
(1972) 09 AHC CK 0021

In the Allahabad High Court

Case No : Sales Tax Reference No's. 686 and 687 of 1971

Satish Chandra Narmesh Kumar

APPELLANT

Vs

Commissioner of Sales Tax and Others

RESPONDENT

Date of Decision : 23-09-1972

Acts Referred:

Limitation Act, 1963 — Section 14, 5

Citation : (1973) 31 STC 440

Hon'ble Judges : T.S. Misra, J; R.L. Gulati, J

Bench : Division Bench

Advocate : J.C. Bhardwaj, for the Appellant; Standing Counsel, for the Respondent

Judgement

R.L. Gulati, J.—This is a statement of the case u/s 11(1) of the U. P. Sales Tax Act relating to assessment years 1966-67 and 1967-68.

2. It appears that the assessment proceedings for the two years in question were taken against the assessee simultaneously. The proceedings were adjourned for as many as 12 times. The cases were ultimately fixed for 28th May, 1969. The assessee again sought adjournment but the same was refused and the assessments were completed ex parte fixing the turnover at Rs. 2 lacs for each of the two years. The assessee moved two applications u/s 30 of the Act for setting aside the ex parte assessment orders. It did not, however, file appeals against the assessment orders u/s 9 of the Act. After the applications u/s 30 were rejected, the assessee preferred two appeals against the assessment orders, but these appeals were filed beyond time. The assessee also filed appeals against the orders rejecting the applications u/s 30. Both these sets of appeals were eventually dismissed. The appeals against the orders u/s 30 were dismissed on the ground that the assessee had willfully failed to appear on the date fixed and the appeals against the ex parte assessments were dismissed on the ground that they were barred by time.

3. The assessee seems to have contended before the appellate authority that in

computing the period of limitation for appeals, the time spent by it in prosecuting the proceedings u/s 30 should have been excluded either u/s 14 or u/s 5 of the Limitation Act. This contention was not accepted by the appellate authority nor has it been accepted by the Judge (Revisions) before whom the assessee went up in revision. Before the Judge (Revisions) it was also contended that the turnover of Rs. 2 lacs fixed for each of the two assessment years was arbitrary and without any material. This contention has also been rejected. However, the Judge (Revisions), at the instance of the assessee, has made this reference on the following questions of law :

(1) Whether, on the facts and in the circumstances of this case, the turnover determined at Rs. 2,00,000 by the assessing authority was justified or not ?

(2) Whether, on the facts and in the circumstances of this case, the period spent by the applicant in prosecuting the remedy u/s 30 of the U. P. Sales Tax Act should have been excluded for computing the period of limitation for filing the appeal ?

(3) Whether, on the facts and in the circumstances of this case, the appellate authority ought to have condoned the delay u/s 5 of the Limitation Act ?

4. We shall take up questions Nos. (2) and (3) first. When an assessment order is passed under the U. P. Sales Tax Act, an appeal lies against it u/s 9 and if the order is ex parte, Section 30 provides an additional remedy by way of an application for setting aside the ex parte order. The two remedies, however, are not mutually exclusive nor consecutive. They are simultaneous. The period of limitation for both the remedies is 30 days from the date of service of the assessment order. If an assessee wants to avail of both the remedies, he must do so within the period of limitation. It is not open to him to pursue one remedy and thereafter to pursue the other and to claim that the time spent in pursuing the first remedy should be excluded from the period of limitation for the second remedy.

5. Section 14(2) of the Indian Limitation Act, upon which reliance has been placed on behalf of the assessee, reads :

14. (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

6. Admittedly, this provision does not apply in terms but its principle may apply. In substance, it provides that a person who had mistakenly been prosecuting some proceeding in a court may be given the benefit of the time spent in such proceeding while computing the period of limitation for the subsequent proceeding in a proper court. But, in order that this provision may apply, three

conditions must exist :

- (i) the first proceeding must be against the same party and for the same relief;
- (ii) the court before whom such proceeding is taken should be unable to entertain ; and
- (iii) the court is unable to entertain the proceeding for defect of jurisdiction or other cause of a like nature.

