

DELHI HIGH COURT

Narula Trading Agency

Vs.

S. T. Commr., Delhi

Sales Tax Case No. 20 of 1979. and Sales Tax Ref. No. 23 of 1979.

(Avadh Behari Rohatgi, S. B. Wad and B. N. Kirpal, JJ.)

26.9.1980

JUDGEMENT

Avadh Behari Rohatgi, J.

1. The question that arises for our consideration in this Full Bench reference does not seem to have been considered by any court. Perhaps the reason is - so it seems to us - that the answer is very obvious. The question referred to us is "whether in a reference which is pending or where an application has been filed under Section 256 (2) of the Income-tax Act or Section 45 (2) of the Delhi Sales Tax Act the High Court has jurisdiction to grant stay of recovery of tax?"

The question is one of law for the court, and is not an issue of fact.

2. In a sales tax case the Appellate Tribunal Sales Tax referred one question for the opinion of this court under Section 45 (1) of the Delhi Sales Tax Act, 1975 (the Act). Other questions which the dealer wanted it to refer for the opinion of this court were refused by the Tribunal. The dealer therefore has made an application under Section 45 (2) for an order to the Tribunal to state those questions for opinion which it has refused to refer. When these matters were before the court the dealer made an application for stay of the recovery of Rs. 1,39,698/- which the sales tax officer had raised as a demand against the dealer and which was affirmed both by the Additional Commissioner and the Tribunal in appeal.

3. We are concerned only with the question of stay in this reference. Has this court power to stay recovery of tax and penalty? This is the question. At this stage it would be convenient to set out Section 45 of the Act :

"45 (1) Within sixty days from the date of an order passed by the Appellate Tribunal under sub-section (6) of Section 43, the dealer or the Commissioner may, by application in writing, and accompanied, where the application is made by a dealer, by a fee of fifty rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and, subject So the other provisions contained in this section, the Appellate Tribunal, shall within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court,

Provided that the Appellate Tribunal may, if it is satisfied that the dealer or the Commissioner was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding thirty days.

(2) If the Appellate Tribunal refuses to state the case which it has been required to do, on the ground that no question of law arises, the dealer or the Commissioner, as the case may be, may within thirty days of the communication of such refusal either withdraw his application (and if he does so, any fee paid shall be refunded), or apply to the High Court against such refusal.

(3) If upon receipt of an application under sub-section (2), the High Court is not satisfied as to the correctness of the decision of the Appellate Tribunal, it may require the Appellate Tribunal to state the case and refer it and on receipt of such requisition, the Appellate Tribunal shall state the case and refer it accordingly.

(4) If the High Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Appellate Tribunal for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Appellate Tribunal a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Appellate Tribunal shall dispose of the case accordingly.

(6) Where a reference is made to the High Court under this section, the costs which shall not include the fee referred to in sub-section (1) shall be in the discretion of the Court.

(7) The payment of the amount of tax and penalty (if any) due in accordance with the order of the Appellate Tribunal in respect of which an application has been made under sub-section (1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof but if such amount is reduced as a result of such reference, the excess tax paid shall be refunded in accordance with the provisions of Section 30."

4. Sub-section (7) deals with the question of stay of recovery. It clearly says that the payment of the amount of tax and penalty due in accordance with the order of the Appellate Tribunal in respect of which an application has been made under sub-section (1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof. In this reference we are in fact called upon to interpret this sub-section.

5. Counsel for the dealer raised a two-fold argument before us. In the first place he said that there is no bar to the grant of stay by the High Court in the case of a reference under Section 45. He argued that sub-section (7) is addressed to the Appellate Tribunal and it is the Appellate Tribunal which has been prohibited from granting stay when a reference is pending in the High Court. He submitted that this does not take away the power of the High Court to grant stay. Secondly, he said that in any event if it is held that sub-section (7) denies to the High Court power to grant stay it restricts itself only to those cases in which reference is made under sub-section (1). Consequently he maintained that there was no bar to the High Court in granting stay where the reference is sought by a dealer under sub-section (2) of Section 45. I will examine the validity of these two contentions.

