

(2013) 03 KL CK 0135
In the High Court Of Kerala
Case No : W.A. No. 303 of 2013

Robymon

APPELLANT

Vs

Assistant Commissioner (Appeals)

RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 44 GST 709 : (2013) 3 ILR (Ker) 67 : (2013) 2 KLT 414 : (2013) 66 VST 302

Hon'ble Judges : K.M. Joseph, J;K. Ramakrishnan, J

Bench : Division Bench

Advocate : M.K. Dileep Kumar, for the Appellant; Bobby John Pulickaparambil), for the Respondent

Judgement

K.M. Joseph, J.—Appellant is the writ petitioner. The Writ Petition was filed seeking the following reliefs:

A. Declare that the petitioner is entitled to insist for the hearing of the Ext. P4 stay petition filed along with the Ext. P2 appeal at the earliest opportunity, before he is compelled to undergo detention for the impugned tax liability in the appeal.

B. Issue a writ of mandamus or such other writ or order directing the first respondent to hear and pass orders in the Ext. P4 stay petition, after considering the Ext. P3 delay petition and admission of the Ext. P2 appeal.

C. Issue a writ of mandamus or such other writ or order directing the third respondent to defer all recovery proceedings against the petitioner towards the sales tax liability till the first respondent passes orders in Ext. P4 stay petition.

Appellant was assessed for the year 2007-2008 under the Kerala Value Added Tax Act. Against the same, appellant filed Ext. P2 appeal accompanied by Ext. P3 application to condone delay of 275 days. In the meantime, apprehending recovery, appellant filed Writ Petition seeking the aforesaid reliefs. The learned Single Judge disposed of the Writ Petition by directing the first respondent to

consider Ext. P3 application. Learned Single Judge directed that, if the delay is condoned, the appellate authority shall proceed to consider the appeal itself within two months. Recovery was directed to be kept in abeyance on the appellant remitting 50% of the amount within two weeks from the date of judgment. It is being aggrieved by the same, the appellant is before us. We heard the learned counsel for the appellant and learned Government Pleader. Learned counsel for the appellant would complain that it is because of the denial of the right available to the appellant by the statutory authorities the appellant has approached this Court. He would submit that, when there is a right there must be a remedy. He invoked the principles of natural justice. He would submit that, it has been held by the Apex Court in *Ravi Gupta Vs. Commissioner Sales Tax, Delhi and Another*, as follows:

It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantiate part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

2. He would also submit that in some cases, the learned Single Judge passed orders directing disposal of the stay petition itself and granted stay of recovery unconditionally whereas in this case very heavy condition is imposed. He would submit that, the soul of the law is reason and no reasons are forthcoming. He would further submit that, it is for the appellate authority to consider the conditions to be imposed and it is not a provision like S. 17(d) of the Kerala General Sales Tax Act under which appeal is not maintainable unless the entire amount is paid and on a party coming to this Court seeking relief imposing of such conditions in some cases and giving unconditional orders in others has created great deal of uncertainty in the law. He would also submit the difficulties of the appellant inasmuch as the appellant stopped business and is undergoing treatment.

3. Learned Government Pleader, on the other hand, would submit that, this is a case where the appellant did not produce assessment order. The assessment order would show that the appellant did not even file the return. He was issued with pre-assessment notice. To the same also he did not respond. The officer was left with no other choice. He had the material in the form of previous assessments and he made assessment in this case in the circumstances and

really there is no injustice at all. He would further submit that, the calculation of 275 days delay by the appellant is incorrect. According to the learned Government Pleader, the order is dated 14.8.2008. The appeal is filed on 14.1.2013. The delay is more than 3 years. According to him, the assessment order was served on 19.9.2008. It is also affixed, he submits. He would therefore submit that there is no merit at all in this case.

