

(2010) 04 PAT CK 0132
In the Patna High Court

D.N. Singh

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 26-04-2010

Acts Referred:

Citation : (2010) 04 PAT CK 0132

Judgement

Dipak Misra, C.J.—A Division Bench, while hearing an application for review of an order passed in an appeal u/s 260A of the income tax Act, 1961 (for brevity, "the Act"), came across certain decisions, namely, Bihar Rajya Sahakari Bhumi Vikas Bank Simitee v. CIT Civil Review Nos. 249-250 of 2008 decided on July 29, 2009, along with Bihar Rajya Sahakari Bhumi Vikas Bank Simitee v. CIT Civil Review No. 250 of 2008, and Bib-hay Kumar Sah v. ITO Civil Review No. 55 of 2008 decided on December 16, 2009, J.B. Associates P. Ltd. v. CIT Civil Review No. 214 of 2008, decided on March 31, 2010 and Bengali Singh (HUF) v. CIT [2010] 325 ITR 350 (Patna) decided on April 8, 2010, holding that an application for review is not maintainable when the appeal is disposed of u/s 260A of the Act, thought it condign to refer the matter to a larger Bench to consider the issue whether an application for review can be entertained when an appeal has been disposed of u/s 260A of the Act. Thus, the matter has been placed before us.

2. The proposition being purely legal it is not requisite to state the facts in detail except stating that a judgment was pronounced by a Division Bench on March 5, 2009 in Miscellaneous Appeal No. 214 of 2002 which was preferred u/s 260A of the Act. The assessee after losing in appeal preferred an application for review and at that juncture the issue of maintainability of the application was raised.

3. We may note with profit that in Bihar Rajya Sahakari Bhumi Vikas Bank Simit (supra), a Division Bench, while hearing an application for review, has held thus:

On behalf of the petitioner it has been submitted that the judgment under review has been delivered by the Division Bench on wrong appreciation of judgments cited and contrary to the views of the Supreme Court. On behalf of the respondents the aforesaid submission has been refuted and it has been further

submitted that the judgment was passed in a miscellaneous appeal preferred u/s 260A of the income tax Act against which only an appeal can be preferred u/s 261 before the apex court and there is no provision of review of the appellate order in the income tax Act which is a code by itself.

4. In *Bibhay Kumar Sah* (supra), another Division Bench in Civil Review No. 55 of 2008 placing reliance on the decision in *Bihar Rajya Sahakari Bhumi Vikas Bank Simit* (supra), has held as follows:

Our attention has been invited to a Division Bench order in Civil Review No. 249 of 2008 holding that the income tax being a code by itself only an appeal lies against the impugned order u/s 261 of the income tax Act before the hon'ble apex court.

5. In *Bengali Singh (HUF) through Bengali Singh* [2010] 325 ITR 350 (Patna), the division Bench has held thus:

7. Learned Counsel for the petitioner has placed reliance upon a judgment of the Supreme Court in the case of *Kunhayammed and Others Vs. State of Kerala and Another*, to submit that no merger could have taken place between the order of this Court and the order of the Supreme Court until leave stage was crossed and matter could be considered at the appellate stage. Hence, according to learned Counsel for the petitioner the review petition is maintainable because the Supreme Court has not decided the matter at the appellate stage on the merits.

8. Learned senior counsel appearing for the income tax Department on the other hand, produced before us copies of order passed by two Division Benches of this Court dated July 29, 2009 and December 16, 2009 whereby Review Petition No. 249 of 2008 together with Civil Review No. 250 of 2008 and Civil Review No. 55 of 2008 were dismissed after noticing the objection raised by the income tax Department that there is no provision for review of the appellate order of this Court. The aforesaid orders show that the Department had raised an objection by submitting that the order under review was passed in a miscellaneous appeal preferred u/s 260A of the income tax Act against which only an appeal can be preferred before the apex court u/s 261 of the income tax Act as there is no provision of review in the Act. It was also contended that the order of the apex court dated November 17, 2008, when read with the final order dated March 23, 2009, amounts to dismissal of SLP by a reasoned order which creates a bar of res judicata for these review petitions.

8. The aforesaid Supreme Court judgment in the case of *Kunhayammed and Others Vs. State of Kerala and Another*, is an authority on the issue as to whether a judgment and order of the High Court or any tribunal would merge with the order of the Supreme Court in case prayer for grant of special leave to appeal is rejected. The Supreme Court has answered in clear terms that there will be no merger in either case, whether the order of dismissal of the special leave to appeal is with reasons or without reasons ; the merger can take place only when special leave to appeal is granted and the matter is considered under

appellate jurisdiction. However, it has further been clarified that if the petition for special leave to appeal is dismissed after recording reasons then there may not be a merger of the said order with the order of the subordinate court or tribunal but still the principle of law laid down by such order will be binding under Article 141 of the Constitution of India and will bind the parties as *res judicata*. In such a case also it will not be proper for the subordinate court or tribunal to exercise power of review.