6. As regards the first contention I do not agree that sub-section (7) refers to the power of the Appellate Tribunal to grant stay. It is addressed both to the Appellate Tribunal and to the High Court. It is comprehensive in scope and sweep. It creates an express prohibition. It says in unmistakable language:

"There shall not be, pending the disposal of the reference, stay of the payment of tax and penalty which has become due in accordance with the order of the Appellate Tribunal."

7. The powers of the Tribunal as regards stay are set out in Section 43 (5). That provision reads as under:

"No appeal against an order of assessment with or without penalty or against an order imposing the penalty shall be "entertained by an appellate authority unless such appeal is accompanied by satisfactory proof of the payment of tax with or without penalty or, as the case may be of the payment of the penalty in respect of which the appeal has been preferred;

Provided that the appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order-

(a) without payment of the tax and penalty, if any, or as the case may be, of the penalty, on the appellant furnishing in the prescribed manner security for such amount as it may direct, or

(b) on proof of payment of such smaller sum, with or without security for such amount of tax or penalty which remains unpaid, as it may direct;

Provided further that no appeal shall be entertained by the appellate authority unless it is satisfied that such amount of tax as the appellant may admit to be due from him has been paid."

8. The general rule is that appeal shall not be entertained by the appellate authority unless the tax or the penalty has been paid in respect of which the appeal is preferred. But the proviso says that the appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order on the appellant furnishing security or on payment of such smaller sum with or without security for such amount of tax or penalty which remains unpaid as the Tribunal may direct. But in no case an appeal shall be entertained by the appellate authority unless it is satisfied that such amount of tax as the appellant himself admits to be due from him has been paid. In matters of stay of recovery of revenue the legislature is rather stringent because an unfettered power of stay can bring the wheels of the Government to a halt. But it does not mean that in a proper case the Appellate Tribunal cannot grant stay on terms.

9. Nor do I think that there is any force in the second contention of the counsel. I cannot accept that the High Court has the power to stay where the reference is sought by the dealer under sub-section (2) of Section 45. The scheme of Section 45 is fairly clear. When a reference is made to the High Court under Section 45

(1) or 45 (2) the decision of the appellate Tribunal cannot be looked upon as final; in other words the appeal is not finally disposed of. It is only when the High Court decides the case, exercises its advisory jurisdiction and gives direction to the Tribunal on the question of law and the Tribunal reconsiders the matter and decides it, that the appeal is finally disposed of. Sub-section (7) of Section 43 makes it clear. It says:

"Save as provided in Section 45, an order passed by the Appellate Tribunal on appeal shall be final."

10. Therefore, it is clear that except in cases which may come up to the High Court on reference, the decision of the Appellate Tribunal under Section 43 is final. But where a reference does go up to the High Court no finality attaches to the decision of the Appellate Tribunal because by a reason of the decision of the High Court the decision given by the Appellate Tribunal is liable to be reopened and it will be the duty of the Appellate Tribunal to give effect to whatever decision the High Court gives.

11. This is what sub-section (5) of Section 45 provides. It says:

"The High Court upon the hearing of any such case shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Appellate Tribunal a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Appellate Tribunal shall dispose of the case accordingly."

12. It is evident that the appeal has not been finally disposed of by the Tribunal whenever there is a reference to the High Court. The shape that the appeal would ultimately take and the decision that the Appellate Tribunal would ultimately give would depend on the view taken by the High Court. The High Court may accept the view of the law taken by the Tribunal in which case the decision of the Appellate Tribunal would stand. The High Court may reverse the decision of the Appellate Tribunal on a question of law in which case the appeal would have to be disposed of in accordance with the opinion of the High Court. Therefore in cases where Section 45 comes into play, the final decision in appeal is only to be given by the Appellate Tribunal after the reference has been answered by the High Court. This means that the opinion of the High Court is binding on the Appellate Tribunal and the Tribunal shall pass such

orders as are necessary to dispose of the case conformably to the judgment delivered by the High Court in its consultative jurisdiction. The word "accordingly" used in sub-section (5) clearly suggests this. (See *Income-tax Appellate Tribunal v. Cambatta and Co. Ltd.*¹, (Chagla, C.J. and Tendolkar, J.)) This decision has been expressly approved by the Supreme Court in *E. Aswathiah v. Commr. of Income-tax*², and *Wealth Tax Commr. v. Tungabhadra Industries Ltd.*,³

