

ALLAHABAD HIGH COURT

Messrs. Janta Cycle

Vs.

Asst. Commissioner

Civil Misc. Writ Petn. No. 874 of 1967
(V.G. Oak, C.J., R.S. Pathak and Rajeshwari Prasad, JJ.)

14.05.1968

JUDGMENT

Oak, C. J.

1. This petition under Article 226 of the Constitution arises out of proceedings under the U.P. Sales Tax Act, 1948 (hereinafter referred to as 'the Act'). Messrs. Janta Cycle and Motor Mart, Kanpur, are the petitioner. The Assistant Commissioner (Judicial), Kanpur, is respondent No. 1.
2. The petitioner is a dealer at Kanpur dealing in cycles and cycle parts. On 29-8-1966 the Sales Tax Officer, Kanpur, passed an assessment order for the year 1964-65. The petitioner's not turnover was fixed at Rs. 2,60,000. A sum of Rs. 12,940 was assessed as sales tax payable by the dealer. The petitioner filed on 19-9-1966 an appeal against the assessment order, dated 29-8-1966. According to the memorandum of appeal, the amount of sales tax admitted by the appellant was Rs. 1,612.91. By this time the appellant had deposited a sum of Rs. 1,610.91 as sales tax. The amount so deposited fell short of the amount of admitted tax by Rs. 2. The appellant deposited an additional sura of Rs. 5 in January, 1967.
3. When the appeal came up for hearing before the Assistant Commissioner (Judicial), Kanpur, on 1-3-1967, it was urged for the Sales Tax Officer that the appeal ought to be rejected on the ground that proof of payment of the admitted tax did not accompany the memorandum of appeal. This contention was accepted by the appellate authority. There was an application by the appellant under Section 5, Indian Limitation Act for condoning delay. It was held that Section 5, Indian Limitation Act, could not be pressed into service for condoning non-fulfillment of the condition prescribed by the

proviso to Section 9 of the Act. In the result, the Assistant Commissioner dismissed the appeal on 1-3-1967 on the ground that it was not maintainable. The present writ petition by the dealer is directed against the appellate order of respondent No. 1, dated 1-3-1967.

4. When the writ petition came up for hearing before a Division Bench of this Court, it was noticed that there was a conflict of opinion between Division Benches of this Court as regards the meaning to be given to the word 'entertained' appearing in the first proviso to sub-section (1) of Section 9 of the Act. The case, therefore, is referred to a Full Bench.

5. Section 9 of the Act provides for appeals. Sub-section (1) of Section 9 states :

"Any dealer objecting to an order allowing.....or to an assessment made under Section 7..... 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:

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 :

Provided, secondly....."

6. Rules have been framed under the Act. Rule 66 deals with contents of memorandum of appeal. Sub-rule (2) of Rule 66 states :

"The memorandum of appeal shall be accompanied by adequate proof of payment of the fee payable and a certified copy of the order appealed against and the chalan showing deposit in the treasury of the tax admitted by the appellant to be due, or of such installments thereof at might have become payable."

7. The question for consideration it whether the petitioner complied with requirements of the first proviso to sub-section (1) of Section 9 of the Act and sub-rule (2) of Rule 66, when it appealed against the assessment order dated 29-8-1966. The decision of this case turns largely upon the meaning to be given to the word 'entertained'

appearing in the first proviso to sub-section (1) of Section 9 of the Act.

8. The word 'entertained' also appears in the proviso to Order 21, R. 90, Civil Procedure Code, as amended by this Court. That proviso runs thus :-

"Provided that no application to set aside a sale be entertained -

(b) Unless the applicant deposits such amount not exceeding twelve and half per cent of sum realised by the sale or furnishes such security as the Court may, in its discretion, fix....."

9. The proviso to Order 21, Rule 90, Civil Procedure Code, came up for consideration before this Court in a number of cases. In *Bawan Ram v. Kunj Behari Lal*,¹ it was held by Bhargava, J., that Clause (b) of the proviso debars a Court from entertaining an objection unless the requirement of depositing the amount or furnishing security is complied with. If the requirement as to deposit or security is not complied with at the time of filing of an objection within limitation and security is furnished after expiry of limitation, the subsequent compliance does not save limitation.

10. In *Kundan Lal v. J. N. Sharma*,² it was held that the expression 'entertained' cannot be given the same meaning as the word 'filed'. The true intention of the proviso appears to be to allow the judgment-debtor to prosecute his application to set aside the sale if he complies with the conditions contained in the proviso to Rule 90 before the application is finally heard and disposed of by the Court.

11. Similarly, in *D. C. Jain v. C. L. Gupta*,³ it was observed that the word 'entertain' bears the meaning of admitting to consideration.

