Before G.S. Singhvi, A.C.J. and Viney Mittal, J

HINDUSTAN CONSTRUCTION COMPANY LTD.,—*Petitioner*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

C.W.P. No. 15749 OF 2004

21st February, 2005

Haryana General Sales Tax Act, 1973—Ss. 39 and 40—Haryana Value Added Tax Act, 2003—Ss. 2, 34, 61 and 62—Punjab General Clauses Act, 1898—S.4—Assessing Authority accepting return filed by a Construction Company—After 4 years, Revisional Authority initiating proceedings under section 40 of 1973 Act—Repeal of 1973 Act by VAT Act—Limitation for exercise of revisional power under section 40 of 1973 Act is 5 years whereas limitation under section 34 of VAT Act is 3 years from the date of supply of copy of Assessment order—Assessment orders attained finality prior to the commencement of the VAT Act—Whether after the repeal of 1973 Act by VAT Act the Revisional Authority continues to have jurisdiction to initiate proceedings under section 40 of 1973 Act—Held, no—S.4 of 1898 Act provides that unless a different intention appears, the repeal does not affect any right, privilege or obligation or any legal proceedings or remedy in respect of any such right, privilege, obligation, liability etc.—S.61 of VAT Act saving the pending applications, appeals, revisions and other proceedings made or preferred to any authority under 1973 Act—Enactment of S.61 showing a different intention expressed by the Legislature, thus, clearly excluding operation of S.4 of 1898 Act—Petition allowed and orders of Revisional Authority revising the assessment order quashed.

Held, that the power of revision conferred upon a Revisonal Authority cannot be treated to be akin or similar to a right of appeal conferred upon a suitor. Section 40 of the 1973 Act merely conferred a power on the Revisional Authority giving *suo motu* powers to the Revisonal Authority. No corresponding right was conferred upon the department to file a petition seeking revision of the order. An enabling provison in a statute conferring certain power upon a competent authority cannot be taken to be any right. muchless a vested right in favour of a suitor-department.

(Paras 23 and 24)

Further held, that a reading of the provisions of Section 4 of the General Clauses Act shows that unless a different intention appears, the repeal does not affect any right, privilege or obligation or any legal proceedings or remedy in respect of any such right, privilege, obligation liability etc. By virtue of Section 61 of the VAT Act, the Legislature, while repealing the 1973 Act, saved the pending application, appeal, revision and other proceedings made or preferred to any authority under that Act and transferred the same for disposal by the officer or authority, who would have had jurisdiction to entertain such application etc. under the new Act. It is, thus clear that while enacting Section 61 of the VAT Act, a different intention has been expressed by the Legislature. Thus, the effect of the aforesaid repealing clause clearly excludes operation of Section 4 of the General Clauses Act. Therefore, that section cannot come to the rescue of the State for defending the action taken by the Revisional Authority.

(Para 25)

K.L. Goyal, Advocate with Sandeep Goyal, Advocate *for the petitioner.*

Jaswant Singh, Senior Deputy Advocate General, Haryana, *for the respondent.*

VINEY MITTAL, J,

(1) In these petitons, the petitioner has prayed for quashing of orders passed by the Joint Excise and Taxation Commissioner (Range)-cum-Revisional Authority, Ambala (respondent No. 2).

(2) For the sake of convenience, we have taken the facts from C.W.P. No. 15749 of 2004.

(3) Petitoner-Hindustan Construction Company Limited, Yamuna Nagar (hereinafter referred to as the petitioner-Company) is engaged in the business of construction and claims to have its area of operation across the entire country. In the State of Haryana, it is duly registered as a dealer under the provision of Haryana General Sales Tax Act, 1973 (hereinafter referred to as the 1973 Act) and under the Central Sales Tax Act, 1956 hereinafter referred to as the Central Act) and is being assessed by Assessing Authority, Yamuna Nagar. For the assessment year 1998-99, the petitioner-Company had

returned a gross turnover of Rs. 20,65,04,077. As per the return, tax liability of the petitioner-Company was Rs. 40,89,786. However, by taking into account the fact that it had already paid tax amounting to Rs. 1,26,01,520 which was deducted at source by the contractees, it filed application for refund of Rs. 81,11,734. Return filed by the petitioner-company accepted by the Assessing Authority,—vide order Annexure P1 and refund granted in terms of the prayer made. After more than four years of the finalisation of the assessment, respondent No. 2 issued notice dated 7th June, 2004 (Annexure P2) to the petitioner-Company to show cause against the proposed refund of the order on the following grounds :—

"(a) you have filed wrong returns and the assessment has been framed wrongly by taking only the cost price of the material used in the works contract for the purpose of assessment. The returns and the assessment should have been frmaed according to the law laid down by the Hon'ble Supreme Court in the case of **Gannon Dunkerley and Company and other versus State of Rajasthan etc.** (C.A. nos. 4861—4864 of 1992) reported in (1993) 88 STC 204 (SC), As per this judgment the value of the goods involved in the works contract will have to be determined by taking into account the value of the entire work contract and deducting therefrom the charges towards labour and services.

(b) A refund has wrongly been allowed as tax paid on cement as there was no manufacturing. This should have been allowed as tax paid sales under rule 24(i).

(c) The duty draw back of rs. 17446674 or amount of Excise duty has been wrongly reduced from the turnover as any incentive/subsidy allowed by the government is not deductible."