9. The aforesaid general principle of law regarding merger does not come in the way of the proposition advanced before us on behalf of the income tax Department. In the context of the income tax Act it has rightly been submitted that the Act is a code by itself and in the absence of any provision for review against an appellate order passed u/s 260A of the Act, no review can be exercised by the High Court. Hence, we are constrained to hold that this review petition is not maintainable.

10. Lastly, on behalf of the petitioner it was submitted that in appropriate cases, to correct apparent mistakes inherent power of the court is permissible to be used by the High Court and such inherent power may be invoked by this Court to consider this review application. In our considered view, once review is not provided by the income tax Act, it would not be proper for us to exercise jurisdiction of review in the garb of exercise of inherent power which normally is to be exercised only to correct clerical or such similar mistakes and not for going into the merits of the case once again. Since we are of the considered view that the review petition is not maintainable, it is dismissed accordingly.

6. On a perusal of the aforesaid decisions, we notice that three aspects, namely, that the income tax Act, 1961 is a self-contained code ; that once there is an appeal provided u/s 261 of the Act, the concept of review is ostracized ; and when there is no provision for review in the income tax Act, the High Court in its inherent power cannot exercise such power, have been highlighted and accordingly the conclusion has been arrived at.

7. Mr. Y.V. Giri, learned senior counsel appearing for the petitioner submitted that the orders passed in the aforesaid decisions are neither in accord with nor in consonance with the law in the field. He has commended us to the decision rendered in *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, The learned senior counsel has specially drawn inspiration from paragraphs 52, 53, 60 and 62. Though the said judgment was rendered in a different context, yet the proponement of Mr. Giri is that superior courts stand on a different pedestal and their powers cannot be curbed or constricted. In paragraph 60 of the said decision, their Lordships have stated thus:

60. There is yet another aspect of this matter to which it is necessary to refer. The High Court is a superior court of record and under Article 215 shall have all powers of such a court of record including the power to punish contempt of itself. One distinguishing characteristic of such superior courts is that they are entitled

to consider questions of their jurisdiction raised before them. This question fell to be considered by this Court in Special Reference No. 1 of 1964 : [1965] 1 SCR 413 at page 499. In that case, it was urged before this Court that in granting bail to Keshav Singh, the High Court had exceeded its jurisdiction and as such, the order was a nullity. Rejecting this argument this Court observed that in the case of a superior court of record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior court is entitled to determine for itself questions about its own jurisdiction. That is why this Court did not accede to the proposition that in passing the order for interim bail, the High Court can be said to have exceeded its jurisdiction with the result that the order in question was null and void. In support of this view, this Court cited a passage from Halsbury's Laws of England where it is observed that:

Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court.

If the decision of a superior court on a question of its jurisdiction is erroneous, it can, of course, be corrected by appeal or revision as may be permissible under the law; but until the adjudication by a superior court on such a point is set aside by adopting the appropriate course, it would not be open to be corrected by the exercise of the writ jurisdiction of this Court.

8. In *M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*, in paragraphs 66, 67 and 68, their Lordships have opined thus:

66. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. (See *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, As stated in Halsbury's Laws of England, 4th edn., Vol. 10, para 713:

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67. The observation of this Court in *Raja Soap Factory and Others Vs. S.P. Shantharaj and Others*, that Section 151 of the CPC did not confer on the High Court jurisdiction which was not specifically vested was made in the context of Section 105 of the Trade and Merchandise Marks Act (43 of 1958) which conferred a specific jurisdiction in respect of a passing off action. That observation is not relevant to the question regarding the inherent and plenary

jurisdiction of the High Court as a superior court of record. The Andhra Pradesh High Court, as a successor to the Madras High Court, is vested with all the appellate and original jurisdiction, including admiralty jurisdiction to order the arrest and detention of a ship.

68. In decisions such as *Jayaswal Shipping Company Vs. The owners and parties interested in Steamship "S.S. Leelavati"*, *Kamalakar Mahadev Bhagat Vs. Scindia Steam Navigation Co. Ltd.*, *Rungta Sons Private Ltd. v. S.S. Edison Mariner* [1961-62] 66 CWN 1083, *National Co. Ltd. v. Asia Mariner* [1968] 72 CWN 635, *Sahida Ismail Vs. Petko R. Salvejkov and Others*, and *Smt. Reena Padhi and Others Vs. Owners and parties, interested, in the motor vessel "Jagdhir" No. 1623 registered at the Bombay Port of Registry, India* and Another, the High Courts took an unduly restrictive view of the court's admiralty jurisdiction by limiting it to what was permitted by the Admiralty Court Act, 1861 and the Colonial Courts of Admiralty Act, 1890. This was, in our view, an unjustified abdication of jurisdiction and a self-assumed fetter on competence to render justice.