12. In *Haji Rahim Bux and Sons v. Firm Samiullah and Sons*,⁴ it was held that the word 'entertain' in the proviso to O. 21, Rule 90, Civil Procedure Code, does not mean 'receive' or 'accept', but 'proceed to consider on merits' or 'adjudicate upon'.

13. The first proviso to Section 9 (1) of the U. P. Sales Tax Act, 1948, came up for consideration before a Division Bench of this Court in *Swastika Tannery of Jajmau v. Commissioner of Sales Tax*,⁵ The facts of that case were these. The last date for filing an appeal against an assessment order was 24-10-1953. Although the assessee admitted its liability for payment of Rs. 510 as sales tax, the memorandum of appeal filed on 12-10-1953 was accompanied by a chalan for Rs. 443 only. On 27-11-1953

the assessee presented two chalan's - one dated 6-10-1953 for about Rs. 9 and the other dated 26-11-1953 for about Rs. 58. It was held by the Division Bench that the Judge (Appeals) rightly rejected the memorandum of appeal on the ground that it was not accompanied by satisfactory proof of the payment of the admitted amount of the tax.

14. The first proviso to Section 9 (1) of the Act came up for interpretation before the Supreme Court in a recent case reported in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner (Judl.) Sales Tax, Kanpur*,⁶ The facts of that case were these. The Sales Tax authority served an order of assessment on the appellant on 16-4-1966. The appellant filed his appeal to the Appellate Assistant Commissioner on 16-5-1966 within time. The memorandum of Appeal was not accompanied by a chalan showing deposit in the treasury of the tax admitted to be due by the appellant as required by Rule 66 (2). The appellant had, however, even before the assessment order was made, paid the major portion of the tax. The appellant deposited the balance of Rs. 99.99 on April 26, 1966, before the appeal was filed. The appellant filed on 24-1-1967 before the Assistant Commissioner a certificate of payment of tax issued by the Sales Tax Officer. In April, 1967, the Asst. Commissioner rejected the appeal on the ground that Section 9 of the Act read with Rule 66 (2) had not been complied with inasmuch as no proof had been given along with the memorandum of appeal that the tax had been paid. It was held by the Supreme Court that the Assistant Commissioner was wrong in rejecting the appeal. Their Lordships observed on pp. 162 and 163 (of STC) .

"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 be at the admission stage or if by the rules of that Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal."

In view of this decision of the Supreme Court, the view taken by Allahabad High Court in (1963) 14 STC 518 (All), as regards the interpretation of the word 'entertained' in the first proviso to Section 9 (1) of the Act cannot be accepted.

15. Mr. B. D. Agarwal appearing for the respondents drew our attention to the following passage on p. 163 (of STC) in the judgment of the Supreme Court in (1968) 21 STC 154 :

"But on the first occasion when the Court takes up the matter for consideration,

satisfactory proof must be presented that that tax was paid within the period of limitation available for the appeal."

Mr. B. D. Agarwal contended that, apart from the question of furnishing proof of payment, the tax has to be deposited within the period of limitation prescribed for appeals.

16. Mr. Swami Dayal appearing for the petitioner urged before us that that observation on p. 163 (of STC) in the judgment of the Supreme Court was merely an obiter dictum. On reading the entire judgment delivered by the Supreme Court in that case, I am unable to accept the suggestion that that observation was merely an obiter dictum.

17. In that case, the Supreme Court had to decide whether the appellant had complied with requirements of the first proviso to Section 9 (1) of the Act and Rule 66(2). It was noticed that there was no strict compliance with Rule 66(2). Nonetheless the Court held that the appeal was competent. It is true that the provision for limitation is contained in sub-section (1) of Section 9 of the Act; and the first proviso does not expressly deal with the question of limitation. But the two provisos have to be read along with the main provision contained in sub-section (1) of Section 9 of the Act. It appears that, according to the Supreme Court, when the First Proviso is read along with the main provision of sub-section (1) of Section 9, the deposit of admitted tax has also to be made within limitation.

18. In that case the appeal could be filed up to 16-5-1966. The Supreme Court noticed that on the one hand, the entire amount of the admitted tax had been deposited by the appellant before 16-5-1966. On the other hand, proof of payment of the entire amount was not furnished at the time of filing the appeal. The necessary proof was furnished some time between the filing of the appeal and the time when the Assistant Commissioner took up the appeal for consideration. It was held that there was sufficient compliance with the requirements of the first proviso to Section 9 (1) of the Act and Rule 66 (2). The discussion of the problem began on p. 157 (of STC) of the judgment thus:

"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 Section 9 of the Act."

It was observed on p. 162 (of STC) :

"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 the tax has been duly made and in time."

Again, on the same page :

"Here the right of appeal has been made subservient to the payment of the admitted tax."