(4) The petitioner-Company contested the notice issued by respondent No. 2. In the reply filed on its behalf, it was pleaded that after the repeal of the 1973 Act by the Haryana Value Added Tax, 2003 (for short, the VAT Act), respondent No. 2 did not have jurisdiction to initiate proceedings uner the old Act. It was claimed that no proceedings wre pending or deemed to be pending on 1st April, 2003

i.e. the date of commencement of the VAT Act and therefore, no action could be taken under the repealed Act. It was also peladed that notice issued for refund of the assessment order ws barred by limitation. On merits, it was pleaded that whle filing the aforesaid return, it had claimed deductions on account of duty draw, back received from the Government of India, as per Export Import Policy. It is further pleaded that the aforesaid deduction was in respect of excise duty amount paid by the manufacturer on cement and steel from whom petitioner-Company had purchased the goods, which were used in the execution of the project (permanently transferred in works). It is further pleaded that the excise duty on cement and steel was reimbursed as the project executed by the petitioner-Company was funded by the Internatinoal Bank for Reconstruction and Development (IBRD) and supplies to such projects are to be regarded as "deemed export" eligible for the aforesaid benefits. It is also claimed that the aforesaid deduction of the petitioner-Company was as per the law laid down by the Supreme Court in **Commissioner of Sales Tax, U.P. versus Indian Aluminium Cable Ltd. (1).** After considering reply dated 16th June, 2004 (Annexure P3) filed on behalf of the petitioner-Company, respondent No. 2 passed order dated 12th July, 2004 (Annexure P5) whereby he revised the assessment order and declared that a sum of Rs. 65,35,632 was recoverable from it.

(5) The petitioner-company has challenged order Annexure P5 mainly on the grounds which were taken by it in the reply to the show cause notice.

(6) In the written statement filed on behal of the respondents, an objection has been taken to the maintainability of the writ petition on the ground that the petitioner-company has failed to avail the alternative remedy of appeal available under Section 39 of the 1973 Act. The repeal of the 1973 Act by enactment of the VAT Act with effect from April 1, 2003 has not been disputed by the respondents. However, the respondents have relied upon a Division Bench judgment of this Court in **M/s Khazan Chand Nathi Ram versus State of Haryana and another (2)** and the provisions of Sectin 4 of the Punjab General Cluses Act, 1898 (for short, the General Cluses Act). On the basis of the aforesaid pronouncement in **Khazan Chand Nathi Ram's case (supra)** as well as provisions of General Clauses

(1) (1999) 115 S.T.C. 172
(2) (2004) 136 S.T.C. 261

Act, it has been claimed by the respondents that on the repeal of the 1973 Act any right, privilege, liability or obligation under the old law is continued to be governed under the old law and, therefore, respondent No. 2 had the jurisdiction to pass order Annexure P5, even though the 1973 Act stood repealed. Reliance has also been placed on the judgment of the Supreme Court in **Gannon Dunkerley and Company and others** *versus* **State of Rajasthan etc (3)** and it has been averred that respondent No. 2 did not commit any illegality by revising the order passed by the Assessing Authority.

(7) We have heard Shri K. L. Goyal, learned counsel appearing for the petitioner-Company and Shri Jaswant Singh, Senior Deputy Advocate General, Haryana appearing for the respondents and with their assistance have also gone through the record of the case.

(8) At the out set, we may mention that Shri K. L. Goyal, learned counsel for the petitoner-Company fairly stated that if this Court comes to the conclusion that respondent No. 2 had the jurisdiction to pass order Annexure P5, then his client may be granted liberty to avail the remedy of appeal under Section 39 of the 1973 Act. At the same time, he argued that alternative remedy of appeal cannot be treated as a bar to the maintainability of the writ petition because order Annexure P5 passed by respondent No. 2 suffers from an inherent lack of jurisdiction.

(9) We have given our anxious consideration to the preliminary objection raised by the respondents with regard to the maintainability of the present petiton and also the contentions raised by the learned counsel for the petitoner-Company. The rule that the High Court will not entertain writ petition under Article 226 of the Constitution of India if an effective alternative remedy is available to the petitoner is not a statutory rule, but is a rule of self-imposed restraint evolved by the Courts and there are well recognised exceptions to this Court, some of which have been noticed in **Babu Parkash Chandra Maheswari** *versus* **Antrim Zila Parishad (Now Zila parishad, Muzaffarnagar) (4) State of U.P. and others** *versus* **Bridge and Roof Company (India) Ltd., (5) and Kerala S.E.B.** *versus* **Kurien E. Kalaithil (6)** One of the exceptions carved out by

(3) (1993) 88 S.T.C. 204
(4) AIR 1969 S.C. 556
(5) (1996) 6 S.C.C. 22
(6) AIR 2000 S.C. 2573

the Courts is that if the order under challenge is *per se* without jurisdiction, the aggieved party may not be relegated to the alternative remedy of appeal etc. In the present case, the petitoner has challenged the impugned order mainly on the ground that respondent No. 2 did not have the jurisdiction to initiate the proceedings under the 1973 Act. Therefore, we do not find any justification to non-suit it on the ground of availability of alternative remedy.

