Lakshmi Rattan Engineering Works Ltd.

Vs

Asstt. Commr. Sales Tax Kanpur & Anr.

Civil Appeal No. 1283 of 1967

(M. Hidayatullah, V. Bhargava, C. A. Vaidialingam JJ)

12.09.1967

JUDGMENT

HIDAYATULLAH J. -

This is an appeal by special leave against an order 2/3 April, 1967, of the Assistant Commissioner (Judicial) I. Sales Tax, Kanpur, Range, Kanpur by which the Assistant Commissioner rejected as defective the memorandum of appeal filed by the present appellant against the assessment order passed by the Sales Tax Officer (S-1) Kanpur. The defect, according to the Assistant Commissioner, was that the memorandum of appeal (which had been filed well within time) was not accompanied by the challan showing the deposit of admitted tax under s. 9 of the Uttar Pradesh Sales Tax Act, 1948. The appellant did not file an application for revision and did not also invite a reference to the High Court of Allahabad but came direct to this Court by special leave which was granted by us on August 23, 1967. At the first hearing of the petition, the State of Uttar Pradesh represented by Mr. O. P. Rana objected to the grant of special leave inasmuch as the other provisions under which remedy could be obtained under the Sales-tax; Act had been by passed. At that time, we overruled the objection and in the course of this judgment, we shall briefly indicate the reasons which had then prevailed with us.

The facts of the case are as follows : The appellant had declared his turnover for the year 1964-65 at Rs. 3,70,941.7 P. on which the admitted tax under the Act came to Rs. 11,135,58p. The Sales-tax authorities, however, assessed his turnover at Rs. 10 lakhs on which tax was calculated at Rs. 90,000. The appellant appealed to the Assistant Commissioner (Judicial) 1, Sales-tax, Kanpur Range, Kanpur. His appeal was filed on May 16, 1966, the order of assessment and the demand notice having been served on him on April 16, 1966. The appeal was therefore filed within time. Section 9 of the Act provides that no appeal against an assessment shall be entertained unless it accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due or of such installments thereof as may have become payable. As is stated earlier, the admitted tax came to Rs. 11,135,58 P. The appellant was required under this provision of law to give satisfactory proof, at the time of the entertainment of the appeal, that this tax was duly paid. It appears that the appellant had paid a greater portion of the tax even before the assessment order had been made, and a balance of Rs. 99.99 P. was due from him from the amount of admitted tax. This amount was deposited on April 26, 1966 before the appeal was filed by him. He did not however present any proof of such deposit, because there is a dispute in the case whether the assessee had shown proof of it to the munsarim or not. As the finding is that he had not shown it we shall proceed on the assumption that the assessee had not furnished proof at the time of the filing of the appeal that the balance of tax had been paid. It is on this promise that the present appeal has proceeded before us. On August 16, 1966, the assessee addressed a letter to the Sales-tax Officer

and asked for a certificate of payment of tax and this certificate having been furnished he filed it on January 24, 1967 before the Assistant Commissioner. He also, as a matter of abundant caution, filed an application for condonation of delay under s. 9(6) of the Act read with s. 5 of the Indian Limitation Act. The order against which the present has been brought before us was made on 2/3 April, 1967 and the appeal of the assessee was rejected, because in the opinion of the Assistant Commissioner s. 9 of the Act read with r. 66(2) had not been compiled with since no proof had been given along with the memorandum of appeal that the tax had been paid. Simultaneously, the application for condition of delay was also dismissed. Against this order, the assessee has filed the present appeal.

The short question in this case is whether having made the deposit even before the appeal was filed and well within the period of limitation, the assessee could be deprived of his right of appeal under s. 9 of the Act. Alternatively, it is to be considered whether the proof of payment of the admitted tax had to accompany the memorandum of appeal as required by r. 66(2) and on failure to furnish such proof, the appeal itself became incompetent. In support of his order the Assistant Commissioner relied on a decision of the Allahabad High Court reported in Swastika Tannery of Jaimau v. Commissioner of Sales-tax, U.P. Lucknow ((1963) 14 S.T.C. 518) in which the learned Chief Justice of that Court and another learned Judge have laid down that the proof of payment must be as required by the rules and, therefore, the memorandum of appeal ought to be accompanied by the Challan showing payment of tax before the appeal can be said to be competent. We shall refer to that ruling presently.

