
(1992) 08 BOM CK 0044

In the Bombay High Court

Case No : Writ Petition No. 2555 of 1984

Balaji Cotton Company

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 28-08-1992

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 36(2), 55

Citation : (1993) 1 MhLj 105 : (1993) MhLj 105

Hon'ble Judges : V.A. Mohta, J;B.P. Saraf, J

Bench : Division Bench

Judgement

DR. B.P. Saraf, J.—The question that arises for consideration in this writ petition relates to the scope of the power of the Sales Tax Officer to impose penalty afresh once the same has been set aside on appeal by the appellate authority u/s 55 of the Bombay Sales Tax Act, 1959 ("the Act").

2. The facts of the case in brief are :

The petitioner, a registered dealer under the Bombay Sales Tax Act, was assessed by the Sales Tax Officer, Wardha, for the period from October 20, 1971 to November 5, 1972, by his order dated September 24, 1973. By the said order, in addition to the amount of tax due which was determined at Rs. 1,42,249.02, penalty of Rs. 45,000 was also imposed on the petitioner u/s 36(2)(c) of the Act for non-payment of the tax with the return. On appeal, the order, so far as it related to imposition of penalty of Rs. 45,000, was set aside by the Assistant Commissioner of Sales Tax (Appeals), Eastern Division, Nagpur, by his order dated September 26, 1975. The Assistant Commissioner held that the order had been passed in violation of principles of natural justice and there was total non-application of mind by the Sales Tax Officer and, as such, the same could not be sustained. The imposition of penalty was, held to be void and illegal and, therefore, set aside. The other part of order of the Sales Tax Officer, so far as it related to the assessment of the tax, was confirmed. It was observed that after adjusting payments made by the petitioner, the balance amount of tax

determined by the Sales Tax Officer should be recovered in accordance with law. On receipt of the aforesaid order of the Assistant Commissioner, setting aside the penalty, the Sales Tax Officer issued a fresh notice to the petitioner, being notice dated February 11, 1976, directing it to show cause as to why for non-payment of tax along with the return for the same period for which penalty had been imposed earlier, penalty of Rs. 45,000 should not be imposed u/s 36(2)(c), Explanation 1. The explanation of the petitioner was sought for within three days. As the petitioner could not submit the explanation within that period, by an order dated April 7, 1976, penalty of Rs. 45,000 was again imposed on the petitioner u/s 36(2)(c) of the Act. The petitioner preferred appeal before the Assistant Commissioner of Sales Tax (Appeals) II, Nagpur Division, Amravati. The said appeal being dismissed, the petitioner preferred second appeal before the Maharashtra Sales Tax Tribunal. The Tribunal, after hearing the parties, set aside the order of penalty on the ground of violation of principles of natural justice. Undeterred by the order of the Tribunal setting aside the order of penalty, the Sales Tax Officer issued a fresh show cause notice. The petitioner showed cause and objected to the proposed action of the Sales Tax Officer. The Sales Tax Officer, however, by his order dated July 30, 1982, for the third time levied the penalty of Rs. 45,000 on the petitioner u/s 36(2)(c), Explanation 1 for the very same period and the very same alleged default for which penalty had been levied on earlier two occasions and set aside by the appellate authorities. This time, the petitioner did not go in appeal but challenged the order directly before this Court by filing the present writ petition under article 226 of the Constitution.

3. We have carefully considered the facts of the case. It is not necessary for the present purpose to go into the merits of the alleged default or the quantum of penalty. What is required to be determined is the power of the Sales Tax Officer to impose a penalty afresh once its order imposing penalty has been set aside by the appellate authority u/s 55 of the Act. For that purpose, we may refer to the provisions of sub-section (6) of section 55 of the Act which deals with the powers of the appellate authority. It provides :

"(6) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers :

(a) in an appeal against an order or assessment, it may confirm, reduce, enhance or annul the assessment; or it may set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; and the assessing authority shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, or interest the appellate authority may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty or interest;

(c) in any other case, the appellate authority may pass such orders in the appeal as it deems just and proper :

Provided that"

It may be observed that this sub-section in its present form setting out the various powers which can be exercised by the appellate authorities in appeals (both first appeal and second appeal) against different orders was introduced by the Maharashtra Act 42 of 1971. Prior to that, this sub-section read as follows :

"(6) Subject to such rules of procedure as may be prescribed, an appellate authority may pass such order on appeal as it deems just and proper."

