

Baba Associates Vs. State of Karnataka

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Court : Karnataka

Decided On : Sep-24-1993

Reported in : ILR1994KAR28

Judge : S.B. Majmudar, C.J. and ;R.V. Raveendran, J.

Acts : [Karnataka Sales Tax Act, 1957](#) - Sections 22(4), (6), 22A, 22A(1), 22A(2), 23 and 25A; Tamil Nadu General Sales Tax Act, 1959 - Sections 55

Appeal No. : S.T.R.P. No. 32 of 1991

Appellant : Baba Associates

Respondent : State of Karnataka

Advocate for Def. : C.V. Kumar, ;High Court Government Pleader

Advocate for Pet/Ap. : P.A. Bhat, Adv.

Judgement :

S.B. Majmudar, C.J.

1. The petitioner, M/s. Baba Associates, has challenged the order dated November 30, 1990, passed by the Karnataka Appellate Tribunal, Bangalore, under section 22(6-A) of the [Karnataka Sales Tax Act, 1957](#) ('the Act' for short). By the said order, the Tribunal has rectified its earlier decision rendered on October 4, 1985, in S.T.A. No. 1340 of 1983. The petitioner has contended that the said

rectification proceeding is barred by time and is without jurisdiction.

2. In order to appreciate the grievance of the petitioner, it is necessary to state briefly, the facts of the case : The relevant period of assessment is December 1, 1978 to June 29, 1979, being a part of assessment year 1978-79. The assessee is the manufacturer and seller of Indian-made foreign liquor. For the relevant period, the petitioner filed a revised return declaring a gross turnover of Rs. 3,22,417.77. The petitioner contended that a sum of Rs. 1,92,110.78 representing excise duty paid by the purchasers directly into the State treasury, will not form part of the sales turnover of the petitioner and therefore did not declare the same as part of its turnover. The assessing authority rejected the claim of the petitioner. The assessee went in appeal to the appellate authority against the order of the assessing authority. The appeal was dismissed. Against the said dismissal order, the petitioner preferred a further appeal before the Tribunal in S.T.A. No. 1340/1983. Before the Tribunal, in support of its contention that the excise duty paid directly by the purchasers will not form part of its sales turnover, the petitioner relied on the decision of the Supreme Court in the case of McDowell & Company Ltd. v. Commercial Tax Officer : [1977]1SCR914 . The Tribunal following the said judgment, allowed the appeal directing the assessing authority to revise the demand by excluding the excise duty paid by the purchasers, directly to the State treasury from the taxable turnover of the petitioner. It was also held that the petitioner was not liable to pay additional tax, as the total turnover of the petitioner would be less than rupees five lakhs.

3. We should mention at this stage that it is the contention of the petitioner that while the petitioner, relied upon McDowell's case : [1977]1SCR914 , the respondent relied upon the later decision of a Constitution Bench of the Supreme Court in McDowell & Company Limited v. Commercial Tax Officer reported in : [1985]154ITR148(SC) and that the Tribunal without referring to the latter Constitution Bench decision in [1985] 59 STC 277 placed reliance upon the first decision in [1977] 39 STC 151 (McDowell & Company Ltd. v. Commercial Tax Officer) and allowed the appeal. For convenience, the aforesaid two decisions will also be referred to as the first McDowell case : [1977]1SCR914 and the second McDowell case : [1985]154ITR148(SC) . The said decision of the Tribunal was

sought to be rectified by the Revenue by filing an application under section 22(6-A) of the Act on December 2, 1989, numbered as S.T.A. Misc. 11 of 1989. It was submitted by the Revenue that even though the decision of the Constitution Bench was brought to the notice of the Tribunal, the Tribunal ignored it and decided the matter following the first McDowell case : [1977]1SCR914 and therefore, there was a 'mistake apparent from the record' which was required to be rectified.

4. The Tribunal took up the said rectification application for consideration, heard the petitioner as well as the applicant (Revenue) and passed an order dated November 30, 1990. The Tribunal took the view that the rectification proceedings were within the period of limitation and that its earlier decision dated October 4, 1985, suffered from an apparent error of law as the second McDowell case : [1985]154ITR148(SC) had not been considered. Consequently, the Tribunal allowed the rectification application by ordering that the excise duty of Rs. 1,92,110.75 paid by the purchasers of liquor directly into the State treasury, formed part of the sale price of the assessee and, therefore, the assessee shall be liable to pay tax, additional tax and surcharge on the said amount of Rs. 1,92,110.75. As noted earlier, the assessee has challenged the said order of rectification of the Tribunal in this revision petition.

