

A. Vs. Sreenivasalu Naidu V. Commissioner of Income-tax Madras.

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Court : Chennai

Decided On : Mar-15-1948

Reported in : [1948]16ITR341(Mad)

Appellant : A.

Respondent : Sreenivasalu Naidu V. Commissioner of Income-tax Madras.

Judgement :

This is a batch of applications under Sections 45 of the Specific Relief Act for directing the Commissioner of Income-tax, Madras, to hear and determine the revisions filed by the petitioner against the orders of the Appellate Assistant Commissioner of Income-tax Coimbatore Range. The facts are not in dispute and they may be briefly stated.

The Income-tax Officer, II Circle, Coimbatore, passed orders of assessment against the petitioner for the assessment years 1940-41, 1941-42, 1943-44, 1944-45 and 1945-46. Against the said orders of assessment the petitioner preferred Income-tax Appeals Nos. 237, 1253, 1254 and 1255 of 1945-46 and Income-tax Appeal No. 315 of 1946-47 to the Appellate Commissioner of Income-tax, Coimbatore Range. The Appellate Assistant Commissioner disposed of the appeals on the 6th December, 1946. The appeals were allowed in part, but the petitioner did not get the entire relief he claimed. Against the said orders the petitioner preferred Income-tax Appeals Nos. 3302, 3303, 3299, 3300 and 3301 of 1946-47 to the Income-tax Appellate Tribunal, madras Bench. The Appellate

Tribunal dismissed the appeals as time-barred. On 15th December, 1947, the petitioner applied to the Commissioner of Income-tax, Madras, under Section 33A (2) of the Indian Income-tax Act for revising the orders of the Appellate Assistant Commissioner, Coimbatore. This was numbered as I. T. R. Nos. 78 to 82 of 1947-48 on the file of the Commissioner of Income-tax, Madras. On 23rd December, 1947, the Commissioner of Income-tax, declined to entertain the said applications on the ground that the orders of the Appellate Assistant Commissioner had already been made the subject of appeals to the Appellate Tribunal. The petitioner seeks the aid of this Court to compel the respondent to hear and determine the revisions, which he was bound in law to do.

The learned counsel for the Commissioner of Income-tax raised three contentions against the maintainability of this application : (1) that the revisions were not maintainable against the order of the Appellate Assistant Commissioner, as those orders had been made the subject of appeals to the Appellate Tribunal within the meaning of Section 33A (2), proviso (c); (2) that the Income Tax Act exhaustively defines the obligations and remedies of the taxpayer and so the remedy provided by Section 45 of the Specific Relief Act is not available for the assessee; (3) that as the applicant had other specific and adequate legal remedy, the petitioner cannot ask for a relief under Section 45 of the Specific Relief Act. The answer to the first point turns upon the construction of proviso (c) of Section 33A (2). The relevant provisions of the Indian Income-tax Act read as follows :-

'Section 33. (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under Section 28 or Section 31 may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him.

(2) The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under Section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner.

(2A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period.

(3) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner, and shall, except in the case of an appeal referred to in sub-section (2), be accompanied by a fee of one hundred rupees.

(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner.

* * * *

(6) Save as provided in Section 66 orders passed by the Appellate Tribunal on appeal shall be final.

Section 33A. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit : Provided that the Commissioner shall not revise any order under this sub-section if -

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Appellate Tribunal, or

(c) the order has been made more than one year previously.

(2) The Commissioner may, on application by an assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in

which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit :

Provided that the Commissioner shall not revise any order under this sub-section if -

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal :

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

(3) Every application by an assessee under sub-section (2) shall be accompanied by a fee of twenty-five rupees.'

Section 33 provides for an appeal against the order of the Assistant Commissioner to the Appellate Tribunal within sixty days of the date on which the order of the Assistant Commissioner is communicated to the party. Section 33 (2A) gives a discretion to the Tribunal to admit an appeal after the expiry of the 60 days if there was sufficient cause for not presenting the appeal in time. Under Section 33A

(1) the Commissioner is empowered to revise the orders of any authority subordinate to him suo motu and Section 33A

(2) provides a revision to the Commissioner against an order of an authority subordinate to him at the instance of the aggrieved party. The proviso to sub-clause

(2) of Section 33A in so far as it is relevant deals with three contingencies when such power of revision cannot be exercised by the Commissioner :

(1) when the time prescribed for preferring an appeal to the Appellate Tribunal has not expired,

(2) when the assessee has not waived his right to prefer an appeal within the time so prescribed, and

(3) where the order has been made the subject of an appeal to the Appellate Tribunal. It is clear from these two sections that the remedy by way of revision is an alternative to the right of appeal provided in Section

