Cheru and another Vs The Sales Tax Officer, Ponnani

Court: High Court Of Kerala

Date of Decision: July 8, 1966

Acts Referred: Income Tax Act, 1961 â€" Section 34, 35
Kerala General Sales Tax Act, 1963 â€" Section 19, 2, 51, 61

Citation: (1966) KLJ 1027

Hon'ble Judges: K.K. Mathew, J

Bench: Single Bench

Advocate: P. Subramonian Potti and S.A. Nagendran, for the Appellant;

Final Decision: Allowed

Judgement

K.K. Mathew, J.
The 1st petitioner is a registered dealer doing business in arecanuts within the jurisdiction of the respondent the Sales-tax

Officer, Ponnani. For the year 1960-61, the 1st petitioner submitted his returns to the respondent and he passed an order of assessment on

18.9.1961 assessing the 1st petitioner on a turnover of Rs. 2,32,000/- and odd. On a verification of the Bank transactions of the petitioner it was

found that the petitioners jointly and severally had received large amounts from banks towards despatch of arecanuts for sale and that these

amounts were not included in the accounts produced before the Sates-tax Officer. Hence a notice dated 14.2.1964 was issued to the 2nd

petitioner calling upon him to show cause why he should not be assessed for the years 1960-61 and 1961-62. Another notice dated 18.2.1964

aws issued to the 1st petitioner calling upon him to show cause within 7 days of the receipt of the notice why his assessment for the year 1960-61

should not be reopened and the assessment revised as indicated in the notice. It is not necessary to state the further proceedings taken by the

Department except to say that the respondent issued notices dated 30.1.1965 to the petitioners proposing to assess them on the escaped turnover

and calling for objections, if any. Exs. P-1 and P-2 are those notices. Thereafter a joint notice marked Ex. P-3 was issued to them stating the

above mentioned facts.

2. The petitioners" contention is that the notices issued to them are without jurisdiction and illegal for the reason that the period for making an

assessment under Rule 33 of the General Sales-tax Rules 1950, has expired on 31-3-1964, and that the provisions of Sec. 19 of the Kerala

General Sales-tax Act, hereinafter referred to as the Act, prescribing a period of four years for making an assessment of escaped turnover are not

available to the Department in the case. The Act came into force on 1-4-1963. The material portion of Sec. 19 of the Act, reads:

(1) Where for any reason the whole or any part of the turnover of business of a a dealer has escaped assessment to tax in any year or has been

under-assessed or has been assessed at a rate lower than the rate at which it is assessable, or any deduction has been wrongly made therefrom,

the assessing authority may, at any time within four years from the expiry of the year to which the tax relates, proceed to determine to the best of its

judgment the turnover which has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at

which it is assessable or the deduction that has been wrongly made and assessing the tax payable on such turnover after issuing a notice on the

dealer and after making such enquiry as it may consider necessary.

It seems to me that only if turnover liable to assessment to tax under the Act escapes assessment that proceedings can be taken under the section.

The escapement of turnover to assessment to tax in this case was under the General Sales-tax Act of 1125. Therefore Sec. 19 would not prima

facie apply. The word "tax" has been defined in Sec. 2 of the Act as follows:-

2. In this Act, unless the context otherwise requires,--

.....

(xxiv) "tax" means the tax payable under this Act.

The definition would make it clear that the provisions of Sec. 19 can apply only to a case where turnover has escaped assessment under the Act,

as there is nothing in the context to attribute a different meaning to the word "tax" in the section.

3. Sec. 61 of the Act would make it further clear that it is only if some step has been taken under the General Sales-tax Act 1125, that it will be

deemed to be a step under the corresponding provision of the Act. Sec. 61 is as follows:-

(1)- The General Sales Tax Act, 1125, (Act XI of 1125), is hereby repealed:

Provided that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or

incurred thereunder, and subject thereto, anything done or any action taken, including any appointment, notification notice, order rule, form,

regulation, certificate, licence or permit, in the exercise of any power conferred by or under the said Act, shall be deemed to have been done or

taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action

was taken, and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.

.....

From the wording of the proviso it is clear that two conditions must be satisfied for applying it; (1) that the right or liability must have been acquired

or incurred under the General Sales-tax Act, 1125, and that it must have been subsisting on the date of the commencement of the Act, (2) that

notice or the other steps mentioned there, must have been taken under the General Sales-tax Act, 1125, in order that they might be deemed to be

notice or other steps taken under the corresponding provisions of the Act. Therefore it is necessary that not only the right and liability must have

been acquired or incurred under the General Sales-tax Act 1125, but that they must have subsisted on the date of the commencement of the Act;

and then only the notice or steps taken under that Act would be deemed to be notice or steps taken under the corresponding provisions of the Act.

Admittedly no notice or other steps had been taken in this case while the General Sales-tax Act, 1125, was in force.