5. Shri P. A. Bhat, learned counsel appearing for the assessee, raised the following contentions in support of his case : (a) As the impugned order of rectification was passed beyond five years specified under section 22(6-A) of the Act, the order is without jurisdiction; and (b) alternatively, even if the order is held to have been made within the permissible time-limit, on merits, the order was unsustainable, inasmuch as there was no mistake apparent from the record. In support of his contention, he submitted that though the earlier decision of the Supreme Court in : [1977]1SCR914 (McDowell & Company Ltd. v. Commercial Tax Officer) as well as the later Constitution Bench decision in [1985] 59 STC 277 (McDowell & Company Ltd. v. Commercial Tar Officer) were cited before the Tribunal, the Tribunal, presumably on the ground that the latter decision of the Constitution Bench did not apply to the facts of the case, did not consider it and allowed the appeal by following the earlier decision of the Supreme Court in : [1977]1SCR914 (McDowell & Company Ltd. v. Commercial Tax Officer); hence

even if the decision of the Tribunal dated October 4, 1985 was erroneous, it did not reflect an apparent error of law which could be a ground for rectification proceedings and, therefore, the proceedings for rectification were without jurisdiction. It was vehemently contended that if an error had to be demonstrated by a long process of reasoning, it cannot be said to be an apparent error which could be made subject-matter of rectification; that if the order of the Tribunal was found to be erroneous, the proper remedy was to file a revision petition before this Court; and only because the time for filing a revision under section 23 had already expired, and as more than four years had elapsed from the date of the order, the Tribunal should not have entertained the rectification proceedings; that by passing the rectification order, the Tribunal virtually sat in appeal over its earlier order, which could not be done even assuming that it was erroneous.

6. The learned counsel for the Revenue, on the other hand, submitted that the rectification proceedings were moved within five years before the Tribunal; that the original order of the Tribunal was dated October 4, 1985 and the rectification application was moved on December 2, 1989, that is, within four years two months, and that merely because the Tribunal found time to decide the matter on November 30, 1990, after issuing notice to the assessee and hearing parties, it could not be said that the rectification order was passed beyond the period prescribed by the Legislature. On merits, it was submitted that it is now well-settled that if a binding decision of the higher court or the law declared by the Supreme Court under article 141 is ignored by the Tribunal in rendering its judgment, such a judgment would necessarily reflect a patent error of law; the effect would be similar to an order being made ignoring a statutory provision; that the first McDowell case : [1977]1SCR914 relied on by the Tribunal, was overruled by the Constitution Bench in [1985] 59 STC 277 (McDowell & Company Ltd. v. Commercial Tax Officer) and despite the said fact being brought to the notice of the Tribunal, the Tribunal ignored the Constitution Bench decision overruling the earlier decision and followed the overruled decision of a smaller Bench; in such an event, the judgment of the Tribunal suffered from a patent error of law and it did not require any long drawn argument to demonstrate the apparent error and therefore, the Tribunal rightly entertained the rectification application and allowed the same.

7. In view of these rival contentions, the following points arise for our consideration :

(i) Whether the order dated November 30, 1990, passed by the Tribunal in rectification proceedings is beyond the period of limitation and is therefore without jurisdiction

(ii) Whether the earlier order of the Tribunal suffers from a patent error of law which can be termed as a 'mistake apparent from the record'

(iii) Whether on merits, the Tribunal was justified in allowing the rectification application

Point No. (1) :

Section 22(6-A) of the Act dealing with rectification by Tribunal reads thus :

'6(A) : With a view to rectifying any mistake apparent from the record, the Appellate Tribunal may, at any time, within five years from the date of any order passed by it under sub-section (4) or sub-section (6), amend such order :

Provided that no order under this sub-section shall be made without giving both parties affected by the order a reasonable opportunity of being heard.'

8. It is true that an application for rectification of any mistake on the ground that it is apparent from the record, should be moved within five years from the date of order. It is also true that as indicated in the section, the Appellate Tribunal can amend an order within five years from the date of the order sought to be rectified. In the present case, the order sought to be rectified was passed by the Tribunal under section 22(4) of the Act. Therefore, the rectification application under section 22(6-A) on the ground that it suffered from a mistake apparent on the face of the record, was maintainable. It was also moved well within five years from the date of the order. It is also true that the order of rectification was passed on November 30, 1990, beyond five years from the date of the order sought to be rectified.

9. Mr. Bhat, learned counsel for the petitioner, vehemently contended that on a correct interpretation of section 22(6-A) an order could be amended only within five years from the date of the order and not thereafter. It is difficult to agree. The proviso to section 22(6-A) shows that no order under the said sub-section shall be made without giving reasonable opportunity of being heard to the affected parties. Once an application for rectification is moved within five years, the Tribunal has to spend some time before it decides the application on merits. It has to issue notices to both sides and must give reasonable opportunity of hearing. This hearing would necessarily take some time and that in the meanwhile, five years from the date of the original order may elapse. The question that arises for consideration is whether an application moved within the period of five years from the date of order, can be decided after five years. In our view, the period of five years laid down by the Legislature for amending the order only contemplates moving the Tribunal within five years from the date of order. Section 22(6-A) cannot be read to mean that the amendment order should also be passed by the Tribunal within five years as canvassed by the learned counsel for the petitioner.

10. A similar question was considered by a learned single Judge of this Court, Venkataramiah, J. (as he then was) in *Sha Vajeshankar Vasudeva and Company v. Assistant Commissioner of Commercial Taxes* reported in [1974] 34 STC 257; (1974) 2 Kar LJ 401, while dealing with section 25A which is in pari material with section 22(6-A). The said section also relates to rectification of mistakes apparent from the record, in the orders of the assessing authority or appellate authority or revising authority functioning under the Act. In that case, a notice for rectification of an order was issued within five years. The question for consideration was whether it could be decided by the authority after the expiry of the prescribed period of five years. Venkataramiah, J., answered the question in the affirmative following the decision of the Supreme Court rendered in the case of *Sales Tax Officer v. Sudarsanam Iyengar & Sons* : [1970]1SCR859 . The learned Judge observed that if a notice has been issued in exercise of the power under section 25A of the Act asking the assessee to show cause as to why the order of assessment should not be rectified, within the period of five years from the date on which the order in question is passed, it has to be held that the order of rectification passed after expiry of the period of five years pursuant to the notice so issued would not be a

defective one.