(10) On merits, Shri K. L. Goyal submitted that order dated 12th May, 2000 had attained finality, in-as-much as, the same was not subjected to revision under Section 40 of the 1973 Act till that Act was repealed by the VAT Act and argued that after coming into force of the new Act, respondent no. 2 could not exercise revisional power under Section 40 of the 1973 Act. He distinguished the judgment in Khazan Chand Nathi Ram's case (supra) by pointing out that the question considered and decided in that case relates to the right of the aggrieved party to avail the remedy of appeal under the 1973 Act. He drew distinction between a right of appeal available to the suitor and power of revision which could be exercised by competent authority and argued that after repeal of the 1973 Act, respondent no. 2 could not have initiated proceedings under Section 40 of the 1973 Act. In support of this contention, Shri Goyal relied on the judgment of the Supreme Court in **Shiv Shakti Cooperative Housing Society, Nagpur** *versus* **Swaraj Developers and others (7)** Shri Goyal then argued that the impugned order is liable to be declared as nullity because even though, in terms of Section 40 of the 1973 Act, the limitation for exercise of revisional power is five years, under Section 34 of the VAT Act, the said power could be exercised within three years from the date of supply of copy of assessment order. He further submitted that a provision relating to the limitation is procedural and, therefore, the proceedings initiated in the year 2004 i.e. after expiry of four year from the date of assessment were clearly barred by time. In the end, he argued that the power of revisional authority has not been conferred under the VAT Act on any officer and, therefore, respondent no. 2 could not have issued notice under section 40 of the Act and revised the order of assessment.

(11) Shri Jaswant Singh, Senior Deputy Advocate General, Haryana supported the impugned order and argued that respondent no. 2 did not commit any jurisdictional error by initiating proceedings under Section 40 of the 1973 Act because there is no provision in that Act for filing of appeal by the department. He pointed out that under

(7) (2003) 6 S.C.C. 659

Section 39, the only assessee can file an appeal, but a corresponding right has not been given to the department to question the order of the Assessing Authority. Shri Jaswant Singh further argued that the power of revision contemplated under Section 40 of the 1973 Act is akin to a right of appeal conferred upon the assessee under Section 39 of that Act and in view of the judgment of the Division Bench in M/s Khazan Chand Nathi Ram's case (supra), the right of the revisional authority will be deemed to be continuing even after the repeal of the 1973 Act. He also relied on Section 4 of the General Clauses Act and argued that the provision relating to *suo motu* revision is in the nature of a right, privilege, obligation or liability and accrued or incurred under the repealed enactment and, therefore, it can be exercised even after the repeal of the 1973 Act. Shri Jaswant Singh distinguished the judgment of the Supreme Court in Shiv Shakti Cooperative Housing Society's case (supra) by arguing that the said judgment turned on the interpretation of Section 115 of the Code of Civil Procedure and ratio thereof cannot be applied to the present case. In support of this argument, Shri Jaswant Singh relied on the judgment of **Siemens India Ltd.** *versus* **The State of Maharashtra. (8).** In the end, he argued that the proceedings initiated by respondent no. 2 cannot be treated as time barred because limitation for exercising power under section 40 of the 1973 Act is 5 years.

(12) We have given our thoughtful and anxious consideration to the rival contentions of the learned counsel for the parties. With the able assistance of the learned counsel, we have also gone through the various provisions of law, judgments cited at the bar and the record of the present case.

(13) Before dilating on various contentions raised by the learned counsel for the parties, we consider it proper to notice the relevant extracts of the provisions of various enactments necessary for adjudication of the present controversy. The same read as under :—

"Haryana General Sales Tax Act, 1973

Section 39 : Appeal

(1) An appeal from every original order, including an order under section 40, passed under this Act or the rules made thereunder shall lie :—

(a) if the order is made by an assessing authority, officer incharge of a check-post or barrier or an officer below the rank of a Deputy Excise and Taxation

(8) (1986) 62 S.T.C. 40

Commissioner, to the Deputy Excise and Taxation Commissioner or such other officer as the State Government may by notification, appoint ;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, or any other officer not below the rank of a Deputy Excise and Taxation Commissioner to the Commissioner or such other officer as the State Government, may by notification, appoint ;

(c) if the order is made by the Commissioner, to the Tribunal.

(2) An order passed in appeal by the Deputy Excise and Taxation Commissioner or the officer appointed by the State Government under clause (a) of sub-section (1) or by the Commissioner or the officer appointed by the State Government under clause (b) of that sub-section shall be further appealable to the Tribunal.

(3) The appellate authority shall not for the first time, receive in evidence on behalf of any dealer in any appeal, any account register, record or document unless for reasons to be recorded in writing, he considers, that such account register, record or documents is genuine and that the failure to produce the same before the authority below was for reasons beyond the control of the dealer.

(4) Every order passed by the Tribunal on appeal under sub-section (2) shall, subject to the provisions of section 42, be final.

(5) No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied, that the amount of tax assessed and the penalty and interest, if any, recoverable from the person has been paid :

Provided that the said authority, if satisfied that the person is unable to pay the whole of the amount of tax assessed, or the penalty imposed, or the interest due, he may, if the amount of tax and interest admitted by the appellant to be due has been paid, for reasons to be recorded in writing, entertain the appeal and may stay the recovery of the

balance amount subject to the furnishing of a bank guarantee or adequate security in the prescribed manner to the satisfaction of the appeallate authority :

Provided further that in the case of an appeal against any order which has to be communicated by the appropriate authority to the appellant, the period of sixty days shall commence from the date of receipt of the copy of the order by the appellant and in the case of an appeal against any other order made under this Act, the time spent in obtaining the certified copy of the order shall be excluded in computing the period of sixty days.