13. As noticed above, the Appellate Tribunal in Section 43 has in express terms been conferred the power to grant stay pending the disposal of the appeal before it. Power to grant stay is incidental and ancillary to the appellate jurisdiction. When an appeal is pending before the Appellate Tribunal the statute conferring appellate jurisdiction expressly grants the power to stay proceeding. Otherwise it will render the appeal nugatory. If the Appellate Tribunal is not given the power in the matter of stay of recovery, the entire purpose of the appeal can be defeated if ultimately the orders of the departmental authorities are set aside. See *Income-tax Officer v. M.K. Mohammed Kunhi*⁴

14. It is true that the power of stay is not to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong *prima facie* (case) is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated by allowing recovery proceedings to continue during the pendency of the appeal.

15. In the Matter of stay the statute goes only this far and no further. What is true of the appellate jurisdiction cannot be predicated of the referential jurisdiction. Power to stay is ancillary to the appellate jurisdiction. But in reference proceedings the legislature in its wisdom has not thought fit to confer the power of stay. This at any rate is the theory of Section 45. Section 45 (7) makes it clear that these powers of stay are limited to such time as the appeal is not heard or decided by the Tribunal. Once the appeal has been disposed of by the Tribunal and the matter is referred to the High Court for opinion there is no power to stay recovery. All that remains to do thereafter is to say, as the sub-section says, that if the amount of tax or penalty "is reduced as a result of such reference, the excess tax paid shall be refunded." The question of refund will only arise if payment is made. The statute therefore postulates payment. And

further that no one will stay payment of tax.

16. I cannot subscribe to the broad proposition that the High Court "as a court" (perhaps in contradistinction to the Appellate Tribunal which is a creature of the statute) has always an inherent power to stay recovery of collection of revenue irrespective of the jurisdiction it exercises, whether that jurisdiction be advisory, consultative, original, appellate, provisional or referential. The power to stay can be circumscribed by the statute. In that case we must look to the statute and statute alone. It is said that on receipt of reference the High Court does not cease to be a court. It is enough to say that this argument loses sight of the fact that the statute has stepped in to provide that though a court, the High Court shall not have power to stay recovery during the pendency of reference.

17. The present sub-section (7) is a counterpart of sub-section (7) of Section 21 of the Bengal Finance Sales Tax Act, 1941, which provided, as the present sub-section provides, that

"The payment of the amount, if any, of tax due in accordance with the order of the Chief Commissioner in respect of which an application has been made under sub-section (1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof, but if such amount is reduced as a result of such reference, the excess tax shall be refunded in accordance with the provisions of Section 12."

18. The only difference in the two sections is that in place of the Chief Commissioner who was the appellate authority under the old Act of 1941 the Sales Tax Tribunal has come in the new Act. Otherwise the draftsmen as well as the legislature have retained the section in the same form as it was in the Act of 1941.

19. The language of sub-section (7) is compelling upon me and there is no sufficient ambiguity to justify me in interpreting this sub-section by reference to its history or mischief against which it was directed. I will only read a passage from the rule declared by the judges in advising the House of Lords in *Sussex Peerage Case*, the well known words in (1844) 8 ER 1034 (1057) (which was accepted by the Judicial Committee of the Privy Council in *Cargo Ex "Argos"* in (1873-74) LR 5 PC 134 (153) to this effect :

"If the words of the statute are in themselves precise and unambiguous, then no

more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

20. The words of the present statute are precise and unambiguous, and in spite of the dangers and difficulties pointed out to us in arguments it would be difficult to say that, when construed in their natural and ordinary sense, they lead to any manifest absurdity and must therefore be qualified by judicial construction. The intention of the legislature is that there shall be no stay of recovery of tax after the appeal is decided by the Tribunal. If such really was the intention of the legislature, however it may be regretted by those who value the supervisory jurisdiction of a court in a world of statutory tribunals, it has used apt, precise and unambiguous words to limit the powers of the High Court on reference. Not that the legislature has not preserved the jurisdiction of the court over a statutory tribunal. This it has done in full measure by providing for reference on a question of law from the Tribunal's decision to the High Court. It thus recognizes the position and prestige of the court in the overall structure. But what it has not done is this. It has not given to the High Court the power to stay recovery.