11. A decision of the Division Bench of this Court in *K. G. Subramanya v. Commissioner of Agricultural Income-tax* reported in : [1969]73ITR499(KAR) dealing with section 35(2) of the Karnataka Agricultural income-tax Act was cited before the learned Judge which was distinguished by him. Under that provision, which is parallel to section 34(3) of the Income-tax Act, 1922, it was mandated that no order shall be made after expiry of four years from the date of the order sought to be revised. In view of this mandatory language used by the Legislature under section 35 of the Agricultural Income-tax Act which was similar to section 34(3) of the Income-tax Act, 1922, the Division Bench in Subramanya's case : [1969]73ITR499(KAR) , took the view that no order could be made after the expiry of four years from the date of the order sought to be revised. The learned Judge rightly distinguished the said judgment in the light of the different language employed by the Legislature in section 25A of the Act which is, as stated above, in pari material with section 22(6-A) of the Act with which we are concerned in the instant case. Placing reliance on the decision of the Supreme Court in *Sales Tax Officer v. Sudarsanam Iyengar & Sons* : [1970]1SCR859 the learned Judge rightly took the view that once the proceeding was initiated within five years, it could be completed even after five years. He further observed :

'One other reason which persuades me to take the view that the present case is indistinguishable from the case before the Supreme Court is that the acceptance of the submissions made on behalf of the assessee would defeat the very purpose for which section 25A of the Act is intended. As observed by the Supreme Court, it is quite possible for the assessee to defeat the purpose of section 25A of the Act by either asking for adjournment before the assessing authority to submit his explanation to the show cause notice issued to him or by approaching a higher court in a collateral proceeding and by obtaining an order of stay resulting in undue delay of the rectification proceedings. It is seen that this was one of the considerations which prevailed upon the Supreme Court in the decision cited above to take the view that the expression 'determine' meant 'proceed to assess' in the context of that case.'

Therefore, the words 'with a view to rectifying any mistake apparent from the record, the Appellate Tribunal may at any time within five years from the date of the order amend such order' would mean that the Tribunal may within five years from the date of the order proceed to amend the order. We are told that the aforesaid judgment of the learned Judge was confirmed by a Division Bench of this Court (See *Sh Vajeshankar Vasudev and Co. v. Assistant Commissioner of Commercial Taxes* [1978] 42 STC 353). We respectfully concur with the view expressed by Venkataramiah, J., in the aforesaid decision, especially when it is supported by the decision of the Supreme Court in : [1970]1SCR859 (*Sales Tax Officer v. Sudarsanam Iyengar & Sons*) referred to by the learned Judge.

12. In this connection, we may also refer to the decision of the Allahabad High Court in *Vithaldas v. Income-tax Officer* : [1969]71ITR204(All) wherein a Division Bench of the Allahabad High Court had to consider whether proceedings for rectification initiated under section 35 of the Indian Income-tax Act, 1922, within four years, could validly result in rectification of the order, after four years period prescribed under the Act. It was held that it was the duty of the Income-tax Officer under section 35 of the Act to make a rectification and as he had failed to do so, the High Court had power to issue a writ directing the Income-tax Officer to make a rectification even though the period of four years fixed in section 35 had expired. The Allahabad High Court relied on the decision of the Madras High Court in *Kadirvel Nadar v. State of Madras* reported in : [1962]46ITR251(Mad) wherein it was explained that section 34 of the Madras Agricultural Income-tax Act merely laid down the period within which proceedings under the section should be commenced and if the proceedings were commenced within the prescribed period, the power of the Commissioner under the section could be exercised at any time thereafter and it was not necessary that the power should be exercised within the period fixed in the section. In *Busunur Industries v. State of Karnataka* [1986] 61 STC 123, a Division Bench of this Court had to consider the question whether, while exercising power of revision under section 22-A(1) of the Karnataka Sales Tax Act, the Commissioner should complete the proceedings and pass final orders within four years from the date of order sought to be revised or he could do so even after the expiry of the said period. Upholding such exercise of power by the Commissioner, it was held that such an order can be passed even after expiry of

four years under section 22-A(1) of the Act. Section 22A on which the Division Bench relied reads thus :

'The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by any officer subordinate to him is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment'.

