Suganmal vs State Of Madhya Pradesh And Ors. on 4 November, 1964

Equivalent citations: AIR1965SC1740, [1965]56ITR84(SC), [1965]16STC398(SC), AIR 1965 SUPREME COURT 1740, 1965 56 ITR 84, 1965 JABLJ 1046, 1966 MAH LJ 361, 1966 MPLJ 385, 1965 (1) SCJ 443, 1965 2 SCWR 582, 1965 (16) STC 398, 1965 SCD 1168, 1965 (1) ITJ 472

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Bench: J.R. Mudholkar, K.N. Wanchoo, M. Hidayatullah, P.B. Gajendragadkar, Raghuber Dayal

JUDGMENT

Raghubar Dayal, J.

1. This appeal by special leave arise out of a petition under article 226 of the Constitution presented by the appellant for the issue of a writ of mandamus against the State of Madhya Bharat and its officers, the Special Tax Commissioner and the Assessing Office, Industrial Tax, to refund a sum of Rs. 62,809-5-2 which had been illegally collected by the Industrial Tax Officer in the years 1943-48 on account of industrial tax. The petition was dismissed by the High court on various grounds.

2. The facts leading to the petition are these : The appellant is the managing proprietor of Bhandari Iron and Steel Company which had its foundry at Shilnath Camp, Indore, where it carried on the business of mechanical engineers, iron, brass and malleble iron founders and re- rollers in steel. There was in force in the Indore State, the Indore Industrial Tax Act, 1927, for the imposition of industrial tax on cotton mills. Excess profits duty was payable under the Indore Excess Profits Duty Order, 1944. The company did not run any cotton mill. Still, when the company was called upon to submit its returns and to deposit industrial tax wherever its balance-sheet showed profits, it did so. In all, the company paid a sum of Rs. 18,234-5-2 in 1944 in advance on account of industrial tax prior to the tax being provisionally assessed by the Assessing Officer. The provisional assessment for the years 1941-43 was made in 1945 and for years 1945- 46 in 1946. The tax was assessed at Rs. 62,809-5-2. Deducting the amounts of Rs. 18234-5-2 deposited in advance in 1944, an amount of Rs. 44,575 was deposited by the appellant on or before June 9, 1948. The tax for different years was finally assessed in 1951 and 1952. The appellant filed appeals against the various assessment orders to the appellate authority. The appeals were decided in June 1955. The appeals against the assessment of industrial tax were allowed on the ground that the company was not liable to pay industrial tax as it did not carry on any business which was liable to be assessed to that tax and the various assessment orders under appeals were quashed. No direction was, however, given by the

appellate authority for the refund of tax which had been realised from the appellant.

3. Thereafter, the appellant approached the various officers of the State Government of Madhya Bharat for the refund of tax amounting to Rs. 1,37,770-14-2, after appropriating Rs. 37,951-7-0 excess profits duty from Rs. 1,75,722-5-2 paid by the company towards the tax and excess profits duty. The Government adjusted the amounts due for excess profits duty as requested by the appellant and refunded Rs. 74,961-9-0 paid subsequent to January 26, 1950 when the constitution came into force. It however refused to admit the claim for refund of the amounts Rs. 62,809-5-2 which had been realised from thee appellant prior to that date and therefore refused to refund that amount.

4. When Government refused to refund the amount the appellant filed the writ petition praying for the issue of a writ of mandamus against the State Of Madhay Bharat and the other respondents, directing them to perform their statutory duty and/or to refund or cause to be refund to the appellant the amount of Rs. 62,809-5-2 which it was alleged there were entitled in law to receive. The respondents contested the claim and the High Court dismissed the writ petition holding that there was no statutory obligation on the State to refund amount, that the order of the appellate authority did not necessarily imply an order to the state to refund the amounts and that the writ of mandamus could not be issued for the purpose of refund of the tax wrongly realised as held by the appellate authority as that would amount to ordering the execution of he decisions of the appellate authority. It is this order of the high court against which the appellant has appealed, after obtaining special leave from this court.

5. Two question arise for determination in this appeal. The first is whether a petition under article 226 of the Constitution praying solely for the refund of money alleged to have been illegally collected by State as tax, is maintainable under article 226. The order is whether a writ of mandamus, if a case for its issue is made our can be issued under article 226 for the refund taxes collected prior to the coming into force of the constitution, though the final assessment was made subsequent to January 26, 1950, and was later set aside by the appellate authority.

6. On the first point, we are of opinion that though the High Court have power to pass any appropriate order in the exercise of the powers conferred under article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the state to refund taxes illegally collected, but all such had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illgally collected. We have not been referred to any case in which the courts were moved by a petition under article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or

unconstitutionality and, therefore, could take action under Art. 226 for the protection of their fundamental right and the Courts, on setting aside the assessment orders exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

7. Reference may be made to the case reported as Sri Satya Narain Singh v. District Engineer, P.W.D.1, where the petitioner had made several prayers in his petition under article 226. Some of these were not available at the time the order was passed by the High Court. He therefore confined his prayer for one relief only. It was for commanding the state to allow abatement of rent on account of the exemption of the state-owned road ways buses from liability to pay the tolls. The single judge issued the with as prayed, but the Division Bench, on Letters Patent appeal, dismissed the petition holding that he was not entitled to the abatement of rent and that he may be entitled to claim abatement of rent or licence fee under the general law but that such a relief could be claimed only in a suit but not in a proceeding under article 226. This court held against the petitioner that no abatement of rent could be claimed as there was no lawful order exempting roadways buses from paying the toll. In view of the petitioners prayer for the grant of any 'other relief' the court felt no difficulty in granting the appropriate relief and, consequently, directing the issue of a writ in the nature of mandamus to the State directing it to pay to the petitioner full tolls with respect to every crossing of the Roadways buses during the relevant period. This was not a case of enforcing a contractual liability of the State Government but it was one where, in the purported exercise of its governmental power, it refused to pay tolls to the contractor though it was liable to pay such tolls under the provisions of the statute viz., S. 15 of the Northern India Ferries Act, 1878. The decision in this case cannot be used in support of the contention that a petition praying merely for a writ of mandamus for refund of tax or any money due from the State can be normally maintainable.

