Income Tax Appellate Tribunal - Hyderabad
K.K. Patel And N.A. Khan And Co. vs Income-Tax Officer on 7 August, 1984
Equivalent citations: 1985 11 ITD 151 Hyd
Bench: G Cheriyan, T R Rao
ORDER George Cheriyan, Accountant Member

1. This appeal by the assessee relates to the assessment year 1979-80. The assessment order dated 16-12-1981 is very short. It is merely stated that the case was posted for hearing on 24-10-1981 and 16-12-1981, but there was no response from the assessee and, hence, the assessment was being made ex parte under Section 144 of the Income-tax Act, 1961 ('the Act').

2. The assessee appealed to the Commissioner (Appeals). The assessee contested the making of assessment under Section 144. The assessee also contested the computation of the total income at Rs. 2,15,000. The Commissioner (Appeals) has given a categorical finding that there is every reason to believe that notice under section 143(2) of the Act was not served on the assessee and there was no evidence of the service of such statutory notice fixing alleged hearing on 24-10-1981 or 16-12-1981. He, therefore, stated that the assessment deserved to be set aside, with a direction to reframe the same after allowing a reasonable opportunity of being heard. As far as the quantum is concerned, he also gave a certain specific finding regarding a disallowance of Rs. 10,000 made by the ITO which was reduced to Rs. 3,000 by him and also regarding the assessability of gross income as shown by the assessee, which, the assessee had contended, did not represent taxable income. According to the Commissioner, the Compensation amount received by the assessee was rightly considered to be taxable income.

3. On the aspect of registration, which was sought, the Commissioner stated that he

4. Finally, he observed in para 7 as follows:

For the above reasons, I set aside the impugned order with a direction to the Income-tax

[Emphasis supplied)

5. Before us, the first contention of the learned Counsel was that since before finalising the assessment under section 144, no notice under Section 143(2) had been served, the opportunity of being heard was not afforded to the assessee. Since the assessee did not have an opportunity of being heard, he submitted, there was clear violation of the principles of natural justice. When the principles of natural justice were violated, he went on to submit, the assessment made would be void and when the assessment made was void, according to him, the Commissioner (Appeals) should have straightaway annulled the same and the question of his setting aside the assessment and directing a fresh assessment being made in accordance with law would not arise. In support of this contention, he relied on the decision of the Gauhati High Court in Jai Prakash Singh v. CIT [1978] 111 ITR 507. That was a case where assessment was made without serving notice under Section

143(2) on 9 out of 10 legal representatives and he submitted, the High Court had clearly held that the assessment should be annulled and the appellate authorities could not nullify the provisions of limitation by passing an order, setting aside the assessment and directing completion of assessment by issue of notice to the remaining legal representatives. The learned Counsel also placed before us elaborate written submissions. In the said submissions, various judicial pronouncements have been referred to and in particular the decision of the Supreme Court in Maneka Gandhi v. Union of India AIR 1978 SC 597, and it was contended that where the principles of natural justice are not followed and an adverse decision is made, the defect in the procedure adopted would be so fatal that the decision would be void. For all these reasons, he contended that the only proper order to be passed would have been one annulling the assessment.

6. On the point of registration, he submitted that the treatment by the ITO of the assessee as an unregistered firm was clearly illegal since declaration in Form No. 12 was filed and the assessee was entitled to the grant of continuation of registration. According to him, the Commissioner erred in directing the ITO to start proceedings under Section 186(2) of the Act.

7. The learned departmental representative, on the other hand, submitted that the case fell squarely within the ratio of the judgment of the Allahabad High Court in Sant Baba Mohan Singh v. CIT [1973] 90 ITR 197, where also notice under Section 23(2) of the Indian Income-tax Act, 1922 ('the 1922 Act'), was not issued before the assessment was made under Section 23(3) and the High Court had held that the power to annul an assessment is a power to be exercised when assessment proceeding is a nullity in the sense that the ITO had no jurisdiction ab initio to take proceedings and the omission of the ITO to issue a notice under Section 23(2) did not affect the ab initio jurisdiction enjoyed by the ITO in respect of the proceeding and after rectifying the omission by issuing the notice, he could proceed to complete the assessment, and, therefore, the direction of the Commissioner to make a fresh assessment after issue of notice was in order.