33. It will be seen from the history of the legislation that Section 33A was introduced by Act XXIII of 1941. The revisional jurisdiction, which the Commissioner had before the Amendment Act of 1939, was taken away by the repeal of the old Section

33. But the legislature obviously found that another alternative remedy less costly was necessary to give relief where the stakes involved were small, and introduced the revisional power again. An assessee can either prefer an appeal to the Appellate Tribunal or he may select the cheaper remedy and apply to the Commissioner to revise the order. If he so elects, if the time prescribed for preferring an appeal has not expired, he must waive his right to prefer an appeal. The object of the sections is clear. The assessee can agitate the validity of the order of the subordinate authority either before the Tribunal or the Commissioner. That was the intention of the legislature, and, in my view, the provisions of the aforesaid two sections clearly bring out the intention. The learned counsel for the Commissioner contended that the same consequences would follow even if an appeal was failed and dismissed as out of time. If this contention is accepted, it will defeat the purpose of the enactment and I cannot accept the same unless the words used in the section clearly support such contention. Mr. Rama Rao Saheb contends that if an assessee exercises his option to prefer an appeal and files an appeal, whether it is admitted or not the order is 'subject of an appeal to the Appellate Tribunal' in clause (c) of the proviso. I cannot agree with this contention.

The order is made the subject of an appeal only when it is the subject matter of an effective appeal. If the appeal is not admitted and is disposed of on the ground that it was filed after the prescribed time, the order could not be said to be the subject of an appeal. Section 33 also supports the said view. Under Section 33

(1) an assessee can prefer an appeal within 60 days and sub-section (2A) empowers the Tribunal to admit an appeal even after 60 days if it is satisfied that there was sufficient cause for not presenting it within the period. This clearly indicates that till such order was made, the appeal was not admitted and, therefore, it must be treated as not having been legally on the file of the Tribunal.

Decided cases also support my view. In *Bayya Reddi v. Gopala Rao* a question arose as regards the construction of the words 'There has been an appeal' within the meaning of Article 182 (2) of the Indian Limitation Act. The words 'There has been an appeal' are obviously wider in scope than the words 'the subject of an appeal.' Even so, Madhavan Nair, J., (as he then was), held that where an appeal memorandum presented to the High Court was rejected as being out of time, there was no appeal to the Court within the meaning of article 182 (2). The learned Judge accepted the argument that as the appeal to the High Court was not admitted as having been filed out of time, it should not be held that there has been an appeal against the decree of the appellate Court. In the present case the Appellate Tribunal refused to excuse the delay and did not admit the appeal.

Shivanath Prasad v. Commissioner of Income-tax also supports the contention of the petitioner. The learned Judges held that rejection of an appeal against an assessment on the ground that the appeal is barred by time is an order refusing to entertain the appeal and is not an order confirming the assessment. In that case an application under Section 66 (3) of the Indian Income Tax Act was taken out requiring the Income-tax Commissioner to state a case under Section 66 (2) of the same Act. If the order of the Assistant Commissioner was considered as an order passed under Sections 31 and 32, Section 66 (2) of the Income-tax Act could be invoked. If, on the other hand, the order of the Income-tax Assistant Commissioner was not an order within the meaning of those sections, the petitioner was not entitled to the relief he asked for. The learned judges held that the order of the

Assistant Commissioner rejecting the appeal and, therefore, the Assistant Commissioners order could not be construed as one passed under Section 31.

The next case relied upon by the learned counsel for the petitioner is Mahant Krishna Dayal Gir v. Syed Abdul Gaffar. The question that arose for consideration in that case was whether a sale should be set aside on the ground of misdescription. Section 33 of the Bengal Land Revenue Sales Act says that no sale shall be annulled unless the ground relied upon shall have been declared and specified in an appeal made to the Commissioner under Section 25 of the Act. Under Section 25 of the Act an appeal to the Commissioner shall be presented within sixty days of the sale, but in that case the appeal was presented after the expiry of sixty days. The learned Judges held that Section 63 has not been complied with, as there has been no appeal to the Commissioner under that section and therefore the suit to set aside the sale was barred.

The aforesaid three cases arose under different Acts, but the principle laid down under those sections is clear and to my mind can be applied to the construction of clause (c) of the proviso. When it was held that there was no appeal when the appeal filed was rejected on the ground it was barred by limitation, it would obviously be unsound to hold that where an appeal had been rejected as out of time, the order had been the subject of an appeal. Indeed, the words 'subject of an appeal' imply that the order appealed against has been decided on the merits. The learned counsel for the Commissioner relied upon a decision of the Judicial Committee in Nagendra Nath Dey v. Suresh Chandra Dey. But the question that arose in that case was one of limitation. Their Lordships held that where an appeal irregular in form and insufficiently stamped was dismissed both on the ground of irregularity and upon the merits, it was nevertheless an appeal within the meaning of Article 182 (2) and though the judgment-debtors against whom execution was sought were not parties to the suit, time only ran against the decree-holder from the date of the decree-holder's decree dismissing the appeal. Dealing with the question on page 334 their Lordships observed :-

'There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court asking it to set

aside or revise a decision of the subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it.'

