CIVIL WRIT

*Before Mehar Singh and I. D. Dua, JJ.*

MANGAT RAM KUTHIALA AND OTHERS,—*Petitioners.*

*versus*

THE COMMISSIONER OF INCOME-TAX, PUNJAB, SIMLA, AND ANOTHER,—*Respondents.*

**Civil Writ No. 115 of 1957.**

1959

Aug., 12th

*Constitution of India—Article 226—Successive applications for mandamus—Whether competent—Omission to claim relief in the earlier application—Whether fatal—Indian Income-Tax Act (XI of 1922)—Section 33(4)—Income Tax Appellate Tribunal dismissing the appeal in default on the ground that the assessee refused to accept notice—Assessee pleading non-service of notice—Whether entitled to prove non-receipt of notice—Right to a hearing—Meaning of—Power of recall orders—Whether vests in quasi-judicial Tribunals.*

*Held,* that it is a settled rule that the Court will not allow a party to succeed, on a second application, when it has previously applied for the very same thing and failed, except in case of alteration in the form of a title or jurat in the affidavit. The clearance of no other defect, on consideration of which the previous application was dismissed, can be permitted to enable a party to succeed in the second application. But the second application has to be between the same parties, for the same purpose, and made after defects found in the previous application have been cleared, excepting the formal defects as referred to above. The mere omission on the part of the petitioners to claim in the first petition the relief that they claim in their second petition, will not render their second petition incompetent.

*Held,* that under section 33(4) of the Income-Tax Act, 1922, the hearing of the parties is a statutory imperative and if a party can prove it as a fact that it was never properly served with the notice given by the Appellate Tribunal and, therefore, was not able to present its case at the hearing of the appeal it cannot be said that such a party has had

an opportunity of being heard within the meaning and scope of the said sub-section. It is no doubt true that the return of the registered cover marked as "refused" is presumptive evidence of service and refusal, but even so if a party can prove it as a fact that such return is not a true return and that there was no presentation of the registered cover to it and no refusal by it, then to refuse to permit such a party to prove that as a fact is denying it an opportunity of being heard inconnection with his appeal.

*Held*, that it is settled rule that a judicial tribunal can recall and quash its own order in exceptional and rare cases when it is shown that it was obtained by fraud or by palpable mistake or was made in utter ignorance of a statutory provision and the like. For the application of this rule the class of the tribunal is not a material matter but what is of substance and material is the nature of the proceedings before the tribunal. If the proceedings are in the nature of judicial proceedings, then, irrespective of the class of the tribunal, the rule will apply, and if an order has been obtained from or has been made by a judicial or a *quasi*-judicial tribunal because of practice of fraud, or because of palpable mistake, or because of ignorance of clear statutory provsion and the like, it has inherent power to recall such an order, quash it, and make an order on merits and according to law in the ends of justice.

*Petition under Article 226 and 227 of the Constitution of India praying that a writ of* certiorari *be issued directing the respondent No. 2 to transmit the records of the Miscellaneous Application No. 6 of 1949/50 in Income-Tax Appeal No. 1002 of 1949/50 to the High Court and further praying that order dated the 27th October, 1950, passed by the said respondent on he aforesaid application be quashed.*

D. N. AWASTHY AND B. C. MAHAJAN, for Petitioners.

S. M. SIKRI AND H. R. MAHAJAN, for Respondents.

ORDER

ıar Singh, J.

MEHAR SINGH, J.—This is a petition under Articles 226 and 227 of the Constitution. The facts are not much in dispute.

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The petitioners are the legal-representatives of Balbhadar Mal Kuthiala, who, on August 24, 1948, was assessed to income-tax by the Income-tax Officer, A Ward, Amritsar. The assessee preferred an appeal against the assessment order, which appeal was heard by the Additional Appellate Assistant Commissioner of Income-tax and dismissed on March 20, 1949 (Annexure 'B'). The assessee went in second appeal to the Income-tax Appellate Tribunal, respondent No. 2. The appeal was sent under registered cover. The petitioners aver that nothing was heard of the appeal by the assessee until on February 7, 1950, a copy of the order, of December 13, 1949, of respondent No. 2, dismissing the appeal in default of appearance of the assessee, was received by the assessee. An application was then moved by the assessee on February 13, 1950, before respondent No. 2 for setting aside the order of respondent No. 2 and for restoration of the appeal for disposal according to law after hearing the assessee. The ground taken in the application, supported by an affidavit of the assessee, was that the assessee never received the registered letter purporting to inform him of the date of hearing of the appeal, that the postal authorities never presented that letter to him, and that he never refused to receive any such letter. The application not having been expeditiously disposed of, the assessee moved another application (Annexure 'G') before respondent No. 2 under section 66(1) of the Indian Income-tax Act, 1922, for drawing up a statement of the case and referring to the High Court questions of law mentioned therein.