In this appeal, learned counsel for the assessee has relied upon a number of authorities in which the interpretation runs counter to the decision of the learned Chief Justice just adverted to and had contended that s. 9 of the Act does not create the bar which the ruling and the Assistant Commissioner's reliance on that ruling has created in the way of the appeal. His contention is that if satisfactory proof is given before the appeal is heard or at any rate before it is admitted, the requirement of law under s. 9 is satisfied and that it is not always incumbent to produce a challan with the memorandum of appeal, r. 66(2) notwithstanding. It is this point which has given rise to the great controversy before us and the matter was argued at great length both at the time of grant of special leave and today.

To consider the matter, we may being by quoting s. 9 of the Act. Section 9 which gives the power of appeal provides as follows :

> "(1) Any dealer objecting to an order allowing or refusing an application for exemption certificate under cl. (b) of sub-section (1) of s. 4 or to an order refusing an application under s. 30 or to an order imposing a penalty under s. 15-A or to an assessment made under s. 7. 7-A, 7-B, 18 or 21, may within 30 days from the date of service of the copy of the order or notice of assessment, as the case may be, appeal to such authority as may be prescribed;
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> Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such installments thereof as may have become payable :
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Under s. 24 of the Act power has been conferred upon the State Government to make rules to carry

out the purposes of the Act and in particular, to provide for all matters expressly required or allowed by this Act to be prescribed. Under sub-s. (4) of that section, it is provided that all rules made under the section shall be published in the Gazette and upon such publication, shall have effect immediately as if enacted in the Act and under 5th sub-section, it is further provided that all rules made under the Act shall be laid for fourteen days before the Legislature as soon as possible after they are made and shall be subject to such modification as the Legislature may make during the session in which they are so laid. In exercise of this power, the State Government has framed the U.P. Sales-tax Rules, 1948. Rules 66 and 67 of these rules bear, among others, upon appeals. Sub-r. 1 of r. 66 provides for the content of the appeal by stating what the memorandum of appeal shall specify in relation to the name and address of the appellant etc. We are not concerned with it. Sub-r. 2 then states that "the memorandum of appeal shall be accompanied by ..... a challan showing deposit in the Treasury of the tax admitted by the appellant to be due or of such installments thereof as might have become payable." Rule 67 lays down how the appalls have to be presented. Sub-r. 1 provides that the memorandum of appeal shall be presented by the appellant or his lawyer or duly authorised agent to the Assistant Commissioner (Judicial) or may be sent by registered post addressed to the Assistant Commissioner. (Judicial). Sub-r 2. provided that if the memorandum of appeals is in order the Assistant Commissioner, (Judicial) shall admit it and on admission, the Reader of the Assistant Commissioner (judicial) shall endorsee thereon the date of its presentation and shall register it in a book to be known as Register of Appeals. The third sub-rule says that if the memorandum of appeal is not in order, it may be rejected or returned after the necessary endorsement on its back about the presentation and return to the applicant for correction and representation within the time to be fixed by the Assistant Commissioner (Judicial) or be amended then and there. Lastly sub-r. 4 provided that on admission of an appeal, the Assistant Commissioner (Judicial) shall fix a date for hearing of the appeal and may send for the record, if necessary.

The contention of counsel for the assessee is that he had fully complied with the requirements of s. 9 although not strictly as laid down in r. 66 which he characterised as directory. The contention on the other side is that the rule lays down the only manner of compliance with the provisions of the Section and in support Counsel for the State refers to the provisions of s. 24(4) and (5) in which it is stated that the rules on being framed become part of the Statue. From this, counsel for the State infers that there is no other mode of compliance except the one stated in the rules and as in this case that mode of compliance was not followed, the appeal is rightly considered to be incompetent and properly rejected. This in main represents the essence of the controversy between the parties.

