
(2010) 02 GAU CK 0034
In the Gauhati High Court
Case No : W.A. No. 147 of 2007

Safur Ali

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 18
Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 16(3), 35

Citation : (2010) 32 VST 547

Hon'ble Judges : Ranjan Gogoi, J;B.P. Katakey, J

Bench : Division Bench

Advocate : J. Bora and P.K. Katila, for the Appellant; R. Dubey, Standing Counsel, Finance, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—The challenge in the writ petition is against an order dated January 19, 2007 (Sufur Ali v. State of Assam [2007] 10 VST 499 (Gauhati)) passed by a learned single judge of this Court in W. P. (C) No. 189 of 2002 dismissing the writ petition filed by the appellant wherein he has challenged the assessment orders under the Assam General Sales Tax Act, 1993 (hereinafter referred to as "the Act") for the years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98.

2. The brief facts required to be noticed for the purpose of the present adjudication are set out herein below.

3. The assessments of the petitioner under the provisions of the Act for the years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98 were completed on November 10, 1997 (reassessment); March 22, 1996, June 3, 1996, January 16, 1998 and November 15, 2000, respectively. Notice u/s 18 of the Act was issued to the petitioner on January 25, 1999 contemplating reopening of the assessments for the year 1993-94 and 1994-95. Pursuant to the said notice the

assessments of the petitioner for the two years in question were finalized on March 1, 1999. Aggrieved, the petitioner instituted an appeal wherein it was, inter alia, contended that the reopening of the original assessments was on the basis of audit objections, which could not have been done. The appeal filed by the petitioner was disposed of on August 14, 2000 setting aside the orders of assessment dated March 1, 1999 and by directing the jurisdictional Superintendent of Taxes to assess the petitioner by estimating the sale price on pro rata basis after taking into account the entire bid money spreading over five assessment years, i.e., 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98.

4. Pursuant to the aforesaid order dated August 14, 2000 passed by the appellate authority, the jurisdictional Superintendent of Taxes reassessed the appellant (petitioner) for all the aforesaid five assessment years by order dated May 25, 2001. It is the aforesaid orders of assessment dated May 25, 2001 along with the appellate order dated August 14, 2000, which had been assailed in the writ petition out of which this appeal has arisen.

5. The learned single judge hearing the writ petition took into account the contentions of the rival parties made on merits as well as on the plea of maintainability of the writ petition as raised on behalf of the respondents. Thereafter, the learned single judge recorded the fact that the petitioner had accepted the appellate order dated August 14, 2000, inasmuch as, he had participated in the reassessment proceeding though it was contended before the learned single judge that the said proceedings were concluded ex parte. In this regard the learned single judge found from the materials placed before him that notices in the reassessment proceedings were issued to the petitioner and the petitioner had appeared in the said proceedings through an authorized representative who had produced the books of accounts. Faced with the situation where the appellate order dated August 14, 2000 under challenge in the writ petition had been accepted by the appellant (petitioner) by participating in the consequential reassessment proceedings and the petitioner having offered no explanation for not availing of the statutory remedy of appeal against the reassessment orders, the learned single judge thought it proper to hold that the writ petition should not be entertained for adjudication on merits. Accordingly, the order of dismissal was passed giving rise to the present appeal.

6. We have heard Shri J. Bora, the learned Counsel for the appellant (petitioner) and Shri R. Dubey, the learned standing counsel, Finance.

7. Shri J. Bora, the learned Counsel for the appellant (petitioner), has strenuously urged that the writ petition having been heard on merits, the learned single judge could not and ought not to have dismissed the same on the ground of its maintainability. In this regard reliance has been placed on a decision of the apex court in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, The learned Counsel has additionally urged that the appellate order dated August 14, 2000 and the consequential reassessment orders are ex facie not tenable, inasmuch as, the proceedings in the appeal in which the order dated August 14,

2000 was passed pertained to two assessment years, i.e., 1993-94 and 1994-95. Therefore, according to the learned Counsel, orders could not have been passed in the said appeal directing the jurisdictional authority to reassess the appellant (petitioner) for the five assessment years, details of which have already been noticed. Shri J. Bora, learned Counsel for the appellant (petitioner), has further submitted that the writ petition was filed in the year 2002 and eight years having elapsed, the same should be heard on merits instead of relegating the appellant (petitioner) to the forum of appeal provided by the statute.

8. Shri Dubey, the learned Departmental counsel, has controverted the contentions advanced on behalf of the appellant (writ petitioner) by contending that the reassessment orders of the five years are a sequel to the appellate order dated August 14, 2000. The appellant (writ petitioner) did not challenge the said appellate order at an appropriate point of time and instead-accepted the same, a fact manifested by the participation of the appellant (writ petitioner) in the consequential reassessment proceedings. Therefore, according to Shri Dubey, learned Departmental counsel, the conduct of the appellant (petitioner) in accepting the appellate order and thereafter turning back from the stand earlier taken should disincline the court, in the exercise of the highly discretionary jurisdiction under Article 226 of the Constitution, to afford to the petitioner an adjudication on merits. That apart, according to the learned standing counsel, there is no explanation whatsoever as to why the appellant (writ petitioner) had not exhausted the remedy provided to him by the statute and that no exceptional case has been made out for examination of the reassessment orders on the merits in exercise of the highly discretionary jurisdiction under Article 226 of the Constitution.