19. It will be noticed that the Supreme Court repeatedly emphasized the importance of paying the admitted tax within the period of limitation. The Supreme Court approached the problem thus. The important thing is that the admitted tax has to be deposited within limitation. Once this basic condition is fulfilled, the manner of furnishing proof of payment is a matter of secondary importance. In view of these considerations, the observation of the Supreme Court on p. 163 (of STC) of the judgment that satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal cannot be dismissed as a passing remark. That is the declaration of the Supreme Court as regards the deposit of admitted tax. Under Article 141 of the Constitution, that declaration of law is binding on this Court.

20. It may be that the view taken by this Court in the case of (1963) 14 STC 518 (All) that proof of payment must accompany the memorandum of appeal is not sound. Yet, the ultimate decision of this Court in that case may be supported on the ground that the appellant did not deposit the full amount of the admitted tax within the period of limitation.

21. Mr. Swami Dayal urged that, in view of the fact that the deposit by the petitioner was short by the trivial sum of Rs. 2, the Assistant Commissioner should have condoned delay under Section 5, Indian Limitation Act.

Section 5, Indian Limitation Act, states :

"Any appeal or application.....may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period....."

22. Under this provision, delay may be condoned if a party makes delay in filing an appeal or moving an application. But no such situation arose in the present case. The petitioner made delay in depositing the admitted tax. The appeal itself was filed within time. The Assistant Commissioner rightly held that there was no room to give the appellant the benefit of Section 5, Indian Limitation Act.

23. It was faintly suggested before the Assistant Commissioner and before us that there was some mistake in calculating the turnover; and the admitted tax might not amount to Rs. 1,612.91. But that aspect of the matter does not appear to have been pressed before the Assistant Commissioner. The appellant proceeded on the assumption that the admitted tax came to Rs. 1,612.91, and there was shortage in depositing the admitted tax. The appellant proceeded to make good the deficiency. We may, therefore, proceed in the present case before us on the footing that the admitted sales tax was Rs. 1,612.91.

24. The assessment order is dated 29-8-1966. It was served on the petitioner on 5-9-1966. The last day of limitation for filing the appeal and for depositing the admitted tax was 5th October 1966. The appeal was filed within limitation on 19-9-1966. The admitted tax was Rs. 1,612.91. Out of that sum, a sum of Rs. 1,610.91 only had been deposited by the time of filing the appeal (19-9-1966) or by the time limitation expired (5-10-1966). According to the petitioner, the additional sum of Rs. 5 was deposited on 19-1-1967. According to the counter-affidavit, the sum of Rs. 5 was deposited on 25-1-1967. It is common ground that the shortage was made good some time in January, 1967. That was long after the period of limitation for filing the appeal and for depositing the admitted tax had expired. The appellant failed to satisfy the test laid down by the Supreme Court in (1968) 21 STC 154 that satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal. The Assistant Commissioner rightly held that the appeal was not maintainable. The appeal was rightly dismissed.

25. In my opinion, this petition should be dismissed with costs.

Pathak, J.

26. I am also of opinion that the petition should be dismissed. I shall state my reasons briefly.

27. The principal question between the parties is whether the admitted tax was paid within time.

28. Section 9 (1) provides :-

"Any dealer objecting.....to an assessment made under Section 7.....may, within 30 days from the date of service of the.....notice of assessment.....appeal....."

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."

29. It is clear there is a right of appeal under Section 9 (1) and that appeal cannot be entertained unless accompanied by satisfactory proof that the amount of the admitted tax has been paid. The Supreme Court has laid down in 1968-21 STC 154 that an appeal is entertained when the Court takes it up for the first time for judicial consideration. At that point of time there should be satisfactory proof that the admitted tax has been paid. That can only be if the appellant has paid the admitted tax. Now the petitioner says that while Section 9 (1) does not expressly specify the period for payment of the admitted tax it does imply that it may be paid at any time before the appeal is entertained. It is the validity of that contention which requires consideration.

30. What is the period within which the admitted tax must be paid is not mentioned in Section 9 (1). All that the sub-section does is to create a right of appeal and to prohibit the appellate authority from entertaining the appeal unless satisfactory proof of payment of the admitted tax has been adduced. The requirement of proof of payment of the admitted tax presupposes payment of the admitted tax. The obligation to pay the tax, and in what manner and within what time it is to be paid, has to be gathered from elsewhere. For that, in my opinion, you must look to Section 8 of the Act and the

relevant rules framed under the Act, Section 8 (1) provides :

"The tax assessed under this Act shall be paid in such manner and in such installments, if any, and within such time, not being less than fifteen days from the date of service of the notice of assessment (and demand), as may be specified in the notice....."