To being with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word 'entertained' in this context ? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available ? The dictionary meaning of the word 'entertain' was brought to our notice by the parties, and both sides agreed that it means either "to deal with or admit to consideration". We are also of the same opinion. The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso ? Is it 'entertained when it is filed or it 'entertained' when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of ? Numerous cases exist in the law reports in which the word 'entertained' or similar cognate expressions have been interpreted by the courts. Some of them from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. For the present we must say that if the legislature intended that the word 'file' or 'receive' was to be used, there was no difficulty in using those words. In some of the statues which were brought to our notice such

expressions have in fact been used. For example, under Order 41, rule 1 of the Code of Civil Procedure it is stated that a memorandum shall not be filed or presented unless it is accompanied etc.; in s. 17 of the Small Causes Courts Act, the expression is 'at the time of presenting the application'. In sec. 6 of the Court Fees Act, the words are 'file' or 'shall be reviewed. It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word 'entertain' and it must be accepted that it has used it advisedly. This word has come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them.

In Kundan Lal v. Jagannath Sharma (A.I.R. 1962 All 547) the Court was concerned with Order 21, rule 90, of the Code of Civil Procedure which had been amended by the High Court by changing the provisions of the original Code. The changed rule is as follows :

> "Provided that no application to set aside the sale shall be entertained :
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> (a) Upon any ground which should have been taken by the applicant on or before the date on which the sale proclamation was drawn up :
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> (b) Unless the applicant deposits such amount and exceeding 12 1/2% of the sum realised by the sale or furnishes such security as the court may in its discretion fix, except when for reasons to be recorded it dispenses with the requirements of this clause......".

The word 'entertain' is explained by a Divisional Bench of the Allahabad High Court as denoting the point of time at which an application to set aside the sale is heard by the court. The expression 'entertain', it is stated, does not mean the same thing as the filing of the application or admission of the application by the court. A similar view was again taken in Dhoom Chand Jain v. Chamanlal Gupta & Anr. (A.I.R. 1962 All 543) in which the learned Chief Justice Desai and Mr. Justice Dwivedi gave the same meaning to the expression 'entertain'. It is observed by Dwivedi J. that the word 'entertain' in its application bears the meaning 'admitting to consideration'. and therefore when the court cannot refuse to take an application which is backed by deposit or security, it cannot refuse judicially to consider it. In a single bench decision of the same court reported in Bawan Ram & Anr. v. Kuni Beharilal (A.I.R. 1961 All 326) one of the (Bhargava, J.) had to consider the same rule. There the deposit had not been made within the period of limitation and the question had arisen whether the court could entertain the application or not. It was decided that the application could not be entertained because proviso (b) debarred the court from entertaining an objection unless the requirement of depositing the amount or furnishing security was complied with within the time prescribed. In that case of the word 'entertain' is not interpreted but it is held that the court cannot proceed to consider the application in the absence of deposit made within the time allowed by law. This case turned on the fact that the deposit was made out of time. In yet another case of the Allahabad High Court reported in Haji Rahim Bux & Sons and Ors. v. Firm Samiullah & Sons (A.I.R. 1963 All 326) a division bench consisting of Chief Justice Desai and Mr. Justice S. D. Singh interpreted the words of O. 21, r. 90, by saying that the word 'entertain' meant not 'receive' or 'accept' but proceed to consider on merits' or 'adjudicate upon'.

In our opinion these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration'. It would therefore appear that the direction to the court in the proviso to s. 9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be

when the case is taken up by the court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai C.J.) holds that the words 'accompanied by' showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be accompanied by satisfactory proof, it had to be in the shape of something tangible, because no intangible thing can accompany a document like the memorandum of appeal. In our opinion, making 'an appeal' the equivalent of the memorandum of appeal is not sound. Even under O. 41 of the Code of Civil Procedure, the expression "appeal" and "memorandum of appeal" are used to distinct two distinct things. In Wharton's Law Lexicon, the word "appeal" is defined as the judicial examination of the decision by a higher Court of the decision of an inferior court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited.

For purposes of limitation and for purposes of the rules of the Court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax.

Now the complicating factor is the existence of the rule, and here, the divergence of submission arises on whether the rules can be regarded as a mandatory or merely directory. It is quite obvious that the section as it stand only requires that at the time of the consideration of the appeal. There should be satisfactory proof that the admitted tax has been deposited. It only says that no appeal shall be entertained unless accompanied by satisfactory proof of the payment tax. This satisfactory proof may take any form; in fact in the present case satisfactory proof was tendered in the shape of a certificate from the Sales-tax Officer that the admitted tax had been deposited and well within time. Under section 9 and its proviso as they stand, it is quite obvious that 'entertainment' means the point of time when the appeal is being considered. There was thus satisfactory proof in the present case. No doubt, proof was not tendered following the method required by the rules but the question is whether the rules can make the section narrower by prescribing a particular mode. The section is general; it provided that the court should accept satisfactory proof. The rule requires that the memorandum of appeal shall be accompanied by the challan showing payment of tax. The rule lays down one uncontestable mode of proof which the Court will always accept but it does not exclude the operation of the proviso when equally satisfactory proof is made available to the officer hearing the appeal and it is proved to his satisfaction that the payment of tax has been duly made in time. In this sense, the rule can be regards as directory since it lays down one of those modes which will be unquestioned for its validity. The other modes of proof are not necessarily shut out.