9. At this juncture, we may note with profit the decision rendered in *Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd.* and Another, Be it noted, Mr. Harshwardhan, learned standing counsel for the Revenue has placed heavy reliance on the same. It is his contention that in the said case, a three-judge Bench of the apex court expressed the view that the High Court had no jurisdiction to condone the delay while entertaining an application for reference preferred u/s 35H(1) of the Central Excise Act. Be it noted, the matter travelled to the three-judge Bench as a doubt was expressed as regards the correctness of the decision rendered in *Commnr. of Customs, Central Excise, Noida Vs. Punjab Fibres Ltd., Noida*, Their Lordships, after taking note of the language employed in Sections 35B, 35EE, 35G and 35H of the Central Excise Act, have expressed the view as follows:

32. As pointed out earlier, the language used in Sections 35, 35B, 35EE, 35G and 35H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the Legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been

provided with to enable the Commissioner and the other party to avail of the same. We are of the view that the Legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision ...

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 - 24 of the Limitation Act by an express reference, it would none the less be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act, but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

10. It is worth noting, their Lordships analysed the anatomy of the provisions and came to hold that where the special law does not exclude the provision of Sections 4 - 24 of the Limitation Act by an express reference, it would none the less be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law impliedly excludes their operation.

11. Mr. Y.V. Giri, learned senior counsel appearing for the assessee-petitioner would contend that there is a sea of difference between the issue of condonation of delay and entertaining an application for review. It is urged by him that a period of limitation is determined under the statute and it bars the remedy. Elaborating the said submission, it is canvassed by him if a suit is barred u/s 3 of the Limitation Act, the court has power to condone the delay subject to the exclusion of the period as engrafted u/s 14 of the Limitation Act. It is propounded by him that a special statute can fix special limitation and in that event Section 29(2) of the Limitation Act would not come into play. It is his further submission that applicability of Sections 4 - 24 can expressly be made not applicable or by implication. To elaborate : in many a statute, the language employed is the limitation can be condoned only for a specific period. By use of the said language it is quite clear beyond the expiry of the said period, no court has power to condone the delay that being the legislative intendment. Meeting the stand and stance put forth by the Revenue that when there is a provision for appeal u/s

261 of the Act and there is no provision for review, the High Court cannot review its own order, the learned senior counsel has commended us to the observation that has been referred to by the apex court in the case of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, in paragraphs 28 and 29. It is urged by him that the certain citations were distinguished by their Lordships as their Lordships were dealing with the facet of applicability of Section 5 to a reference under the Central Excise Act, but their Lordships have stated in categorical terms that the High Court has all powers in order to correct errors apparent on the face of record and it has power of review. Their Lordships have accepted the proposition but the same was not given acceptance regard being had to the scheme of the Act in the context of condonation of delay. Regard being had to the issue involved we think it apposite to reproduce paragraphs 28 and 29 of the said decision:

28. The other decision relied on is M.M. Thomas Vs. State of Kerala and Another, . This case arose out of the vesting of all private forests in the State of Kerala on the appointed day (10-5-1971) under the Kerala Private Forests (Vesting and Assignment) Act, 1971. It is true that in para 14 it was held that : (SCC pages 672-73)

14. The High Court as a court of record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A court of record envelops all such powers whose acts and proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law.

Hence, the High Court has not only the power, but a duty to correct any apparent error in respect of any order passed by it. This is the plenary power of the High Court.

29. In para 17 of the abovementioned decision, it was held : (M.M. Thomas case, SCC page 673)

17. If such power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of the record.

There is no doubt that the High Court possess all powers in order to correct the errors apparent on the face of record. While accepting the above proposition, in the light of the scheme of the Act, we are of the view that the said decision is also not helpful to the stand taken by the appellant.

12. In view of the aforesaid clear pronouncement of law, we have no scintilla of doubt that the High Court can entertain the application for review arising out of a

judgment passed u/s 260A of the Act. In view of the aforesaid, the decisions rendered in Bihar Rajya Sahakari Bhumi Vikas Bank Simitee (supra), Bibhay Kumar Sah (supra), J. B. Associates (P) Ltd. and Bengali Singh (HUF) through Bengali Singh [2010] 325 ITR 350 (Patna) are overruled and any decision following the said line of decisions would be deemed to have been overruled. The reference is answered accordingly.

13. Let the matter be listed before the appropriate Division Bench.