21. Taking the sub-section solely on its actual language, what do we find? We find that the sub-section creates a positive prohibition. After the decision of the Appellate Tribunal which fixes the liability of the payment of the amount of tax and penalty there shall be no stay "pending the disposal of reference." We will not be justified in doing violence to the language of the enactment in order to extend our jurisdiction where there is none. There is an ancient saying that it is the part of the good judge to extend his jurisdiction. (See Constitutional Fundamentals Hamlyn lectures by H.W.R. Wade p. 65). But this cannot be done by disobeying an Act of Parliament. Not by going beyond power conferred by it. We cannot insist on preserving our jurisdiction even in the face of legislation purporting to exclude it.

22. I find the words in sub-section (7) too strong to enable me to say that the legislature did not intend to take away the inherent power of the High Court, "as a Court". In fact this is precisely what the legislature was trying to do. Had this not been the intention of the legislature nothing would or could have been easier than for the legislature to say so. To say that notwithstanding sub-section (7) the High Court retains its inherent powers is to misread the whole purpose of sub-

section (7). It has to be given its appropriate place and purpose, which was to enact a positive prohibition to the exercise of powers of stay, whether it be Tribunal or the High Court, Once the Appellate Tribunal has given its verdict on the amount of tax due and the penalty, if any, I cannot at all agree that sub-section (7) creates a bar to the Appellate Tribunal but not to the High Court in the exercise of its powers of stay. I, therefore, hold that an application for stay to the High Court is not competent because it has no power of stay.

23. It will be anomalous to hold that the High Court has no power to grant stay when the reference is made to it under sub-section (1) but it is left free to stay recovery where the reference is made to it under sub-section (3) of Section 47. Take this very case. The Tribunal has referred to this court one question under sub-section (1) but it has refused to refer other 17 questions which the dealer wanted it to refer. Now the dealer has made an application under sub-section (2) to this court against such refusal. Will it be right to say that under sub-sections (2) and (3) the High Court has the power to stay but not under sub-section (1)? It will then mean this that in the reference made to us under sub-section (1) by the Appellate Tribunal we have no power to stay. But we have power to stay under sub-section (3) if we direct the Tribunal to state the case to us on the questions which it has refused to refer. Such a view will not only be anomalous but patently absurd.

24. If this argument of counsel is accepted it will mean that if the amount is reduced as a result of reference under sub-section (1), the excess tax paid shall be refunded but not so if the reference is answered by the High Court on a direction by it to the Tribunal to refer to it the questions of law under sub-section (3). Such incongruous result could never have been intended by the legislature.

25. The words "such reference" are quite suggestive. They reinforce the conclusion I have reached. The legislature is talking of refund as a result of reference, whether made under sub-section (1) or (3). Sub-section (5) is comprehensive in its intake. It addresses itself both to the Tribunal and the High Court. It includes reference as a whole, whether made by the Tribunal itself or on a mandamus by the High Court. This is distinctly its intention and, I think, plainly its meaning.

26. The concept of reference embodied in Section 45 is one whole. It has two

facets. One aspect is where the Appellate Tribunal draws up the statement of the case and refers it to the High Court. The other is where the High Court requires the Appellate Tribunal to state the case and refer to it because the Appellate Tribunal when moved had refused to refer and the High Court is not satisfied as to the correctness of the refusal to refer by the Appellate Tribunal. It is true that only sub-section (1) is expressly mentioned in sub-section (7). But it does not mean that sub-sections (2) and (3) are left out. They are comprehended within the expression "or any reference made in consequence thereof" used in sub-section (7). A reference made under sub-sections (2) and (3) is made in consequence of the application made under sub-section (1). The words "in consequence thereof" are the key words, 'Consequence' means the results which flow from and follow on a Particular act or event which is deemed the cause of them. A distinction is drawn between immediate consequences of an act or event and remote or indirect consequences. These three words, viz., "in consequence thereof" mean that we must, in dealing with causation, look at the proximate and not the remote cause : See *Hall Brothers Steamship Co. Ltd. v. Young*,⁵

