
(1981) 11 AHC CK 0060

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 471 of 1975

M.P. Poddar and company

APPELLANT

Vs

Additional Judge (Revisions), Sales Tax

RESPONDENT

Date of Decision : 04-11-1981

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1982) 50 STC 183

Hon'ble Judges : R.R. Rastogi, J;C.S.P. Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

C.S.P. Singh, J.—The assessee, who is the-petitioner here, had filed four revisions before the Additional Judge (Revisions), Sales Tax, Gorakhpur. These revisions were listed for hearing on 22nd February, 1973. The applicant's case is that its pairokar went to the court at 10 A.M. and found that the presiding officer was not sitting in the court. He then went to civil courts in connection with some other case, and came back again at 2 P.M. when he was told that the Additional Judge (Revisions), Sales Tax, had left the court after finishing court work for that day. It is averred that the pairokar of the assessee went to the court of the Additional Judge (Revisions), Sales Tax, on the next day, i. e., 23rd February, 1973, along with a letter of the counsel for the assessee to the effect that he could not attend the court on 22nd February, 1973, as he was ill. This letter was not entertained. Thereafter he sent an application on 26th February, 1973, which was received in the office of the revising authority on 28th February, 1973. A prayer was made in this application that the petitioner be heard. The petitioner was not informed of the order passed on this application. On receiving the ex parte order of the Additional Judge (Revisions), Sales Tax, on 16th March, 1973, he filed a restoration application on 10th April, 1973. The Judge (Revisions) has dismissed this application on two grounds. In the first place he has taken the view that there was no justification for the assessee for waiting till 10th April,

1973, for moving the restoration application, and further that there was no specific provisions in the Act for setting aside the ex parte order. We are of the view that the revising authority is in error on both the counts.

2. We have already adverted to the fact that the petitioner had moved an application on 26th February, 1973, for setting aside the ex parte order. In the counter-affidavit filed on behalf of the department, it has been admitted in para 7 that such application was received in the office on 28th February, 1973. It is, however, stated that the report of the Reader dated 2nd March, 1973, regarding this application was placed before the Additional Judge (Revisions), Sales Tax, on 5th March, 1973, whereupon the Additional Judge (Revisions) directed it to be filed, inasmuch as the revisions had been disposed of on 28th February, 1973. The revising authority has not referred to this application at all. There was no delay in making this application, and in fact the application had reached the office of the revising authority on 28th February, 1973, on which date the judgment was given. The office of the revising authority should have put up this application before the revising authority on the same date, and should not have withheld this application, as the case was being disposed of on that date, and all pending applications in the case should have been put up before the Presiding Officer for disposal. Inasmuch as an application had already been moved on 26th February, 1973, and was received on 28th February, 1973, on the date when the case was being disposed of, there was no delay on the part of the assessee in moving the restoration application. There also does not appear any delay on the part of the assessee in moving the second application as it was moved within a month of the assessee having received the copy of the order of the revising authority. It is, however, not necessary to consider the delay or haste in moving, the second application for restoration, as there was already a pending application for restoration of the case on the date when the judgment was delivered. It was thus erroneous on the part of the revising authority to have held that there was delay on the part of the assessee in moving the restoration application, and further that it was inexcusable.

3. Coming now to the question as to whether the revising authority had jurisdiction to set aside the ex parte order. The unanimous weight of judicial authority is that he enjoyed such a jurisdiction.

4. The revising authority in taking the view which he did was impressed by the fact that there was no specific provisions in the Sales Tax Act for setting aside any ex parte order. But that is not conclusive. Under the Indian Income Tax Acts, 1922, and 1961, provisions have been made for an appeal being filed before the Income Tax Appellate Tribunal. Both these Acts do not contain any specific provisions for setting aside an ex parte order, but time and again it has been held that the Tribunal enjoys such a power, due either to the inherent nature of the appellate jurisdiction which it enjoys, or alternatively on the ground that such a power is auxiliary or ancillary to the appellate power. The exercise of such a power has also been upheld on the ground of inherent power conferred on the

