

(1998) 09 AHC CK 0045
In the Allahabad High Court
Case No : Trade Tax Revision No. 737 of 1990

U.P. Brick Field Mavi Kalan

APPELLANT

Vs

Commissioner, Sales Tax

RESPONDENT

Date of Decision : 21-09-1998

Acts Referred:

Central Sales Tax Act, 1956 — Section 21
Uttar Pradesh Trade Tax Act, 1948 — Section 10, 11, 9

Citation : (1998) 4 AWC 513 : (1998) AWC 513

Hon'ble Judges : M.C. Agarwal, J

Bench : Single Bench

Advocate : Shah O.P. Agrawal, for the Appellant;

Judgement

M.C. Agarwal, J.—This revision petition u/s 11 of U. P. Trade Tax Act is directed against the order dated 9.11.1989, passed by Trade Tax Tribunal, Meerut, and the questions involved in the case is whether the order passed by the assessing officer in consequence of the order of remand passed by the 1st appellate authority survived when subsequently the order of remand itself is set aside by the Trade Tax Tribunal disposing of the second appeal against the first appellate order.

2. I have heard Sri S.O.P. Agarwal, learned counsel for the revisionist and Sri R.D. Gupta, learned standing counsel appearing on behalf of respondent.

3. The proceedings relates to the assessment year 1982-83. The order of assessment was made on 12.4.1985. The dealer revisionist preferred an appeal to the Assistant Commissioner (Judicial) Trade Tax. The appeal was allowed by an order dated 20.7.1985 and setting aside the assessment order the matter was remanded to the assessing officer. In pursuance of the remand order, the assessing officer made a fresh assessment on 19th October, 1985, which is said to have been communicated to the dealer on 18.11.1985.

4. On 24.10.1985, the dealer preferred a second appeal being Second Appeal No.

598 of 1985, against the order of remand dated 20.7.1985. The Tribunal by an order of the same date stayed the proceeding before the assessing officer till the decision of the second appeal. This appeal was ultimately allowed by an order dated 29.6.1987. The remand order was set aside and the Assistant Commissioner (Judicial) Trade Tax was directed to dispose of the appeal on merits.

5. Against the assessment order dated 19.10.1985, the dealer again preferred an appeal which was decided on 31.3.1986 and the dealer preferred a second appeal before the Trade Tax Tribunal; being Second Appeal No. 593 of 1986 and that has been dismissed by the impugned order dated 9th November, 1989.

6. It was contended before the Tribunal that the order of remand passed by the Assistant Commissioner (Judicial) Trade Tax that conferred authority on the assessing officer to make fresh assessment order, having been set aside by the Tribunal, the assessment based on the order dated 20th July, 1985 became a nullity. Reliance was placed by the dealer appellant on a judgment of this Court in Commissioner of Sales Tax v. M/s. Orgamatic Chemicals 1983 ATJ 116, in which the question was whether the appeal pending before the Tribunal against the order of remand passed by the Assistant Commissioner (Judicial) Trade Tax, became infructuous, if in compliance with the order of remand, the assessing officer made fresh assessment order. This Court, held that the appeal did not become infructuous. It was observed as under :

"8. The assessee filed an appeal against the order of the Assistant Commissioner (Judicial) before the Tribunal. Consequent upon the order of remand passed by Assistant Commissioner (Judicial), the Sales Tax Officer made an assessment order u/s 21 of the Sales Tax Act during the pendency of the appeal before the Tribunal. It is urged that in view of an order having been made u/s 21, the appeal of the assessee before the Tribunal became infructuous.

9. The order of remand itself was challenged in the appeal. Any order passed by the Sales Tax Officer in pursuance of the order of remand passed by the Assistant Commissioner (Judicial) could only survive if the remand order survives. In other words, if the appeal of the assessee was unsuccessful. An appeal by the assessee before the Tribunal did not become infructuous in view of the order passed by the Sales Tax Officer. In this connection see the decision in the case of Sardar Sher Ali Khan and others v. Prescribed Authority and others. 1978 UPRCC 618, and cases referred to therein."

