

Mela Ram and Sons

Vs

Commissioner of Income-Tax, Punjab

Civil Appeal No. 17 of 1954

(CJI S. R. Dass, T. L. Venkatarama Ayyar, N. H. Bhagwati JJ)

21.02.1956

JUDGMENT

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VENKATARAMA AYYAR, J. -

The appellant is a firm carrying on business at Ludhiana in the Punjab. The Income-tax Officer assessed its income for 1945-1946 at Rs. 71,186, and on September 17, 1947, a notice of demand was served on it for Rs. 29,857-6-0 on account of income-tax and super-tax. The appellant preferred an appeal against the assessment, and it was actually received in the office of the Appellate Assistant Commissioner on November 5, 1947. It was then out of time by 19 days, but the appeal was registered as No. 86, and notice for hearing under section 31 of the Income-tax Act was issued for December 13, 1947, and after undergoing several adjournments it was actually heard on October 1, 1948. For the year 1946-1947, the Income-tax Officer assessed the income of the firm at Rs. 1,09,883 and on September 29, 1947, a notice of demand was served on it for Rs. 51,313-14-0 on account of income-tax and super-tax. The appellant preferred an appeal against this assessment, and it was actually received in the office of the Appellate Assistant Commissioner on November 5, 1947, and it was then 7 days out of time. It was registered as No. 89, and notice for hearing under section 31 was issued for June 24, 1948. Eventually, it was heard along with Appeal No. 86 on October 1, 1948.

At the hearing, the Department took the objection that the appeals were presented out of time, and were therefore liable to be dismissed. The appellant prayed for condonation of the delay on the ground that following on the partition of the country the conditions were very unsettled and that curfew order had been promulgated and was in force, that the post office did not accept registered letters and that the traffic on the Grand Trunk Road was closed, and that in view of these exceptional circumstances, it had sufficient cause for not presenting the appeals in time. On December 31, 1948, the Appellate Assistant Commissioner passed orders in both the appeals, holding that there was not sufficient ground for condoning the delay, and rejecting them in limine. These orders were purported to be passed under section 31 read along with section 30(2) of the Act.

Against these orders, the appellant preferred appeals under section 33 of the Act to the Appellate Tribunal, which by its order dated April 4, 1950, dismissed them on the ground that the orders of the Assistant Commissioner were in substance passed under section 30(2) and not under section 31, and that no appeal lay against them under section 33. On the application of the appellant, the Tribunal referred under section 66(1) of the income-tax Act the following question for the decision of the High Court of Punjab :

"Whether in the circumstances of the case appeals lay to the Tribunal against orders of the Appellate Assistant Commissioner dismissing the appeals against the assessments for the years 1945-1946 and 1946-1947 in limine."

The reference was heard by Khosla and Harnam Singh, JJ., who held following an earlier decision of that Court in *Dewan Chand v. Commissioner of Income-tax* that the orders of the Appellate Assistant Commissioner were under section 30(2) and not appealable under section 33. Certificate to appeal to this Court against this order having been refused by the High court, the appellant applied for and obtained leave to appeal to this Court under article 136 of the Constitution, and that is how the appeal comes before us.

The provisions of the Act bearing on the question may now be referred to. Section 30(1) confers on the assessee a right of appeal against orders passed under the sections specified therein. Section 30(2) provides that the appeal shall ordinarily be presented within thirty days of the order of assessment, but the Appellate Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period. Section 30(3) provides that "the appeal shall be in the prescribed form and shall be verified in the prescribed manner." Section 31(1) enacts that "the Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing." Section 31(3) specifies the orders that may be passed in the appeals according as they are directed against orders passed under the one or the other of the sections of the Act which are specified in section 30(1). When the appeal is against an order of assessment under section 23 - and this is what we are concerned with in this appeal - it is provided in section 31(3), clauses (a) and (b), that in disposing of the appeal the Appellate Assistant Commissioner may (a) confirm, reduce, enhance or annul the assessment, or (b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Income-tax Officer thinks fit. Section 33(1) enacts that, "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."

Stated succinctly, section 30 confers a right of appeal on the assessed, section 31 provides for the hearing and disposal of the appeal, and section 33 confers a right of further appeal against orders passed under section 31.