Appellate Tribunal. It would be profitable to begin with a case of our own court, which is the earliest in the point of time. In *Bhagwan Radha Kishen Vs. Commissioner of Income Tax*, it was held that the Tribunal had inherent power to set aside an order of dismissal for default or an order passed in an appeal heard *ex parte*, when it is satisfied that there was no service of notice or that there was sufficient cause which prevented the appellant or the respondent from appearing on the date fixed. We next come to two decisions of the Calcutta High Court, which were brought to our notice. The first being *Murlidhar Surda Vs. Income Tax Appellate Tribunal and Others*, . A learned single Judge of the Calcutta High Court held that if in a particular case it appeared to the Tribunal that a party did not get an opportunity of placing its case before the Tribunal, the Tribunal had the power to decide the appeal again, after notice to the party or after giving the party an opportunity of being heard. It was held that such a power is incidental or ancillary to the jurisdiction given to the Tribunal. Such a power was also justified on the ground that it was inherent in the jurisdiction vested in the Tribunal. The other case is the decision of a Division Bench of the Calcutta High Court in *Income Tax Officer "F" Ward, District IV(2) and Others Vs. Murlidhar Sarma and Another*, , which decision was given on appeal from the first decision. The Division Bench affirmed the view of the single Judge, and justified such a power on the ground that it was a part of the jurisdiction that the Tribunal has been given by the statute conferring appellate powers. The Kerala High Court in *Commissioner of Income Tax Vs. Income Tax Appellate Tribunal and Another*, held that in a case where the Tribunal was satisfied that an *ex parte* order was passed without giving reasonable opportunity of being heard to the aggrieved party, it had jurisdiction to set aside the order and pass a fresh order. Such a power was justified on the basis that it was an essential part of the appellate jurisdiction of the Appellate Tribunal. It was also held that as there was no specific provision in the Act prohibiting the exercise of such a power, the Appellate Tribunal could set aside an *ex parte* order.

5. It would also be profitable to refer to the decision of the Supreme Court in *Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi*, . In that case a reference application under the Income Tax Act had come up for hearing in this Court. None appeared for the applicant and this Court passed an order declining to answer the reference on account of default of the applicant, and also on the ground that paper books had not been filed. This order was passed on 26th August, 1970. On 21st September, 1970, the clerk of the Advocate, who was appearing in the case discovered that notices of the reference had been received from the High Court. On inquiry being made it was found that the matter had been disposed of on 26th August, 1970. Thereupon, an application was filed for permission to file paper books, and for rehearing of the reference. This Court held that on the reference being returned, it had become *functus officio* to entertain the application. This view was reversed by the Supreme Court. It was held that if a party or its counsel are prevented from appearing at the time of hearing of the reference, and the party shows

subsequent to the order declining to answer the reference, that there was sufficient reason for non-appearance, the High Court had inherent power to recall its earlier order and dispose of the reference on merits. It was further held that as there was no specific provisions in the Indian Income Tax Act, 1922, which either expressly or by necessary implications prohibited the High Court from recalling an order of dismissal for default, the High Court had jurisdiction to set aside the earlier order. We have purposely referred to this case, to thwart an argument raised by the standing counsel that the inherent power to set aside an ex parte order reaches only to a case where the order has been passed without due notice to an assessee or the opposite party. It is clear that the reach of inherent power exercised by a Tribunal extends beyond this region too, and embraces cases where a party shows sufficient cause for not being present on the date when the matter is up for hearing.

6. The standing counsel tried to dissuade us from taking this view by reciting a decision of this Court in the case of Property Agents Vs. Shamsheer Bahadur and Others, . This case is not in point, for all that it lays down is that the U. P. Rent Control and Eviction Act of 1947 does not confer any power of review on the Rent Control and Eviction Officer. In the present case we are not concerned with a review order. The proceedings arose out of an application for restoration and not for review.

7. As a last resort the standing counsel contended that the assessee had an alternative remedy, viz., by a reference to this Court under the U. P. Sales Tax Act, and as such this Court should decline to interfere under Article 226 of the Constitution. It is not necessary to consider as to whether a reference lies against the impugned order. We may assume that it is so. That, however, is not sufficient in the circumstances of the present case to deter us from exercising the powers under Article 226 of the Constitution, for this Court entertained the petition in 1976 without any objection on the ground of alternative remedy. It would not now be equitable, after the expiry of half a decade to throw out the petition on the ground of an alternative remedy, for by this time the reference application would be hopelessly beyond time. We are satisfied that the order of the revising authority is incorrect, and deserved to be quashed.

8. The petition is accordingly allowed with costs. The revising authority is directed to dispose of the restoration application on merits in accordance with law, and in the light of the observations made above.