Sub-section (2) of section 22A states that the power under sub-section (1) shall be exercisable only within a period of four years from the date of the order sought to be revised. Interpreting section 22-A(2), this Court rejected the contention of the assessee that revision proceeding not completed within four years was barred by time and held : 'The power of revision conferred by the section is judicial and in any event quasi-judicial power. The section empowers the Commissioner to call for the records, examine them and then initiate proceedings in conformity with the provision which incorporates the principles of natural justice to revise or not to revise the order of his subordinate. Without calling for the records and examining them, the power of revision cannot at all be exercised. When once the Commissioner calls for the records for purposes of section 22A of the Act, the one and the only way that can be understood and interpreted is that he has initiated the proceedings for revision under section 22-A(1) of the Act. Section 22-A(2) of the Act does not stipulate that the power initiated by calling for the records should also be peremptorily completed within 4 years from the date of the order sought to be revised. All that the section requires is that the power of revision shall be exercisable within four years from the date of the order. If the power of revision can only be exercised by calling for records and not in a vacuum, then the very first step of calling for records must be of necessity construed as falling within the meaning of the term 'shall be exercisable'. In many a case as in this very case for a variety of good reasons, which cannot be catalogued and stated exhaustively, it will be impossible for the Commissioner to complete the proceedings within four

years from the date of the order though he had initiated proceedings by calling for records within that period. We are of the view that on this construction of section 22A which carries out the purposes and object of that provision, we cannot uphold the contention of Sri Srinivasan'

13. In the light of this settled legal position, in our view, there is no substance in the first contention raised by the learned counsel for the petitioner that even though rectification application was moved within the permissible period of five years, merely because the Tribunal took time to decide the same after hearing both sides and by the time the final order was passed five years had passed, rectification proceedings were barred or without jurisdiction. The first point is, therefore, answered against the petitioner and in favour of the respondent.

Point No. 2

14. So far as the merits of the rectification order are concerned, learned counsel for the petitioner submitted that the order cannot be rectified unless it is shown that the same suffers from a patent error apparent from the record; that both the decisions of the Supreme Court in the first McDowell : [1977]1SCR914 and the second McDowell [1985] 59 STC 277 were placed for consideration before the Tribunal; the Tribunal chose to follow the first McDowell decision : [1977]1SCR914 on the facts and circumstances of the case and did not follow the second decision presumably because, according to the Tribunal, it did not apply to the facts of the case; merely because the Tribunal has not so noted in the order, it cannot be said that the order suffers from a patent error.

15. In support of this contention, he relied upon the decision of the Rajasthan High Court in the case of Commissioner of Income-tax v. Limited Mercantile Co. (Private) Limited . In that case the Rajasthan High Court considered the question whether a successor-Income-tax Officer can rectify an order passed by his predecessor under section 154 of the Income-tax Act, 1961, on the ground that the order of the predecessor suffers from mistake of law apparent on the face of the record. The predecessor relying upon the earlier decision of the Supreme Court in Emerald & Co. Ltd. v. Commissioner of Income-tax : [1959]36ITR257(SC) , had computed the income of the assessee accordingly. His successor took the view

that the said decision suffered from an apparent error as the facts of the case were governed by the decision of the Supreme Court in Commissioner of Income-tax v. Dalmia Investment Co. Ltd. : [1964]52ITR567(SC) . Both these decisions of the Supreme Court were before the Income-tax Officer who made the assessment in the first instance. The Division Bench took the view that the grounds put forward by the successor-Income-tax Officer for rectifying the order of the predecessor-Income-tax Officer was not covered under section 154 of the Income-tax Act, 1961 and therefore, the rectification proceedings were without authority of law. For coming to that conclusion, Mal Lodha, J., speaking for the Division Bench, referred to the relevant facts and held as follows :

'The Income-tax Officer in the order, annexure 1, has computed the capital gains taking the value of the shares at the time of their purchase and accepted the mode of calculation of the capital gains as worked out by the assessee. It was not in dispute that this was done in accordance with the principles laid down by their Lordships of the Supreme Court in Emerald & Co.'s case : [1959]36ITR257(SC) . It may be recalled that, according to the successor-Income-tax Officer, the basis adopted for computation of the capital gains was wrong inasmuch as the law laid down by the Supreme Court in Dalmia Investment Co.'s case : [1964]52ITR567(SC) was not taken note of which is applicable

A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record

In the case on hand, the Appellate Assistant Commissioner with whom the Appellate Tribunal had agreed, has stated that the case of the assessee is governed by Emerald & Co.'s case : [1959]36ITR257(SC) .

In the circumstances, it is difficult to hold that there was an obvious and patent mistake committed by the Income-tax Officer who passed the original assessment orders of the assessee in respect of the assessment years

We fail to appreciate how the aforesaid observations could be pressed into service on the facts of the case. In this case, what is urged by the Revenue is that before the Tribunal, two decisions of the Supreme Court were placed for consideration, viz., : [1977]1SCR914 (McDowell & Company Ltd. v. Commercial Tax Officer) which was rendered by a Bench of two Judges and [1985] 59 STC 277 (McDowell & Company Ltd. v. Commercial Tax Officer) rendered by a Constitution Bench. The Tribunal ignoring the decision of the larger Constitution Bench which overruled the earlier decision, based its decision on the overruled earlier decision of the Supreme Court. It is obvious that law declared by the Supreme Court under article 141 will be binding on all the authorities. If the Tribunal ignores the law declared by the Supreme Court on the point, and relies upon an overruled earlier decision of the Supreme Court, it can certainly be said that the decision of the Tribunal suffers from a patent error of law. Therefore the decision of the Rajasthan High Court rendered on the facts of that case, cannot be of any assistance to the petitioner.

