(2003) 07 AHC CK 0181

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 790 of 2003

Anant Ram Prem Prakash — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 04-07-2003

Acts Referred:

Trade Tax Tribunal Regulations, 1988 — Regulation 11
Uttar Pradesh Trade Tax Act, 1948 — Section 10, 10(11), 10(6), 10(8), 21
Uttar Pradesh Trade Tax Rules, 1948 — Rule 68

Citation : (2006) 143 STC 542

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : Rakesh Ranjan Agarwal, for the Appellant; Bipin Kumar Pandey, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—This writ petition is against the order dated May 26, 2003 passed by the Trade Tax Tribunal, Meerut. The petitioner has sought quashing of the aforesaid order dated May 26, 2003 and also a writ of mandamus directing the respondent No. 2 not to proceed with the remand proceeding for the assessment years 1986-87 and 1987-88 u/s 21(2) of the U.P. Trade Tax Act, 1948 till the disposal of Second Appeals Nos. 249 of 1995 and 250 of 1995. By the impugned order the Tribunal granted the adjournment sought for by the petitioner, but vacated the earlier stay order dated July 10, 1995.

The brief facts for disposal of the present writ petition are as follows :

2. The petitioner was reassessed u/s 21 of the Act. The said reassessment order was challenged in appeal before the first appellate authority. The first appellate authority set aside the reassessment order and remanded back the matter for passing fresh reassessment order after verifying the facts from the books of account, vide order dated May 29, 1995. Aggrieved against the aforesaid order the petitioner filed two appeals namely, Second Appeals Nos. 249 of 1995 and

250 of 1995 for the assessment years 1986-87 and 1987-88 respectively and obtained stay order dated July 10, 1995 from the Trade Tax Tribunal staying further proceeding consequent to the remand order passed by the first appellate authority.

3. The aforesaid two appeals are pending since, 1995. It has been mentioned in the impugned order of the Tribunal that hearing of the appeal at the instance of the petitioner is being adjourned for one reason or the other, has been adjourned for 14 times. It appears that the Tribunal being fed-up with the successive adjournments even then allowed adjournment by the impugned order and fixed hearing of the appeals on June 9, 1993. But the Tribunal vacated the earlier stay order granted in favour of the petitioner. The petitioner is aggrieved against the vacation of stay order.

4. Heard Sri Rakesh Ranjan Agarwal, in support of the petitioner and Sri Bipin Kumar Pandey, learned Standing Counsel, for the respondents.

5. The learned Counsel for the petitioner submits that the Tribunal has no power to vacate the stay order granted it. He placed reliance upon Section 10, Sub-section (6) and Sub-section (8) of the U.P. Trade Tax Act. A perusal of Section 10(6) shows that the Tribunal may on the application of the appellant moved along with memo of appeal, grant stay order staying operation of the order, appealed against for recovery of the disputed amount of any tax, fees or penalty, etc. He further invited my attention to Rule 68 of the Rules framed under the aforesaid Act. Rule 68 of U.P. Trade Tax Rules, 1948 provides the manner of disposal of appeal.

6. Learned Standing Counsel has placed reliance upon Trade Tax Tribunal Regulations, 1988. He brought to my notice Regulation 11(iii)(d) of the said Regulations, which reads as under :

Regn. 11. Filing and disposal of stay and waiver application,--

(i) ....

(ii)

(iii)(a)....

(d) Every application for adjournment shall be submitted well in time or latest by 10.30 a.m. before the commencement of hearing of regular cases after supplying a copy thereof to the opposite party. Such adjournment application may be disposed of then and there on such terms and conditions as may be deemed fit.

7. He submitted two-fold arguments. Firstly, that power to pass an order includes the power to withdraw the order. Secondly, the action of the Tribunal is fully justified in view of the above regulation 11(iii)d) of the Trade Tax Tribunal Regulations, 1988.

8. In view of respective submissions of parties following two questions fell for

determination :

(1) Whether Trade Tax Tribunal possessed power to recall, vary or modify stay order granted earlier at a subsequent stage of proceedings ?