(6) Subject to regulations made by the Tribunal under sub-section (10) of section 4 and subject to such rules of procedure as may be prescribed in relation to an appellate authority other than the Tribunal, an appellate authority may pass such order on appeal as it deems to be just and proper, including an order enhancing the amout of tax or penalty or interest or all under this Act .

(7) An assessing authority may challenge in appeal before the Tribunal, the order of the officer on whom the State Government has conferred the powers of the Commissioner under sub-section (2) of section 40, within one year from the date of the order appealed against.

Section-40

Revision

"(1) The Commissioner may on his own motion call for the record of any case pending before, or disposed of by, any officer appointed under sub-section (1) of section 3 of the Act to assist him or] any assessing authority or appellate authority, other than the Tribunal, for the purposes of satisfying himself as to the legality or to propriety of any proceedings or of any order made therein and may pass such order in relation thereto as he may think fit :

Provided that no order, shall be so revised after the expiry of a period of five years from the date of the order :

Provided further that the aforesaid limitation of period shall not apply where the order in a similar case is revised as a result of the decision of the Tribunal or any Court of Law].

Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.

(2) The State Government may by notification, confer or any officer the powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification.

(3) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard. (*See* rule 60)."

The Haryana Value added Tax Act, 2003

2. (1) In this Act unless the context otherwise requires—

(a) ** ** ** **

(b) ** ** ** **

(c) ** ** ** **

(d) "assessee" means any person who is required to pay any tax, interest, penalty, fee or any other sum under this Act or the rules made thereunder :

(e) "assessing authority" means any person authorised by the State Government to make any assessment under this Act and to perform such other duties as may be required, by or under this Act :

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(zc) "registered" means registered under this Act;

(zd) "revising authority" means a person who exercises power of revision under this Act :

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(zo) "taxing authority" means an officer not below the rank of Assistant Excise and Taxation Officer appointed under sub-section (1) of section 55 to carry out the purposes of this

Act and includes an assessing authority and a revising authority but does not include an appellate, authority:

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Section 34 : Revision

(1) The Commissioner may, on his own motion, call for the record of any case pending before, or disposed of by, any taxing authority for the purposes of satisfying himself as to the legality or to the propriety of any proceeding or of any order made therein which is prejudicial to the interests of the State and may, after giving the person concerned a reasonable opportunity of being heard, pass such order in relation thereto as he may think fit :

Provided that no order passed by a taxing authority shall be revised on an issue which on appeal or in any other proceeding from such order is pending before, or has been settled by, an appellate authority or the High Court or the Supreme Court, as the case may be :

Provided further that no order shall be revised after the expiry of a period of three years from the date of the supply of the copy of such order to the assessee except where the order is revised as a result of retrospective change in law or on the basis of a decision of the Tribunal in a similar case or on the basis of law declared by the High Court or the Supreme Court.

(2) The State Government may, by notification in the Official Gazette, confer on any officer not below the rank of Deputy Excise and Taxation Commissioner, the powers of the Commissioner under sub-section (1) to be exercised subject to such exceptions, conditions and restrictions as may be specified in the notification and where an officer on whom such powers have been conferred passes an order under this section, such order shall be deemed to have been passed by the Commissioner under sub-section (1).

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Section 61. Repeal and saving

(1) The Haryana General Sales Tax Act, 1973 (20 of 1973), is hereby repealed :

(2) Notwithstanding anything contained in sub-section (1), —

(a) any application, appeal, revision or other proceedings made or preferred to any authority under the said Act, and pending at the commencement of this Act, shall, after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceedings under this Act as if it had been in force on the date on which such application, appeal, revision or other proceedings was made or preferred :

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** ** ** **

Section 62 :

Any reference in any provision of the law contained in the repealed Act to an officer, authority or Tribunal, shall for the purpose of carrying into effect the provisions contained in section 61, be construed as a reference to the corresponding officer, authority or Tribunal and if any question arises as to who such corresponding officer, authority or Tribunal is, the decision of the State Government thereon shall be final.

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Punjab General Clauses Act, 1898

SECTION-4

"**4. Effect of repeal.**—Where this Act or any Punjab Act *[---] repeals any enactment, then, unless a different intention appears, the repeal shall not—

(a) ** ** ** **

(b) ** ** ** **

(c) affect any right, privilege, obligation or liability acquired accrued or incurred under any enactment so repealed; or

(d) ** ** ** **

(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."

(14) We shall now refer to some of the judicial precedents which have bearing on the question arising in these petitions. In **Man Mohan Lal** *versus* **B. D. Gupta (9),** a Division Bench of this Court held as under :—

"The words all suits and other proceedings in sub-section (2) of this section (Section 57 of Delhi Rent Control Act 1958) are sought to be interpreted in two different ways by the learned counsel for the parties. Mr. Hardyal Hardy, learned counsel for the petitioners, urges that these words also include appeals and revisions, whereas Mr. R. S. Narula learned counsel for the respondents, contends that they do not. These words have been interpreted by two learned Judges of this Court also in two different ways. In **Shri Krishana Aggarwal** *versus* **Satya Dev** (1959) 61 P.L.R. 574 Bishan Narain J. has held that these words refer only to the original proceedings in the trial Court and do not include appeals or revisions. In **Shri Bimal Parshad Jain** *versus* **Shri Naidarmal** (1960) 62 P.L.R. 664 Falshaw J. has held that the word 'suits' includes appeals and revisions because they are in the nature of rehearing of the suits. After giving our careful consideration to the matter we are definitely of the opinion that the words 'suits and other proceedings' used in the

(9) (1962) 64 P.L.R. 51

operative part of sub-section (2) of this section mean only the suit and other proceedings at the stage of their trial in the Court of the first instance.