16. The learned counsel for the petitioner then invited our attention to the two decisions of the Madras High Court. In the case of Sneva Diamond Tools (P) Ltd. v. Appellate Assistant Commissioner [1989] 72 STC 329, the learned single Judge Swamikkannu, J., considering section 55 of the Tamil Nadu General Sales Tax Act which permitted rectification of the order on the ground of error apparent on the face of the record, held that 'rectification' means 'taking out mistakes from' and that the provisions of section 55 of the Tamil Nadu General Sales Tax Act, 1959, is only to rectify any error apparent on the face of the record, such as clerical error, typing mistakes, etc. It is difficult to agree with this line of reasoning as 'error apparent' is not confined to a typing nor a clerical error, as is wrongly assumed by the learned Judge. Perhaps the learned Judge might have gone on the analogy of sections 152 and 153 of the Code of Civil Procedure which are meant for correction of unintentional mistakes committed by the courts, clerical or arithmetical mistakes in judgments, decree or orders arising from accidental slips or omissions. It is no doubt true that rectification of an error apparent on the face of the record may not be the same as power of review under order 47, rule 1 of the Code of Civil Procedure, as power of review is available not only in a case where there is a mistake or error apparent on the face of the record, but it is also

available in cases where new and important matter or evidence is discovered, which was not within the knowledge of the party seeking review or which could not be produced at the time when the decree or order was passed, in spite of exercise of due diligence or for any other sufficient reasons. While rectification on the ground of error apparent on the face of the record is only available where no further investigation of facts is called for and where the order suffers from a patent error of law, still such power cannot be circumscribed by the limitation regarding rectification contemplated under section 152 of the Code of Civil Procedure. Therefore, with respect, we are not in a position to agree with the decision of Swamikkannu, J., in the aforesaid decision. A view similar to the view taken in [1989] 72 STC 329 (Mad.) (Sneva Diamond Tools (P) Ltd. v. Appellate Assistant Commissioner) was taken by the Madras High Court in the case of State of Tamil Nadu v. Everest Trading Co. [1987] 67 STC 148. On the same grounds, we are not able to agree with the view taken by the Division Bench in the aforesaid decision.

17. The learned counsel for the assessee invited our attention to the judgment of the Bombay High Court in Commissioner of Income-tax v. Ramesh Electric and Trading Co. : [1993]203ITR497(Bom) . In that case, the Division Bench of the Bombay High Court speaking through Mrs. Sujata Manohar, J., after considering the power of the Appellate Tribunal to rectify a mistake apparent from the record, under section 254(2) of the Income-Tax Act, 1961 held :

'Under section 254(2) of the Income-tax Act, 1961, the Appellate Tribunal may,'with a view to rectifying any mistake apparent from the record', amend any order passed by it under sub-section (1) within the time prescribed therein. It is an accepted position that the Appellate Tribunal does not have any power to review its own orders under the provisions of the Act. The only power which the Tribunal possesses is to rectify any mistake in its own order which is apparent from the record. This is merely a power of amending its order. The power of rectification under section 254(2) can be exercised only when the mistake which is sought to be rectified is an obvious and patent mistake which is apparent from the record, and not a mistake which requires to be established by arguments and a long drawn process of reasoning on points on which there may conceivably be two

opinions. Failure of the Tribunal to consider an argument advanced by either party for arriving at a conclusion is not an error apparent on the record, although it may be an error of judgment. The Tribunal cannot, in the exercise of its power of rectification, look into some other circumstances which would support or not support its conclusion.'

No exception can be taken to the view expressed in the aforesaid decision of the Bombay High Court. It is no doubt true that no party can seek rectification by long drawn process of reasonings nor can the Tribunal be asked to rectify its order on the basis of an alternative argument. It is also true that rectification is not a proceeding analogous to review or appeal. However, on the facts and circumstances of the present case, rectification which has been made by the Tribunal is of a patent error committed by the earlier Bench in following an overruled decision and it did not involve a long drawn process of reasoning or some new argument.

18. Learned counsel for the assessee invited our attention to the decision of the Division Bench of the Orissa High Court in *Commissioner of Income-tax v. Jagabandhu Roul* : [1984]145ITR153(Orissa) . R. N. Misra, C.J., speaking for the Division Bench of the Orissa High Court in that case had to consider the scope and ambit of section 254 of the Income-tax Act, 1961. Rectification was sought only on the ground that the ratio of the decision of the Orissa High Court rendered in *Commissioner of Income-tax v. Dhadi Sahu* : [1976]105ITR56(Orissa) was not applied by the Tribunal while disposing of certain appeals. It was held on the facts and circumstances of the case that the application was not for rectification under section 254(2) but it was one for review. It was held that there was no apparent error in the earlier judgment which could be rectified under section 254(2) and that only because the earlier decision was sought to be reviewed and reconsidered in the light of the later decision of the High Court, no case was made out for interference with the earlier order in the rectification proceedings. We fail to understand how the view taken in the aforesaid decision is of any relevance. Grievance here is that the Tribunal has ignored article 141 of the Constitution which is binding on the courts; that it has relied upon an overruled decision of the Supreme Court even though its attention was drawn to it.

