

(1973) 11 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 7805 of 1972

Satish Chandra, Nirmesh Kumar

APPELLANT

Vs

Additional Judge (Revisions), Sales Tax and Others

RESPONDENT

Date of Decision : 26-11-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Constitution of India, 1950 — Article 226, 227

Limitation Act, 1963 — Section 10, 11, 14, 30, 5

Citation : (1974) 34 STC 304

Hon'ble Judges : R.L. Gulati, J;C.S.P. Singh, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

R.L. Gulati, J.—This is a petition under Article 226 of the Constitution.

2. It appears that the assessment proceedings under the U. P. Sales Tax Act were taken against the petitioner simultaneously for the years 1966-67 and 1967-68. The hearing was adjourned for a number of times and was finally fixed for 28th May, 1969. The petitioner again sought adjournment, but the same was refused and the assessments were completed ex parte fixing the turnover at rupees two lacs for each of the two years. The petitioner moved two applications u/s 30 of the Act for setting aside the ex parte assessment orders. These applications were rejected and thereafter the petitioner preferred two appeals against the assessment orders, but they were filed beyond time. The petitioner also filed appeals against the orders rejecting the applications u/s 30. Both these sets of appeals were eventually dismissed. The appeals against the order u/s 30 were dismissed on the ground that the petitioner 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. The petitioner 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 was it accepted by the Judge (Revisions). Before the Judge (Revisions) it was contended that the assessment of the turnover at rupees two lacs fixed for each year was arbitrary and without any material. The Judge (Revisions) disposed of these grounds in the following words:

When the four revisions were heard, in view of the gap between the assessee's estimates and the estimates of the S.T.O., I felt inclined to allow the revisions so that the assessee could be given an opportunity to place its version before the assessing authority. At that time I was not given any indication that in the next preceding year, i.e., 1985-66, the admitted turnover of the assessee was Rs. 81,000 and the estimate made by the assessing authority was Rs. 1,50,000. I had observed that even though there may not have been any sufficient cause for non-appearance yet when the estimates are without basis this Court would be entitled to ask for the correction of the assessment. Now that the assessment order has been read from which it has appeared that even in the next preceding year the turnover has been fixed at Rs. 1,50,000. This aspect of the assessment has disappeared.

3. The petitioner then applied for a reference and the revising authority referred the following three questions for the opinion of this Court:

(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. This Court by its judgment dated 23rd September, 1972 *Satish Chandra Narmesh Kumar Vs. Commissioner of Sales Tax and Others*, answered questions Nos. (2) and (3) in the negative and against the assessee. Question No. (1) was answered in favour of the assessee in the following words:

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.

5. After the reference had been answered the revising authority was required to pass an order u/s 11(6) of the Act in conformity with the judgment of this Court. The obvious thing for him to do was to modify the revisional order by making a proper assessment of the turnover in place of the assessment of Rs. 2,00,000, which was found by this Court to be without any basis or material. But the revising authority felt that no relief could be allowed to the petitioner because the order passed by the appellate authority rejecting the assessee's appeals had become final. He accordingly passed a queer order u/s 11(6). In place of the paragraph dealing with the assessee's contention regarding the turnover as extracted in this judgment, he substituted the following:

As regards the estimate of the turnover, I find that the assessing authority was not justified in determining it at Rs. 2,00,000 for any of the years in question.

6. He, however, left the operative portion of the order dismissing the revision petition intact. The result was that although the assessments were found to be unjustified, yet the assessee got no relief.

7. Now, it is true that the petitioner's appeals against the quantum of turnovers were rejected by the appellate authority on the ground that they were barred by time and the revising authority as such could legitimately refuse to entertain the revisions against the quantum of the turnover, but, as it is, he entertained the revisions and rejected them on the merits justifying the estimate of the turnover. Not only that, he, u/s 11(1), referred a question to this Court with regard to the quantum. At the time of the reference also it was nobody's case that question No. (1), which related to the quantum of the turnover, had wrongly been referred. In these circumstances, this Court answered question No. (1) also as it arose out of the revisional order and had been referred. After that it was not open to the revising authority to give effect to the judgment of this Court on any ground whatsoever. Section 11(6) provides that the revising authority shall pass such orders as are necessary to dispose of the case in conformity with such judgment. The order contemplated u/s 11(6) has to be in conformity with the opinion given by the High Court on the reference made to it. The revising authority, while passing such an order, is not exercising its revisional jurisdiction u/s 10. It has merely to carry out the judgment of the High Court and pass an order in conformity with it. The position is not altered even if the reference made

by the revising authority turns out to be wrong. The revising authority had no option in the matter except to pass an order in conformity with the judgment of the High Court. The order passed by the revising authority u/s 11(6) is not an order passed in conformity with the judgment of this Court.

