
(2006) 07 MP CK 0089

In the Madhya Pradesh High Court

Case No : IT Appeal No's. 54 and 62 of 2004

Commissioner of Income Tax

APPELLANT

Vs

Hope Textiles Ltd.

RESPONDENT

Date of Decision : 11-07-2006

Acts Referred:

Income Tax Act, 1961 — Section 140, 143(3), 246, 260A
Income Tax Rules, 1962 — Rule 45

Citation : (2006) 206 CTR 82 : (2006) 287 ITR 321 : (2007) 159 TAXMAN 287

Hon'ble Judges : N.K. Mody, J; A.M. Sapre, J

Bench : Division Bench

Advocate : R.L. Jain and V. Mandlik, for the Appellant; S.C. Bagadia and D.K. Chhabra, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Sapre, J.—The decision rendered in this appeal shall also govern disposal of other connected appeal being ITA No. 62 of 2004, because both these appeals arise between the same parties and involve same point.

2. This is an appeal filed by the CIT u/s 260A of the IT Act, against an order dt. 25th Nov., 2003, passed by Tribunal, Indore in ITA Nos. 16, 17 and 18/Ind/2003. The appeal was admitted for final hearing on following substantial questions of law:

1. Whether the Tribunal was justified in holding that requirement of Rule 45 of IT Rules, 1962 are directory and not mandatory?
2. Whether the Tribunal was justified in holding that a memo of appeal filed by the assessee before the CIT (A) is valid even though it is not signed by the assessee but is signed by his lawyer?
3. Facts of the appeal lie in a narrow compass. However, they need mention in brief infra to appreciate the controversy raised in this appeal.

4. The respondent (assessee) suffered an adverse, assessment order, dt. 8th Feb., 2002 (Annex. P-1), passed by AO u/s 143(3) of the Act for the asst. yrs. 1990-91 and 1995-96. The respondent, i.e., assessee, therefore, filed an appeal before the CIT (A) against the order of AO u/s 246 of the Act r/w Rule 45 of the IT Rules in Form No. 35. It is this appeal, which was dismissed by CIT (A) by his order dt. 11th Dec, 2002 (Annex. P-2) on the ground that since the memo of appeal was not filed by the assessee in accordance with the requirement of Rule 45 r/w Section 140 i.e., not signed by him personally but signed by an advocate and hence, it is not maintainable. As a consequence, the appeal was dismissed on this short ground without examining the merits of the case. It is against this order, the assessee (respondent) filed an appeal to Tribunal. By impugned order, the Tribunal allowed the appeal and set aside the order of the CIT (A). It was held that not signing of the memo of appeal by the assessee and signing of the same by their advocate can at best be regarded as an irregularity and not illegality so as to empower the appellate authority to dismiss the appeal as not maintainable. In the opinion of Tribunal in such case instead of dismissing the appeal outright, the appellate authority should have afforded an opportunity to rectify the irregularity to the assessee, i.e., appellant before the CIT (A) by allowing the assessee to sign the memo of appeal as provided in Section 140 r/w Rule 45. It is with this finding, the appeal was allowed and while setting aside of the impugned order passed by CIT (A), the case i.e., appeal was remanded to the CIT(A) with a direction to the learned appellate authority to allow the assessee to sign the memo of appeal so as to make the same in conformity with the requirement of Section 140 r/w Rule 45 and then decide the appeal on merits. It is against this order, the CIT has felt aggrieved and filed this appeal.

5. Heard Shri R.L. Jain, learned senior Counsel with Ku. V. Mandlik, learned Counsel for the appellant and Shri S.C. Bagadia, learned senior Counsel with Shri D.K. Chhabra, learned Counsel for the respondent.

6. Having heard learned Counsel for the parties and having perused record of the case, we find no merit in the appeal and hence, it is liable to be dismissed.

7. The law on this point remains no longer *res integra*. Indeed, whenever this issue arose either under the civil law or even under the IT Act, the Courts in our country have been consistent in their judicial approach. The issue came before Bombay High Court as back as in 1953 in a case reported in *Dahyabhai Girdhardas Vs. Bobaji Dahyaji Kotwal and Others*, . In that case, the plaint was signed by a son of the plaintiff who had no authority to sign on behalf of the plaintiff. The plaintiff then made an application for amendment seeking permission to sign the plaint. It is this application which was rejected by the Trial Court which gave rise to filing of revision by the plaintiff before the High Court. Allowing the revision and setting aside of the order passed by the Trial Court, the learned Chief Justice Chagla, J. held as follows:

A plaint signed by the son of the plaintiff who had no proper authority to sign it on behalf of the plaintiff can be allowed to be amended at a later stage by

allowing the plaintiff to sign irrespective of the bar of limitation, inasmuch as the defect is merely formal.