4. Thus, prior to 1971, the powers of the appellate authority were expressed in widest possible terms. No distinction was made on the basis of the nature of the order appealed against. But in the existing sub-section (6) which applies since 1971, the various powers that can be exercised in appeal against an order of assessment and an order of penalty have been separately set out in clear terms. In an appeal against an order imposing a penalty, the appellate authority has been conferred with the powers to confirm, or cancel such order or vary it so as either to enhance or reduce the penalty. No power has been given, as in case of an appeal against the order of assessment, to set aside the order of penalty and refer the case back to the authority which passed the order for making a fresh order in accordance with the direction given by it or after making such further enquiry as may be necessary. There is thus a clear distinction in the power of the appellate authority in an appeal against an order of assessment and in appeal against an order of penalty. While dealing with an appeal against an order of assessment it has been specifically conferred with the power to set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in the manner specified therein but no such power is there while deciding an appeal against an order of penalty. The omission of this power of setting aside and referring back for fresh order is not accidental but deliberate. The Legislature has given to the appellate authority while dealing with an appeal against an order of penalty, in addition to the power to confirm or cancel such order, also the power to vary it so as either to enhance or reduce the penalty. Similar is the position in case of an appeal against interest. It is, therefore, clear that the appellate authority while disposing an appeal against an order of penalty cannot set aside the penalty and refer the case back to the assessing authority to make a fresh order of penalty.

5. A question then arises whether such a power can be inferred as "inherent power" of the appellate authority. The answer may be in affirmative in a case where the powers are not set out in details as in this case but expressed in wide or broad terms as was the case prior to 1971 or as is the case even today in case of appeals against orders other than orders of assessment or orders of penalty or interest. As earlier stated the powers of the appellate authority in an appeal against an order of assessment and in an appeal against an order of penalty or

interest have been spelt out separately in details. It is only in case of other orders failing under clause (c) that it has been expressed in general terms and the appellate authority has been given power "to pass such order in the appeal as it deems just and proper". The powers in the third category, unlike the earlier two categories, have been couched in broadest possible terms to take care of all eventualities that may arise depending on the nature of the order that might be subject-matter of appeal. But that wide power is not available in case of appeals against assessment and orders of penalty or interest where the powers have been specified in clear terms. That being the position, no power of remand can be inferred in case of appeal against order of penalty. An order of penalty can be either confirmed or cancelled or varied. It cannot be remanded to the original authority for making a fresh order after making fresh enquiries. The setting aside of a penalty order by the appellate authority under the circumstances can only mean cancellation and the authority which imposed the penalty shall have no power to take up the matter again and to pass a fresh order of penalty. In view of the foregoing discussion, we are of the opinion that the Sales Tax Officer acted without any authority of law in passing the fresh order of penalty after his original order imposing penalty had been cancelled or set aside by the appellate authority. The impugned order of penalty is, therefore, liable to be quashed.

6. The matter may still be looked into from one more angle. Even assuming that the appellate authority had the power to set aside the order of penalty and to remit the same to the assessing officer for making a fresh order in accordance with the directions given by it, then also the impugned order of penalty cannot be sustained as admittedly no such direction had, in fact, been given in the instant case by the appellate authority while setting aside the order of penalty. In the absence of any such direction in the order, the Sales Tax Officer had no power to take up the matter again and to pass a fresh order. The order, therefore, cannot be sustained on that count also.

7. In the result, the impugned order of penalty dated July 30, 1982, passed by the Sales Tax Officer, Wardha, is set aside. The writ petition is allowed with costs, which in view of the facts and circumstances of the case, is quantified at Rs. 2,000.

8. Writ petition allowed.