On this part of the case, we must state that the Tribunal, in its order refusing

to refer the question to this Court, has in terms

¹ ILR 47 All. 332 : (AIR 1925 All 293 (2) KB)

stated that the order in this case was passed in the presence of the applicants and their Advocate. Unfortunately, Mr. J. P. Pandit, Advocate for the applicants, who appeared in these proceedings, has made a statement at the Bar that the order was not made in his presence or in the presence of his clients. It would have been a somewhat delicate situation were we required to determine as a question of fact whether or not the order was passed in the presence of the parties. Naturally, of course, this Court would prima facie accept the statement made by responsible members of the Tribunal; but, fortunately for us, in the view that we take of the law it is not necessary for us to determine whether the order was passed in the presence of the parties. We will assume that it was not so passed as the applicants allege and, therefore, that time begins to run from the 15th May 1956, that is, the date on which the order was received by the assessee.

5. The next question we have to determine is whether the period of limitation is governed by Section 34 of the Bombay Sales Tax Act, 1953, or by Section 23 of the repealed Act being the Bombay Sales Tax Act, 1946. Under Section 34 of the Act of 1953, the period is ninety days, whilst under Section 23 of the Act of 1946 the period was only sixty days. Mr. Palkhiwala contends that the provisions of the Bombay Sales Tax Act, 1953, Section 34, apply to this case, whilst Mr. Joshi contends on behalf of the State that the provisions of Section 23 of the Act of 1946 apply.

6. Now, as a general proposition of law, in the absence of any intention to the contrary, as a mere matter of interpretation of a statute, whilst the provisions of substantive law are always construed prospectively in respect of matters of procedure the law is presumed to be retrospective; and unless there was anything contrary to this presumption in the Bombay Sales Tax Act, 1953, the time prescribed during which an application for a statement of the case should be made to the High Court being procedural, the time that would have been applicable would be the time prescribed by Section 34 of the Act of 1953. Mr. Joshi for the State of Bombay urges that there is an intention to the contrary manifest in the provisions of Section 48 sub-section (2) of the Act of 1953. Now, before we turn to these provisions, as a mere matter of history, we must notice that before the Act of 1953 there was in force Bombay Ordinance No. III of 1952 which was known as the Bombay Sales Tax (No. 2) Ordinance, 1952. This ordinance, by Section 50 thereof, repealed the Sales Tax Act of 1946 as from the appointed day, which was defined by Section 2 sub-section (3) as the 1st of November 1952 : and whilst repealing the Act of 1946, Section 50 sub-sec. (2) provided as follows:

"But nothing in this Ordinance or any repeal or amendment made thereby shall affect or be deemed to affect-

(ii) any legal proceeding or remedy pending in respect of any right, title, interest, obligation or liability or anything done or suffered before the appointed day and any such proceeding shall be continued and disposed of, as if this Ordinance had not been passed:

(iii) the recovery of any tax or penalty which may have become payable under any of the Acts so repealed before the appointed day and all such taxes or penalties or arrears thereof shall be recovered, as the case may be, as if this Ordinance had not been passed."

Now, the Act of 1953, by Section 48 sub-sec. (1) repealed the Act of 1946 from the 1st of

November 1952; and by sub-section (2) it provided as under:

"Notwithstanding the repeal of the said Act and the said entries, the said repeal shall not affect or be deemed to affect-

- (i) any right, title, obligation or liability already acquired, accrued or incurred;
- (ii) any legal proceeding pending on the 1st day of November 1952 in respect of any right, title, obligation or liability or anything done or suffered before the said date; and any such proceeding shall be continued and disposed of, as if this Act had not been passed;
- (iii) the recovery of any tax or penalty which may have become payable under the said Act and the said entries before the said date; and all such taxes or penalties or arrears thereof shall be assessed, imposed and recovered, so far as may be, in accordance with the provisions of this Act."

It is clear that the language of this sub-section is in all essential particulars a reproduction of the language of Section 50, Sub-sec. (2) of the Ordinance; and it is this sub-section that we have been called upon to interpret.

7. Now, on the one hand, Mr. Joshi for the State of Bombay says that since the two notices initiating proceedings were given in this case on the 28th of October, 1952, that is, prior to the 1st of November 1952, there was a legal proceeding pending on the 1st of November 1952, and he says that such proceeding must be continued and disposed of as if the Act of 1953 had not been passed by virtue of Section 48. sub-sec. (2), Clause (ii). On the other hand, Mr. Palkhiwala for the petitioner contends that the sub-section applicable to assessment proceedings is clause (iii) of Section 48 sub-sec. (2) and not clause (ii) of Section 48 sub-sec. (2). He says that clause (ii) of Section 48 (2) only applies to proceedings in a Court of law and not to assessment proceedings. Mr. Palkhiwala further urges that, assuming that Section 48 (2) (ii) applied to the present proceedings, such proceedings were disposed of by the Tribunal by its order made on the 17th of April 1956, and an application for reference to the High Court is not a continuation of the proceedings and is not governed by the provisions of the Act of 1946.