27. Now it appears to me that a reference made to this court under sub-sections (2) and (3) is the result following as a natural sequence from the application made under sub-section (1) of Section 45. It is the proximate and not the remote cause. If the Tribunal accepts the application of the Commissioner or the dealer under sub-section (1) it itself makes a reference and states the case for the opinion of the High Court. But where it refuses to state the case on the ground that no question of law arises the dealer or the Commissioner, as the case may be, approaches the High Court against such refusal and the High Court, if it is satisfied that the Appellate Tribunal was wrong in refusing to state the case, will direct the Appellate Tribunal to state the case and refer it to the High Court. The Appellate Tribunal on receipt of the requisition from the High Court shall state the case and refer it accordingly. It is left with no option. I am therefore of opinion that whether the reference is made to the High Court by the Appellate Tribunal under sub-section (1) or whether the reference comes before it on a direction by the High Court under subsections (2) and (3), the High Court will have no power to stay recovery.

28. It is said that the inherent power always resides in a court to do justice between the parties before it and that such power is not conferred on it but is

inherent in the court. This argument ignores the express provisions of Section 45 (7) by appealing to Section 151 of the Civil Procedure Code. It is impossible to hold that in a matter which is governed by the Act, an Act which enacts a statutory prohibition, there can be implied in the court outside the limits of the Act a general discretion to dispense with its provisions: See *Maqbal Ahmed v. Onkar Pratap*,⁶ It is well settled that inherent jurisdiction or power is inherent in a court and Section 151 of the Civil Procedure Code does not confer such jurisdiction or power on the court but merely saves it because it already exists there. But inherent jurisdiction of a court can be invoked only when there are no specific provisions to meet the necessities of a case. Where there are specific provisions such as in this case the inherent jurisdiction cannot be invoked. To exercise the power of stay when there is a clear provision to the contrary in the Act is to fly in the face of the statute.

29. I sum up my conclusion in the following propositions:

1. Sub-section (7) of Section 45 enacts a positive prohibition and the High Court has no power to grant stay pending the disposal of a reference.
2. That the High Court has no power to grant stay under Section 151 of the Civil Procedure Code or *ex debito* justifies.

30. I say nothing on the jurisdiction of the High Court to grant stay of the recovery of tax where a reference is pending or where an application has been filed under Section 256 (2) of the Income-tax Act. This question has been answered by a division bench of this court in *Lala Bansidhar and Sons v. Commr. of Income-tax, Delhi*,⁷ (T.V.R. Tatachari, C.J. and P.S. Safer, J.). Following a Division Bench decision of the Andhra High Court in *Pollisetti Narayana Rao v. Commissioner of Income- tax*,⁸ the learned Judges have held that the High Court has inherent jurisdiction, in a proper case, to stay the recovery of the tax pending disposal of the reference under Section 66 of the Indian Income-tax Act 1922 or Section 256 of the Income-tax Act 1961. I think it is unnecessary for me to pronounce on the correctness of this decision in these sales tax cases which are under the Sales Tax Act and not under the Indian Income-tax Act. In the absence of a concrete income-tax case and without the benefit of rival arguments from the Income tax department and the assessed it will not be proper for us, I think, to express a definitive opinion on the correctness of that decision. I content myself with saying that a contrary view

can be plausibly argued, perhaps with greater force and cogency.

31. The matter will now be placed before the Division Bench for disposal of these cases in accordance with law.

Answered accordingly.

Cases Referred.

1. AIR 1956 Bombay 509
2. AIR 1968 Supreme Court 36
3. AIR 1970 Supreme Court 352.
4. , (1969) 71 ITR 815.
5. (1939) 1 KB 748 (761-762).
6. AIR 1935 PC 85.
7. 1978) III ITR 330, (1978 Tax LR 332)
8. (1956) 29 ITR 22; AIR 1957 Andhra Pradesh 672