19. The learned counsel for the Revenue rightly contended before us that if the Tribunal had followed the earlier judgment of the Supreme Court distinguishing the later judgment of the Constitution Bench or if it had held that the later judgment did not apply to the facts of the present case, no rectification could have been permissible. But as is seen herein before, the earlier order of the Tribunal, totally ignored the Constitution Bench judgment of the Supreme Court which had overruled the earlier McDowell decision : [1977]1SCR914 which was made the basis of the Tribunal's order. This is not a case in which the decision of the Constitution Bench was not brought to the notice of the Tribunal. We fail to appreciate how a binding decision of the Supreme Court to which its attention was drawn could be ignored by the Tribunal. It is difficult to agree with the submission of the learned counsel for the petitioner that in the event the Tribunal ignored a binding decision of the Supreme Court, no rectification proceeding would lie, but only an application for contempt of court would lie. It is obvious that if the mistake committed by the Tribunal amounts to contempt of court, it necessarily would be a mistake apparent on the face of the record which can be corrected by a later Bench of the Tribunal to get rid of the charge of contempt.

20. Our attention was drawn by the learned counsel for the Revenue to the decision of the Division Bench of this Court in the case of Selection Committee for Admission to the Medical and Dental College v. M. P. Nagaraj reported in AIR 1972 Mys 44 which has taken the view while interpreting the term 'mistake or error apparent on the face of the record' under order 47, rule 1 of the Code of Civil Procedure, which is almost in pari material with the present provision for rectification found in section 22(6-A) of the Act, that a decision of a court by overlooking a decision of the Supreme Court which is binding on all courts in India, constitutes an error apparent on the face of the record justifying review of the decision rendered contrary to the decision of the Supreme Court. The following pertinent observations are made by the Division Bench speaking through Chandrashekhar, J. (as he then was) :

'23. In this state of divergence of views as to whether overlooking a binding decision amounts to an error apparent on the face of the record, the key to the solution of this question is, in our opinion, found in the test laid down by

Rajagopala Iyengar, J., who spoke for the court in *Thungabhadra Industries Ltd. v. Government of Andhra Pradesh* : [1964]5SCR174 . Without intending to deal with that question exhaustively, His Lordship said that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

24. Article 141 of the Constitution provides that the law declared by the court, shall be binding on all courts within the territory of India. Hence, where there is a decision of the Supreme Court bearing on a point and where a court has taken a view on that point, which is not consistent with the law laid down by the Supreme Court, it needs no elaborate argument to point to the error and there could reasonably be no two opinions entertained about such error. Applying the above test laid down by Rajagopala Iyengar, J., in : [1964]5SCR174 (*Thungabhadra Industries Ltd. v. Government of Andhra Pradesh*) such an error would clearly be an error apparent on the face of the record. The reasoning of Srinivasan Iyengar, J., in : AIR1927 Mad998 (*Opporthi Padhi v. Paila Ujjula*) and of Waller, J., in AIR 1933 Mad. 631 (*Venkatappayya v. Punneya*), that a mistake of law apparent from a contrary decision of a superior court, cannot be said to be apparent on the face of the record, cannot prevail in view of the test laid down by the Supreme Court as to what constitutes an error apparent on the face of the record.'

In view of the aforesaid settled legal position, therefore, it cannot be said that rectification application moved by the Revenue, on the grounds raised, was not maintainable under section 22(6-A) of the Act. The second point is therefore answered against the petitioner.

Point No. 3.

21. Now is the stage for consideration of the merits of the impugned order in rectification proceedings. We have already noted earlier that the only contention of the assessee before the Tribunal was that the excise duty paid by the purchasers of liquor directly into the treasury, should not be added to his taxable turnover and it was wrongly added by the assessing authority and the appeal was wrongly

dismissed by the appellate authority. In support of this contention, the assessee relied on the decision of the Supreme Court in *McDowell & Company Ltd. v. Commercial Tax Officer* : [1977]1SCR914 . Relying on the said decision, the Tribunal allowed the appeal. When we turn to that decision, we find that, that decision was rendered on October 25, 1976. In that case, *McDowell & Company Ltd.* which was the appellant had manufactured Indian liquor in its distilleries established in Andhra Pradesh. It had sold such liquor to several purchasers who had paid the excise duty under the Andhra Pradesh Excise Act, directly to the treasury. McDowell's contention before the Supreme Court was that though it manufactured liquor and though the excise duty was payable by it as manufacturer of liquor, because under the Andhra Pradesh Excise Act and the relevant Rules applicable at that time, even a purchaser can pay excise duty before taking delivery of the liquor from the distillery under a distillery pass and as the purchasers had directly paid the excise duty it was not added to the sale price of the liquor charged by them. The Division Bench of the Supreme Court speaking through Jaswant Singh, J., observed as follows :