8. Before proceeding to consider which of these two rival contentions is the correct one, it would be useful to refer to the position as it would have existed if the Act of 1946 was simply repealed from the 1st of November 1952 and there had been no provision in the Act of 1953 in terms of Section 48 sub-sec. (2). That position would have arisen by reason of Section 7 of the Bombay General Clauses Act, 1904, which deals with the effect of repeal of an Act, and the relevant part of that sub-section for the present purpose is as follows:

"Where this Act, or any Bombay Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -

- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had

not been passed."

Therefore, the position would have been, so far as legal proceedings were concerned, that they could have been "instituted continued or enforced." Now, when we turn to the provisions of Section 48(2)(ii) of the Sales Tax Act of 1953, which deals with legal proceedings pending on the 1st of November 1952, it deals only with continuance and disposal of such proceedings naturally, because since such proceedings were pending, they had already been instituted; but what happens then to liabilities incurred under the Act of 1946 in respect of which proceedings had not been instituted? These would have been preserved by Section 7 sub-clause (e) of the Bombay General Clauses Act, 1904, and if the Legislature set about to depart from the language of that section and to enact Section 48 sub-sec. (2), it must have been for some purpose and the purpose in this case appears prima facie to be plain when one turns to the provisions of clause (iii) of Section 48 sub-sec. (2). That clause is somewhat curiously worded, because in the first part it talks of the recovery of any tax or penalty, whilst in the second part it talks of such taxes or penalties or arrears thereof being assessed, imposed and recovered. Read as a whole, undoubtedly that clause contemplates that a tax or a penalty shall be assessed, imposed and recovered "so far as may be, in accordance with the provisions of this Act." The words "so far as may be" import into such assessment -imposition and recovery- such provisions of the new Act of 1953 as may be necessarily involved by reason of a change in the law or by reason of the provisions of the Act of 1946 not being applicable in their very nature to such proceedings. Therefore, the object of the Legislature was that in respect of matters governed by clause (iii) of Section 48 sub-sec. (2) the assessment, imposition and recovery of tax or penalty will be governed by the Act of 1946 to the extent it was possible and by the Act of 1953 to the extent it was necessary. In other words, the Legislature wanted to draw a distinction between proceedings that had been instituted already and a liability for a tax or a penalty that had arisen under the Act, but proceedings in respect whereof had not been instituted. In the former case, it provided that the proceedings which are pending shall be governed by the old Act only "as if this Act had not been passed" that is in all respects, until the proceedings were disposed of; whilst in the latter class of cases it provided that the proceedings shall be governed, no doubt by the Act of 1946, but to the extent possible and to the extent necessary by the Act of 1953. In our opinion, therefore, sub-clauses (ii) and (iii) of Section 48 sub-sec. (2) deal with these two different classes of liability one a liability in respect of which a proceeding was pending and the other in respect of a liability where no proceedings had been initiated. This conclusion is strengthened by reason of the fact that to interpret the expression "legal proceeding" in Section 48 sub-sec. (2) (ii) in the way in which Mr. Palkhiwala invites us to interpret it, namely, as proceedings in a Court of law, would be straining the language employed by the Legislature and indeed not giving effect to it. "Legal proceeding" in its normal connotation can only mean a proceeding in accordance with law, and there can be no doubt that assessment proceedings under the Sales Tax Act are such proceedings. What then is the justification for limiting the meaning of the expression "legal proceeding" in Section 48 sub-sec. (2)(ii) to proceedings in a Court of law? When one looks at it still more closely, the only proceedings other than assessment proceedings which are contemplated by the Act of 1946 are proceedings in relation to offences and penalties under Section 24 of the Sales Tax Act of 1946. Sub-section (1) sets out the various offences and sub-section (2) of that section provides that no Court shall take cognisance of any offence except with the previous sanction of the Collector. Mr. Palkhiwala's submission is that it is only to these proceedings before a Court for imposing a penalty in respect of an offence that the expression "legal proceeding" in Section 48 (2)(ii) should be restricted. The first answer to this contention is that if this was the object, the Legislature would naturally have used the quite simple and obvious word "prosecutions" and not "legal

proceeding", because Section 24 sub-sec. (2) dealt entirely with prosecutions and nothing else. The second objection to Mr. Palkhiwala's argument is that there are penalties other than penalties which can be imposed by a Court under Section 24 sub-sec. (2) which are leviable under the Bombay Sales Tax Act; for example, under Section 12 sub-sec. (3-A) of the Act, if the tax is not paid within the time prescribed, a penalty may be imposed; and if "legal proceeding" under Section 48 sub-sec. (2) (ii) were to mean proceedings for the imposition of penalties, there can be no justification for separating penalties which can be imposed by the Sales Tax authorities and penalties that can be imposed by a Court of law and for holding that "legal proceeding" in Section 48(2)(ii) only included proceedings for inflicting penalties which could be imposed by a Criminal Court under Section 24 sub-sec. (2). It must be remembered in this context that the expression "legal proceeding" is not synonymous with "judicial proceedings", Proceedings may be legal even if they are not judicial proceedings, if they are authorised by law; and Mr. Palkhiwala, by his argument undoubtedly requires us to equate the expression "legal proceeding" in Section 48 sub-sec. (2) (ii) with judicial proceedings, for which, in our opinion, there is no warrant in law.

