

Neutral Citation No. - 2024:AHC-LKO:47957

Court No. - 7

Case :- SALES/TRADE TAX REVISION No. - 31 of 2023

Revisionist :- M/S Rajdhani Arms Corporation, Lucknow Thru. Propreitor, Seema Sarna

Opposite Party :- Commissioner Of Commercial Tax U.P., Commercial Tax Bhawan, Lucknow

Counsel for Revisionist :- Anand Dubey

Counsel for Opposite Party :- C.S.C.

Hon'ble Alok Mathur, J.

1. Heard Shri Anand Dubey, learned counsel for the revisionist as well as learned Standing Counsel for the opposite party and perused the record.

2. By means of the present revision, the revisionist has challenged the order dated 07.09.2017 passed by the Commercial Tax Tribunal, Lucknow, whereby the Tribunal has rejected the second appeal of the revisionist and upheld the order of first appellate authority dated 11.02.2016.

3. Learned counsel for the revisionist has submitted that the revisionist has assailed the order dated 07.09.2017 passed by the Tribunal on the ground that on the date fixed, the counsel of the revisionist/appellant could not appear before the Tribunal and only on hearing the representative of the State, the second appeal was decided. The Tribunal has further recorded that despite information and service being sufficient upon the revisionist, no one had appeared and accordingly the Tribunal was proceeding to decide the case on merits.

4. The question raised by the revisionist in the present revision is as to whether in absence of counsel of the revisionist/appellant, the Commercial Tax Tribunal can proceed to consider and decide the appeal 'ex parte' in absence of the revisionist/appellant. He submits that the principles with regard to appearance of the plaintiff or defendant and order to be passed thereon and as to how the court could proceed in the matter of suits and appeals has been provided under the Code of Civil Procedure.

5. He submits that according to Order IX, Rule 6(1)(a) of the Code of Civil Procedure, where the plaintiff appears and the

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defendant does not appear when the suit is called on for hearing, then when summons duly served, if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte. He submits that it is open for the court to continue the hearing of the proceedings in absence of defendant on the merit of the case and suit may proceed ex parte, but according to the Order IX Rule 8 of the Code of Civil Procedure, where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof.

6. He further placed reliance on the Order XLI Rule 17 of the Code of Civil Procedure, where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

7. It is in the aforesaid circumstances, it was submitted that in case the appellant does not appear and only the State appeared before the Commercial Tax Tribunal, the Tribunal should have dismissed the appeal in default rather to proceed to pass an order on merits of the case only after hearing the State - opposite parties. He further relied upon the judgement of the Supreme Court in the case of **Benny D'Souza & Ors. Vs. Melwin D'Souza & Ors.**; S.L.P. (C) No.23809 of 2023, wherein though the Supreme Court was interpreting the provisions of Order XLI Rule 17 of the Code of Civil Procedure, and was of the view that where the appellant does not appear, the court can only dismiss the appeal for want of prosecution and not consider the case on merits.

8. The observation of the Supreme Court in the aforesaid judgement is quoted herein-below:

"Leave granted.

The appellants herein are the plaintiffs who were the appellant in RSA No.196/2022. The only grievance of the appellants herein is with regard to the dismissal of the said appeal vide order dated 26.09.2023 on merits although the appellants were not represented inasmuch as there was no counsel who appeared for the appellants and the junior counsel for the appellants submitted that the senior counsel engaged in the matter, was not available as his cousin had passed away. Therefore, on account of a bereavement in the family of the arguing counsel there was no representation on behalf of the appellants before the High Court.

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Learned senior counsel appearing for the appellants submitted that the High Court could have dismissed the appeal for non prosecution in terms of the order XLI Rule 17 CPC and particularly the Explanation thereto instead of dismissing the appeal on merits by stating that no substantial question of law was made out. Therefore, the learned senior counsel submitted that the impugned judgment may be set aside and the matter may be remanded to the High Court for consideration on the merits of the appeal.

Per contra, learned counsel appearing for the respondent supported the impugned judgment and contended that the appellants consistently failed to appear before the High Court and therefore, the High Court had no option but to pass the impugned judgment and that there is no merit in the appeal.

Having heard learned senior counsel for the appellants and learned counsel for the respondents, at the outset, we extract Order XLI Rule 17 of the CPC which reads as under:

"17. Dismissal of appeal for appellant's default :- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation. - Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

The Explanation categorically states that if the appellant does not appear when the appeal is called for hearing it can only be dismissed for non-prosecution and not on merits.

However, the impugned judgment is a dismissal of the appeal on merits which is contrary to the aforesaid provisions and particularly the Explanation thereto. On that short ground alone the appeal is allowed the impugned order is set aside.

The RSA No.196/2022 is restored on the file of the High Court.

The parties are at liberty to advance arguments on the merits of the case.

All contentions are left open. The appeal is allowed and disposed of in the aforesaid terms.

No costs.

Pending application(s), if any, shall stand disposed of."