8. We have considered the rival submissions. The principles of natural justice are based on two main limbs: (1) right of fair hearing, also known as audi alterant partem, and (2) rule against bias. In the present case, we are not concerned with the second aspect. On the scope and nature of the hearing to be given, in the majority judgment of the Supreme Court in Swadeshi Cotton Mills v. Union of India AIR 1981 SC 818, there are the following observations in para 76:

The audi alterant partem rule, as already pointed out, is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. Thus, in the ultimate analysis, the question (as to what extent and in what measure) this rule of fair hearing will apply at the pre-decisional stage will depend upon the degree of urgency, if any, evident from the facts and circumstances of the particular case.

So, to what extent and in what measure the rule of fair hearing will apply at the pre-decisional stage, will eventually be dependent upon the degree of urgency evident from the facts and circumstances of the particular case. In certain instances, it would also be possible, since the concept of natural justice is flexible, to take certain action provisionally and give a hearing 'remedial in aim' to the

person aggrieved to enable him to present his case and controvert that of the deciding authority, as in the case of impounding passports, as seen from the decision relied on by the learned Counsel in Maneka Gandhi's case (supra). In the case of Swadeshi Cotton Mills (supra), where this decision was also referred to by the Supreme Court, the Court had occasion to consider what was the effect of the non-observance of the fundamental principle of fair play of giving a hearing before taking a decision. The observations and the decision of the Court in this regard in Swadeshi Cotton Mills' case (supra), are as under:

92. The further question to be considered is: What is the effect of the non-observance of this fundamental principle of fairplay ? Does the non-observance of the audi alterant partem rule, which in the quest of justice under the rule of law, has been considered universally and most spontaneously acceptable principle, render an administrative decision having civil consequences, void or voidable ? In England, the outfall from the watershed decision, R. v. Baldwin, 1964 AC 40 brought with it a rush of conflicting opinion on this point. The majority of the House of Lords in Ridge v. Baldwin held that the non-observance of this principle, had rendered the dismissal of the Chief Constable void. The rationale of the majority view is that where there is a duty to act fairly just like the duty to act reasonably, it has to be enforced as an implied statutory requirement, so that failure to observe it means that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void (See Wade's Administrative Law, ibid., page 448). In India, this Court has consistently taken the view that a quasi-judicial or administrative decision rendered in violation of the audi alterant partem rule, wherever it can be read as an implied requirement of the law, is null and void [e.g., Maneka Gandhi's case [AIR 1978 SC 597] (ibid.) and S.L. Kapoor v. Jagmohan [AIR 1981 SC 136] (ibid.)]. In the facts and circumstances of the instant case, there has been a non-compliance with such implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The impugned order, therefore, could be struck down as invalid on that score alone. But we refrain from doing so, because the learned Solicitor-General in all fairness, has both orally and in his written submissions dated August 28, 1979, committed himself to the position that under Section 18-F, the Central Government in exercise of its curial functions, is bound to give the affected owner of the undertaking takenover, a 'full and effective hearing on all aspects touching the validity and/or correctness of the order and/or action of takeover', within a. reasonable time after the takeover. The learned Solicitor has assured the Court that such a hearing will be afforded to the appellant company if it approaches the Central Government for cancellation of the impugned order. It is pointed out that this was the conceded position in the High Court that the aggrieved owner of the undertaking had a right to such a hearing.

93. In view of this commitment/or concession fairly made by the learned Solicitor-General, we refrain from quashing the impugned order, and allowing Civil Appeal 1629 of 1979 send the case back to the Central Government with the direction that it shall, within a reasonable time, preferably within three months from today, give a full, fair and effective hearing to the aggrieved owner of the undertaking, i.e., the company, on all aspects of the matter, including those touching the validity and/or correctness of the impugned order and/or action of takeover and then after a review of all the relevant materials and circumstances including those obtaining on the date of the impugned order, shall take such fresh decision, and/or such remedial action as may be necessary, just, proper and in accordance with law.

Eventually, therefore, whether the decision should be set aside and a further opportunity of full and fair hearing should be given or not, or the decision should be annulled straightaway and the law be left to take its course, is dependent on the facts of the case. It is not that in each and every case, annulment is the only proper order to be passed.