4. It is generally agreed that the law of limitation in force at the time when an action is instituted would govern the period of limitation applicable to

it, and if the law of limitation in force when the cause of action accrued fixing a shorter period, is repealed before the cause of action got barred

under it, by an enactment providing a longer period for the same type of cause of action, the action can be prosecuted within the longer period

prescribed in the repealing statute. But Mr. Subramanian Potti, for the petitioner, submitted on the basis of the ruling in S.S. Gadgil, Income Tax

Officer, Bombay Vs. Lal and Company, that rule 33 of the General Sales-tax Rules, 1950, does not prescribe a period of limitation as understood

in the law of limitation, and therefore the ruling (the rulings cited are 13 S.T.C. 914, S.S.T.C. 340 & 15 S.T.C. 319) where it has been held that a

provision like rule 33 prescribes a period of limitation and applying the longer period prescribed by the amending or repealing statute require

reconsideration. The case in AIR 1965 S.C. 171 was concerned with a notice issued u/s 34 of the Indian income tax Act 1922. There it was

observed:

Counsel also submitted that S. 34 lays down a rule of limitation for commencing an action for assessment or re-assessment, and that in the absence

of an express provision to the contrary, a statute of limitation in operation at a given time governs all proceedings from the moment of its enactment

even though the cause of action on which the proceeding was based came into existence before the Act was enacted. Equating a proceeding under

S. 34 of the Indian income tax Act with a suit or a proceeding in a civil court, counsel said that the law of limitation being a law of procedure,

assessment proceedings including proceedings for reassessment are governed by the law in force at the date on which they are instituted, and that

the rule that the repeal of a statute without express words of clear implication in the repealing statute, cannot take away a right vested in a party

acquired under the repealed statute when it was in force, is a rule of prescription and not of procedure, and notwithstanding general observations

to the contrary in certain decisions, apply only to those actions in which by the determination of the period prescribed a right to institute an action

for possession of property is extinguished. Counsel relies in support of the plea on Ramchandra Singh and Others Vs. Mt. Bibi Khodaijaiul Kubra

and Others, . It is unnecessary to dilate upon this argument in any detail, or to enter upon an analysis of the numerous cases which were mentioned

at the Bar to determine whether the rule that without an express provision, or a clear implication arising from the amending statute rights acquired

under the repealed statute by the determination of the period of limitation prescribed thereby cannot be deemed to be revived, applies to suit for

possession only. It may be sufficient to make two comments on the argument. The rule has in fact been applied to suits other than suits for

possession: e.g. Mahomed Mehdi Faya v. Sakinabai ILR. 37 Bom. 393 (a suit for restitution of conjugal rights); Krishnaswami Naicker v.

Thiruvengada Mudaliar-- AIR. 1935 Mad. 245 (a suit for recovery of a debi):Shumbhoonath Shaha v. Guruchurn Lahiri ILR. 5 Cal. 894 (an

application for execution); and Nepal Chandra Roy v. Niroda Sundari Chose--ILR 39 Cal. 506 (an application for setting aside an ex-parte

decree). Again soon after it was delivered the authority of Baleswar''s case, ILR 24 Pat. 249.....was weakened by the judgment in Jadish

Prasad v. Saligram Lal, ILR 24 Pat 391.....where the Court doubted the correctness of the earlier view.

A proceeding for assessment is not a suit for adjudication of a civil dispute. That an income tax proceeding is in the nature of a judicial proceeding

between contesting parties is a matter which is not capable of even a plausible argument. The income tax authorities who have power to assess and

recover tax are not acting as judges deciding a litigation between citizen and the State: they are administrative authorities whose proceedings are

regulated by statute, but whose function is to estimate the income of the tax payer and to assess him to tax on the basis of that estimate. Tax

legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the

proceeding with the character of an action between the citizen and the State: Commissioner of Inland Revenue v. Sneath, (1932) 17 Tax Cas 149

at P. 164 and Shell Co. of Australia Ltd., v. Federal Commissioner of Taxation- 1931 A.C. 275. Again the period prescribed by S. 34 for

assessment is not a period of limitation. The section in terms imposes a fetter upon the power of the income tax Officer to bring to tax escaped

income. It prescribes different periods in different classes of cases for enforcement of the right or the State to recover tax. It was observed by this

Court in Ahamadabad Manufacturing and Calico Printing Co., Ltd, v. S.C. Mehta, 1963-48 ITR (SC) 154 at P. 171.....

It must be remembered that if the income tax Act prescribed a period during which tax due in any particular assessment year may be assessed,

then on the expiry of that period the department cannot make an assessment. Where no period is prescribed the assessment can be completed at

any time but once completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the

record (S. 35) or to reassess where there has been an escapement of assessment in income for one reason or another (S. 34). Both these sections

which enable reopening of back assessments provide their own periods of time for action but all these periods of times whether for the first

assessment or for rectification or for reassessment, merely create a bar when that time passed against the machinery set up by the income tax Act

for the assessment and levy of the tax. They do not create an exemption in favour of the assessee 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. This is, of course, subject to the condition, either expressly or by clear implication. If

the language of the law has that clear meaning, it must be given that effect and where the language expressly so declares or clearly implies it the

retrospective operation is not controlled by the commencement clause.