4. The first prayer sought by the appellant is for a declaration that the appellant is entitled to insist for the hearing of the Ext. P4 stay petition at the earliest opportunity before he is compelled to undergo detention for the impugned tax liability in the appeal. We are of the view that, the said prayer is completely misconceived. Admittedly, this is a case where there is delay. We are at a loss to understand how the appellant can seek a declaration that he is entitled to have a hearing of the stay petition without reference to the delay application being allowed. Accordingly, as sought the 1st prayer could not have been granted. The second prayer was, no doubt, to hear and pass orders on Ext. P4 stay petition after considering Ext. P3 delay petition. Here also, unless the delay is condoned, there can be no occasion for a direction to consider the stay petition. The last prayer was to defer all recovery proceedings till the first respondent passes orders on Ext. P4 stay petition. Here also we have noticed that this is a case where there is a delay and the appellant cannot get a direction from the Court to pass orders on stay petition without the delay petition being heard and allowed.

5. We must also notice that the appellant actually filed appeal on 14.1.2013. The Writ Petition was filed on 21.1.2013. Mandamus will lie when there is failure on the part of the authority against whom mandamus is sought to act or there is a clear refusal on his part. In this case, as already noticed, appellant filed appeal on 14.1.2013. In a week's time he is before this Court complaining of alleged denial of justice. The explanation, no doubt, is that the appellant was arrested on account of non-payment of tax arrears and he was released so that he could file appeal. Whatever that be, it may not be fair to blame the statutory authority unless there is definite material to show that the appellant has filed appeal and stay petition and delay petition have been moved. No doubt, the learned counsel has a case that concerned authority is not sitting according to the knowledge. When an appeal is filed accompanied by a stay petition, no doubt, it is for the appellate authority to consider and pass orders on the said petition at the earliest. But, since there are number of appeals it is for the assessee to move the stay petition. Without moving the said petition, it may not be fair to blame the authorities for not passing orders on the stay petition. Once the appellate authority is moved and if there is delay in the matter the party may be justified in blaming the statutory authority in not discharging its duties. When there is an application for stay in an appeal but the appeal is filed out of time the matter assumes a different complexion altogether as the appellate authority cannot possibly pass orders on the stay petition unless the delay is condoned. In the facts of this case, even according to the appellant, there is a delay of 275 days. According to the learned Government Pleader, it is much more and he points out

the averments in the affidavit accompanying the delay petition wherein it is stated that there is a minimum delay of 275 days. No doubt, these are all matters to be considered by the appellate authority.

6. When a stay petition is filed and orders are not being passed on the same that may give a cause of action for the party to approach this Court. Merely filing a delay petition and stay petition and then rushing to this Court and blaming the authority in not passing orders may not be justified as it is done without giving opportunity to the statutory authority to consider the stay petition on its own. It is, as we already noted, only when there is failure to pass orders within a reasonable time and that too after the stay petition is moved that a cause of action can possibly arise under Art. 226 of the Constitution for a writ of mandamus.

7. In a case where there is a delay unless and until the delay is condoned, there cannot be an order that the stay petition to be disposed of. At best a direction could be granted in appropriate cases where there is delay on the part of the appellate authority in taking up the application to consider the delay petition and to pass orders on the same, and, if the delay is allowed also to direct the stay petition to be taken up and orders passed. But, in such a case a further order that recovery be stayed will be entirely in the discretion of the writ Court. The party cannot have the right to say that in such a case the writ Court should not impose any condition. The conditions which are to be imposed will depend upon the facts of each case. In the facts of this case, applying the aforesaid principles, we notice this is a case where as pointed out by the learned Government Pleader assessment order is passed in the year 2008, appellant did not file return. He did not respond to the notice proposing to assess him. It is in such a case then an appeal is filed with a delay petition. The appeal is filed as already noted on 14.1.2013. The Writ Petition was filed in the space of 7 days that is on 21.1.2013. We would think that, in the circumstance in the facts of this case we should modify the judgment of the learned Single Judge by directing that the application for condonation of delay should be disposed of within a time limit, and, if the delay is condoned, further direct the stay petition to be disposed of within a particular limit and pass orders on the same and further orders recovery to be kept in abeyance provided that a reasonable amount is remitted.

We partly allow the appeal and we direct the first respondent to consider Ext. P3 application within a period of three weeks from today and pass orders on the same, and, if the application is allowed, he will within one week thereafter take up Ext. P4 and pass orders thereon. In the meantime, recovery proceedings will be kept in abeyance only if the appellant deposits 1/3rd of the amount demanded under the impugned notice within two weeks from today.