On October 27, 1950, the first application of the assessee was dismissed by respondent No. 2 (Annexure 'H'). The Judicial Member of respondent No. 2 found that the registered cover addressed to the assessee having been returned marked as

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'refused', there was a presumption of proper and due service upon the assessee and proceeded to observe that "so far as the Tribunal is concerned, there is no requirement that they must get these notices served. What all they are required to do is to give opportunity to the assessee of being heard. This at any rate I am satisfied has been done in this case." He then held that respondent No. 2 had ample powers to dispose of the appeal because of the absence of the assessee. He further held that "there can be no doubt that the Tribunal had decided that there was no power of review inherent in it. If an authority were needed for that proposition, the ruling in *Commissioner of Income-tax* v. *Ahmedbhai-Umarbhai and Co.* (1) is ample. That being the position to seek to get round that correct legal position by invoking vague, undefined inherent power would not, in my opinion, be proper". The Accountant Member of respondent No. 2 observed that—"whether an opportunity of being heard was given in this case to the assessee is a matter which can be agitated in a reference application if the assessee so desires. I am not convinced that the Tribunal has any inherent powers of reviewing their own order".

On the second application of the assessee, respondent No. 2 on January 24, 1952, drew up a statement of the case in accordance with the provisions of section 66(1) of the Indian Income-tax Act, 1922, and framed two questions of law for determination by the High Court (Annexure 'I'). These two questions were—

> "(i) Where a properly addressed registered letter, postage prepaid, is returned by the post office with an endorsement by a postman—'Inkariwala hai'—(in the category of refusal), does a presumption

(1) 1950 I.T.R. 472 at p. 509

arise of due service of the letter on the addressee, and following as a corollary,

(ii) If the answed to the above question is in the negative, whether the order of the Tribunal, dismissing the appeal for default, is not liable to be recalled on the ground that it is null, as the appellant had not been given an opportunity of being heard in support of his appeal?"

On May 12, 1952, the assessee made an application under section 66(4) of the Indian Income-tax Act, 1922, read with Articles 226 and 227 of the Constitution, praying that statement of the case submitted by respondent No. 2 be referred back to them with the direction that reference to the assessee's first application and respondent No. 2's order thereon be included in the statement of the case, which should be returned to the High Court with those additions thereto and the documents referred to in this application to the High Court. This application and the reference under section 66(1) of the Indian Income-tax Act, 1922, were pending in this Court when on March 22, 1955, the assessee died. The petitioners are, as stated, the legal-representatives of the assessee and they continued pursuing the reference as also that application.

The reference and the application came for hearing before a Division Bench of this Court in the beginning of 1957 and on February 6, 1957, the learned Judges dismissed both. The case is reported as *Balbhadar Mal Kuthiala* v. *The Commissioner of Income-tax* (1). The first question was answered in the affirmative and it was held that the second, in view of the answer to the first

(1) A.I.R. 1957 Punj, 284

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question, did not arise. In regard to the application of the assessee under section 66(4) of the Indian Income-tax Act, 1922, and Articles 226 and 227 of the Constitution the learned Judges observed that—"the assessee may, if so advised, present a fresh application for the purpose." This they held on the view that the events that took place after the order of respondent No. 2 dismissing the appeal under section 33(4) of the Indian Income-tax Act, 1922, cannot be gone into or taken into consideration in a reference under section 66 of the said Act and the documents relating thereto should not be included in the paper-book.

It was after that that on February 11, 1957, the petitioners filed the present petition for quashing the order of October 27, 1950, of respondent No. 2 on the first application of the assessee to it and for a direction for disposal of that application by respondent No. 2 in accordance with law on these grounds that—

"(i) the Tribunal has an inherent power to review its order;

(ii) there was no question of review for all that Miscellaneous Application No. 6 of 1949-50 sought was to show that the assessee had no opportunity of hearing in view of the facts stated therein and since at best the presumption raised by the returned registered envelope was rebuttable only, respondent No. 2 was bound in law to go into the matter;

(iii) in refusing to consider the application of the assessee on a wrong view of law the respondent has failed to exercise a jurisdiction vested to it by law."