8. We are conscious of the fact that out of the three questions, questions Nos. (2) and (3) were answered against the assessee, as a result of which it had to be held that the petitioner's appeals were rightly rejected as time-barred. In such circumstances, question No. (1) would not have survived. But, as no objection was taken by the department at the time of the hearing of the reference, question No. (1), which related to the quantum, was also answered by this Court and the answer was in favour of the assessee. After this Court had answered question No. (1), the revising authority could not ignore The answer. However, the revising authority was not in a happy position inasmuch as it had to dispose of the case in conformity with the answer given by this Court to all the three questions, and as a result of the answer to questions Nos. (2) and (3), the petitioner's revision petition had to be dismissed as time-barred. In these circumstances, we allowed the assessee to amend the petition and pray for the quashing of the assessment orders.

9. The learned standing counsel contends that the assessment orders cannot be quashed because they have merged in the appellate orders which in turn have merged in the revisional orders. This argument does not present much difficulty inasmuch as the appellate and the revisional orders can also be quashed along with the assessment orders. But it is not necessary to adopt that course, because we are of the opinion that, in the instant case, the assessment orders did not merge in the appellate orders. The petitioner's appeals were dismissed as time-barred and were not dismissed on merits. The question as to whether the assessments were right or wrong was never gone into. The appellate authority did nothing more than refuse to entertain the appeals. As has been pointed out by the Supreme Court in *State of Madras Vs. Madurai Mills Co., Ltd.*, , the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that whenever there are two orders one by the inferior authority and the other by the superior authority passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject-matter of the appellate or the revisional order and the scope of the appeal or the revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or the revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

10. In *Janata Oil Industries, Nagpur v. Deputy Commissioner of Sales Tax* [1967] 19 S.T.C. 97 All, it has been held that where a second appeal under the C. P. and Berar Sales Tax Act is rejected on the ground of non-payment of tax, the order appealed against does not merge in the order of dismissal, so that a revision would lie against the former order. The same view has been taken by the Mysore High Court in *Krishna Flour Mills Ltd. Vs. Commissioner of Income Tax, Mysore*, .

11. u/s 33-A of the Income Tax Act, 1922, the Commissioner can revise an order passed by the Appellate Assistant Commissioner of Income Tax, but he has no power to revise such an order if the same has been made the subject of an appeal to the Appellate Tribunal. There is a catena of cases decided by the various High Courts to the effect that an order can be said to be subject of an appeal only when it is subject of an effective appeal, so that if the Tribunal refuses to admit an appeal on the ground that it is time-barred, the order cannot be said to be subject of an appeal and the assessee would be entitled to apply to the Commissioner in revision: see *A. Vs. SREENIVASALU NAIDU v. COMMISSIONER OF Income Tax MADRAS.*, and *Jagmohandas Gokaldas Vs. Commissioner of Wealth Tax, Bombay.* . The principle underlying these cases is the same, namely, that an order does not merge in an appellate order, if the appeal is dismissed as time-barred or on similar other preliminary grounds.

12. The learned Counsel then contended that after a reference u/s 11 of the U. P. Sales Tax Act this Court was not competent to entertain a writ petition under Article 226 of the Constitution against the assessment orders. In support of this contention he has placed reliance upon a decision of the Supreme Court in *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat.* . In that case a question arose as to whether the High Court could interfere under Article 226 or 227 of the Constitution with the order of the appellate court in a proceeding under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, when a revision petition u/s 115, C.P.C. against the same order had previously been dismissed by the High Court. The Supreme Court answered the question in the negative on the ground that an order passed on revision stood on the same footing as an order passed on appeal and the order of the appellate court merged in the revisional order of the High Court. This case has no application to the facts of the present case for the simple reason that; an order passed by the High Court u/s 11 of the U.P. Sales Tax Act is not a revisional or appellate order and the orders of the sales tax authorities do not merge in such an order which, in fact, is an opinion expressed by the High Court on a question of law. The High Court does not dispose of the case which is disposed of by the revising authority in conformity with the opinion expressed by the High Court. It is true that ordinarily this Court would not interfere with the orders passed by the sales, tax authorities after a final order has been passed by the revising authority in conformity with the opinion expressed by the High Court. But, as we have indicated above, the proceedings by way of reference in the instant case have misfired inasmuch as even though question No. (1) was answered in favour of the assessee, the revising authority was not able to dispose of the case in conformity with the opinion of this Court because of technical difficulties pointed out above. In these circumstances, we are unable to hold that the assessment orders cannot be interfered with in a petition under Article 226 of the Constitution. Whether or not a petition should be entertained against an assessment order would depend on the facts of each case. The facts of the present case are such that there is no other way of giving relief to the petitioner

to which he has been found entitled.

13. We, accordingly, allow this petition and direct that a writ in the nature of certiorari shall issue quashing the assessment orders dated 31st May, 1969, relating to the assessment years 1966-67 and 1967-68, copies whereof are annexures A and B to the writ petition. It will, however, be open to the Sales Tax Officer to pass fresh assessment orders in accordance with the law and the observations made herein.

14. The petitioner is entitled to the costs.