Now, on these provisions the question is whether an order dismissing an appeal presented under section 30 as out of time is one under section 30(2) or under section 31 of the Act. If it is the former, there is no appeal provided against it; if it is the latter, it is open to appeal under section 33. On this question, there has been a sharp conflict of opinion among different High Courts and even among different Benches of the same High Court. The Bombay High Court has held that when an appeal is presented out of time, and there is, no order of condonation of delay under section 30(2), there is, in law, no appeal before the Appellate Assistant Commissioner, and that an order by him rejecting the appeal does not fall within section 31 and is not appealable : *Commissioner of Income-tax v. Mysore Iron and Steel Works* and *K. K. Porbunderwalla v. Commissioner of Income-tax*; but that if the appeal is admitted after an order of condonation is made under section 30(2), an order subsequently passed dismissing it on the ground of limitation would be one under section 31 and would be appealable under section 33, and the result will be the same even when the appeal is admitted without any order of condonation under section 30(2) : *Champalal Asharam v. Commissioner of Income-tax*. The High Court of Allahabad has also taken the same view, and held that an order refusing to condone delay and rejecting an appeal before it was admitted was not one

under section 31 and was not appealable : Vide Shivnath Prasad v. Commissioner of Income-tax, Central and U.P., and Municipal Board, Agra v. Commissioner of Income-tax, U.P.; but that an order dismissing the appeal as time barred after it had been admitted was one under section 31 and was appealable : Mohd. Naim Mohd. Alam v. Commissioner of Income-tax. The High Court of Punjab has held following Shivnath Prasad v. Commissioner of Income-tax, Central and U.P., and Commissioner of Income-tax v. Mysore Iron and Steel Works that when the Appellate Assistant Commissioner declines to condone delay and rejects the appeal, it is one under section 30(2) and not appealable. It has further held that even if the appeal had been admitted without an order of condonation and dismissed at the hearing on the ground of limitation, it would not be under section 31, because the scheme of the Act contemplated that an order to be passed under that section must relate to the merits of the assessment. It is on this decision that the judgment under appeal is based. It may be mentioned that the decision in Dewan Chand v. Commissioner of Income-tax was dissented from in a recent decision of the Punjab High Court in General Agencies (India) Ltd. v. Commissioner of Income-tax.

In Commissioner of Income-tax v. Shahzadi Begum, the Madras High Court has held that an order declining to excuse delay and rejecting the appeal is one under section 31, whether it is made before the appeal is admitted or after, and that an appeal which is filed out of time is, none the less, an appeal for purposes of section 31, and that an order dismissing it would be appealable under section 33. In Gour Mohan Mullick v. Commissioner of Agricultural Income-tax, the Calcutta High Court has, after a full discussion, come to the conclusion that an order of dismissal on the ground of limitation at whatever stage was one which fell under section 31. It is unnecessary to refer to the views expressed in decisions of other High Courts, as the point now under discussion did not directly arise for decision therein.

The question is, which of these views is the correct one to adopt. We start with this that under section 33 it is only orders under section 31 that are appealable. The question therefore narrows itself to this whether an order declining to condone delay and dismissing the appeal as barred by time is an order under section 31. It will be, if it is passed in appeal against an order of assessment, and is one which affirms it. Now, the conflicting views expressed by the several High Courts center round two points : (1) when an appeal is presented out of time and there has been a refusal to condone delay under section 30(2), is an order rejecting it as time-barred one passed in appeal; and (2) if it is, is such an order one confirming the assessment within section 31(3)(a) ?

On the first point, as already stated, it has been held by the Bombay High Court that while an order dismissing an appeal as time-barred after it is admitted is one under section 31, a similar order passed before it is admitted is one under section 30(2). The ratio of this distinction is stated to be that in law there is no appeal unless it is presented in time, and if presented beyond time, unless the delay is excused. In Commissioner of Income-tax v. Mysore Iron and Steel Works Chagla, C.J., stated the position thus :

"An assessee has a statutory right to present an appeal within thirty days without any order being required from the Appellate Assistant Commissioner for admission of that appeal. But if the time prescribed expires, then that statutory right to present an appeal goes; and an appeal can only be entertained provided it is admitted by the Appellate Assistant Commissioner after condoning the delay. Therefore, before an appeal could be admitted in this case, an order from the Appellate Assistant Commissioner was requisite that the delay had been condoned and it was only on such an order being made that the appeal could be entertained by the Appellate

Assistant Commissioner. Now section 31 deals only with such appeals which are presented within the prescribed period or admitted after the delay has been condoned, and the procedure laid down in section 31 with regard to the hearing of appeals only applies to such appeals. Therefore, in my opinion, when the Appellate Assistant Commissioner refused to condone the delay, there was no appeal before him which he could hear and dispose of as provided under section 31 of the Act. Section 33 then gives the right of appeal to the assessee from an order made by the Appellate Assistant Commissioner either under section 28 or under section 31. Therefore the Legislature did not give the right of appeal to the assessee against an order made by the Appellate Assistant commissioner under section 30 of the Act."