(2) Whether the impugned order can be said to be arbitrary and illegal ?

Elaborating the argument it was submitted by the learned Counsel for the petitioner that section 10(6) of the U.P. Trade Tax Act does not confer any power on the Tribunal to recall the stay order. The said argument is misconceived. Power to pass an order includes power to recall that order on sufficient grounds. Power to grant stay order is ancillary power to the appellate jurisdiction of a Tribunal or an authority. The Supreme Court in the case reported in [1969] 71 ITR 815 : AIR 1969 SC 430 (income tax Officer v. M.K. Mohammed Kunhi)(sic). Relevant portion of the judgment is quoted below :

It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective Sutherland Statutory Construction, third edition, Articles 5401 and 5402. The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat''s Civil Law (Cushing''s edition, volume 1), at page 88, it has been stated :

It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it.

Maxwell on Interpretation of Statutes, eleventh edition, contains a statement at page 350 that ''Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cut jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit''. An instance is given based on Ex parte, Martin [1879] 4 QBD 212 on appeal [1879] 4 QBD 491 that ''where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced''.

Tribunal u/s 10 of U.P. Trade Tax Act, 1948 enjoys a jurisdiction to set aside an ex parte order. This was so held in M.P. Poddar and company Vs. Additional Judge (Revisions), Sales Tax, to set aside an ex parte order is auxiliary or ancillary to the appellate jurisdiction. Such power was justified on the ground that it was inherited in the jurisdiction vested in the Tribunal as the Tribunal has been given appellate power by the statute. Following the aforesaid judgment a learned single Judge of this Court has held in 2003 UPTC 608 Ram Sewak Coal Depot v. Commissioner of Sales Tax, that if in a given case it is established that a party was unable to appear before the Tribunal for no fault of his, the end of justice would clearly require that ex parte order against him should be set aside, otherwise it would be a case of manifest error in law. It is well-settled that power to pass order includes power to recall that order. The power to pass stay order has been conferred on the Tribunal under Sub-section (6) of section 10 of the Act. It will therefore include power to recall the stay order in appropriate cases. The Tribunal has got power to recall/ modify or set aside the stay order at this subsequent stage of appeal in appropriate cases. The argument of the learned Counsel is that the Tribunal does not possess any power to recall or modify the stay order is too wide and cannot be accepted.

9. Rule 68 of U.P. Trade Tax Rules, 1948 provides the manner of disposal of appeal. The said rule has no relevancy to the controversy involved in the case. The second appeals are still pending decision before the Tribunal.

10. A bare perusal of the Regulation 11(iii)(d) of Trade Tax Tribunal Regulations shows that application for adjournment may be disposed of by the Tribunal on such terms and conditions as may be deemed fit. It was submitted by learned Standing Counsel that the Tribunal while granting adjournment may impose such terms and conditions as it may deem fit.

11. In reply thereto it was submitted by the learned Counsel for the petitioner that the aforesaid Regulations are not statutory and these Regulations have been adopted by the Tribunal in exercise of powers conferred by Sub-section (11) of Section 10 of U.P. Trade Tax Act, 1948 as amended from time to time. It was also submitted by counsel for the petitioner that the words "such terms and conditions" will not give power to the Tribunal to vacate the stay order granted by the Tribunal earlier. I am afraid that none of the contentions of counsel for the petitioner has any merit. Without entering into the controversy whether the said Regulations are statutory or not, the said Regulations have been adopted by the Tribunal for hearing and disposal of the appeal. These rules were framed for adopting uniform practice by all the Tribunals in the State as regards the manner of disposal of appeals.

12. Supreme Court in B.S. Minhas Vs. Indian Statistical Institute and Others, has held that if the body frames certain rules, those rules may not be statutory. Adherence to such rule is expected from such body in the name of "fair play" and to avoid arbitrariness. Relevant paragraph is quoted below :

In view of the pronouncement of this Court on the point it must be held to be obligatory on the part of the respondent No. 1 to follow the bye-laws, if the bye-laws have been framed for the conduct of its affairs to avoid arbitrariness. Respondent No. 1 cannot, therefore, escape the liability for not following the procedure prescribed by bye-law 2.

