The State of Kerala

Vs

M/S. Vijaya Stores

Civil Appeal No. 477 of 1976

(P. N. Bhagwati, V. D. Tulzapurkar, R. S. Pathak JJ)

01.09.1978

JUDGMENT

TULZAPURKAR, J. -

1. The short question raised in this appeal by special leave is whether the Appellate Tribunal has power under Section 39(4) of the Kerala General Sales Tax Act, 1963 to enhance the assessment in the absence of any appeal or cross-objections by the Revenue ?

2. The respondent firm (M/s. Vijaya Stores) is a dealer in stationery having its Head Office at Cochin and branches at Ernakulam and Kottayam. For the assessment year 1965-66 the respondent firm returned a total turnover of Rs. 25,54,974.58 and a net taxable turnover, after claiming exemptions, of Rs. 12,99,996.49. The Sales-Tax Officer rejected the Book results on the basis of certain material gathered from a rough note-book detected and seized by the Inspecting Officer from the Head Office at Cochin; it was found that about 50 per cent. of the transaction recorded in that rough note-book were not entered in the regular books maintained by the assessee; the Sales-Tax Officer, therefore, made an addition of 10 per cent. (Rs. 45,654.73) to the admitted turnover of the Cochin shop and accordingly completed the assessment by his order dated January 16, 1967. In an appeal preferred by the respondent-firm to the Appellate Assistant Commissioner, the assessee raised a two-fold contention that the rejection of accounts was not justified and that the addition made on the basis of the rough note-book was excessive and arbitrary. The Appellate Assistant Commissioner by his order dated November 1, 1958 negatived the first contention and as regards the second he gave relief to the assessee by reducing and limiting the addition to 5 per cent. (Rupees 22,823.00) of the admitted turnover of the Cochin shop. Against the order of the Appellate Assistant Commissioner the respondent firm preferred a second appeal to the Appellate Tribunal challenging the addition of 5 per cent. to the taxable turnover. No appeal nor any cross-objections were filed by the Revenue to the Tribunal against the said order of the Appellate Assistant Commissioner. The Appellate Tribunal was of the view that the Sales-Tax Officer and the Appellate Assistant Commissioner had no reason to make addition at any figure less than Rs. 80,218.22 as was seen from the detected rough note-book; the Tribunal, therefore, by invoking the power under Section 39(4) of the Act issued notice to the assessee to show cause against the proposed enhancement of the turnover and after hearing the objections of the assessee by its order dated May 10, 1973 directed an addition of a sum of Rs. 80,218.22 to the taxable turnover. The respondent-firm preferred a Tax Revision Petition (being T.R.C. 59 of 1973) to the Kerala High Court contending that the tribunal had no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department and prayed for quashing of the order. The Kerala High Court by its judgment and order dated April 11, 1975 accepted the contention of the respondent-firm and set aside the impugned order of the Tribunal and remanded the case for hearing the appeal of the

assessee afresh in accordance with law and in the light of what it had said in its judgment; in doing so the High Court relied upon two decisions of the Bombay High Court in Motor Union Insurance Co. Ltd. v. C.I.T. ((1945) 13 ITR 272) and New India Life Assurance Co. Ltd. v. C.I.T. ((1957) 31 ITR 844) The State of Kerala has come up in appeal to this Court.

3. Counsel for the appellant raised two contentions in support of the appeal. He first contended that on a true construction of Section 39(4) of the Act the Appellate Tribunal should be regarded as possessing the power to enhance the assessment in the absence of any appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order and that the only requirement before making such enhancement was to give a reasonable opportunity of being heard against the proposed enhancement which the Appellate Tribunal had done in this case; secondly, he contended that Section 39(4) of the Kerala General Sales Tax Act, 1963 was not in pari materia with Section 33(4) of the Indian Income Tax Act, 1922, and, therefore, the High Court ought not to have relied upon the decisions of the Bombay High Court rendered under Section 33(4) of the Indian Income Tax Act, 1922. He also pressed the contrary view taken by the Orissa High Court in the case of Commissioner of Sales Tax, Orissa v. Chunnilal Parmeshwar Lal ((1961) 12 STC 677), for our acceptance. For the reasons which we shall presently indicate it is not possible to accept either of these contentions urged by counsel for the appellant.