'We have first to see as to how far the contention of counsel for the appellants that apart from a manufacturer of Indian liquors and an owner of a bonded warehouse [who in our opinion cannot but be regarded as primarily responsible for payment of excise duty and countervailing duty respectively in view of sections 21, 28 and 65 of the Andhra Pradesh Excise Act, 1968, and rules 3, 4, 5, 6, 67 and 76 of the Andhra Pradesh Distillery Rules, 1970, and condition No. 9 of the distillery licence granted under rule 5 of these Rules, rules 5 and 10 of the Andhra Pradesh Indian Liquor (Storage in Bond) Rules, 1969, conditions Nos. 7 and 10 of the licence granted in form B.W. 1 under rule 5(2), the phraseology of the application for receipt of liquor into the bonded warehouse prescribed by rule 9(2) and the terms of the counterpart agreement required to be executed by a licensee of an Indian liquor bonded warehouse under rules 3(2) and 5(2) of these Rules] the buyers of the said liquors are also liable under the law for payment of the aforesaid duties can be sustained. For a proper determination of this question, it is necessary to recall the provisions of the Andhra Pradesh Distillery Rules, 1970, which have been set out in the earlier part of this judgment. The said rules particularly rules 79, 81, 82, 83 and 84 lend a good deal of support, in our opinion, to the contention

of counsel for the appellants and make every intending buyer of the Indian liquor liable for payment of the excise duty before obtaining the distillery pass and lifting the quantity mentioned therein from the distillery. Accordingly agreeing with counsel for the appellants we hold that intending purchasers of the Indian liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty which is collected from them by the authorities of the excise department.'

Having taken that view, the Division Bench of the Supreme Court held that McDowell's turnover did not include the excise duty and countervailing duty paid on liquor as the same did not go into their common tills and did not become a part of their circulating capital. The Division Bench, therefore, was of the view that the sales tax authorities were not competent to include in the turnover of McDowells the excise duty and the countervailing duty which were not charged from them but were charged from and paid directly to the excise authorities by the buyers of the liquor as stated above.

22. It appears that thereafter the Andhra Pradesh Legislature amended the relevant Distillery Rules and made the manufacturer of liquor solely responsible for payment of excise duty and on that basis raised fresh demand under the Sales Tax Act. That was challenged by the very same McDowell & Co. Ltd. in the Andhra Pradesh High Court by filing a writ petition. That challenge failed and that is how, the McDowell once again came before the Supreme Court. The very same contentions were canvassed by McDowells in the second proceeding before the Supreme Court. When leave was granted, the Division Bench of the Supreme Court doubted the correctness of the decision earlier rendered in : [1977]1SCR914 (McDowell Company Ltd. v. Commercial Tax Officer) and the matter was referred to a larger Bench. That is how the matter was placed before a Constitution Bench of the Supreme Court. The Constitution Bench speaking through Ranganath Misra, J. (as His Lordship then was), with whom Chinnappa Reddy, J., agreed by his concurring judgment, took the view that the reasoning adopted by the earlier Division Bench which decided [1977] 39 STC 151 (McDowell & Company Ltd. v. Commercial Tax Officer) could not be sustained. It is true that the said decision of the Constitution Bench in [1985] 59 STC 277 (McDowell & Company Ltd. v.

Commercial Tax Officer) does not expressly observe that [1977] 39 STC 151 (McDowell & Company Ltd. v. Commercial Tax Officer) stands overruled. But the contrary decision rendered by the Constitution Bench necessarily leads to that conclusion. Referring to [1977] 39 STC 151 (McDowell & Company Ltd. v. Commercial Tax Officer) at page 287 of the Report, Misra, J., observed :

'This Court then proceeded to determine whether excise duty paid directly to the excise authorities or deposited directly in the State exchequer in respect of Indian liquor by the buyers before removing the same from the distillery could be said to form part of the taxable turnover of the appellant-distillery. Precedents were referred to and the court came to the conclusion that excise duty did not go into the common till of the appellant and did not become a part of the circulating capital. Therefore, the sales tax authorities were not competent to include in the turnover of the appellant the excise duty which was not charged by it but was paid directly to the excise authorities by the buyers of the liquor. The appellant, therefore, succeeded before this Court and the notices issued by the sales tax authorities were quashed.'

Misra, J., then referred to the subsequent development by which rules 76 and 79 of the Distillery Rules were amended whereby the holder of D-2 licence, that is, the manufacturer of liquor, had to pay excise duty before removing the said liquor. At page 290 of the Report, Misra, J., has made the following pertinent observation :

'On an examination of the provisions of the Excise Act, the Rules framed thereunder and the pronouncements referred to above, we are of the view that the conclusion of this Court at page 921 of the Reports : [1977]1SCR914 that intending purchasers of the Indian liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty is too broadly stated. The 'duty' was primarily a burden which the manufacturer had to bear and even if the purchasers paid the same under the Distillery Rules, the provisions were merely enabling and did not give rise to any legal responsibility or obligation for meeting the burden. We do not propose, however, to examine this aspect any further for the change in rule 76 of the Distillery Rules has clearly affirmed the position that

liability for payment of excise duty is of the manufacturer. Provisions of rules 80, 81, 82, 83 and 84 do not militate against the conclusion that the payment of excise duty is a liability exclusively of the manufacturer. In these rules, detailed provisions have been made regarding obtaining of distillery pass, correct calculation and full payment of excise duty, the manner of depositing such duty and ultimately issue of the spirit under the pass from the distillery. These rules, therefore, do not detract from the position that payment of excise duty is the primary and exclusive obligation of the manufacturer and if payment be made under a contract or arrangement by any other person it would amount to meeting of the obligation of the manufacturer and nothing more.'

He then considered the definition of 'turnover' found in the Andhra Pradesh General Sales Tax Act and observed that the definition clearly indicated that the total amount charged as the consideration for the sale is to be taken into account for determination of the turnover and where a bill of sale is issued (which obviously had to state the total amount charged as consideration), the total amount set out therein is to be taken into account and that in every transaction of sale, there is bound to be a seller at one end and a buyer at the other and transfer of title in the goods takes place for a consideration.