For the purpose of deciding the case in hand the question whether Rule 33 of the General Sales-tax Rules 1950 or Section 19 of the Act

prescribes a period of limitation as understood in the law of limitation need not be decided by me. Even assuming for the sake of argument that

Rule 33 or section 19 prescribes a period of limitation for re-assessment in cases of escaped turnover the wording in Section 19 is inapt to take in

a case where turnover has escaped assessment to tax under the General Sales-tax Act, 1125. In other words, even assuming that Section 19 of

the Act prescribes a period of limitation the section would not take within its coverage, if I may say so, the cause of action here, namely, the

escapement of turnover liable to assessments to tax under the General Sales-tax Act 1125. The proviso to Section 61 of the Act, no doubt,

preserves the rights and liabilities acquired or accrued under the General Sales-tax Act and which subsisted on the date of the Act, but it does not

provide or indicate the machinery for enforcing the right or liability, in question. As I have already said, no notice was issued or other steps taken

when the old Act was in force, so that the proceedings for reassessment may be continued, under the corresponding section of the Act (I am

assuming here that Section 19 is a corresponding section). As there is no machinery provided in the Act for enforcing the right or liability which

survived the repeal of the old Act I think, the relevant provision of the repealed Act or the rules thereunder must be deemed to continue in force for

the purpose of working out the rights or liabilities saved by the repealing Act.

5. Mr. Potti, said that the petitioners, liability for assessment to tax on the escaped turnover, subsisted only for a period of 3 years from the close

of the assessment year in question, that that period expired on 31.3.1964, that the liability that was saved by the proviso to Section 61 of the Act is

that liability and nothing else, and that as that liability ceased to exist at the end of the period prescribed by, rule 33 of the General Sales-tax Rules

1950 after 31.3.1964, no proceedings can be taken to enforce that liability. I think, the liability that was saved by the proviso is the liability for re-

assessment, and if there is provision in the Act prescribing a longer period for enforcing that liability, that provision would have applied

notwithstanding the fact that the liability for assessment of escaped turnover subsisted only for 3 years under Rule 33 from the close of the

assessment year in question. In other words, the liability that was saved was the liability for assessment to tax of escaped turnover, and that would

not have been circumscribed by the three year rule of limitation had the legislature indicated its intention in Section 19 to enlarge the period of that

liability. But as Section 19 is not comprehensive enough to catch in the escapement of turnover to tax under the General Sales-tax Act 1125, I

think, the liability or the right saved can be worked out only within the ambit of Rule 33 and within the period specified there. The operation of Rule

33 would continue notwithstanding the repeal of the General Sales-tax Act. If rights and liabilities acquired or incurred under a previous enactment

are saved by a repealing Act, and if the repealing Act contains no provision for enforcing them, the provisions of the previous enactment for

enforcing them will continue. For otherwise to what purpose the rights and liabilities are saved by the repealing enactment? Section 4 (e) of the

Kerala Interpretation & General Clauses Act states:

4. Where any Act repeals any enactment hitherto made or hereafter to be made then, unless a different intention appears the repeal shall not--

.....

(c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment

as afore-said; 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.

In Jatindra Nath De v. Jetu Mahato AIR 1946 Cal. 339, 347 Chakravartti J., observed:--

The Legislature cannot be regarded as having contemplated such a result. It must therefore be one of the general rules of construction that if rights

and procedure are both altered but rights accrued under the repealed enactment are saved, then, in the absence of an intention to the contrary

expressed necessarily implied in the new statute, it will be proper to interpret the intention of the legislature to be that the old procedure will subsist

for the enforcement of the saved rights. There is no question of any vested right in procedure. The position simply is that the accrued rights having

been saved and the new Act not having abrogated the old procedure as respects those rights, nor made the new procedure applicable to them, the

old procedure is consequently saved, as the only possible machinery for enforcing those rights.

It might be asked, why not then treat the notices issued by the Department to the petitioners before the expiry of the 3 years from the close of the

assessment year in question but after the Act came into force, as notices issued under Rule 33, as that rule should be deemed to continue in

operation even after the repeal of the General Sales-tax Act, 1125, and deem them under the proviso to Section 61 as notices issued under the

corresponding provision of the Act, namely Section 19. The answer to the question would depend upon the wording of Section 61. Sec. 51 says

that an action taken in the exercise of any power conferred by or under the General Sales-tax Act 1125, shall be deemed to have been done or

taken in the exercise of the powers conferred by or under the Act as if the Act were in force on the date on which the action was taken. This

would indicate that the notices should have been issued when the General Sales-tax Act 1125 and the rules thereunder were in force and the Act

was not actually in operation. As the notices were issued in this case after the Act came into operation, I do not think the notices would come

within the purview of Section 61 in order that they may be deemed as notices u/s 19. The proviso to Section 61 seems to contemplate the taking

of some action when the General Sales-tax Act was in force and before the commencement of the Act. As it is dear that the notices were issued

after the Act came into force, I think, they cannot be deemed to be notices issued under the corresponding section of the Act. I think, the notices

Exs. P.1 to P. 3 have to be quashed, and I do so.

I allow the writ petition without any order as to costs.