(2008) 10 AHC CK 0120

In the Allahabad High Court

Rapti Commission Agency APPELLANT

Vs

The State of U.P. and Another RESPONDENT

Date of Decision : 15-10-2008

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2008) 10 AHC CK 0120

Hon'ble Judges : U.K. Dhaon, J;Satish Chandra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The petitioner shall affix additional court fee of Rs. 100/-.

2. Heard Sri U.K. Srivastava, learned Counsel for the petitioner and Sri H.P. Srivastava, learned Additional Chief Standing Counsel for the opposite parties.

3. The petitioner being aggrieved by the impugned orders dated 29.8.2008 passed by the Deputy Commissioner, Commercial Tax, Sector - 21/22, Lucknow and the ex-parte assessment orders dated 28.2.2008 and 31.3.2008 has filed the instant writ petition.

4. The petitioner has alleged that it is carrying on business of purchasing Mentha Oil from the farmers and the cultivators within the State of U.P. on behalf of its Ex-U.P. Principals and is transporting the same to Ex-U.P. Principals on the basis of the agreement made between the parties.

5. The petitioner has further alleged that as soon as the petitioner acquired the knowledge about the ex-parte assessment orders for the first quarter and the second quarter of the Assessment Years 2007-08, She moved an application u/s 30 of the Trade Tax Act before the Assessing Authority well within the time. The learned Counsel for the petitioner submits that the Assessing Authority in a most arbitrary and illegal manner by the impugned orders dated 29.8.2008 has dismissed the application moved by the petitioner u/s 30 of the Trade Tax Act. He

further submits that the Assessing Authority has himself mentioned in the impugned order that the application moved by the petitioner u/s 30 of the Act is well within time and the date on which she could not appear, a medical certificate regarding illness has been filed. He further submits that the absence of the petitioner on the date fixed was not deliberate and it was genuine and bona fide as she was ill on the date of the hearing of the case.

6. The learned Additional Chief Standing Counsel appearing on behalf of the opposite parties submits that against the ex-parte assessment orders dated 28.2.2008 and 31.3.2008, the petitioner has an alternative and efficacious remedy of appeal u/s 9 of the Trade Tax Act. He further submits that the petitioner has not deposited the admitted tax before the Assessing Authority while moving application u/s 30 of the Act and there is no illegality in the impugned orders dated 29.8.2008 and the writ petition deserves to be dismissed.

7. We have considered the submissions made by the learned Counsel for the parties and gone through the record.

8. It is admitted case of the parties that the petitioner is carrying on business of purchasing Mentha Oil from the farmers and cultivators within the State of U.P. on behalf of its Ex-U.P. Principals and is transporting the same to Ex-U.P. Principals outside the State. A notice in respect to the first quarter and the second quarter of the Assessment Years 2007-08 was issued to the petitioner by the Assessing Authority for 28.2.2008 and 31.3.2008. The petitioner has alleged that on account of the illness she could not appear before the Assessing Authority on the date fixed and after coming to know about the ex-parte order she moved an application u/s 30 of the Trade Tax Act well within the time. The opposite party No. 2 in the impugned orders dated 29.8.2008 has mentioned that the application moved by the petitioner u/s 30 of the Trade Tax Act was well within the time and she has also filed the medical certificate to show that she was ill on the date fixed for hearing of the assessment proceedings. The objection of the learned Additional Chief Standing Counsel that the writ petition is not maintainable as the petitioner has an alternative remedy u/s 9 of the Trade Tax Act against the ex-parte assessment order cannot be accepted as the opposite party No. 2 in the impugned order has mentioned that the absence of the assessee on the date fixed was genuine. The alternative remedy is not an absolute bar and to do justice between the parties or to prevent injustice, this Court under Article 226 of the Constitution of India can entertain a petition.

9. Hon''ble the Supreme Court in the case of M.P. State Agro Industries Development Corporation Ltd. and Another Vs. Jahan Khan, has held:

The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) Where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar.

10. In the instant case, the Assessing Authority while passing the impugned orders dated 29.8.2008 has himself admitted that the application moved by the petitioner u/s 30 of the Trade Tax Act is well within thirty days from the date of the ex-parte assessment order and that the application is also supported with the medical certificate and the absence of the assessee on the date fixed was genuine.

11. Hon''ble the Supreme Court in the case of Rabindra Singh v. Financial Commissioner Co-operation, Punjab and Ors. reported in (2008) 7 SCC 663 has held:

All Courts in a situation of present nature have the incidental power to set aside an ex-parte order on the ground of violation of the principles of natural justice even in the absence of any express provision, having regard to the principles of natural justice in such a proceedings, the courts will have ample jurisdiction to set aside an ex-parte decree, subject of course to the statutory interdict what matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law.

Where the principles of natural justice are required to be complied with, non-affording of an opportunity itself causes prejudice.

12. We are of the view that there was no justification for the Assessing Authority to reject the application of the petitioner moved u/s 30 of the Trade Tax Act. Since the absence of the assessee on the date fixed was not deliberate and it was genuine and bona fide. The opposite party No. 2 ought to have allowed the application moved by the petitioner u/s 30 of the Act. The impugned orders dated 29.8.2008 and the ex-parte assessment orders dated 28.02.2008 and 31.03.2008 deserves to be set-aside.

13. In the result, the writ petition succeeds and is allowed. The impugned orders dated 29.8.2008, the copies of which have been annexed as Annexures 1 and 2 to the writ petition and the ex-parte assessment orders 28.2.2008 and 31.3.2008, the copies of which have been annexed as Annexures 3 and 4 to the writ petition are hereby set-aside and the application moved by the petitioner u/s 30 of the Trade Tax Act is hereby allowed. The matter is remitted back to the opposite party No. 2 to decide afresh on merits, after affording opportunity to the petitioner. The petitioner shall not seek any adjournment in the matter before the Assessing Authority.