13. In view of the above argument of learned Counsel for the petitioner that the said rule being not statutory no reliance can be placed has no force. Having held that Tribunal can recall an order including stay order the next question arises

under what circumstances recall of stay order can be justified ? It is not possible to give exhaustive events. Action of the Tribunal would be judged on the principles of reasonableness. It should be equitable also. One of the cases would be when an order was obtained by fraud. Fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., . Second kind of cases would be abuse of the stay order obtained by the party concern. Stay orders are passed with the sole object that parties may maintain status quo till the disposal of the case. Stay order gives temporary relief to the appellant and prevents the respondent to reap the fruits of the order under appeal. The appellant who is thus benefited if indulges in prolonging the hearing of the appeal himself makes disentitle for continuance of the stay order.

14. The Tribunal while granting adjournment application may impose reasonable terms and conditions, in the facts and circumstances of a particular case. The Tribunal cannot act arbitrarily or whimsically. In the facts of the present case it cannot be said that vacation of stay order is arbitrary or whimsical. It was not denied by the petitioner that the case was got adjourned 14 times. By vacation of the stay order the petitioner is not going to suffer any irreparable loss. The subject-matter of appeal, which is before the Tribunal, is the validity of remand order. The result of vacation of the stay order is that the assessing authority will be obliged to undertake reassessment proceeding, which is not likely to be concluded in a day or two.

15. It has been held in the following cases that fresh orders passed after remand by the assessing authorities are dependent on the assumption that they had valid jurisdiction to make the assessment on the assessee. The necessary conclusion is as soon as the remand order is set aside, the order passed by the assessing authority in pursuance of remand order automatically becomes non est.

(1) 1984 UPTC 1122 Ameer Chand Singh v. Commissioner of Sales Tax.

(2) 1998 RD 232 Lalta Prasad v. Deputy Director of Consolidation.

16. The counsel for the petitioner contended that stay order of at least six weeks should be granted. I am not prepared to accept the said contention of counsel for the petitioner. The writ petition is a discretionary remedy. This discretion cannot be exercised in favour of a person who has abused the stay order.

17. Learned counsel for the petitioner has placed reliance upon following cases :

(1) 1987 UPTC 1370 Taj Cutlery and Allied Agencies v. Commissioner of Sales Tax

(2) 1988 UPTC 658 Tara Glass and Chemical Industries v. Commissioner of Sales Tax

(3) 2002 NTN 580 Lord Krishna Textiles Mill v. Commissioner of Sales Tax

(4) 2003 NTN (22) 141 Inder Steels v. Commissioner of Sales Tax

I have gone through all the aforesaid rulings. The controversy involved in the case of Taj Cutlery and Allied Agencies 1987 UPTC 1370, was quite different. This Court has held that some reasons must be given for rejecting the adjournment application. In the present case adjournment has been granted and reasons have been given. Therefore the said case is distinguishable. In 1988 UPTC 658 Tara Glass and Chemical Industries v. Commissioner of Sales Tax, ex parts decision after the Tribunal passed rejection of application for adjournment. In that connection it was held by this Court that even if assessee was allowed indulgence on several previous occasions and hearing of appeal was adjourned, there is no reason and adjournment had been sought with some motive. Therefore this case is also distinguishable.

18. Strong reliance was placed by the counsel for the applicant on 2002 NTN 580 Lord Krishna Textiles Mill v. Commissioner of Sales Tax. I have gone through the said judgment and it has no application. In that case the Tribunal had earlier granted 38 adjournments. Thereafter the Tribunal rejected the subsequent adjournment application. In that connection it was held that adjournment application should be considered on its own merits and the case was remanded. This case is also not applicable. For the same reason the judgment reported in 2003 NTN 141 Inder Steels v. Commissioner of Sales Tax has also no application, in the facts and circumstances of the present case.

19. For the reasons given above I do not find any merit in the petition. The petition is dismissed summarily.