The first respondent to the petition is the Commissioner of Income-tax, Punjab. The return on

behalf of the respondents does not deny the facts as detailed above but it denies the three grounds on the basis of which the petitioners seek that the order in question be quashed and respondent No. 2 be directed to hear their first application on merits and according to law.

There is a preliminary objection to the petition by the learned Advocate-General that it being a second petition between the same parties, for the same purpose, and seeking the same relief, no such second petition is competent. In this behalf reference is made to para 156, at page 83, of Halsbury's Laws of England, Third Edition, Volume 11, which para is—

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> "When an application for an order of *certiorari*, prohibition or *mandamus* has been made, argued, and refused on the ground of defects in the case as disclosed in the affidavits supporting the application, it is not competent for the applicant to make a second application for the same order on amended affidavits containing fresh materials. The rule applies even in cases where the defects in the case which caused the refusal of the first application are remedied in the second, and it makes no difference whether the motion is made in a private capacity or by a law officer on public grounds. Where, however, there was a mere formal defect, such as that the affidavits were wrongly entitled in the first place, there may be a second application upon affidavits amended in this respect."

The previous application of the petitioners under Articles 226 and 227 was not for the same relief as

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the present petition and it was not refused on the ground of defects in the case as disclosed in the affidavits supporting that application. The relief claimed in that application was a direction to respondent No. 2 to make certain additions to the reference under section 66(1) of the Indian Income-tax Act, 1922, by invoking the powers of the High Court under sub-section (4) of that section in addition, but in that application there was no prayer that the order, dated October 27, 1950, of respondent No. 2 on the first application of the assessee to them be quashed and direction be issued to respondent No. 2 to hear and dispose of that application on merits and according to law. This prayer is made in the present petition. The cases that are the basis of the para already cited above may now be considered. The first case is *Rex* v. *Orde* (1), in which a rule for a quo warranto information against a mayor, on the ground that he did not reside as the charter required, was discharged on affidavits, shewing residence. Afterwards a second rule was obtained, on the same ground, on affidavits impeaching the former opposing affidavits, and tending to shew that the residence was colourable. Lord Tenterden, C. J., said "that the rule ought not to have been granted, that the objection to the mayor's title was a captious one, and that to allow it to be raised on a second application would be to encourage parties to come before the Court in the first instance with an imperfect case, and then eke it out on a second application by picking out inconsistencies in the opposing affidavits." The rule was discharged without hearing on merits. The second case is *Regina* v. *The Manchester and Leeds Railway Company* (2). It was a case of a second application for writ of certiorari. Lord Denman, C. J.,

(1) 8 A and E 420 not
(2) 8 A. and E. 413

observed that—"the rule of practice, if not altogether universal and flexible, is as nearly so as possible, that the Court will not allow a party to succeed, on a second application, who has previously applied for the very same thing without coming properly prepared. We are constantly acting on this principle, of which the convenience and the justice are apparent." In *Queen* v. *Pickles* (1), a rule for mandamus having been discharged on the ground of imperfect affidavits, a subsequent rule was obtained by the same parties, on the same ground, on amended affidavits, and the Court refused to hear the second application on merits, and discharged the second rule following the rule referred to above, which it was said had by then been confirmed by several authorities. In *Levy* v. *Coyle* (2), with reference to a second application, when the first application had been dismissed on affidavits wrongly sworn, the rule was discharged because all that had happened was that properly sworn affidavits were filed with the second application. Wightman, J., observed—"I have sent to the full Court, and they think you ought to come fully prepared in the first instance." In *Regina* v. *The Great Western Railway Company* (3). it was held that the general rule of practice is, that a party failing in a motion by reason of a defect in his affidavit shall not repeat his application on an amended affidavit, shewing no ground of application which might not have been presented before. Lord Denman, C. J., said that—"the general rule is that which was laid down in *Regina* v. *The Manchester and Leeds Railway Company* (4), the exception is where the alteration would be simply in the form of a title or jurat, and reswearing the