7. All these three conditions are wanting in the instant case. The relief u/s 30 is to have the case reopened after having the ex parte orders set aside while the relief u/s 9 is to have the assessment order annulled, set aside or modified. Thus the relief in the two proceedings are not identical. The application of the assessee u/s 30 was entertainable and had been entertained but was dismissed on merits. It was not dismissed for want of jurisdiction or a cause of similar nature. The Full Bench decision of this Court in Commissioner of Sales Tax, U. P. v. Parson Tools and Plants, Kanpur [1971] 27 S.T.C. 73 is clearly distinguishable. There an appeal was dismissed on default under Rule 68(5) of the U. P. Sales Tax Rules. An application was made under Sub-rule (6) of Rule 68 for setting aside the order dismissing the appeal in default. In the meantime, this court held Rule 68(5) to be ultra vires. The restoration application was accordingly dismissed on the ground that Rule 68(5) being ultra vires, no application for restoration was maintainable as the appeal could not be deemed to have been dismissed in default. In such a case, this court held that the time spent in prosecuting the application under Rule 68(6) should be excluded u/s 14(2) of the Limitation Act, obviously, because the application had been dismissed for want of jurisdiction. Such, however, is not the position in the case before us.

8. In India Electric Works Ltd. Vs. James Mantosh and Another, , the Supreme Court has no doubt observed that the words "causes of a like nature" occurring in Section 14 of the Limitation Act must be construed liberally. But in that case also the earlier suit had been dismissed by reason of an infirmity or defect of jurisdiction and since the defect of jurisdiction had in no way been brought about by the plaintiff or by any absence of diligence or good faith on his part, the plaintiff was held to be entitled to the benefit of Section 14. But, however liberally one may construe the words "other causes of a like nature", the benefit of Section 14 cannot be extended to a case where an application was entertainable and was, in fact, entertained, but dismissed on merits. We are thus clearly of the opinion that the benefit of Section 14(2) could not have been extended to the assessee.

9. Coming now to question No. (3), the time spent by the assessee in prosecuting its application u/s 30 cannot, in our opinion, be excluded even u/s 5 of the Limitation Act. The learned counsel says that it was the mistaken legal advice which was responsible for the delay and, as such, it should be held to be a sufficient cause. We do not find how the advice given to the assessee was mistaken. Section 30 was clearly applicable and the assessee was properly

advised to move an application under that section to have the ex parte order set aside. There is no assertion that the assessee was advised not to file an appeal within the period of limitation. As such, there is no question of the delay having been occasioned by a mistaken legal advice and the delay in filing the appeal, therefore, could not have been excused u/s 5 of the Limitation Act.

10. Now the question No. (1). The two assessments were best Judgment assessments and of necessity had to be made by estimate. But even an estimate has to be based upon some material. It cannot be a sheer guess. For the assessment year 1966-67, the assessee had returned a turnover of Rs. 28,870 and for the assessment year 1967-68, the returned turnover was Rs. 16,889. The Sales Tax Officer estimated the turnover for both the assessment years at a uniform figure of Rs. 2 lacs. The revising authority at first considered the assessments too high and arbitrary but when it found that the turnover for the immediately preceding year had been fixed at Rs. 1,50,000, it confirmed the assessments. From the statement of the case now it appears that the turnover as fixed by the assessing authority for the year 1965-66 was Rs. 1,15,000 and not Rs. 1,50,000. Thus the basis upon which the revising authority proceeded to confirm the assessment has turned out to be erroneous. Moreover, the assessment for the year 1965-66 was then pending in revision before the Judge (Revisions). He has since set it aside and remanded the case to the Sales Tax Officer for a fresh assessment. Thus the very basis upon which the two assessments in question have been affirmed has disappeared. There is no other material upon which the assessments can be justified.

11. We accordingly answer the three questions as below :

Question No. (1) in the negative in favour of the assessee and against the department.

Question No. (2) in the negative in favour of the department and against the assessee.

Question No. (3) in the negative in favour of the department and against the assessee.

12. In the circumstances, there will be no order as to costs.