Bhagwan Radha Kishen vs Commissioner Of Income-Tax on 25 March, 1952

Equivalent citations: AIR1952ALL857, [1952]22ITR104(ALL), AIR 1952 ALLAHABAD 857

JUDGMENT

Malik, C.J.

1. This is a reference under Section 66 (1), Income-tax Act in which two questions are raised. The assesses filed an appeal before the Appellate Tribunal in which 22-4-1948, was the first date fixed for hearing. Notice of this application was sent to the assessee at the address, given for service. The notice was as follows :

> "Take notice that the above appeal has been fixed for hearing at 23A, Thornhill Road, Allahabad, at 10.30 A. M. on 22-4-1948."

The notice came back unserved with an endorsement by the postal authorities as follows : "Not claimed." The tribunal thereupon postponed the hearing to 28-7-1948, and a fresh notice in exactly similar terms was sent by registered post. This came back with the endorsement by the postal authorities as follows : "Refused." The Tribunal thereupon dismissed the case for default on 28-7-1948. The order of the Tribunal was as follows :

> "Notice of the first hearing in this appeal was sent to the appellant by the postal address by which he undertook to receive the notice but it was received with the endorsement 'not claimed' on it after the date of hearing viz. 22-4-48 had passed away. We, therefore, adjourned the appeal sine die and issued a fresh notice by the same postal address for today. This has been returned with the note by the postal authorities 'Refused'. As a matter of precaution, we also had a letter sent to Mr. Trivedi, the gentleman who actually filed and prosecuted the appeal in its initial and intermediate stages till now but he has not even cared to acknowledge the same. In the circumstances, the notice is duly served. No one appears for the appellant. The appeal is, therefore, dismissed for default of protecution under Rule 24, Income-tax Appellate Tribunal Rules, 1946."

The assessee did not move the Appellate Tribunal to set aside the order of 28-7-1948, dismissing, his appeal for default but applied for a reference under Section 66 (1), Income-tax Act. The tribunal has referred two questions for answer : The first is:

> "Whether the mere endorsement of 'refusal' to accept the service of the notice of hearing of the appeal made by the Postal authorities was sufficient in the eye of law to justify the presumption of service of the notice on the applicant?"

Under Order 5, Schedule I, Civil P. C. this Court has made a Rule (20A) to the following effect :

> "a summons may be served on the defendant by registered post and ..... where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served."

Section 63, Income-tax Act provides that a notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908, and Section 27, General Clauses Act (10 of 1897) provides that "Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

A Bench of this Court considered these provisions in the case of M.X. De Nornha & Sons, Kanpur v. Commissioner of Income-tax, U.P., 1950-18 I. T. R. 928 (ALL.) and held that there was a presumption of proper service and it was for the assessee to rebut that presumption if he contends that the service of notice was not in fact effected on him. The answer to the first question, therefore, must be in the affirmative.

2. The second question is as follows :

> "Whether Rule 24 of the Income-tax Appellate Tribunal Rules, 1946, is ultra vires and could not be framed in the form it has been framed by the Tribunal in exercise of its authority under Sub-section (8) of Section 5A, Income-tax Act, 1922."

As regards this question learned counsel has raised three points. He has submitted that Rule 24 of the Income-tax Appellate Tribunal Rules 1946, which is as follows :

> "Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called for hearing, the Tribunal may dismiss the appeal for default "

and which was framed under Sub-section (8) of Section 5A is ultra vires as it is in conflict with Section 33 (4) of the said Act. Section 33 (4) provides that "The appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Learned counsel contends that the words 'orders thereon' mean that the Appellate Tribunal is bound to pass orders on the various points raised in the appeal and decide and determine the same according to law. Learned counsel has relied on a decision of the Bombay High Court in Motor Union Insurance Co. Ltd. v. Commissioner of Income-tax, Bombay, 1945-13 I. T. R. 272. That case is really not in point as the point raised there was whether the Tribunal could itself raise a ground or permit a party, which had not appealed, to raise a ground which would work adversely to the appellant and was not raised by the appellant and the Court rightly held, if we may say so with respect, that the Tribunal must confine itself to the appeal and cannot allow such points to be raised. That case, however, has no bearing on the point raised before us. Learned counsel has to concede that it is open to a party who has appealed to give up either some of his points or all his points or even to make a statement that he does not wish to press his appeal in which case the Tribunal will be bound to dismiss the same. In the circumstances where notice was in fact served on an assessee and he did not choose to appear the Tribunal could as well assume that he did not wish to proceed further with the appeal and dismiss it for default and it cannot, therefore, be said that the provision in Rule 24 for dismissal of an appeal for default was in any way in conflict with Section 33 (4), Income-tax Act.

3. The second contention is that the rule is ultra vires as it does not require the Tribunal to wait for service of notice and even in spite of non-service the tribunal may dismiss an appeal for default. We have already quoted the language of this rule and though it is true that it does not say that 'the appellant does not appear in spite of service of notice' but that is what is implied and what it must mean. We, therefore, see no force in this contention either.

4. Lastly, it is urged that there is no provision in the rules, as they now stand, for setting aside of an order of dismissal for default even in a case where the Tribunal might be later satisfied on unimpeachable evidence that notice was not in fact effected or that there was sufficient cause for non-appearance. It is true that there is no such rule but it must be held that there is inherent jurisdiction in the Tribunal to set aside an order of dismissal for default or an order passed on an appeal heard ex parte when it is satisfied that there was in fact no service of notice or that there was sufficient cause which prevented the appellant or the respondent from appearing on the date fixed. As a matter of fact Mr. Das on behalf of the Department has not challenged this inherent power of the Tribunal. We see no force in this contention and in our view Rule 24 of the Income-tax Appellate Tribunal Rules 1946, is not ultra vires.

5. The Department is entitled to its costs which we assess at Rs. 300.