4. The question raised before us really turns upon the correct interpretation to be placed on Section 39(4) of the Act, but sub-sections (1), (2), (3) and (4) of Section 39 are material for our purposes which run thus :

> 39. Appeal to the Appellate Tribunal.-(1) Any officer empowered by the Government in this behalf or any other person objecting to an order passed by the Appellate Assistant Commissioner under sub-section (3) of Section 34 and any person objecting to an order passed by the Deputy Commissioner under sub-section (1) of Section 35, and any person objecting to an order passed by the Inspecting Assistant Commissioner under clause (c) of sub-section (4) of Section 28 may, within a period of sixty days from the date on which the order was served on him in the manner prescribed, appeal against such order to the Appellate Tribunal :
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> Provided that the Appellate Tribunal may admit an appeal presented after the expiration of the said period if it is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period.
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> (2) The Officer authorised under sub-section (1) or the person against whom an appeal has been preferred, as the case may be, on receipt of notice that an appeal against the order of the Appellate Assistant Commissioner has been preferred under sub-section (1) by the other party, may, notwithstanding that he has not appealed against such order or any part thereof, file, within thirty days of the receipt of the notice, a memorandum of cross-objections, verified in the prescribed manner against any part of the Appellate Assistant Commissioner, and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal prescribed within the time specified in sub-section (1).
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> (3) The appeal or the memorandum of cross-objections shall be in the prescribed form and shall be verified in the prescribed manner, and, in the case of an appeal preferred by any person other an officer empowered by the Government under sub-

section (1), it shall be accompanied by such fee not exceeding one hundred rupees as may be prescribed.

(4) In disposing of an appeal, the Appellate Tribunal may, after giving the parties a reasonable opportunity of being heard either in person or by a representative,

(a) in the case of an order of assessment or penalty,

(i) confirm, reduce, enhance or annul the assessment or penalty or both;

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed; or

(iii) pass such other orders as it may think fit; or

(b) in the case of any other order, confirm, cancel or very such order.

5. Considerable emphasis was laid by counsel for the appellant upon sub-section (4) which indicates what things the Appellate Tribunal may do while disposing of an appeal and in particular it was pointed out that under sub-section (4)(a)(i) the Appellate Tribunal has been given power "to enhance the assessment" while disposing of an appeal against an order of assessment after giving the party a reasonable opportunity of being heard and it was urged that such power could be exercised even when the appeal against the Appellate Assistant Commissioner's assessment order had been preferred by the assessee and not by the Department. To place such a construction on sub-section (4)(a)(i) would amount to ignoring the scheme of Section 39. Sub-section (1) provides for an appeal being preferred against an assessment order passed by the Appellate Assistant Commissioner under Section 34(3) either by the assessee or by the Department through an officer empowered by the Government in that behalf. Further, sub-section (2) provides for filing of cross-objections by a party, against whom an appeal has been preferred, notwithstanding that he has not himself appealed against the decision or any part thereof and such cross-objections are to be disposed of by Appellate Tribunal as if it were an appeal. Then comes sub-section (4) which enumerates the various powers conferred upon the Appellate Tribunal while disposing of such appeals (including cross-objections) and the power conferred upon the Appellate Tribunal under Section 4(a)(i) is "to confirm, reduce, enhance or annul the assessment"; the power to enhance the assessment must be appropriately read as relatable to an appeal or cross-objections filed by the Department. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it, and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-section (4)(a)(i) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-section (4)(a)(i) would be really rendering sub-section (2) of Section 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the tribunal would have the power to enhance the assessment, a provision for cross-objections by the Department was really unnecessary. Having regard to the entire scheme of Section 39, therefore, it is clear that on a true and proper construction of sub-section (4)(a)(i) of Section 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department.

6. It is true that the two Bombay decisions reported in 13 ITR 272 and 31 ITR 844 (supra) on which the High Court has relied have been rendered in relation to Section 33(4) of Indian Income Tax Act, 1922 but in our view the said provision of Income-Tax Act is in pari materia with the provision of Section 39(4) of the Kerala General Sales Tax Act, 1963. Moreover, the Bombay High Court has pointed out in those decisions that Section 33(4) merely enacted what was the elementary principle to be found in Civil Procedure Code that the respondent who has neither preferred his own appeal nor filed cross-objections in the appeal preferred by the appellant, must be deemed to be satisfied with the decision of the lower authority and he will not be entitled to seek relief against a rival party in an appeal preferred by the latter. In the first mentioned case the elementary principle is stated at page 282 of the report thus :

Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour.

7. As regards the decision of the Orissa High Court in Commissioners of Sales Tax, Orissa v. Chunnilal Parmeshwar Lal ((1961) 12 STC 677) (supra), the same cannot avail the appellant for the decision in that case was rendered on a concession made by the assessee's counsel.

8. In the result we are clearly of the opinion that the High Court was right in the view it took and the appeal, therefore, fails and is dismissed. Since the respondent has not appeared, there is no question of any costs.

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