

(2009) 11 AHC CK 0110
In the Allahabad High Court

Gaurav Trading Co.

APPELLANT

Vs

Dy. Commissioner (Assessment)-II and Another

RESPONDENT

Date of Decision : 10-11-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2010) 33 VST 554

Hon'ble Judges : Subhash Chandra Nigam, J;Prakash Krishna, J

Bench : Division Bench

Judgement

Prakash Krishna, J.—The petitioner, a proprietorship concern, registered u/s 8A of U.P. Trade Tax Act, is carrying on the business of kirana and dry fruits etc. Exparte assessment orders were passed under U.P. Trade Tax Act for the assessment years 2000-01, 2001-02 and 2002-03 by the assessing authority. Applications to set aside the exparte assessment orders were dismissed. The matter ultimately travelled to the Tribunal in second appeals, being second appeal Nos. 262, 263 and 264 of 2004, for all three assessment years. The Tribunal by its common judgment and order dated 6-1-2005 allowed all the three appeals on the finding that the petitioner was prevented by sufficient cause and could not participate in the assessment proceedings. It consequently allowed the applications filed u/s 30 of the Act and set aside the exparte assessment orders on the finding that the petitioner could not appear in the assessment proceedings as well at the time of hearing of the applications for setting aside exparte assessment orders on the ground of his illness. The matter was restored back to the assessing authority with direction to reframe the assessment orders after giving opportunity of hearing to the petitioner. The petitioner, armed with the order of the Tribunal, approached the assessing authority with an application dated 11-1-2005 and submitted that in view of the fact that the assessment orders have been set aside by the Tribunal, the recovery citation issued earlier on the basis of ex parte orders may be withdrawn. The assessing authority issued order, withdrawing the recovery proceedings. Thereafter, the proceeding for framing fresh assessment order was initiated by issuing notice dated 2-6-2005,

fixing 25-6-2005 for appearance of the petitioner. The said notice was served on 23-6-2005. On the date so fixed, an adjournment application was moved on 25-6-2005 on the ground that the petitioner wants to get his case transferred to another assessing authority. Hearing of the case, on the basis of the adjournment application, was adjourned. Thereafter number of dates were fixed, but the petitioner sought adjournments on the ground that he is seeking remedy for transfer of the case to another assessing authority. The Commissioner, Trade Tax rejected the transfer petition filed by the petitioner and this fact was communicated by the Joint Director (Sankhya) Trade Tax, Head Quarter by its letter dated 25-8-2005. Even then, the petitioner did not appear in response to the notice and sought adjournment on 31-8-2005. The assessing authority, faced with this situation, again framed the exparte assessment orders, all dated 3-9-2005 in respect of above three assessment years. Although the assessment orders are appealable but the present writ petition has been filed instead, solely on the ground that the impugned orders of assessment are barred by time in view of Section 21(5) of U.P. Trade Tax Act.

2. In the counter affidavit filed on behalf of the respondents, it has been stated that the petitioner has deliberately concealed the material facts in the writ petition. The fact that an application was filed by the petitioner on 17-1-2005 praying for withdrawal of recovery certificate on the ground that his appeals have been allowed by the Tribunal and the matter has been remanded to the assessing authority has not been disputed. The respondents have come out with a case that along with the said application, an illegible and unattested copy of the order of the Tribunal was filed. The notice for reassessment, fixing 25-6-2005 was issued by the respondent No. 1 on 2-6-2005 which was served on the petitioner on 23-6-2005. On 25-6-2005, an adjournment application was filed before the assessing authority on the ground that he wants to get his case transferred to another assessing authority and the matter was adjourned. On 27-6-2005 another notice was issued to the petitioner directing him to submit the details of the steps taken for getting his case transferred, fixing 6-7-2005. None appeared on that date. Thereafter, the matter was taken up on 11-7-2005 and again a notice was issued for appearance, fixing 25-7-2005. On 25-7-2005, Subhas Chandra Gupta, authorised representative appeared and prayed for adjournment on the plea that he is taking steps to get the case transferred but could not produce any evidence to show that any such transfer application was filed by the petitioner. On the said date, an application (Annexure-CA 6) was filed stating that he has already applied for transfer of the case to the Commissioner, Trade Tax for transferring his case and requested that the assessing authority should extend full cooperation in transferring the cases. The assessing authority thus stayed his hands awaiting the disposal of the transfer application moved by the petitioner before the Commissioner, Trade Tax, U.P. Lucknow. Since no order regarding transfer of the case was produced by the petitioner, again a show cause notice dated 26-8-2005, fixing 31-8-2005, was issued requiring the petitioner to submit reply to the show cause notice issued earlier. On the said

