
(1972) 08 CAL CK 0008
In the Calcutta High Court
Case No : Matter No. 562 of 1970

Murlidhar Surda

APPELLANT

Vs

Income Tax Appellate Tribunal and Others

RESPONDENT

Date of Decision : 04-08-1972

Acts Referred:

Income Tax Act, 1922 — Section 33(4)

Citation : (1973) 92 ITR 189

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : S.C. Bose, for the Appellant; Ajoy Mitra, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this matter the assessment of the petitioner under the Indian Income Tax Act, 1922, for the assessment year 1961-62 was completed on the 30th November, 1965. It is not necessary to refer to the details of that assessment order. The petitioner preferred an appeal, being aggrieved by the said assessment order, to the Appellate Assistant Commissioner. On the 17th October, 1966, the Appellate Assistant Commissioner affirmed the order of the Income Tax Officer. On the 12th January, 1967, the petitioner filed an appeal before the Tribunal challenging the said order of the Appellate Assistant Commissioner. On the 20th December, 1969, notice was issued from the Income Tax Appellate Tribunal to the assessee, the petitioner herein, intimating that the appeal had been fixed for hearing on the 7th January, 1970. On the 5th January, 1970, the petitioner sent a letter by registered post with acknowledgment due praying for adjournment of the appeal on the alleged ground of illness of the petitioner. On the 6th January, 1970, the aforesaid letter was received. It has to be mentioned that the said letter was not addressed to the Income Tax Appellate Tribunal but to the authorised representative of the Income Tax Appellate Tribunal. On the 27th January, 1970, the Tribunal decided the said appeal without taking into consideration the adjournment petition. Inasmuch as the letter had been wrongly addressed, the aforesaid letter praying for adjournment by the

assessee had not been placed before the Tribunal before the disposal of the said appeal. On the 12th February, 1970, the said appellate order was received by the petitioner and on the 7th March, 1970, the petitioner made an application for restoration of the said appeal and for fresh hearing as, according to the petitioner, the petitioner was prevented by sufficient cause from appearing on the date fixed for hearing of the appeal. On the 20th June, 1970, the Tribunal refused to restore the said appeal on the ground that it had no power to cancel the said order. It would be relevant at this stage to refer to the order of the Tribunal. The Tribunal, *inter alia*, stated as follows:

"What has been submitted by the assessee may be true. However, (he Tribunal has no power to cancel its order and to rehear the appeal when there is no mistake in its order apparent from the record. The prayer is accordingly refused."

2. Thereupon after obtaining certified copy of the said order the petitioner on the 25th September, 1970, moved this application under Article 226 of the Constitution challenging the aforesaid order of the Tribunal.

3. The short question with which I am concerned in this application is whether the Tribunal had refused to exercise its jurisdiction which it had under the Act. The powers and jurisdiction of the Income Tax Appellate Tribunal in hearing the appeal are regulated by the provisions of Section 33 of the Indian Income Tax Act, 1922, which is similar to the provisions of Section 254 of the Income Tax Act, 1961. Sub-section (4) of Section 33 of the Indian Income Tax Act, 1922, provides as follows:

"(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

4. Rules have been framed for regulating the procedure of appeal before the Income Tax Appellate Tribunal. It is undisputed that there is no express provision either in the Act or in the Rules permitting or authorising the Income Tax Appellate Tribunal to deal with or dispose of an application of this nature made to it by the assessee in the present case after the disposal of the appeal. Counsel for the assessee, however, contended that this power was inherent and/or ancillary to or incidental to the power given to the Appellate Tribunal. It was on the other hand contended on behalf of the revenue that the Income Tax Appellate Tribunal, being a creature of statute, did not have the powers of a court but these powers were circumscribed and after an appeal had been disposed Of by a decision given on it as in this case, the Income Tax Appellate Tribunal had become *functus officio* and could not deal with the said appeal any longer. It is undoubtedly true that the Income Tax Appellate Tribunal is a tribunal of limited jurisdiction and it has not the powers of a court under the ordinary law. Its jurisdiction, powers and procedure are circumscribed by the specific provisions of the Act but at the same time it has to be remembered that where the Act or statute confers a jurisdiction or power upon an authority, the