7. The Tribunal has observed that this ruling does not apply to the facts and circumstances of the present case because Second Appeal No. 598 of 1985 was preferred after the assessment had already been made. This view of the Tribunal is patently perverse because if the party has a right of appeal against the order of remand, as admittedly the dealer-revisionist had, the said right cannot be pre-empted by making hurried assessment. The right of appeal is a statutory right and does not depend on the conduct of other party and no party can legally

frustrate the right of appeal by others. This is what was held by this Court, in the aforesaid case in which reference was made to the case of Sardar Sher Ali Khan v. Prescribed Authority and others 1978 UPRCC 618. In that case, it was observed that if the basis collapses, the superstructure standing on it would also fall. The order of remand dated 20.7.1985 is the basis for the second assessment order dated 19.10.1985 and the basis that is the order dated 20.7.1985, having been knocked off by the Tribunal, the assessment order dated 19.10.1985 and the appellate order dated 31.3.1986 became nullity by the very force of the Tribunal's order dated 29th June. 1987 and this would be the result even if no appeal was filed against the second assessment order or the first appellate order.

8. A similar controversy had arisen before Hon. Supreme Court in Shiromani Gurdwara Parbandhak Committee and Others Vs. Raja Shiv Rattan Dev Singh and Others, , in that case High Court had remanded the case to the trial court for proceeding in accordance with law and between the date of application for leave to appeal to Hon"ble Supreme Court from the order of the High Court and the date on which leave was granted the trial court passed the decree. The question was whether the subsequent decree by the trial court would affect the appeal before Hon"ble Supreme Court. Hon"ble Supreme Court held that subsequent decree of the trial court even if not appealed against must in the circumstances be taken to be subject to the result of appeal to Hon"ble Supreme Court and cannot be said to be conclusive so as to prevent Hon"ble Supreme Court from dealing with the appeal and setting aside or modifying the judgment of the High Court. If passing of an order in pursuance of remand order does not affect the appeal against the order of remand, it cannot affect the right of the aggrieved party to appeal against the order of remand. This is necessary conclusion from the above statement of law otherwise the right to appeal against the order of remand can be frustrated by hurried compliance of the remand order. Therefore, if any order is passed in pursuance of the order of remand, it will always be subject to any order that may be passed on the appeal against the order of remand and if, as in the present case, the remand order is set aside and ceases to have legal force, any order passed in compliance of the order of remand would automatically be nullified and as observed by Hon"ble Supreme Court, no appeal need be filed to get such an order set aside and declared a nullity. Wherever, as in the present case, second appeal against the subsequent order was pending when the order of remand was set aside, the second appeal required to be allowed and the subsequent assessment order set aside. The learned Tribunal has observed that the dealer did not bring to the notice of the Tribunal while the first second appeal, i.e., Second Appeal No. 598 of 1985 was pending, that assessment has already been made in compliance with the order of remand and even the first appeal had been dismissed and that if it was so done, the fate of that second appeal would have been different. This is a wrong, approach. The department is equally a party to the proceeding and could have brought the said facts to the notice of the Tribunal. Even if such facts were brought to the notice of the Tribunal at that time, that did not mean that the dealer's appeal would

have been dismissed. The validity of the order of remand depended on its own facts and validity cannot be lent to it by the subsequent order of assessment or the order on the dealer's second first appeal.

9. Learned standing counsel merely toed the repeated the view taken by the Trade Tax Tribunal, for which he could not site any authority in support of his contention.

10. For the aforesaid reasons, the impugned order passed by the Trade Tax Tribunal is not in accordance with law and deserved to be set aside. This revision petition is, therefore, allowed and setting aside the Tribunal's order dated 9.11.1989, it is ordered that the said appeal will stand allowed. The order dated 31.3.1986 passed by the Assistant Commissioner (Judicial) Trade Tax is also set aside and the assessment order dated 19.10.1985 is quashed. The dealer revisionist will get costs of this revision, which I assess at Rs. 1,500.