date i.e. on 31-8-2005, neither the petitioner nor any person on his behalf appeared in pursuance of the notice dated 26-8-2005. The respondent No. 1 received a communication letter dated 25-8-2005 informing that the transfer application filed by the petitioner has been rejected by the Commissioner, Trade Tax, U.P. Lucknow. On the very next date, the assessing authority received a letter of the petitioner under registered cover requesting the assessing authority not to pressurise him for hearing of the case. The said application was rejected by the assessing authority and thereafter the impugned assessment orders were passed. It has been pleaded that the writ petition is liable to be dismissed as the petitioner has concealed the material facts and has approached the Court with unclean hands and is not entitled to invoke extra ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India. The petitioner has been avoiding hearing of the case since 25-6-2005 till the impugned assessment orders were passed.

3. In the supplementary affidavit filed by the petitioner, three letters of the respondent No. 1, written to the Collector, for withdrawal of the recovery for the relevant assessment years have been enclosed. In the rejoinder affidavit, the allegation that the petitioner concealed the material facts has been denied. However, the filing of the adjournment applications seeking adjournment of the case and transfer application etc. have not been denied. The plea of limitation has been sought to be reiterated on the ground that six months" period of limitation as provided u/s 21(5) of the Act will be applicable in the present case.

4. Heard the learned Counsel for the parties and perused the record.

5. The sole contention raised by the learned Counsel for the petitioner is that in view of Full Bench decision of this Court in the case of Meenakshi Udyog, Agra v. Commissioner of Trade Tax 2005 UPTC 143 (wrongly mentioned as 145), the impugned assessment orders are barred by time. Elaborating the arguments, the learned Counsel submits that in the present case, as held in the case of M/S Meenakshi Udyog, Agra (supra), the period of limitation, as provided u/s 21(5) of the Act, would be applicable. An application dated 11-1-2005 annexing copy of the order of the Tribunal was filed before the assessing authority and the assessing authority on 17-1-2005 issued the order withdrawing the recovery certificate, the period of limitation would start running from 17-1-2005. The assessment orders could have been passed within six months therefrom. The assessing authority is wrong in saying that period of six months will begin to run from 7-3-2005, when copy of the order of Tribunal was served on him. The learned Standing Counsel, on the other hand, submits that Sub-section (4) of Section 21 of the Act will be applicable and not its Sub-section (5). In other words, he submits that the assessment orders are passed within period of limitation of one year, as provided under Sub-section (4) of Section 21 of the Act. Secondly, the period of limitation would start running from 7-3-2005 when a copy of the order of the Tribunal was served on the assessing authority and not earlier to it.

6. Considered the respective submissions of the learned Counsel for the parties and perused the record.

7. As noticed hereinabove, the exparte assessment orders were passed against the petitioner for the assessment years 2000-01, 2001-02 and 2002-03. The applications for setting aside the exparte assessment orders, as provided u/s 30 of the Act, were filed in respect of all the three assessment years and all of them were rejected by the assessing authority and the first appellate authority as well. The matter was carried in second appeals before the Tribunal. The Tribunal by its order dated 6-1-2005 allowed all the three second appeals. It allowed the applications for setting aside the exparte assessment orders as well directed the assessing authority to reframe the assessment orders afresh on merits after giving an opportunity of hearing to the petitioner.