provisions of the Act must be so construed that the Act grants all the powers incidental to or necessary for the purpose of exercising that power, provided, however, the said incidental or necessary powers are not in conflict with any specific powers granted to that authority by the statute. Reliance may be placed for this proposition on Halsbury's Laws of England, 3rd edition, volume 36, at page 436, Article 657. In the case of Income Tax Officer Vs. M.K. Mohammed Kunhi, the Supreme Court had occasion to consider the scope of incidental or ancillary powers u/s 254 of the Income Tax Act, 1961, which is similarly worded as Section 33(4) of the Indian Income Tax Act, 1922. There the Supreme Court observed that Section 254 of the Income Tax Act, 1961, which conferred on the Appellate Tribunal powers of the widest amplitude in dealing with appeals before it, granted by implication the powers of doing all such acts or employing such means as were essentially necessary for its execution. The statutory power u/s 254 carried with it the duty in proper cases to make such orders for staying recovery proceedings pending an appeal before the Tribunal, as would prevent the appeal, if successful, from being rendered nugatory. The Supreme Court further observed that it was firmly established that an express grant of statutory powers carried with it by necessary implication the authority to use all reasonable means to make such grant effective. The Supreme Court in the aforesaid decision was dealing with the power of stay pending hearing of the appeal. This specific question of passing an order after disposal of a matter by the Appellate Tribunal was considered by the Allahabad High Court in the case of Bhagwan Radha Kishen Vs. Commissioner of Income Tax, . There Malik C.J. of the Allahabad High Court, delivering judgment of the court, observed that there was inherent jurisdiction in the Tribunal to set aside an order of dismissal for default or an order passed on an appeal heard ex parte when it was satisfied that there was in fact no service of notice or there was sufficient cause which had prevented the appellant or the respondent from appearing on the date fixed. In the case of V. Venkataraman Vs. Controller of Estate Duty, Madras, the Division Bench of the Punjab High Court observed that it was a settled rule that a judicial tribunal could recall and quash its own order in exceptional cases when it was shown that it was obtained by fraud or by palpable mistake or was made in utter ignorance of a statutory provision and the like and for the application of that rule the class of the Tribunal was not a material matter but what was of substance and was material was the nature of the proceedings before it. If the proceedings were in the nature of judicial proceedings, then irrespective of the class of the Tribunal the rule applied; the Tribunal had inherent jurisdiction. The Division Bench of this court had occasion to consider the scope of the power of the Tribunal u/s 33 of the Indian Income Tax Act, 1922, in the case of Malchand Surana Vs. Commissioner of Income Tax, . There it was observed that the Appellate Tribunal had power u/s 33 of the Indian Income Tax Act, 1922, for doing all such acts or employing such means as would be essentially necessary for the exercise of its appellate jurisdiction. When the appeal against the assessment order u/s 23(4) was not decided on the merits, but was allowed as a consequential relief on the decision of the Tribunal in the appeal against the

order u/s 27 and the appeal had subsequently to be dismissed in accordance with the answer given by the High Court in a reference, it was held that when the former order of the Tribunal in the appeal against the order u/s 23(4) was merely consequential, there was no decision in that appeal on merits and on the appellate order u/s 27 being reversed, the order in appeal against the order of assessment should be revised by the Tribunal. For deciding that case the Calcutta High Court relied on the decision of the Supreme Court in the case of Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi, referred to hereinbefore. The Bombay High Court in the case of Khushalchand B. Daga Vs. T.K. Surendran, 4th Income Tax Officer, A-1 Ward and Others, held that the assessee could move the Tribunal for rehearing the appeal on the ground that Rule 24 was invalid only after February, 1969, when the Supreme Court delivered its judgment setting at rest the conflict of opinion on the validity of Rule 24.

5. It appears to me that the Tribunal has the power and indeed the obligation to dispose of the appeal and pass such order thereon after giving both the parties in appeal an opportunity of being heard. It is necessary, therefore, that the Tribunal should have all the powers to ensure that the opportunity that the Tribunal grants to the parties concerned is fair, adequate and proper. If in a particular case it appears to the Tribunal that the opportunity could not have been properly availed of by a particular party as a result whereof the party did not have opportunity of placing its case before the Tribunal, it would be improper in my opinion to curtail the power of the Tribunal to decide the appeal again upon notice to the party or after giving the parties opportunity. Such a power is inherent in the jurisdiction vested upon the Tribunal, It is a power incidental to or ancillary to the jurisdiction given to the Tribunal. There is no express provision against the exercise of such power in the Act or in the Rules nor such exercise of such power is in conflict with any of the provisions or the purpose or the functions of the Tribunal. On the other hand such power would be in consonance with the power or the jurisdiction of the Tribunal. In the aforesaid view of the matter, I am of the opinion that the Tribunal has inherent and ancillary power in an appropriate case to give a party an opportunity of rehearing after an appeal has been disposed of in the absence of that party. Therefore, the Tribunal in the instant case had jurisdiction to deal with the application made to it on the 7th March by a party to cancel its previous order for hearing the assessee again. The Tribunal has not exercised that jurisdiction.

6. Counsel for the revenue, however, contended that this was an order which the Tribunal had disposed of on the merits and if the petitioner has been aggrieved by any of the decisions made on the merits, the petitioner could agitate its contentions in a reference application or in a reference to the High Court. It is true that the Tribunal had decided the appeal on the merits as indeed the Tribunal was obliged to do. But the party alleges that it did not have an opportunity of placing its views. When the party applied, the Tribunal has not given to the assessee that opportunity, not because in the facts and circumstances of the case the Tribunal did not consider it proper that the

assessee should have that opportunity but because the Tribunal thought that it had no jurisdiction to give such an opportunity. In my opinion, therefore, the fact that the petitioner might have raised its contention in a reference before the High Court would not affect the petitioner's right to ask for a consideration of the appeal after being given an opportunity of being heard.

7. In the aforesaid view of the matter, I, therefore, set aside the order of the Tribunal dated 20th June, 1970, which is annexure "F" to the petition and I direct the Tribunal to consider the application or the petition dated the 7th of March, 1970, for restoration of the appeal and for hearing the petitioner before the disposal of the appeal. The Tribunal, however, would be entitled to consider whether the petitioner is entitled to such a hearing or whether the petitioner has made out such a case before the Tribunal that there were proper and sufficient causes for recalling its previous order. After consideration of the said facts the Tribunal would pass such an order in accordance with law as the Tribunal would consider fit and proper. Let writs in the nature of certiorari and mandamus issue accordingly. The rule is made absolute to the extent indicated above.

8. There will be no order as to costs of this application. Operation of this order is stayed for six weeks.