9. In the case of Kapurchand Shrimal v. CIT [1981] 131 ITR 451 (SC), though a claim for partition under Section 25A of the 1922 Act had been made in time, the ITO proceeded to complete the assessment without making the enquiry enjoined by the aforesaid provision. The observations of the Supreme Court and the conclusions of their Lordships as to the effect of the non-observance of this statutory requirement in Kapurchand Shrimal's case (supra) are as under:

From a fair reading of Section 25A of the Act it appears that the ITO is bound to hold an inquiry into the claim of partition if it is made by or on behalf of any member of the HUF which is being assessed hitherto as such and record a finding thereon. If no such finding is recorded, Sub-section (3) of Section 25A of the Act becomes clearly attracted. When a claim is made in time and the assessment is made on the HUF without holding an inquiry as contemplated by Section 25A(1), the assessment is liable to be set aside in appeal as it is in clear violation of the procedure prescribed for that purpose. The Tribunal was, therefore, right in holding that the assessments in question were liable to be set aside as there was no compliance with Section 25A(1) of the Act. It is, however, difficult to agree with the submission made on behalf of the assessee that the duty of the Tribunal ends with making a declaration that the assessments are illegal and it has no duty to issue any further direction. It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute. The statute does not say that such a direction cannot be issued by the appellate authority in a case of this nature. In interpreting Section 25A(1), we cannot also be oblivious to cases where there is a possibility of claims of partition being made almost at the end of the period within which assessments can be completed making it impossible for the ITO to hold an inquiry as required by Section 25A(1) of the Act by following the procedure prescribed therefor. We, however, do not propose to express any opinion on the consequence that may ensue in a case where the claim of partition is made at a very late stage where it may not be reasonably possible at all to complete the inquiry before the last date before which the assessment must be completed. In the instant case, however, since it is not established that the claim was a belated one the proper order to be passed is to set aside the assessments and to direct the ITO to make fresh assessments in accordance with the procedure prescribed by law. The Tribunal, therefore, erred in merely cancelling the' assessment orders and in not issuing further directions as stated above.

[Emphasis supplied] Therefore, if necessary, it can be said to be the duty of the appellate authorities to issue appropriate directions to the assessing officer, against whose decision the appeal is preferred to dispose of the matter in a particular manner.

10. We have to consider the action of the Commissioner (Appeals), in the present case, in the aforesaid background. The assessee did not have an opportunity of being heard before the assessee

was saddled with an assessment. This is violative of the principles of natural justice. But, since the ITO had already valid jurisdiction to make an assessment provided the requirement of a reasonable opportunity of being heard was complied with, the Commissioner (Appeals) set aside the assessment directing the ITO to give a fresh hearing by issue of notice under Section 143(2). The action taken by the Commissioner is not opposed to the principles in the cases decided by the Supreme Court to which we have referred, viz., Kapurchand Shrimal's case (supra) and Swadeshi Cotton Mills' case (supra). The action taken by the Commissioner is also in conformity with the ratio of the decision of the Allahabad High Court in Sant Baba Mohan Singh's case (supra). In the light of these findings, we are unable to agree with the learned Counsel for the assessee that there was any error in the manner in which the Commissioner (Appeals) exercised his discretion as far as setting aside the assessment is concerned and directing a fresh assessment in accordance with law after giving due opportunity of being heard.

11. The learned Counsel had placed before us further submissions, viz., to the effect that if the setting aside was considered to be in order, then it should be construed that the assessment in its entirety was set aside and it should be open to the assessee to urge all matters de novo before the ITO. In the present case, since the assessment was made without affording any opportunity to the assessee of being heard, we agree with the learned Counsel that the Commissioner was not justified in giving his findings on one or two aspects. The proper course was to set aside the assessment in its entirety and we, accordingly, hold that the specific findings on particular issues given by the Commissioner (Appeals) would also stand set aside and the order of the Commissioner (Appeals) would be construed as one setting aside the assessment in its entirety, directing a fresh assessment in accordance with law after giving notice under Section 143(2) and a reasonable opportunity of being heard.

12. On the point of registration, we are unable to read into the order of the Commissio

13. The result is, the appeal is treated as allowed in part.