Learned counsel for the appellant disputes the correctness of the last observation that an order of the Appellate Assistant Commissioner refusing to condone the delay is one under section 30(2), and contends that the only order that could be passed under that section was one excusing delay, and an order refusing to condone it will fall outside it, and that such an order could only be made under section 31. We find it difficult to accede to this contention. When power is granted to an authority to be exercised at his discretion, it is necessarily implicit in the grant that he may exercise it in such manner as the circumstances might warrant. And if the Appellate Assistant Commissioner has a discretion to excuse the delay, he has also a discretion in appropriate cases to decline to do so. We are therefore of opinion that the refusal to excuse delay is an order under section 30(2).

But the question still remains whether the view taken in *Commissioner of Income-tax v. Mysore Iron and Steel Works* and *K. K. Porbunderwalla v. Commissioner of Income-tax* that an appeal which is held beyond the period of limitation is, in the eye of law, no appeal, unless and until there is a condonation of delay, and that, in consequence, an order passed thereon cannot be held to be passed in appeal so as to fall within section 31, is right. Now, a right of appeal is a substantive right, and is a creature of the statute. Section 30(1) confers on the assessee a right of appeal against certain orders, and an order of assessment under section 23 is one of them. The appellant therefore had a substantive right under section 30(1) to prefer appeals against orders of assessment made by the Income-tax officer. Then, we come to section 30(2), which enacts a period of limitation within which this right is to be exercised. If an appeal is not presented within that time, does that cease to be an appeal as provided under section 30(1) ? It is well established that rules of limitation pertain to the domain of adjectival law, and that they operate only to bar the remedy but not to extinguish the right. An appeal preferred in accordance with section 30(1) must, therefore, be an appeal in the eye of law, though having been presented beyond the period mentioned in section 30(2) it is liable to be dismissed in limine. There might be a provision in the statute that at the end of the period of limitation prescribed, the right would be extinguished, as for example, section 28 of the Limitation Act; but there is none such here. On the other hand, in conferring a right of appeal under section 30(1) and prescribing a period of limitation for the exercise thereof separately under section 30(2), the legislature has evinced an intention to maintain the distinction well-recognised under the general law between what is a substantive right and what is a matter of procedural law. In *Nagendranath Dey v. Suresh Chandra Dey*, Sir Dinshaw Mulla construing the word "appeal" in the third column of article 182 of the Limitation Act 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 subordinate Court, is an appeal within the ordinary acceptance of the term, and that it is no less an appeal because it is irregular or incompetent."

These observations were referred to with approval and adopted by this Court in *Raja Kulkarni and Others v. The State of Bombay*. In *Promotho Nath Roy v. W. A. Lee*, an order dismissing an application as barred by limitation after rejecting an application under section 5 of the Limitation Act to excuse the delay in presentation was held to be one "passed on appeal" within the meaning of section 109 of the Civil Procedure Code. On the principles laid down in these decisions, it must be held that an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal.

Then, the next question is whether it is an order passed under section 31 of the Act. That section is the only provision relating to the hearing and disposal of appeals, and if an order dismissing an appeal as barred by limitation is one passed in appeal, it must fall within section 31. And as section 33 confers a right of appeal against all orders passed under section 31, it must also be appealable. But then, it is contended that in an appeal against assessment the only order that could be passed under section 31(3)(a) is one which confirms, reduces, enhances or annuls the assessment, that such an order could be made only on a consideration of the merits of the appeal, and that an order dismissing it on the ground of limitation is not within the section. That was the view taken in *Dewan Chand v. Commissioner of Income-tax*. But there is practically a unanimity of opinion among all the other High Courts that to fall within the section it is not necessary that the order should expressly address itself to and decide on the merits of the assessment, and that it is sufficient that the effect of the order is to confirm the assessment as when the appeal is dismissed on a preliminary point. In *Commissioner of Income-tax v. Shahzadi Begum, Satyanarayana Rao, J.*, said :

"If the appeal is dismissed as incompetent or is rejected as it was filed out of time and no sufficient cause was established, it results in an affirmation of the order appealed against."