Rule 45 says:,

"As soon as the assessment has been made the Sales Tax Officer shall send to the dealer a notice in Form XI together with a copy of the assessment order free of charge and the dealer shall pay the tax so assessed within the time and in the manner specified in the notice."

The notice in Form XI is described as a notice of assessment and demand for payment of tax. By paragraph 1 of the notice, the dealer is informed of the turnover and the tax to which he has been assessed; he is thus notified of the assessment. Para 2 mentions the amount of tax which is due. By paragraph 3, he is told that the tax must be paid "within 30 days from the date of service of this notice"; he is thus given notice of the demand. The notice in Form XI, therefore, bears the description that it does. Rules 48 and 49 detail the manner of payment. A perusal of these several provisions demonstrates that there is a complete self-contained code in the Act and the rules in respect of the payment of tax. You must have recourse to that code whenever you wish to determine the manner and the time within which the tax has to be paid. The admitted tax, to which the proviso to Section 9 (1) refers, is merely a part of the assessed tax mentioned in Section 8 (1). It is part of the tax Liability respecting which complete provision for payment has been made within the framework of the code.

31. It will also be noticed that the proviso to Section 9 (1) speaks of proof of payment of the admitted tax or of the installments thereof which have become payable. The language is strongly reminiscent of Section 8 (1) which provides for the payment of tax either in one sum or in installments. That is clear indication of the relationship between Section 8 (1) and the proviso to Section 9 (1).

32. Another circumstance of some significance is that the period within which the

dealer is required to pay the tax is, by paragraph 3 of the notice of assessment and demand, 30 days from the date of service of the notice. That is also the period of limitation for filing the appeal. The period for paying the tax is identical with the period for filing the appeal. The dealer has thus been placed in a position enabling him to adduce proof of payment of the admitted tax before the appeal is entertained. It would seem that provision of the same period for payment of the tax and for filing the appeal is not a fortuitous coincidence.

33. After this survey, if we now turn to the proviso to Section 9 (1), the context in which it has been framed becomes clear at once. The Legislature envisages that before a dealer can have his appeal entertained, he must comply with the notice of assessment and demand at least to the extent of the tax admitted by him to be due, and he must show that he has done so before the appeal is entertained.

34. Upon the aforesaid considerations, the admitted tax, in my opinion, must be paid within a period of 30 days from the date of service of the notice of assessment and demand.

35. Our attention has been drawn to some observations of the Supreme Court in *Lakshmi Ratan Engineering Works Ltd.*, 1968-21 STC 154 (supra), that the admitted tax must be paid within the period of limitation for preferring an appeal. There was considerable debate before us whether those observations are binding upon us. The period of limitation for filing an appeal is 30 days from the date of service of the notice of assessment. I have taken the view that the admitted tax has to be paid within 30 days from the date of service of the notice of assessment and demand. In the circumstances, I consider it unnecessary to enter into the controversy involved in that debate.

36. Clearly, the petitioner did not deposit the entire amount of the admitted tax within 30 days from the date of service of the notice of assessment and demand. The Assistant Commissioner (Judicial) was plainly right in declining to entertain the appeal.

37. The petitioner urges that the Assistant Commissioner (Judicial) should have considered his application for condonation of delay in depositing the balance of the admitted tax. The application was made under Section 5 of the Limitation Act read

with Section 9 (6) of the U. P. Sales Tax Act. Section 9 (6) provides:

"Section 5 of the Indian Limitation Act, 1908, shall apply to appeals under this Act."

and Section 5 reads:

"Any appeal or application.....to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for preferring the appeal or making the application within such period."

Section 5 provides for condoning the delay in filing an appeal or application. Section 9 (6), U. P. Sales Tax Act, applies Section 5 to appeals. Section 5 is not attracted when the question arises whether the delay in depositing the admitted tax should be condoned. It seems to me that the application made by the petitioner for condonation of the delay in depositing the entire amount of the admitted tax is not maintainable under Section 5 of the Limitation Act read with Section 9 (6) of the U. P. Sales Tax Act.

38. In my judgment, the petition should be dismissed with costs.

R. Prasad, J.

39. For the reasons given by his Lordship the Chief Justice as well as those given by Hon'ble Pathak, J., I agree with the proposed order. The entire admitted amount of tax must be deposited within the period prescribed for filing appeal against an order of assessment of sales tax made under U. P. Sales Tax Act, 1948.

BY THE COURT

40.

The petition is dismissed with costs.

Petition dismissed.

Cases Referred.

1. AIR 1962 All 42
2. 1962 All LJ 574: AIR 1962 All 547
3. 1962 All LJ 729: AIR 1962 All 543
4. AIR 1963 All 320
5. (1963) 14 STC 518 (All)
6. (1968) 21 STC 154