
(2002) 05 CAL CK 0033
In the Calcutta High Court
Case No : Writ Petition No. 958 of 2002

Rakesh Kumar Shaw

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 10-05-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 246, 249(2), 249(3), 250, 253

Citation : (2002) 177 CTR 573 : (2002) 257 ITR 268

Hon'ble Judges : Dilip Kumar Seth, J

Bench : Single Bench

Advocate : Tapas Saha, for the Appellant; Shome, for the Respondent

Final Decision : Dismissed

Judgement

Dilip Kumar Seth, J.—Facts and submissions : Aggrieved by an order passed u/s 271D of the Income Tax Act, 1961, imposing penalty on account of violation of acceptance of loan in cash exceeding Rs. 20,000 prohibited-under Section 269SS, the petitioner had preferred an appeal u/s 246 of the Income Tax Act. He has also made an application u/s 249, Sub-section (3), for admission of the appeal, which was preferred beyond the limitation provided in Sub-section (2) of Section 249 . This has since been dismissed by the Commissioner of Income Tax. This order has since been challenged before this court on various grounds, particularly, on the ground that the order is perverse and this court should interfere with the same. Relying on Section 273B, he contends that the failure to comply with Section 269SS was supported by reasonable cause and as such no penalty could be imposed upon the petitioner.

2. Mr. Shome, learned counsel for the respondent, on the other hand, points out that there is no merit since there was delay of about three years and that there was a reminder, despite which the appeal was not preferred within time. He also points out from the impugned order that there is no perversity in it. According to him, the authority can decide the matter one way or the other. The second

ground he has taken is that the order is appealable u/s 253 of the Income Tax Act before the Appellate Tribunal. Therefore, this court cannot entertain this writ petition in exercise of its writ jurisdiction. The question involves element of fact, which this court cannot undertake in exercise of writ jurisdiction. Therefore, the petition should be dismissed.

3. Learned counsel for the petitioner relied on two decisions, viz., in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and In the Matter of the Appropriate Authority and Another Vs. Smt. Sudha Patil and Another, , to contend that in case of perversity and illegal exercise of jurisdiction and non-consideration of material facts and documents, this court can entertain the writ petition.

The scope :

4. After having heard learned counsel for the parties, it appears that the questions involved are as to whether there are justifiable reasons on the question of failure in respect of Section 269SS or not and whether the amounts of penalty u/s 271 can be justified or not. Whether the petitioner was able to justify the reasonableness of the cause of failure to comply with Section 269SS, in view of the provisions contained in Section 273B, are not questions which can be gone into in this case, when the order rejecting the appeal was on the ground of filing the appeal beyond the period of limitation. In the said order, the merits of this case have not been gone into. As such, this court cannot undertake the exercise to that extent.

5. Admittedly, the order was passed u/s 271D of the Act. Such an order is appealable u/s 246(2)(ee) of the Act. Accordingly, the appeal was filed. Such appeal, in view of Section 249(2) of the Act, is to be filed within 30 days from the date of service of the notice of demand relating to the assessment or penalty as provided u/s 249(2)(b) of the Act. Sub-section (3) of Section 249 of the Act empowers the Commissioner (Appeals) to admit the appeal after the expiry of the period of limitation, if he is satisfied that the appellant had sufficient cause for not preferring the appeal within the period prescribed. In this case, the appellate authority had found that the explanation was unsatisfactory. As such, it did not admit the appeal and at the same time, dismissed the appeal. The order of dismissal refusing to admit an appeal is also an order u/s 250 of the said Act, which is appealable u/s 253 of the Act before the Appellate Tribunal. Therefore, there is an adequate remedy available to the petitioner u/s 253 under which the Tribunal can go into all these questions, which are now being raised before this court.

Alternative remedy :

6. After having gone through the order impugned, it appears that certain factual aspects are to be determined as to whether there was justified reason for the delay or not. These are questions relating to determination of fact, which this court cannot undertake.