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9. Learned Standing Counsel on the other hand has opposed the writ petition. He has submitted that the Value Added Tax Rules, 2008 itself provides for the situation and conditions for hearing in absence of appearance of the appellant. He submits that according to Rule 63(4) and (5) of the U.P. Value Added Tax Rules, 2008 provides as follows:

"(4) On the date of hearing, if all the relevant records of appeal have been received, the parties shall be given reasonable opportunity of being heard and the appellate authority or the Tribunal, as the case may be, may after examining all the relevant records, decide the appeal:

Provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte.

(5) The judgment in appeal shall be in writing and shall state –

(a) the points for determination,

(b) the decision thereon, and

(c) the reasons for such decision."

10. He relying upon Rule 63 (4) of the U.P. Value Added Tax Rules, 2008 submits that if despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte and it was submitted that considering the Rules 63(4) of the U.P. Value Added Tax Rules, 2008, it was open for the Tribunal to proceed to consider and decide the appeal preferred by the revisionist ex parte in accordance with the U.P. Value Added Tax Rules, 2008 and hence, no illegality was committed by the Tribunal while considering and deciding the appeal preferred by the revisionist in his absence.

11. Considering the rival submissions of learned counsel for the parties, it is noticed that on one hand, the general law of land enshrined in the Code of Civil Procedure provides that in absence of plaintiff/appellant, the suit or appeal should be dismissed for want of prosecution, while it was contended by learned Standing Counsel that as per Rule 63 of the U.P. Value Added Tax Rules, 2008, it is open for the Tribunal to consider and decide the appeal on merits even where despite of service of summons, the appellant does not appear before the Tribunal. This Court has given due consideration to the rival contentions and for the reasons given below, this Court is of the considered view that where the appellant does not appear before the Tribunal, the appeal should be dismissed for want of

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prosecution rather than deciding the same on merits. Proviso to Rule 63 (4) of the U.P. Value Added Tax Rules, 2008 provides that if despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte.

12. The aforesaid proviso though on the face of it provides that in absence of a party to the proceedings, the appeal can be decided by the Tribunal on merits, but the word 'ex parte' used in the proviso can be interpreted as "want of appearance on behalf of the opposite party/defendant" and not the appellant/plaintiff. The word 'ex parte' has not been defined under the U.P. Value Added Tax Rules, 2008 and accordingly its meaning and definition can be taken from the Code of Civil Procedure. The word 'ex parte' occurs in Order IX Rule 6 (a) of the Code of Civil Procedure, where only the plaintiff appears and defendant does not appear and accordingly in the aforesaid circumstances, the proceedings are conducted "ex parte". The word 'ex parte' does not appear in Order IX Rule 8, which in a situation where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof. Accordingly the word 'ex parte' can be given its natural meaning as appearing in the Code of Civil Procedure and certainly the Tribunal can proceed to consider and decide the case ex parte in a situation where only the appellant appears, but the respondent/State does not appear, while in a case, where the appellant does not appear, the only consequence of such a situation would be to dismiss the appeal for want of prosecution and not to enter and decide the case on merits of the controversy.

13. Even otherwise, deciding a case ex parte on merits without giving reasonable opportunity to the parties is blatant violation of rule of "Audi alterum partem". In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits.

14. In this regard, the Supreme Court in the case of **Siemens Engineering & Manufacturing Company of India Ltd. v. Union of India**, (1976) 2 SCC 981, gave directions to the administrative authority and tribunals exercising quasi-judicial powers. The Court observed as under:

"If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities

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and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process."

15. The other concern raised before us was that there is no provision for setting aside the ex parte order in such a situation where the Tribunal proceeds to allow the appeal ex parte in absence of the defendant. In this regard, reliance was placed upon a judgement of a Coordinate Bench of this Court passed in ***M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs. The Commissioner of Trade Tax, U.P, Lucknow; 2003 NTN (Vol.22)- 341***, wherein interpreting the provisions of Section 22 of the U.P. Value Added Tax Act, 2008, which is pari materia with provision of Section 31 of the U.P. Value Added Tax Act, 2008, which provides for rectification, this Court has held that wherein an appeal is decided ex parte, it shall be open for moving an application for rectification of such a situation. Accordingly, adequate reasons are given for the defendant for non appearance and judgement is rendered ex parte, but recall of order, exercise of rectification has been provided under Section 31 of the U.P. Value Added Tax Act, 2008.

16. In light of the above, the impugned order dated 07.09.2017, whereby the Tribunal has proceeded to decide the appeal preferred by the revisionist in his absence, is held to be illegal and arbitrary and accordingly set aside and the matter is remitted back to the Tribunal to decide the matter afresh after affording an opportunity of hearing to the parties and considering the fact that much time due to pendency of the aforesaid proceedings, has elapsed, the Tribunal is directed to expedite the appeal and decide the same within three months from the date of production of a certified copy of this order, in accordance with law.

17. With the aforesaid observations, the revision is **disposed of**.

18. The revisionist undertakes to cooperate in the proceedings before the Tribunal.

(Alok Mathur,J.)

Order Date :- 15.7.2024
Anupam S/-