So far as the petitions for revision are concerned, there can be no doubt that they are not included in the words 'suits' because they cannot be said to be in the nature of rehearing of the same. It is a well known proposition of law that no party has a right to insist that a particular order must be revised by the High Court under the powers of revision vested in the said Court and that it is the right of the High Court alone to interfere in revision as and when it thinks fit to do so and as and when the conditions precedent for its interference, as mentioned in the provisions of law vesting the powers of revision in this Court, are satisfied,—*vide*, in this connection, **Dinshaw Iron Work** *versus* **Maikhan Adamji and Co.** I.L.R. 1943 Bom. 33 **Bishambar Nath** *versus* **Achal Singh** I.L.R. 55 All. 891 and **Laxmandas** *versus* **Chunilal** A.I.R. 1931 Nag. 17. Falshaw J. in the case decided by him and referred to above has sought to draw a distinction between the powers of revision under the provisions of section 115 of the Civil Procedure Code, and those under the provisions of section 35 of the Delhi and Ajmer Rent Control Act, 1952. He has taken the view that as the scope of revision under the Rent Act was much larger than the one under the Civil Procedure Code, the revision under the Rent Act could be treated more or less on the same footing as a second appeal. With great respect we cannot endorse this view. It may be that the scope of interference by this Court in one case is less and in the other more but the fact remains that none of the two is a right of any of the parties. The provision's under both the enactments give only a power to the High Court to call for the records, and to pass such orders as it may deem fit. Unlike a second appeal, where this Court is bound to interfere when there is error of law in the judgment of the lower appellate Court, this Court may well refuse to interfere in revision if it feels that substantial justice has been done between the parties. No revision, whether it is under the Civil Procedure Code or

any other law, can, in these circumstances be treated as a rehearing of the suit inasmuch as the party itself has no right to have such are hearing." (emphasis supplied).

(15) Section 35(1) of Delhi and Ajmer Rent Control Act, 1952 came to be examined by the Apex Court in the case of **Hari Shanker and others** *versus* **Rao Girdhari Lal Chaowdhury, (10)** and it was observed that there is a real distinction between an appeal and a revision. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way, as has been done in second appeals arising under the Code of Civil Procedure but the power to hear a revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. The following observation from **Hari Shankar's case** *(supra)* may be noticed :—

"The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right to appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of Code of Civil Procedure, the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or a refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other Acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision there in is according to law and to pass such orders in relation to the case as it thinks fit. The phrase according to law refers to the decision as a whole, and is not to be equated to error of law or of fact simpliciter. It refers to the overall decision, which must be according to law which it would not be, if there is a miscarriage of justice due to a mistake of law. The section

(10) AIR 1963 S.C. 698

is thus framed to confer larger powers than the power to correct error of jurisdiction to which section 115 is limited. But it must not be overlooked that the section in spite of its apparent width of language where it confers a power on the High Court to pass such orders as the High Court might think fit, is controlled by the opening words, where it says that the High Court may send for the record of the case to satisfy itself that the decision is according to law. It stands to reason that if it was considered necessary that there should be a rehearing, a right of appeal would be a more appropriate remedy, but the Act says that there is to be no further appeal. The section we are dealing with, is almost the same as section 25 of the Provincial Small Cause Courts Act. That section has been considered by the High Courts in numerous cases and diverse interpretations have been, given. The powers that it is said to confer would make a broad spectrum commencing, at one end, with the view that only substantial errors of law can be corrected under it, and ending; at the other, with a power of interference a little better than what an appeal gives. It is useless to discuss those cases in some of which the observations were probably made under compulsion of certain unusual facts, it is sufficient to say that we consider that the most accurate exposition of the meaning of such sections is that of Beaumont, C.J. (as he then was) in **Bell & Co. Ltd.** *versus* **Waman Hemraj 40 Bom.** L.R. 125 (A.I.R. 1938 Bom. 223) where the learned Chief Justice, dealing with section 25 of the Provincial Small Cause Courts Act, observed :

> The object of section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. The section does not enumerate the cases in which the Court may interfere in revision, as does section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt an exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the Court made the order had no jurisdiction, or in which the Court has based its decision on evidence

which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would have arrived at. This observation has our full concurrence."