8. The aforesaid decision was followed by this Court in the case reported in Kalu Ram Pannalal and Another Vs. V. Jagannath Kalua, where the learned Judge P.R. Sharma in somewhat similar facts held as follows:

In the case before Chagla C.J., as well as in the one before me, the plaint was signed by a person holding a general power of attorney. Though the signature on a pleading by an "Aam Mukhtiyar" is not in accordance with law, such a pleading is not signed and presented by an utter stranger or a person who had not at all been authorized by the plaintiff to sign it, so as to result in the suit being deemed not to have been instituted at all. Be it as it may, the weight of authority is in favour of the view taken by Chagla, C.J. and consistently by this Court. I would, therefore, hold that the defect in the plaint in the present case was purely formal in nature and that on the plaint being signed by the plaintiffs, the amendment would date back to the date of the institution of the suit. A formal defect in the plaint of this character would fall within the ambit of the rule laid down by their Lordships of the Supreme Court in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., according to which the Court has a discretion to allow an amendment even where the right to plead the bar of limitation has in the meantime become vested in the opposite party. It is needless to say that simply by reason of the fact that the Trial Court makes a reservation in favour of the defendant that he could raise the plea of limitation, the discretion of the appellate Court in the matter cannot be deemed to have been taken away. It is open to the appellate Court in a proper case to set aside that reservation and to order that the amendment shall take effect from the date of the presentation of the plaint. I would, therefore, reverse the finding of the lower appellate Court on this point and hold that the plaintiff's suit cannot be held to be time-barred on the ground that the plaint was not properly signed at the time of its presentation (After discussing the evidence His Lordship proceeded). In this view of the matter, it must be held that the findings given by the learned District Judge in para 11 of his judgment are wholly unjustifiable on the materials on record.

9. This question then directly arose before the Division Bench of Patna High Court under the IT Act in a case reported in Smt. Gouri Kumari Devi Vs. Commissioner of Income Tax, . In that case also, the Tribunal dismissed the appeal on the ground that assessee failed to personally sign the memo of appeal. Ramaswami, J. (as his Lordship then was) speaking for the Bench while setting aside such dismissal held as follows:

Failure of an assessee personally to sign the memorandum of appeal presented to the Tribunal is not an illegality but only a mere irregularity which can be rectified by an amendment, the amendment taking effect from the date of memorandum of appeal was originally filed. It is incumbent on the Tribunal to allow the assessee to amend the memorandum of appeal by affixing his signature thereto.

Where a memorandum of appeal signed by the power of attorney agent was originally presented in time but when after the period of limitation had expired, the case came up for hearing and the assessee presented a petition for amending the memorandum of appeal and filed a fresh memorandum of appeal signed by her.

Held - that there was a proper appeal presented before the Tribunal and the appeal could not be dismissed on the ground that it was barred by time.

10. This controversy is now put to rest by the Supreme Court in a recent decision reported in *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another*, . It is in this case, their Lordships in clear terms on similar facts though arose in civil law held that such omission only amounts to an irregularity and hence, the litigant must be afforded an opportunity to rectify the omission rather than to dismiss the appeal outright making such defect as basis for dismissal. Placing reliance on well known English authority, reported in *Cropper v. Smith* (1884) 26 Ch D 700 wherein Their Lordships had observed that:

The object of Courts is to decide the rights of parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights....Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

Speaking for the Bench, the learned Judge R.V. Raveendran made following subtle observations for the guidance of all Courts and Tribunals in country:

Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.

11. Coming to the facts of this case, it was not disputed that advocate appearing for the assessee had signed the memorandum of appeal. In these circumstances, the Tribunal was perfectly justified in remanding the appeal to CIT (A) with a direction to allow the assessee to sign the memo of appeal so as to make the appeal in conformity with the requirement of Rule 45 r/w Section 140 of the Act. In a case of this nature, the appellate authority must always afford an opportunity to appellant to remove the defect noticed by the authority rather than to penalize him by dismissing his appeal. Requirements of Rule 45 r/w Section 140 of the Act are not mandatory but they are directory in nature. In any event, an opportunity to remove the defect before dismissal of appeal has to be afforded to the appellant so as to make filing of appeal in accordance with the requirement of Section 140 r/w r. 45 *ibid*. It should always be the endeavour of the Courts/Tribunals who are invested with the power to decide the rights of the parties to do substantial justice between the parties and not to penalize them of

their faults while prosecuting their lis. Indeed, this is what is consistently reminded of by Supreme Court to all Courts for observance. We can never ignore the subtle observations made by the Supreme Court in one of the most coveted decision reported in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, , where Vivian Bose - the learned Judge, speaking for the Bench made following memorable observations in his imitable style of writing. How eloquent and far reaching these observations are:

A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leave no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very" means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, the decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

12. It is these observations of Supreme Court which must always be kept in mind by the Courts/Tribunals while deciding the rights of the parties and the issues of the nature which is subject-matter of this case.

13. In view of foregoing discussion, we find no merit in this appeal. As a consequence, the appeal fails and is accordingly, dismissed. No costs.