9. We have considered the rival submissions advanced on behalf of the parties.

10. The first point that has to be answered by the court is whether on the strength of the decision of the apex court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, any law can be understood to have been laid down to the effect that once a writ petition is admitted for adjudication, such adjudication must necessarily be on merits and the writ petition cannot be dismissed on ground of its maintainability.

11. To answer the aforesaid question, it is necessary to have a close look on the facts in which the decision in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, was rendered by the apex court. In the aforesaid case one Hirday Narain was assessed in the status of an HUF along with five of his sons for a part of the period and also in the status of an HUF along with his minor son for the remaining period. While passing the assessment order, the primary authority, i.e., the Income Tax Officer, had made the income in the hands of Hirday Narain and his minor son liable to tax by virtue of the provisions contained in Section 16(3)(a)(ii) of the Income Tax Act, 1922. Hirday Narain filed a rectification application u/s 35 of the Income Tax Act, 1922, pointing out that there is an ex facie error in the order passed by the Income Tax Officer, inasmuch as, Section

16(3)(a) (ii) of the Act had no application in assessing the income of Hirday Narain along with his minor son in the status of an HUF. The Income Tax officer accepted the stand projected in the rectification application but refused to grant any relief to Hirday Narain by changing the status of Hirday Narain from that of an HUF to an individual. The aforesaid change of status was, however, without any notice or opportunity.

12. In the aforesaid facts, the apex court first of all considered the question as to whether there was a second HUF consisting of Hirday Narain and his minor son as held by the Income Tax Officer. In paragraph 10 of the judgment (at page 31 of 78 ITR), the apex court came to the finding, "There was in fact an existing Hindu undivided family of which, for a part of the period, Hirday Narain and his wife were members, and for the rest, besides the two, their infant son was a member". Thereafter, the apex court came to the conclusion that the change of status of Hirday Narain from an HUF to that of an individual was made by the Income Tax Officer without affording any opportunity and, therefore, there was a gross violation of the principles of natural justice. It is only thereafter that the apex court took the view that the failure on the part of Hirday Narain to exhaust the remedy of revision as provided to him by the statute cannot be fatal in a situation where the High Court had considered the case of the rival parties on merits.

13. The facts stated above would make it amply clear that the view of the apex court that failure on the part of Hirday Narain to exhaust the revisional remedy provided to him by the statute was not fatal was taken in the peculiar facts and circumstances of the case and the aforesaid decision, by no means, can be understood to have laid down any law of general application to the effect that once a writ petition is admitted for regular hearing, the same cannot be dismissed or rejected on the ground of maintainability, as asserted by the learned Counsel for the petitioner.

14. There are numerous decisions details of which need not burden this order, to show that the rule of exhaustion of alternative remedy is not a rule of law but one of prudence and discretion and further that in the following three situations the availability of an alternative remedy should not be construed as a bar for entertaining a writ petition, (1) where a writ petition seeks enforcement of any fundamental right(s), (2) where there is violation of the principles of natural justice and (3) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged.

15. In the present case the learned single judge by reference to the records had negated the contention of the appellant (petitioner) that the reassessment proceedings were without any notice or opportunity to him, inasmuch as, it was conclusively found by the learned judge that notices in the reassessment proceedings had been issued to the appellant (writ petitioner) who had participated in the same. Whether the reassessment proceedings carried out pursuant to the appellate order dated August 14, 2000 are legally tenable or

otherwise, is a question that can be determined only after detailed consideration of the merits of the case. Prima facie, the said reassessment proceedings being pursuant to the appellate order and the appellate order not having been challenged by the appellant (writ petitioner), it cannot be said that the said proceedings are without jurisdiction. The question as to whether the writ petition should be heard despite failure of the appellant (writ petitioner) to exercise the statutory remedies is essentially a question of discretion to be exercised within well laid down judicial parameters. In the present case the learned single judge had exercised his discretion against the appellant by holding that the appellant (writ petitioner) had accepted the appellate order and had participated in the reassessment proceedings. The learned single judge had also recorded that no explanation had been offered by the appellant (writ petitioner) for not availing of the alternative remedy available to him. In such a situation, it cannot be said that the discretion vested in the learned single judge was exercised in an unacceptable manner. So long the exercise of discretion is proper even if we are to disagree with the eventual conclusion of the learned single judge, (we make it clear that no such disagreement is expressed) the same would not be sufficient to supplant our views in place of those recorded by the learned single judge in an intra court appeal.

16. We, therefore, are inclined to take the view that the order of the learned single judge dated January 19, 2007 passed in W. P. (C) No. 189 of 2002 See [2007] 10 VST 499 ought not to be interfered by us. The writ appeal consequently has to fail. It is accordingly dismissed. However, in the facts and circumstances of the case, we make no order as to costs.