(16) A Full Bench of this Court in the case of **Chanan Dass** *versus* **Union of India and others, (11)** was also seized of a similar controversy. Taking into consideration the law laid down in **Man Mohan Lal's case** *(supra)* and **Hari Shankar's case** *(supra),* the Full Bench made the following observations :—

"So the view taken by the learned Judges in Man Mohan Lal's case (1962) 64 P.L. R.51 finds affirmance by their Lordships in the above case. In spite of the larger amplitute of the power in section 35 of the Delhi and Ajmer Rent (Control) Act, 1952, as compared to the revisional power of the High Court under section 115 of the Code of Civil Procedure, their Lordships have now affirmed (a) that the power of revision is not the same as an appeal, and (b) that a revision is not a rehearing of the original proceedings. There is thus not intrinsic unity of proceedings to the stage of revision with the suit of original proceedings as to the stage of appeal as has been observed in Garikapati Veerayas case A.I.R. 1957 S.C. 540. It has already been shown that the opinion of Shamsher Bahadur J. that the position in revision is the same as in the case of a pending appeal with regard to the continuation of the original proceedings, is not supported by Gummalapura Taggina Matada Kotturuswami's case 1959 S.C 577." (emphasis supplied).

(11) 1967 P.L.R. 1

(17) We may also notice with advantage the following observations made by K. Subba Rao, J. in the case of **The State of Kerala** *versus* **K.M. Charia Abdulla and Co., (12).**

> ".....When the Legislature confers a right of appeal in one case and a discertionary remedy of revision in another, it must be deemed to have created two jurisdictions different in scope and content. When it introduced the familiar concepts of appeal and revision, it is also reasonable to assume that the well-known distinction between these two jurisdictions was also accepted by the legislature. There is an essential distinction between an appeal and a revision. The distinction is based on differences implicit in the said two expressions. An appeal is a continuation of the proceedings in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressely confers on it that power. That limitation is implicit in the concept of revision."

(18) The distinction between a right of appeal and the existence of a power of revision has also been examined in a recent judgment by the Apex Court in **Shiv Shakti Coop. Housing Society's case** *(supra).* The relevant observations of the Supreme Court in the aforementioned case may be noticed as folloows :—

> "13. First aspect that has to be considered is the respective scope of appeal and revision. It is fairly a well-settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application under Section 115. Though great emphasis was laid on certain observations in **Shankar Ramchandra Abhyankar** *versus* **Krishnaji Dattatreya Bapat** (1969)2 SCC 74: AIR 1970 SC 1 to contend that appeal and revision stand on the same pedestal, it is difficult to accept the propostion. The observations in the said case are being read out of context. What was held in that case

(12) AIR 1965 S.C. 1585

related to the exercise of power of a higher court, and in that context the nature of consideration in appeal and revison was referred to. It was never held in that case that appeal is equated to a revision.

14. Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision under Section 115 is not linked with a substantive right.

15. Language of Section 96 and 100 of the Code which deal with appeals can be compared with Section 115 of the Code. While the former two provisions specifically provide for right of appeal, the same is not the position *vis-a-vis* Section 115. It does not speak of an application being made by a person aggrieved by an order of subordinate court. As noted above, it is a source of power of the High Court to have effective control on the functioning of the subordinate court by exercising supervisory power.

16. An appeal is essentially continuation of the original proceedings and the provisions applied at the time of institution of the suit are to be operative even in respect of the appeals. That is because there is a vested right in the litigant to avail the remedy of an appeal. As was observed in **K. K. Kapen Chako** *versus* **Provident Investiment Co. (P) Ltd.** (1977) 1 SCC 593: AIR 1976 SC 2610 only in cases where vested rights are involved, a legislation has to be interpreted to mean as one affecting such right to be prospectively operative. The right of appeal is only by statute. It is (sic not a) necessary part of the procedure in an action, but "the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. It seems absurd to denominate this peramount right part of the practice of the inferior tribunal". (Per Lord Westbury, See: **Attorney General** *versus* **Sillem,** 33 LJ Ex. 209; 10LT 434, ER p.1209) The appeal, strictly so called, is "one in which the question is whether the order of the court from which the appeal is brought was right on the

materials which that court had before it." **(Per Lord Devuil Ponnammal** *versus* **Arumogam** 1905 AC 383, 390. The right of appeal, where it exists, is a matter of substance and not of procedure **(Colonial Sugar Refining Co.** *versus* **Irving** 1905 AC 369).

17. Right of appeal is statutory. Right of appeal inhered in one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed in **State of Kerala** *versus* **K.M. Charia Abdulla and Co. AIR 1965 SC 1585** the distinction between right of appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings: in effect the entire proceedings are before the Appellate Authority and it has the power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four Judge Bench in Hari Shankar versus Rao Girdhari Lal Chowdhury AIR 1963 SC 698 that the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way, as have been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's power under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone."

(19) Although Shri Jaswant Singh, learned counsel appearing for the respondents, has tried to distinguish the law laid down in **Shiv Shakti Coop. Housing Society's case** *(supra)* by contending