7. The decisions cited by learned counsel has no mariner of application in the present case where it is a question of determination of fact on the basis whereof it can be decided one way or the other. The alleged allegation of perversity is not necessary to be gone into in this case since I am not inclined to entertain this petition on the ground of maintainability by reason of existence of alternative remedy.

8. The proposition of law with regard to alternative remedy is now a settled principle. It is not an absolute bar. But where the alternative remedy is adequate and efficacious and the issues to be determined involve elements of facts, which are disputed, ordinarily the court is not supposed to exercise such discretion. A question involving determination of facts can be dealt with more efficaciously by the alternative forum. Inasmuch as, while exercising the writ jurisdiction, this court cannot undertake determination of disputed questions of fact. In the present case, as it appears that the remedy by way of appeal before the Tribunal u/s 253 is not only adequate but also more efficacious, since the question involves elements of disputed facts. As such it can best be decided by the Tribunal.

Order :

9. In the circumstances, this writ petition fails and is dismissed as not maintainable on the ground of alternative remedy. It will be open to the petitioner to approach the Appellate Tribunal, if he is so advised.

10. Since no affidavit-in-opposition has been filed in this matter, the allegations, as contained in the petition, are not admitted by the respondents.

11. At this stage, learned counsel for the petitioner submits that the demand may be stayed for a period of a fortnight in order to allow him to have breathing time to prefer an appeal before the Appellate Tribunal.

12. The petitioner may prefer an appeal within a week from date and apply for stay before the appropriate authority and such authority shall decide the question of stay as early as possible. However, the respondent authority shall not take steps for realising the demand for a period of a fortnight from date. Can such stay be granted by this court in such case ? Mr. Shome had opposed the granting of such stay, on the ground that this court has no jurisdiction. I am unable to agree with this contention. It is not a case of absence of jurisdiction of this court. Admittedly, this court has jurisdiction. But it is a question of discretion. The existence of alternative remedy does not operate as a bar of jurisdiction. Existence of alternative remedy is a factor to be taken into consideration for deciding whether the court will exercise its discretion to invoke the jurisdiction. It is a question of expediency to be weighed against exercising its discretion to allow invocation of writ jurisdiction. Despite having jurisdiction, the court may decline to invoke it, at its discretion. When there are adequate alternative remedy, the court may decline to exercise its discretion. When the court having jurisdiction declines to exercise it, in its discretion, on the ground of

alternative remedy, it can pass appropriate orders. But such orders are to satisfy the test of judiciousness. It is to satisfy the test of justifiability in a given situation. Appropriate order can be passed to secure the ends and interest of justice. The court would be failing in its duty, while declining to exercise its discretion to invoke writ jurisdiction, if it fails to secure the ends of justice, having regard to the facts and circumstances of a given case. The refusal to exercise discretion is a refusal to determine the case on its merits. Such an order does not close the avenue for challenging the impugned order before the appropriate forum where alternative remedy lies. It is in effect granting of liberty to the petitioner to approach such alternative forum or in other words, is an indirect remission of the matter to the appropriate alternative forum at the choice and behest of the petitioner, which the petitioner may or may not accept or be advised to follow. Therefore, when such liberty is granted, the court has every right to see that such alternative remedy remains an adequate alternative remedy, if on the facts it so feels, it may secure the doors of alternative remedy to remain open and see that it is not closed. Having regard to the facts and circumstances of this case, in my view, unless adequate protection is made available to the petitioner, the alternative remedy available to it would be rendered infructuous. In such a case as in the present one, the court in its discretion may pass appropriate order for securing the ends of justice, which I hereby do by granting the interim order as above. However, this order is passed without prejudice to the rights and contentions of the respective parties.

13. The Appellate Tribunal will decide the question of granting of stay or the appeal according to its own wisdom and discretion without being influenced by any of the observations made in this order.

14. All parties concerned are to act on a xerox signed copy of this dictated order on the usual undertaking.