In *Gour Mohan Mullick v. Commissioner of Agricultural Income-tax*, construing sections 34, 35 and 36 of the Bengal Agricultural Income- tax Act which are in terms identical with those of sections 30, 31 and 33 of the Indian Income-tax Act, *Chakravarti, J.*, observed :

"I would base that view on the ground that the order, in effect, confirmed the assessment or, at any rate, disposed of the appeal and was thus an order under section 35, because what that section really contemplates is a disposal or conclusion of the appeal and the forms of orders specified in it are not exhaustive. An appellate order may not, directly and by itself, confirm or reduce or enhance or annul an assessment an may yet dispose of the appeal. If it does so, it is immaterial whether the ground is a finding that the appeal is barred by limitation or a finding that the case is not a fit one for extension of time or both."

This reasoning is also the basis of the decisions of the Bombay and Allahabad High Courts which hold that an order rejecting an appeal on the ground of limitation after it had been admitted is one under section 31, though there is no consideration of the merits of the assessment. Thus, in *K. K. Porbunderwalla v. Commissioner of Income- tax, Chagla, C.J.*, observed :

"... although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under section 31 and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer."

In *Special Manager of Court of Wards v. Commissioner of Income-tax*, the Allahabad High Court stated that the view was "possible that even though the period of limitation is prescribed under section 30 and the power to grant extension is also given in that section the power is really exercised under section 31 as the Appellate Assistant Commissioner when he decides not to extend the period of limitation may be said in a sense to have confirmed the assessment."

The respondent relied on a later decision of the Allahabad High Court in *Mahabir Prasad Niranjnall v. Commissioner of Income-tax*, wherein it was held by the learned Judges, departing from the previous course of authorities of that Court, that an order of the Appellate Assistant Commissioner dismissing an appeal as time-barred was one under section 30(2) and not under section 31, and was therefore not appealable. This conclusion they felt themselves bound to adopt by reason of certain observations of this Court in *Commissioner of Income-tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar*. But when read in the context of the point that actually arose for decision in that case, those observations lend no support to the conclusion reached by the learned Judges. There, the facts were that an appeal was preferred by the assessee under section 30(1) against an order of the Income-tax Officer, and that was dismissed by the Appellate Assistant Commissioner on November 19, 1945, as incompetent. No appeal was filed against this order, and it became final. But acting on a suggestion made in the order dated November 19, 1945, the assessee filed an original miscellaneous application before the Appellate Tribunal for relief, and by its order dated February 20, 1946, the Tribunal set aside the findings of the Income-tax Officer, and directed him to make a fresh computation. Then, on the application of the commissioner of Income-tax, the Tribunal referred to the High Court under section 66(1) of the Income-tax Act the following question :

"Whether in the facts and circumstances of the case, the order of the Bench dated February 20, 1946, in the miscellaneous application is an appropriate order and is legally valid and passed within the jurisdiction and binding on the Income-tax Officer."

The High Court declined to answer this reference on the ground that the order of the Tribunal was not one passed in an appeal under section 33(1), and that in consequence, the reference under section 66(1) was itself incompetent. The correctness of this decision was challenged on appeal to this Court, and, in affirming it, this Court observed :

"... when on November 19, 1945, the Appellate Assistant Commissioner declined to admit the appeal, the assessee did not prefer any appeal but only made a miscellaneous application before the Appellate Tribunal. There is no provision in the Act permitting such an application. Indeed, in the statement of the case the Appellate Tribunal states that in entertaining that application and correcting the error of the Income-tax Officer it acted in exercise of what it regarded as its inherent powers. There being no appeal under section 33(1) and the order having been made in exercise of its supposed inherent jurisdiction, the order cannot possibly be regarded as one under section 33(4) and there being no order under section 33(4) there could be no reference under section 66(1) or (2), and the appellate Court properly refused to entertain it."