It will therefore be seen that that decision does not support the contention of Mr. Rama Rao Saheb, as in that case the appeal was admitted and was heard in due course and a decree was made upon it. This case was considered by Madhavan Nair, J., as he then was, in Bayya Reddi v. Gopala Rao. Here the learned Judge, after reciting the observations of the Judicial Committee, stated thus :-

'Having regard to the fact that the appeal with which they were concerned was admitted, which fact is stated in the judgment, the observations should not be made to apply to the question that I am called upon to consider. These observations must be understood with reference to the special arguments which were addressed to their Lordships in connection with meaning of the term where there has been an appeal.'

For the aforesaid reasons I hold that the orders of the Assistant Commissioner have not been made the subject of an appeal to the Appellate Tribunal. If so, it is incumbent on the Commissioner to dispose of the revisions filed before him on the merits in accordance with law.

There is also not much force in the second contention the learned counsel for the Commissioner. He argued that the petitioner had other specific and adequate legal remedy, as he could have filed the appeal to the Appellate Tribunal in time. It is true that the appellant could have preferred an appeal to the Appellate Tribunal against the orders of the Assistant Commissioner within six weeks from the said orders. But, under the Act, they were not bound to do so. They had alternative remedies and they are entitled to have resort to either of them, unless they are precluded from doing so by any provisions of the Act. When the legislature for valid reasons gave them two remedies, it is not open to the Commissioner to say that they were bound to prefer the appeals. This argument obviously could not have any force, if the appellant did not, in the first instance, prefer time-barred ineffective appeals and straightway preferred the revisions. This argument, if it had

any merits, should equally apply to a case where an aggrieved person waived his right of appeal and preferred revisions which were dismissed by the Commissioner. This argument should also apply to cases where a party exercises his option, allows the time to prefer appeals to run out and files a revision, which is dismissed by the Commissioner illegally. Obviously this contention would not have been open to the Commissioner in such cases. If so, it will equally be obtainable in the case of a dismissed or a time-barred ineffective appeal, as in law it has no legal existence. To put in other words, when the option was exercised or when the circumstances of a particular case gave the aggrieved party the right of revision under the statute, it is, as it were, that the other remedy was not open to him. I therefore have no hesitation to reject this argument.

The learned counsel argues that the Income Tax Act exhaustively defines the obligations and remedies of the taxpayer and that, therefore, if a party is aggrieved by any order passed thereunder, he has to resort only to such remedy as provided by the Act. He contends that by implication the remedy to the assessee provided under Section 45 of the Specific Relief Act is taken away by the legislature. In support of this contention he relies upon the decision of the Judicial Committee in *Commissioner of Income-tax, West Punjab v. Tribune Trust, Lahore*. Their Lordships held in that case that the reference under Section 66 (2) was incompetent, as the order of the Commissioner on the assessee's application under Section 33 was not prejudicial to the assessee in the sense that after the order it was in a worse position than before the order was made. Their Lordships also held that in that case the assessments were made by the Income-tax Officer in the exercise of his duty and could not be said to be a nullity merely on the ground that if they had been challenged in due time, they might have been set aside. In the course of the judgment their Lordships reviewed the various sections of the Act and pointed out that it exhaustively defined the obligations and the remedies of the taxpayer and that it would be incompatible with the scheme of the Act that there should have been a collateral right, necessarily vague and undefined, founded on the principle of equity and good conscience. That decision does neither support the argument of the learned counsel directly, nor even remotely throw any light on his argument. The Act may be self-contained; it may provide in a comprehensive manner the rights and the remedies of the parties. If a party is

aggrieved by an order under the provisions of the Act, he will have to resort to the remedy provided thereunder. But if a party takes the remedy provided by the Act in strict conformity thereof but the Tribunal constituted under the Act refuses to discharge its duties provided by the same Act, it is not open to the Tribunal or the authority to say that he cannot be compelled to discharge his statutory functions. Section 45 is extended only to govern such cases and to compel officers to discharge their statutory duties. I therefore also reject this argument.

I am clearly of opinion that this is a fit case for making an order under Section 45 of the Specific Relief Act. The respondent is hereby directed to hear and determine I. T. R. Nos. 78 to 82 of 1947-48 preferred by the petitioner herein against the orders of the Appellate Assistant Commissioner of Income-tax, Coimbatore, in accordance with law. The respondent will pay the costs of the petitioner. One set.

Order accordingly.

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