23. He then referred to the following observations of the Supreme Court in Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979] 43 STC 13; : [1979]1SCR276 .

'The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale

Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The sale price in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the

purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But, even so, it would be part of the sale price because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill.'

Thereafter Misra, J., observed :

'We would like to add, that the position is not different when under a prior agreement, the legal liability of the manufacturer-dealer for payment of excise duty is satisfied by the purchaser by direct payment to the excise authorities or to the State exchequer.'

Again at page 292 of the Report, it has been observed thus :

'Admittedly, the bills issued by the appellant did not include the excise duty. As already found, payment of excise duty is legal liability of the manufacturer; its payment is a condition precedent to the removal of the liquor From the distillery and payment by the purchaser is on account of the manufacturer. According to normal commercial practice, excise duty should have been reflected in the bill either as merged in price or being shown separately. As a fact, in the hands of the buyer the cost of liquor is what is charged by the appellant under its bill together with excise duty which the buyer has directly paid on seller's account. The consideration for the sale is thus the total amount and not what is reflected in the bill. We are, therefore, clearly of the opinion that excise duty though paid by the purchaser to meet the liability of the appellant, is a part of the consideration for the sale and is includible in the turnover of the appellant. The purchaser has paid the tax because the law asks him to pay it on behalf of the manufacturer.'

Thereafter the court considered the submission based on relevant entries in the First Schedule to the Andhra Pradesh General Sales Tax Act which showed that different rates of tax were imposed in cases where consideration for the sale or purchase of liquor includes the excise duty payable under the Andhra Pradesh Excise Act and in cases where it was not so.

24. In the light of the above entries, it was observed by the Constitution Bench that for resolving the dispute as to whether excise duty is a part of the turnover, reference to the Schedule is indeed wholly irrelevant. Thereafter it was held :

'We are of the view that the conclusion reached in the appellant's case in : [1977]1SCR914 [McDowell & Co. Ltd. v. Commercial Tax Officer : [1977]1SCR914 , on the second aspect of the matter, namely, when the excise duty does not go into the common till of the assessee and it does not become a part of the circulating capital, it does not constitute turnover, is not the decisive test for determining whether such duty would constitute turnover.'

25. On the basis of the aforesaid conclusion, the Constitution Bench dismissed the appeal of the McDowells. It becomes therefore clear that the basis on which [1977] 39 STC 151 (McDowell & Company Ltd. v. Commercial Tax Officer) was decided was knocked off by the Constitution Bench decision and the Constitution Bench reconsidered the correctness of the said decision and though having expressly not so stated, proceeds on the premise that the earlier decision did not lay down correct law. Having regard to the conclusions reached by the Constitution Bench in [1985] 59 STC 277 (McDowell & Company Ltd. v. Commercial Tax Officer) the earlier contrary conclusions of the Division Bench of the Supreme Court in : [1977]1SCR914 (McDowell & Company Ltd. v. Commercial Tax Officer) cannot be sustained and must be held to be overruled. As a result, it becomes inevitable to hold that the Tribunal at an earlier stage, when it allowed the appeal of the petitioner relying upon the overruled decision of the Supreme Court in : [1977]1SCR914 (McDowell & Company Ltd. v. Commercial Tax Officer) ignored the law declared by the Supreme Court under article 141. Therefore, the earlier decision of the Tribunal must be held to suffer from a mistake apparent from the record and such mistake does not require to be proved by any long drawn

argument, but by merely looking into the relevant portions of the decision of the Supreme Court in : [1985]154ITR148(SC) (McDowell & Company Ltd. v. Commercial Tax Officer) and that such mistake was rightly corrected by the impugned judgment under section 22(6-A) of the Act.

26. In this connection, it is useful to refer to the Division Bench decision of this Court in Govindaraju Chetty v. Commercial Tax Officer [1968] 22 STC 46 wherein the Division Bench speaking through Narayana Pal, J. (as he then was), held that a mistake which is capable of being made out only upon further evidence or investigation of further facts can never be regarded as a mistake apparent on the record within the meaning of rule 38 of the Mysore Sales Tax Rules, 1957. Similarly, a mistake which cannot be made out except upon long and elaborate argument cannot ordinarily be regarded as a mistake apparent on the record. Where, however, no further investigation of facts is called for and on the facts found, the principle of law declared by the Supreme Court may be straightway applied with the consequence of rendering an existing order mistaken, it would be a case of mistake apparent on the record within the meaning of the said rule 38.

27. In the light of the aforesaid discussion and on the facts of the case, it has to be held that the decision of the Constitution Bench in : [1985]154ITR148(SC) (McDowell & Company Ltd. v. Commercial Tax Officer) had to be applied which is the law declared by the Supreme Court holding the field. In these circumstances, therefore, if the Tribunal ignoring the law, followed an overruled decision, no other conclusion is possible except the one and only conclusion that the said decision suffered from a patent error and required to be rectified. Consequently, even on merits, no flaw could be found in the decision rendered on November 30, 1990. Accordingly the third point is answered against the petitioner.

28. These are the only contentions urged before us, and as there is no substance in any of them, the revision application fails and is dismissed.

29. Petition dismissed.