8. Now, the question falls for consideration is whether Sub-section (4) or Sub-section (5) of Section 21 of the Act will be applicable. It may be noted that when a matter is remanded by an appellate authority to the assessing authority, the period of limitation, as provided under Sub-section (4) is one year. If an order of assessment or reassessment for any assessment year is set aside u/s 30, the period of limitation of six months for passing a fresh order of assessment or reassessment has been provided for under Sub-section (5) thereof. The controversy on hand is no longer res integra and appears to have been set at rest by the aforesaid decision of Full Bench in the case of M/S Meenakshi Udyog (supra). In this view of the matter, the order of assessment or reassessment for all the three assessment years involved herein could have been made within six months u/s 21(5) as the petitioner contends, from the date on which the earlier assessment order was set aside.

9. Now, the second question which falls for consideration in the present case is whether the period of limitation of six months would start running from 7-3-2005, the day when a copy of the order of the Tribunal was served on the assessing authority or from 11-1-2005 when a copy of the order of the Tribunal was filed before the assessing authority by the petitioner along with an application to withdraw the recovery certificate. This point has also been considered in paragraphs-18 and 19 of the aforestated decision by Full Bench. For the sake of convenience, paragraphs-18 and 19 are reproduced below:

18. As regards the question as to from what date the limitation period will run, in our opinion if the parties or counsels were present before the appellate authority when he passed his order then the limitation will run from the date of the order, but if they came to know about the order only subsequently it will run from the date of service of the order or knowledge of the order whichever is earlier.

19. This view is in accordance with the decision of the Supreme Court in Raja Harishchandra Singh v. Deputy Land Acquisition Officer AIR 1961 SC 15. In the present case admittedly the appellate order dated 13th December, 1993 was served on the Assessing Authority on 11th January, 1994, and hence the said

authority certainly knew about the appellate order on 11th January, 1994. Hence in this case the limitation period for making the assessment had clearly expired.

10. From the above quotation, it would appear that if the parties or counsels were present before the appellate authority when he passed his order then the limitation will run from the date of the order, but if they came to know about the order only subsequently it will run from the date of service of the order or knowledge of the order whichever is earlier.

11. It may be noted that the relevant provisions from the Trade Tax Act and the Rules framed there under were not brought to the notice of the Full Bench. Rule 68(7) of the Rules framed under the Act provides that copy of every order u/s 9 or Section 10 shall be delivered to or on, the parties concerned free of charge. Rule 77 provides "Modes of Service" of any notice, summons or order under the Act or the Rules. However, it is not necessary, for the purpose of the present case, to dilate the said issue any further in view of authoritative pronouncement of the Full Bench which is binding on us.

12. Having said as above, we are of the opinion that in the present case the period of limitation may start running from 17-1-2005. But that is not end of the matter. Taking into consideration the fact that the petitioner has resorted to extra ordinary remedy under Article 226 of the Constitution of India, this Court is entitled to examine the conduct of the petitioner also. Time and again, it has been said that proceeding by way of writ petition is "not of course". The Apex Court in A.M. Allison Vs. B.L. Sen, has said that the proceedings by way of certiorari under Article 226 are "not of course". The High Court has the power to refuse the writ if it is satisfied that there was no failure of justice. Unless the Court is satisfied that justice of the case requires it, a writ court may refuse to interfere in a matter. In other words, a writ court may refuse to entertain a writ petition even if the order of the authority below is illegal or contrary to law, in appropriate cases, if the conduct of the petitioner is blame worthy and he is instrumental and responsible by his conduct in passing of the order complained of, such person has no right to take recourse to extra ordinary remedy as provided under Article 226 of the Constitution of India.

