(2003) 08 BOM CK 0013

In the Bombay High Court

Case No : Writ Petition No. 1582 of 2003 & Writ Petition No. 1582 of 2003 20 August 2003

Rainbow Agri Industries Ltd. APPELLANT

Vs

Income Tax Appellate Tribunal RESPONDENT

Date of Decision : 20-08-2003

Acts Referred:
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 242(2)

Citation : (2003) 132 TAXMAN 752

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Full Bench

Advocate : J.D. Mistry and A.K. Jasani, for the Assessee R.V. Desai and P.S. Jetly, for the Revenue, for the Appellant;

Judgement

V.C. Daga, J.

Rule returnable forthwith. Mr. R.V. Desai, Sr. Counsel for the revenue waives service on behalf of the respondents. By consent of parties petition is heard on merits.

2. The case of the petitioners in short is that the petitioners themselves by mistake while giving their office address in the Form No. 36, have given it as ''Raheja Centre'' instead of ''Raheja Chambers''. Both buildings are located in the same area known as Nariman Point, Mumbai - 400 021. It appears that typographical error had crept in the Form No. 36. It was a mistake committed by the typist while typing Form No. 36. This has resulted in non-receipt of notice of hearing of appeal issued by the Tribunal, with the result, the Petitioners could not appear before Tribunal when the appeal was called out for final hearing. Tribunal heard appeal ex parte. The appeal came to be dismissed on merits by a reasoned judgment and order dated 8-8-2001. The petitioners herein; (Appellant before Tribunal) came to know about the adverse order, when the copy of the judgment of the Tribunal was received by them. It appears that the office of the Tribunal

despatched copy of the judgment on the address of the petitioners at 812, Raheja Centre, Mumbai. This was not the correct address of the petitioners. However, it appears that the postman of the area; who was knowing correct address of the petitioners; corrected it on the envelop. Envelop carrying corrected address reached the office of the petitioners. The xerox copy of the envelop addressed to the petitioners produced before us shows that the postman has deleted the word ''centre'' and substituted it with ''chamber''. The said postal envelop carrying corrected address reached the office of the petitioners located in ''Raheja Chambers'', that is how the petitioners came to know about the adverse order passed by the Tribunal.

3. The petitioners after acquiring knowledge about the above adverse order passed by the Tribunal, moved the Miscellaneous Application bearing No. 109/ Mumbai/2003 on 8-3-2003 disclosing reason mentioned hereinabove for their absence with a prayer to set aside the ex parte order and afford a fresh opportunity of hearing to them.

4. The above referred Miscellaneous Application was heard by the Tribunal. The Tribunal refused to set aside ex parte order holding a view that the mistake sought to be pleaded could not be said to be a mistake apparent on the face of record u/s 242(2) of the Income Tax Act. The Tribunal held that the petitioners themselves were the architect of the alleged mistake as such they could not be allowed to take advantage of their own mistake. The Tribunal, thus rejected the application moved by the petitioners. This order of the Tribunal dated 8-3-2001 is a subject-matter of challenge in the present writ petition filed under article 226 of the Constitution of India.

5. Mr. J.D. Mistry, learned counsel appearing for the petitioners brought to our notice rule 24 of the Income Tax Appellate Tribunal Rules, 1963 (hereinafter referred to as ''the rules''), which specifically lays down that if the Appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for non-appearance when the appeal was called on for hearing, the Tribunal shall set aside the ex parte order and restore the appeal. This provision engrafted under rule 24 of the rules is similar to order 9 rules 13 of the Civil Procedural Code (hereinafter referred to as ''C.P.C.''). This court while interpreting the provisions of order 9, rule 13 of the C.P.C., time and again laid down that the approach of the courts or Tribunals in deciding whether there was sufficient cause or not is expected to consider whether or not the party was really interested to appear on the date fixed for the case; if he honestly intended to remain present and was not guilty of misconduct or gross negligence he should be given chance. The reason for absence has been sufficiently explained by the petitioners. The mistake of a typist cannot be attributed to the petitioners. The mistake was not a deliberate one. The petitioners were not to be benefited from the mistake in question. It was nothing but a bona fide mistake. Petitioners were not to gain anything by giving wrong address. Why anybody, who has filed appeal involving heavy stakes, would give wrong address unless it is a bona fide mistake. The

words ''was prevented by any sufficient cause from appearing'' must be liberally construed to enable the court or Tribunal to exercise ex debito justitiae. The ''sufficient cause'' referred to in rule 24 may be construed as good cause. If the cause is good it would also be sufficient. If a party is unaware of the date of hearing and the unawareness is not due to any fault of his, then unawareness would be sufficient cause which would prevent a party from appearing in the court. The approach of the Tribunal should have been little liberal with a view to advance cause of justice. Keeping in view the principles laid down by this court Devi Ramchand Waswani Vs. S.V. Bastikar, , Hemchand Mahabir Prasad Singhania Vs. Subhkaran Nandlal Baragra, , we find that the petitioners had shown sufficient cause to the Tribunal for setting aside the ex parte order in question. The Tribunal itself ought to have allowed the application and should have granted an opportunity of rehearing to the petitioners. In this view of the matter, we quash and set aside the impugned order dated 8-8-2001 passed by the Tribunal and allow this petition for the reasons mentioned herein and as a consequence of this order, we also set aside ex parte order of the Tribunal dated 17-7-2002 passed in Appeal No. 109 (Mum.) of 2002 and restore appeal to file and remit the said appeal back to the Tribunal, for rehearing on merits and decision thereon in accordance with law on its own merits.

6. In the result, petition is allowed. Rule is made absolute in terms of prayer clause (b), however, subject to payment of cost quantified in the sum of Rs. 5,000 to be deposited with the Tribunal within two weeks from today for being paid to the Commissioner of Income Tax, Mumbai.