that the Apex Court in the aforesaid case was dealing with the scope of the revisional powers of the High Court under Section 115 of the Code and under Section 40 of the 1973 Act, the powers of revision are very wide and, therefore, according to the learned counsel no reliance could be placed upon Shiv Shakti Coop. Housing Society's case (supra) but we express our inability to agree with the aforesaid contention. In **Shiv Shakti Coop. Housing Society's case** *(supra)*, the Supreme Court has drawn a distinction between the appellate powers and the revisional jurisdiction. Whereas it has been recognised that a right of appeal, although a creation of statute, was inherent in a suitor as per the statute on the commencement of the lis and, therefore, could be treated to be a vested right but no such right could be claimed as a matter of right by any person with regard to a power of revision. The distinction between the appellate powers and the revisional powers, having been spelled out in Shiv Shakti Coop. Housing Society's case (supra), is fully attracted to the distinction of those powers in 1973 Act as well. In any case, the law laid down by the Division Bench in **Man Mohan Lal's case** *(supra)* and by the Apex Court in **Hari Shankar's case** *(supra)* and by the Full Bench of this Court in **Chanan Dass's case** *(supra)* coupled with the observation in **K.M. Charia Adbulla's case** *(supra)* leave no manner of doubt that the distinction sought to be drawn by Shri Jaswant Singh with regard to the application of **Shiv Shakti Coop. Housing Society's case** *(supra)* is wholly illusory. As a matter of fact, we have also noticed and reproduced above. Section 35 of Delhi and Ajmer Rent (Control) Act, 1952. The said provision is couched in similar language as Section 40 of the 1973 Act and can almost be deemed to be *pari materia* with the provision of Section 40 of the 1973 Act. The observations made in the aforesaid cases are fully attracted to the controversy in question.

(20) At this stage, we may also notice the law laid down by a Division Bench of this Court in **Khazan Chand Nathi Ram's case** *(supra)*. Learned counsel for the respondents placed great reliance upon the observations made in the aforesaid case to contend that the law applicable for the purpose of appeal or revision would be the law on the date when lis commences and in the case of a return filed or due to be filed, the lis shall be deemed to have commenced when such a return is filed or a notice for filing of the

aforesaid return had been issued. Learned counsel for the respondents relied upon the following observations made in **Khazan Chand Nathi Ram's case** *(supra)* :—

"34. In view of various judgments referred to above and on the reading of section 61(2) of the HVAT Act, 2003 it is concluded that section 61(2) of the HVAT Act does not give any retrospective effect to the provisions of the aforesaid Act either expressly or by necessary implication. Sub-section (2) of section 61 of the HVAT Act, 2003 contemplates transfer of pending proceedings pertaining to application, appeal, revision or other proceedings to the authorities constituted under the HVAT Act, 2003 and to be disposed of by the authorities so constituted. Such authorities constituted under the HVAT Act has been given deemed fiction to be in existence for the purpose of such application, appeal, revision or such other proceedings so as to be in force on the date such application, appeal, revision of other proceedings have been made or preferred. Since expressly or by necessary intendment, no retrospective effect is sought to be given, therefore, the effect of repeal of the HGST Act is required to be examined with reference to section 4 of the Punjab General Clauses Act, 1898 (as applicable to the State of Haryana).

35. Section 4 of the Punjab General Clauses Act, 1898 (as applicable to the State of Haryana) is the relevant provision of law in such a situation where the subsequent Act while repealing the old Act has not provided for any retrospective operation of the new Act either expressly or by implication. Section 4 of the Punjab General Clauses Act contemplates that in the absence of any contrary intention expressly or impliedly, any right, privilege, liability or obligation under the old law will continue to be governed under the old law. The assessee has a right to file appeal under the HGST Act with a liability or obligation to pre-deposit the amount of tax, interest and penalty. Such obligation or liability confers a right in favour of the State to insist upon pre-deposit of tax, interest or penalty. From the judgments of the Hon'ble Supreme Court in Hoosein Kasam Dada's case [1953] 4 STC 114 and Garikapati Veeraya's case AIR 1957 SC 540, it is apparent that the right of appeal is vested

right and accrues to the litigant and exists as on and from the date of lis commences. Such right is actually exercised when the adverse judgment is pronounced. Such right is to be governed by the law prevailing on the date of the institution of the suit or proceeding and not by the law that prevails on the date of its decision or at the date of the filing of the appeal.

36. In civil proceedings, lis commences on the presentation of the plaint or in cases claiming compensation under the Motor Vehicles Act on filling claim application. The question is when lis can be said to commence under the taxation laws, Section 25 of the HGST Act enjoins a duty upon an assessee to file quarterly return and deposit tax thereon. If such returns are accepted, there is no lis. Consequently, there would be no occasion for the parties to file an appeal. However if such returns are not accepted the cause of action which arise on the date when returns are required to be filed. The cause of action can be said to be arisen also when an assessee is called upon to furnish return on his failure to do so in terms of the provisions of the old Act. In fact, that is the relevant date as in Vitthalbhai Naranbhai Patel's case [1961] 12 STC 219 (SC): AIR 1967 SC 344.

37. In view of the above discussion, we hold that right of appeal is a vested right as if exists on the date of commencement of lis. The lis can be said to commence under the HGST Act on the date when return is filed or is required to be filed. Therefore, the provisions of section 39(5) of the HGST Act would continue to govern the right of appeal vested in the petitioner which is saved in terms of section 4 of the Punjab General Clauses Act (as applicable to State of Haryana)."

(21) In our opinion, the proposition of law laid down in **Khazan Chand Nathi Ram's case** *(supra)* has no bearing on the decision of these petitions because in that case, the Court was primarily concerned with the right of an appeal and the question as to whether a revision was also liable to be considered akin to a right of appeal was not, at all, involved in the case. There is no quarrel with the proposition of law laid down in Khazan Chand Nathi Ram's case (supra) that a right of appeal is a vested right as it exists on the date of commencement of the lis and the lis can be said to have commenced under the 1973

Act on the date when the return is filed or is required to be filed and the aforesaid right of appeal would continue to be saved in terms of Section 4 of the General Clauses Act. However, the aforesaid proposition of law is not at all attracted to the facts of the present case inasmuch as, the controversy involved in the present case is with regard to the revisional jurisdiction of the Revisional Authority i.e. as to whether the revisional authority continues to have any power to initiate proceeding with regard to assessment orders which had attained finality prior to the commencement of the VAT Act and when no lis was pending on the date of coming into force of the aforesaid enactment.