13. Keeping the above principle in the background of mind, the conduct of the petitioner needs examination. The petitioner did not appear in the original assessment proceedings on the pretext of his illness. He even failed to press his applications filed u/s 30 of the Act on the same pretext. However, he succeeded before the Tribunal. The Tribunal took a liberal view of the matter and granted one indulgence by restoring the matter back to the assessing authority. The petitioner failed to appreciate the latitude and leniency extended by the Tribunal in its correct perspective and inspite of service of notice failed to file any reply to the show cause notice issued by the assessing authority after remand by the Tribunal. He took a strange stand that he wants the cases to be transferred to some other authority. The assessing authority was certainly in dilemma. The assessing authority had no option but to adjourn the case as per wishes of the

petitioner. It is admitted fact that the notice was served on the petitioner and he did not file any reply and took somersault that he is seeking transfer of the case by filing transfer application before the Commissioner, Trade Tax. Hearing of the case was adjourned on the request of the petitioner from time to time, to accommodate him.

14. Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly. See- N. Balakrishnan Vs. M. Krishnamurthy,

15. The very idea of providing period of limitation of six months is to prevent official delay. The said provision has been enacted for the benefit of a dealer. If a dealer, like the petitioner, seeks adjournment, one after another, on the ground that he has no faith in the assessing authority, the assessing authority is left with no option, but to adjourn the case. In such circumstance, an official authority has practically no option except to await the result of the transfer application otherwise he is likely to be condemned.

16. In this fact situation, it may be deemed that a dealer, like the petitioner, has waived his right to claim benefit of "period of limitation" prescribed for completing the assessment proceedings. The Apex Court in the case of State of Rajasthan and Others Vs. D.R. Laxmi and Others, after quoting a passage from "Administrative Law" by H.W.R. Wade (7th Edition), has held that the order or action, if ultra vires the power, it becomes void and it does not confer any right. But the action need not necessarily set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, the Court may in appropriate case decline to grant the relief, even it holds that the order was void. The net result is that extra ordinary jurisdiction of the Court may not be exercised in such circumstances.

17. In Prestige Lights Ltd. Vs. State Bank of India, the Apex Court has held that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.

18. The aforesaid observations of the Apex Court are fully applicable to the facts of the present case. The petitioner has not disclosed the full facts in the writ petition. Filing of successive adjournment applications and getting the case adjourned has not been disclosed. In paragraphs-15, 16 and 17 of the writ petition it has been stated that the petitioner made an application before the

Commissioner, Trade Tax for transfer of the cases for the aforesaid assessment years from the jurisdiction of respondent No. 1 to some other officer which was ultimately rejected on 25-8-2005. It has been stated in paragraph-17 of the writ petition that from the date of filing transfer application and till the date of its disposal by the Commissioner of Trade Tax, the Commissioner of Trade Tax had not stayed the assessment proceedings before the respondent No. 1. But the petitioner has not disclosed the fact that he was instrumental in getting the assessment proceedings adjourned by filing the adjournment applications before the authority concerned. The date of filing of transfer application has also not been disclosed. The petitioner is guilty of not disclosing the true and correct facts and has tried to mislead the Court. The conduct of the petitioner in not extending his cooperation to the assessing authority to reframe the assessment orders by filing reply to show cause notice and by not participating in the proceedings and seeking adjournments and concealing these facts in the writ petition dis-entitles him to get any relief. It would be travesty of justice, if such a person, who was instrumental in getting the case time barred, is granted relief by a writ court.

19. There is no equity in favour of the petitioner. The aim of the equity is to promote honesty. A party seeking relief in equity must come with clean hands. Writ jurisdiction has been conferred on the High Courts to reach injustice wherever it is found. If the impugned orders are not allowed to stand, it would promote dishonesty and will amount abuse of the process of Court.

20. In view of the above, we hold that the petitioner is not entitled to get any relief under Article 226 of the Constitution of India.

21. The writ petition is, therefore, dismissed summarily with costs of Rs. 5,000/-.