It is to be remembered that all rules of procedure are intended to advance justice and not to defeat it. Here the right of appeal has been made subservient to the payment of the admitted tax. If the admitted tax is paid and there is proof available that it has been so paid, there exist no reason to create a second impediment in the way of the appeal. No doubt, rule makes it easy for the assessee to bring satisfactory proof in an uncontestable manner, but the provision of the rule is not to the exclusion of other satisfactory modes of proof. Suppose for instance that the challan was lost and time for the filing of the appeal was expiring, could or could not the person concerned say that he had the certificate but had lost it and that he would produce a copy of the challan from the Treasury or obtain a certificate from the Treasury Officer. Could he not obtain from the bank the discarded cheque by which the amount of tax was deposited by him and produce it as the discharged counterfoil of payment. All these modes of proof will be equally irrefutable. In the present case the assessee had in his petition of appeal stated that the amount of tax had been paid and had fortified the statement by an affidavit. Before the hearing he produced a certificate from the Sales-tax Officer

that the tax had been paid. The Assistant Commissioner ought therefore to have proceeded with the appeal because it was accompanied by satisfactory proof of the payment of the tax. To hold otherwise would put a premium upon a technically which we do not see will advance the cases either for the collection of the tax or for the administration of justice. The rule, as we have stated, indicates what is the best and easiest method of achieving satisfactory proof. The certificate from the Sales-tax Officer, however, is as good proof as the challan from the Treasury and if such certificate was produced at the admission of the appeal, how the memorandum of appeal can be said to be defective under the section as it stands. In these circumstances, we hold that the rule is merely directory and indicates only one of the modes of satisfactory proof.

The distinction made by the learned chief Justice between the tangible and intangible objects does not in our opinion fall for consideration in the present case. If one holds that by 'entertainment' is meant the time of admission of the appeal, satisfactory proof may be furnished at the time of admission of the appeal. We are of opinion that by the word "entertain" here is meant the first occasion on which the court takes up the matter for consideration. It may at the admission stage of if by the rules of that Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal. But on the first occasion when the court takes up the matter for consideration, satisfactory proof must be presented that the tax was paid within the period by limitation available for the appeal. In the present case when the Assistant Commissioner took up the appeal for consideration, satisfactory proof was available in the shape of a certificate which even today is not denied. In our opinion the Assistant Commissioner was wrong in declining to consider the appeal in the presence of such uncontestable proof.

It remains to point out why we did not insist upon the assessee exhausting his other remedies under the Act before coming to this Court. It was made to appear to us that there is a right of revision and right of reference to the High Court in all such cases and that this remedy was not resorted to by the assessee before making a petition for special leave in this Court. We were taken through a number of cases in which it has been laid down by this Court that this Court will not ordinarily grant special leave to appeal against an order when other remedies are available and have not been exhausted. But there is no inflexible rule that this Court will never entertain an appeal and numerous instances have occurred in this Court where such appeals have been admitted. It would have been futile in this case for the assessee to have gone to the court of revision which was bound by the ruling of the Allahabad High Court reported in Swastika Tannery of Jaimau v. Commissioner of Sales-tax U.P. Lucknow ((1963 14 S.T.C. 518) and it would have been equally futile to have gone to the High Court on a reference. The matter was more easily disposed of by giving special leave in this Court and we therefore felt that this was one of those extraordinary cases in which the ends of justice would be better served, by avoiding a circuit of action and by dealing with this matter in this Court directly. It is for this reason that we granted special leave to appeal. The appeal shall therefore be allowed and the appeal shall be remitted to the Assistant Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur, for disposal in accordance with law. There shall be no order as to costs.

Y.P.

Appeal allowed and remitted.

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