(22) We may now advert to the judgment of Bombay High Court in **Siemens India Ltd.** *versus* **The State of Mahrashtra** *(supra)*. In that case, a Division Bench of Bombay High Court, after considering the relevant statutory provisions, held :—

> "12. The right of the Commissioner to initiate *suo motu* revision proceedings in respect of an assessment order is similar to a right of appeal in this context though it may differ from a right of appeal in other regards. At the time when the assessment proceedings are initiated the assessee has a right to have these proceedings finalised in accordance with substantive law then in force. This would include a right to file an appeal if prescribed under the law then in force. It would also include a right to apply to revision or a liability to have the order revised in accordance with the substantive law then in force. But if under the law in force at the date of initiation of assessment proceedings a time-limit is prescribed within which the right of revision has to be exercised, is such time-limit a part of the substantive law or is it a procedural law ?"

(23) In our opinion, the above judgment is clearly distinguishable. The only question considered by Bombay High Court was with regard to the period of limitation which would be applicable for filing a revision in view of the subsequent amendment in law. It was held that the period of limitation is to be considered as a procedural law rather than a substantive law. Some of the observations made in that judgment do support the cause of the respondents, but in our opinion, the same are merely obiter and cannot be taken as an expression of opinion on a specific question of law. That apart, in view

of the authoritative pronouncements of the Supreme Court in **Hari Shankar's case** *(supra)* and also in view of the law down by this Court in **Man Mohan Lal's case** *(supra)* and **Chanan Dass's case** *(supra)* we have no hesitation in holding that the power of revision conferred upon a Revisional Authority cannot be treated to be akin or similar to a right of appeal conferred upon a suitor.

(24) Even otherwise, we find that Section 40 of the 1973 Act merely conferred a power on the Revisional Authority giving *suo-motu* powers to the Revisional Authority. No corresponding right was conferred upon the department to file a petition seeking revision of the order. An enabling provision in a statute conferring certain power upon a competent authority cannot be taken to be any right, much less a vested right in favour of a suitor-department.

(25) We shall now deal with the provisions of Section 4 of the General Clauses Act. A reading thereof shows that unless a different intention appears, the repeal does not affect any right, privilege or obligation or any legal proceedings or remedy in respect of any such right, privilege, obligation, liability etc. By virtue of Section 61 of the VAT Act, the Legislature, while repealing the 1973 Act, saved the pending application, appeal, revision and other proceedings made or preferred to any authority under that Act and transferred the same for disposal by the officer or authority, who would have had jurisdiction to entertain such application etc. under the new Act. It is, thus, clear that while enacting Section 61 of the VAT Act, **a different intention** has been expressed by the Legislature. Thus, the effect of the aforesaid repealing clause clearly exludes operation of section 4 of the General Clauses Act. Therefore, that section cannot come to the rescue of the State for defending the action taken by respondent No. 2. In this connection, we may notice the following observations of the Supreme Court in **Kalawati Devi Harlalka's case** *(supra)* :—

> "It is true that whether a different intention appears or not must depend on the language and content of section 297(2). It seems to us, however, that by providing for so many matters mentioned above some in accord with what would have been the result under Section 6 of the General Clauses Act and some contrary to what have been the result under Section 6, Parliament has clearly evidenced an intention to contrary."

(26) In view of the above discussion, we do not consider it necessary to deal with other points raised by the counsel for the parties.

(27) In the result, the writ petitions are allowed. Orders dated 12th July, 2000 passed by respondent No. 2 are quashed. However, the parties are left to bear their own costs.

R.N.R.

Before Ajay Kumar Mittal, J

BALWINDER KUMAR,—*Petitioner/Appellant*

versus

RAJINDER KUMAR AND OTHERS,—*Respondents*

F.A.O. No. 504 of 2005

The 25th January, 2005

Code of Civil Procedure, 1908—O.39 Rl.2—A—Wilful disobedience of the stay order—Injunction order restraining appellant from disposing of suit property passed by trial Court—After four years of stay order appellant executing sale deed—Stay order neither varied nor modified at any time—Appearance of appellant through his counsel—Whether knowledge of the injunction order can be imputed to the appellant when he appeared through his counsel—Held, yes—Appellant failing to show that injunction order was not in his knowledge—Order of learned ADJ holding the appellant guilty for violating the stay order and ordering him to be detained in civil prison for three months held to be legal.

Held, that the act which had been committed by appellant by executing a sale deed on 30th May, 1997 in violation of interim order dated 5th February, 1993 is such which cannot be reversed or rectified or modified voluntarily by the appellant as he had got a sale deed executed and thereby created third party rights. The learned Additional District Judge has rightly held the appellant guilty for violating the ad interim stay order dated 5th February, 1993 and has ordered the appellant to be detained in civil prison for three months. No illegality or infirmity could be pointed out in the impugned order.

(Para 7)

A.K. Jindal, Advocate, for the appellant.