There is, of course, nothing in the decision itself which bears on the point now under discussion. But certain observations occurring at pages 474 and 475 were referred to by the learned Judges as leading to the conclusion that an order dismissing an appeal as barred by time would fall under

section 30(2). Now, those observations came to be made by way of answer to a new contention put forward by the learned Attorney-General in support of the appeal. That contention was that the miscellaneous application presented to the Tribunal might be treated as an appeal against the order dated November 19, 1945, in which case the order passed thereon February 20, 1946, would fall under section 33(4) and the reference would be competent. In disagreeing with this contention, this Court observed that the appeal to the Appellate Assistant Commissioner was incompetent under section 30(1), that even if it was competent, the order dated November 19, 1945, was not one contemplated by section 31, and there could be no appeal against such an order under section 33(1). Now, it should be noticed that the question actually referred under section 66(1) was the correctness and legality of the order passed in a miscellaneous application and not of any order made in an appeal preferred under section 33(1). In this context, the point sought to be raised by the learned Attorney-General did not arise at all for decision, and the observations in answer thereto cannot be read as a pronouncement on the question of the maintainability of the appeal, much less as a decision that an order dismissing an appeal as barred by limitation is one under section 30(2). Accordingly, the question whether an order dismissing an appeal as barred by limitation falls under section 30(2) or section 31 remains unaffected by the observation in Commissioner of Income-tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar.

Then again, under the provisions of the Act, limitation is not the only preliminary ground on which an appeal could be disposed of without a consideration of the merits. Section 30(3) provides that an "appeal shall be in the prescribed form and shall be verified in the prescribed manner." If the Appellate Assistant Commissioner holds that the appeal does not comply with the requirements of this enactment and rejects it on that ground, the order must be one made under section 31, since section 30(3) makes no provision for such an order, as does section 30(2) in the case of limitation. All the orders under section 31 being appealable under section 33, the order of dismissal for non-compliance with section 30(3) must also be appealable, and it was so decided in Maharani Gyan Manjari Kuari v. Commissioner of Income-tax. How is this view to be reconciled with the contention that section 31 contemplates only orders on the merits of the assessment and not on preliminary issues? Vide also decision in Kunwarji Ananda v. Commissioner of Income-tax which was followed in Maharani Gyan Manjari Kuari v. Commissioner of Income-tax, and in Ramanarayana Das Madanlal v. Commissioner of Income-tax. There is thus abundant authority for the position that section 31 should be liberally construed so as to include not only orders passed on a consideration of the merits of the assessment but also orders which dispose of the appeal on preliminary issues, such as limitation and the like.

The learned Solicitor-General sought to get over these decisions by taking up the position that section 31(3)(a) construed in its literal and ordinary sense, conferred jurisdiction on the Appellate Assistant Commissioner only to pass orders on the merits of the assessment, that it was not therefore open to him to entertain any question which did not directly relate to such merits, and that accordingly he could not hear or decide any issue of a preliminary nature such as limitation, and dispose of the appeal on the basis of the finding on that issue. He conceded that this contention would run counter to numerous authorities, but argued that they were all wrong. Having given due consideration to this contention, we are of opinion that it is not well-founded.

Taking the plea of limitation - which is what we are concerned with in this appeal - when there is a judgment or order against which the statute provides a right of appeal but none is preferred within the time prescribed therefore, the respondent acquires a valuable right, of which he cannot be deprived by an order condoning delay and admitting the appeal behind his back. And when such an order is passed ex parte, he has a right to challenge its correctness at the hearing of the appeal. That

is the position under the general law (vide *Krishnasami Panikondar v. Ramasami Chettiar*), and there is nothing in the provisions of the Income-tax Act, which enacts a different principle. Therefore, if an appeal is admitted without the fact of delay in presentation having been noticed, clearly it must be open to the Department to raise the objection at the time of the hearing of the appeal. That would also appear to be the practice obtaining before the Income-tax Tribunal, as appears from the decisions cited before us, and that, in our opinion, is right. Similar considerations would apply to other objections of a preliminary character, such as the one based on section 30, sub-section (3). We should be slow to adopt a construction which deprives parties of valuable rights. We are therefore of opinion that contentions relating to preliminary issues are open to consideration at the time of the hearing of the appeal, and that the jurisdiction of the Appellate Assistant Commissioner is not limited to the hearing of the appeal on the merits of the assessment only. In this view, the orders of the Appellate Assistant Commissioner holding that there were no sufficient reasons for excusing the delay and rejecting the appeals as time-barred would be orders passed under section 31 and would be open to appeal, and it would make before or after the appeal is admitted.

The question referred must accordingly be answered in the affirmative. This appeal will therefore be allowed, and the order of the Court below set aside. The appellant will have his costs here and in the Court below.

Appeal allowed.

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