8. We may also refer to Burmah Construction Co. v. State of Orissa 1, where it was prayed that an appropriate writ directing the State of Orissa to refund the amount of sales tax and penalty realised from the appellant be issued Shah J., speaking for the court, said :

> "The High Court normally does not entertain a petition under article 226 of the Constitution of enforce a civil liability arising out of breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under articles 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation."

9. We therefore hold that normally petitions solely praying for the refund of money against the State by a writ of kmandamus are not to ne entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defenses to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exeercise of writ jurisdiction.

10. We now proceed to consider the second point about the petitioner's right to the issue of a writ of mandamus for the refund of the money realised as tax prior to the coming into force of the Constitution. We are of opinion that the appellant has not made out any case for the issue of a writ of mandamus for the said purpose.

11. Recently this court had to consider this matter in some detail in State of Madhya Pradesh v. Bhailal Bhai 2, The assessee, in that case, by its writ petition, challenged the validity of the assessments and had prayed as a consequential relief for the refund of the taxes collected from him. This court held that the High Court had power for the purpose of enforcement of fundamental and statutory rights to give consequential relief by ordering repayment of money realised by Government without the authority of law and then indicated the various factors the court had to consider in deciding whether such consequential order be passed or not. We may usefully quote the observations at page 1011 in this connection 1 :

> "At the same time we cannot lose sight of the fact that the special remedy provided in article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seekin this special remedy and what excuse there is for it. Another is the nature of the controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these case, a person comes to the court relief under article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the Court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may, however, be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of crises it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution."

12. Reference may also be made to Sohan Lal v. Unin Of India 2, wherein it was laid down that proceedings by way of a writ were not appropriate in a case where the decision the court would

amount to a decree declaring a part's title and ordering restoration of possession, that the proper remedy in such a case was by way of a title suit in a civil court and that the alternative remedy of obtaining relief by a writ of mandamus or an order in the nature of mandamus could only be had if the facts were not in dispute and the title to the property in dispute was clear.

13. Mr. Setalvad, for the appellant, referred us to Commissioner of Police, Bombay v. Gordhandas Bhamji 1 in support of the contention that a writ of mandamus for the refund of money can be issued if the petitioner's right to refund of money does not arise under any statutory laws but arises under any law. In that case a writ of mandamus was prayed for under section 45 of specified Relief Act and the court had to construe the expression "under any law for the time being in force" in proviso (b) to section 45. In that connection this court held that the words "any law" were wide enough to embrace all kinds of law. It may be noted that in that in that particular case the duty soughty to be enforced arose under rules framed in the exercise of a power conferred by a statute. We cannot use the construction placed on the words "any law" in proviso (b) to section 45 of the specific Relief Act for the purpose of issuing a writ of mandamus in the exercise of powers under article 226 of th Constitution and especially when two earlier cases of this Court, already referred to, sepcifically state that a mandamus, for the recovery of money, could be issued only when the petitioner is entitled to recover that money j under some statute.

14. The appellant has not been able to bring his claim for refund within any statute or statutory rule. Rule 8(a) of the Rules provided for a refund of the excess tax realised before the completion of assessment if it is found that the tax payable was less in amount and if the assessee applied for the refund within a month from the dated of completion of the final assessment. This rule does not provide that in case the appellate authority sets aside the final assessment, the tax realised to refunded to the assessee on his application within any specified period of time. The High Court is therefore right in saying that the appellant has no right, under any statutory law, to the refund of the tax paid and that no duty is cast on the State to refund the amount it had realised which has been subsequently found to be not in accordance with law. The mere order of the appellate authority that the tax collected was not authorised by any law is not a decision to the effect that the state is to return the amount to the assesee nor can it be" taken to amount to a law making it incumbent on the State to refund the amount to the assessee.

15. Reference is made to section 72 of the Contract Act for the contention that the state is duty bound to return the amount to the appellate. whether the case of he appellant falls under the provisions of that section would be a point for decision in a regular sut and not in the proceedings under article 26. In the circumstances of the case already narrated, there may be such defences, as urged by the state in its reply, open to it to urge against the appellant, one of the main defences being that the claim would be time-barred. It would be a moot point to consider whether the payment of tax made by the appellant can be said to be under a "mistake" within the meaning of that expression under section 72 of the Contract Act.

16. We are, therefore, of opinion that the High Court rightly refused the writ of mandamus for the recovery of the sum of Rs. 62,809-5-2 alleged to have been raised by the respondent between 1944 and 1948. We need not, therefore, express any opinion on the question as to whether the right to

claim refund arose when the amount was realised or when the final assessment of tax was held illegal by the appellate authority.

17. We therefore, dismiss the appeal and order the parties to bear their own costs.

18. Appeal dismissed.