9. Attention was also drawn by Mr. Palkhiwala to the provisions of Section 49 of the Act of 1953. That section deals with liabilities that arose under the Ordinance of 1952. That Ordinance itself was repealed and the saving proviso in sub-sec. (2) of Section 49 is somewhat differently worded from Section 48 sub-sec. (2). In so far as the saving proviso deals with legal proceedings, it is in these terms :-

"Provided that the repeal hereby made shall not affect or be deemed to affect -
(ii) any legal proceeding or remedy in respect of any such right, title, obligation or liability."

In our opinion, this proviso in no way enables us to decide the true meaning of what is deliberately different language employed in Section 48 sub-sec. (2), which, as we have already pointed out, is the language which was employed in the saving section of the Ordinance itself, which had, in the first instance, repealed the Sales Tax Act of 1946. We are, therefore, of opinion that the expression "legal proceeding" in Section 48(2) (ii) includes assessment proceedings, and that in the case before us such proceedings were pending on the 1st of November 1952, because notice initiating the proceedings had been served on the applicants on the 28th of October 1952.

10. The other argument that survives for determination is whether these proceedings terminated with the decision of the Tribunal or whether the proceedings continued when a reference to the High Court was applied for. We have no doubt whatever in our mind that the proceedings did not terminate with the decision of the Tribunal, but the proceedings continued even at the stage when an application was made for a reference to the High Court. Indeed, the assessment proceedings can only terminate when the rights of the assessee as well as the taxing authorities have been finally and irrevocably determined. Until then, whatever steps are taken to bring about the final and irrevocable determination are all steps in the legal proceedings and intended for the continuance and disposal of the legal proceedings. Such a view was taken by my learned brother sitting as a single Judge in *Income -Tax App. Tribunal V. S. C. Cambatta and Co. Ltd.*², where my learned brother had to deal with the case of a reference under the Income-tax Act to the High Court. The matter arose in this way. A decision was given by the High Court upon a reference

made to it and the case went back to the Appellate Tribunal to pass an order in conformity with the decision. In disposing of the matter it was held that a question of law arose out of the order passed by the Tribunal and that a second reference lay in respect of such a question of law, as what was done by the Tribunal was a mere continuation of the first hearing by the Tribunal. The matter came up in appeal before a Division Bench of this Court, to which I was a party and which is reported in 1956-29 ITR 118 , and we confirmed the decision of the learned trial Judge. In the course of the judgment, Chagla, C. J., in terms observes at page 120 (of ITR) :-

"Therefore, it is clear that except in cases which may go up to the High Court on a reference, the decision of the Appellate Tribunal under Section 33 is final. But where a reference does go up to the High Court, no finality attached to the decision of the Appellate Tribunal because by reason of the decision of the High Court the decision given by the Appellate Tribunal is liable to be reopened and it will be the duty of the Appellate Tribunal to give effect to whatever decision the High Court gives."

The position under the Sales Tax Act is entirely similar to the position under the Income -Tax Act so far as the reference to the High Court on a question of law is concerned, and this decision is therefore, equally applicable to the facts of the present case.

11. We have, therefore, no, doubt in our mind that an application for a reference to the High Court was a continuation of the pending legal proceeding, namely, the assessment of the applicants; and by reason of Section 48 sub-sec. (2) (ii) this proceeding is to be disposed of "as if this Act had not been passed." In other words, it must be disposed of under the Act of 1946 and ignoring the provisions of the Act of 1953. The applicants before us, therefore, cannot invoke the ninety days' period allowed to them by Section 34 of the Act of 1953. They are governed by the sixty days' period that was allowed under Section 23 of the Act of 1946. If that is the correct period, it is obvious on the facts that even computing the period of time from the date when the applicants received the order on the 25th of May 1956, the reference application was beyond time. It was, therefore, incompetent to the Tribunal to entertain such an application and to dispose of it. An application to us, therefore, cannot arise out of the refusal of the Tribunal to refer a case when the application to refer the case was itself barred by limitation.

12. The result, therefore, is that this petition fails and will have to be dismissed with costs.
Petition dismissed.

²⁵⁸Bom L. R. 259