(1) L.J. 12 Q.B. 40
(2) L.J. 12 Q.B. 294
(3) 5 Q.B. 597
(4) 8 A. and E. 413

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affidavit would clearly leave parties in the same situation in which they were before. The prosecutors here do not come within the exception. To make their application admissible we have to look at the particulars of the affidavits and its history, and an ingenious discussion is required. The general rule is simple, and easily applied. If we allow of alterations beyond its limit, we impose difficulties on ourselves, and tempt suitors into multiplied litigation." That was a case of a writ for a mandamus. In *EX Parte Thompson* (1), it was held that where a rule for a mandamus to compel a corporation to make an order has been discharged, on the ground that no demand and refusal have taken place, the Court will not grant a new rule for a mandamus to the same effect, though a demand and refusal have taken place since the discharge of the former rule. The last case is *Queen* v. *Mayor and Justices of Bodmin* (2). That was a case in which a rule for a mandamus to compel a corporation to perform a statutory duty had been discharged, on the ground that no demand and refusal had taken place, and the Court discharged the subsequent rule for the same purpose, although a demand and refusal had subsequently taken place since the discharge of the former rule. Day, J., at page 23, observes in reference to argument for the defendants showing cause against the rule—

> "He alleges that there is a well-established practice of the Courts that after an application for a prerogative writ has been made, argued, and refused, it is not competent to the applicant to make any further application for the same writ. The facts in the present case are

(1) 6 Q.B. 721
(2) (1892) 2 Q.B. 21

not in dispute. As I read the authorities, it has always been held, whenever this objection has been taken and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first application has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the Court in such matters. It is a view which has commended itself to many Judges who have acted upon it, and it commends itself to me. It is no doubt extremely convenient that no second application for a high prerogative writ should be allowed after a first application has been refused. Such a writ is an extraordinary remedy, and persons seeking it may very reasonably be required not to apply for it unless they have sufficient cause for doing so. They must come prepared with full and sufficient material to support their application, and if those materials are incomplete, I think it is quite right that they should not be allowed to come again. The rule, as I have said, is well-established, and it is laid down by Lord Denman, in *Ex Parte Thompson* (1), a case which is not distinguishable from the present case. It is true that in the case of *Reg* v. *Deptford Pierco* (2), a second application for a mandamus was granted; but the point does not there seem to have been brought to the attention of the judges."

(1) 6 Q.B. 721
(2) A. and E. 910

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It is thus a settled rule that the Court will not allow a party to succeed, on a second application, when it has previously applied for the very same thing and failed, except in case of alteration in the form of a title or jurat in the affidavit. The clearance of no other defect, on consideration of which the previous application was dismissed, can be permitted to enable a party to succeed in the second application. But the second application has to be between the same parties, for the same purpose, and made after defects found in the previous application have been cleared, excepting the formal defects as referred to above. In the present case the parties are the same but the present petition is not for the same purpose as was the earlier application of the petitioners under Articles 226 and 227, and it has not been made simply to claim the same relief by clearing away defects found in the earlier application. What has happened is that in the earlier application the petitioners claimed a direction or order in the Court to respondent No. 2 to refer additional question for its consideration according to section 66(4) of the Indian Income-tax Act, 1922, but, as pointed out, the learned Judges held that that could not be allowed. In that application it was never the prayer of the petitioners to have the order of October 27, 1950, of respondent No. 2 quashed on the grounds on which it is sought to be quashed in the present petition. So upon these considerations this petition cannot be found to be incompetent. However, the learned Advocate-General urges that the relief claimed by the petitioners in the present petition could well have been claimed by them in the first application under Articles 226 and 227, in other words, it is the omission of the petitioners to claim that relief in that earlier application that is urged as a ground for dismissal of this petition. It is an attempt to apply the rule of

estoppel against the petitioners because they omitted to claim this relief in the earlier application. I do not consider that that rule can be applied in the circumstances of the present case. Mere omission on the part of the petitioners to claim the relief that they now claim in their earlier application, in my opinion, does not render their present petition incompetent.

The learned Advocate-General then says that the order sought to be quashed is of October 27, 1950, and the present petition was made on February 11, 1957, which means a little over six years after the date of that order. He points out that this is not a case of mere delay but of gross negligence on the part of the petitioners in not claiming the relief that they now seek in their earlier application under Articles 226 and 227. But the petitioners have explained, and to my mind with considerable justification, that they were misled into an approach to the case as made by them in their previous application because of the observation of the learned Accountant Member of respondent No. 2. This is clear from the observation of the learned Accountant Member to which reference has already been made. The petitioners, in the circumstances of the case, appear apparently to have been misled by that observation and believed in good faith that they could have relief against the order of respondent No. 2, dated October 27, 1950; in the manner in which they sought relief in their first application under Articles 226 and 227. It was only after the learned Judges in the Division Bench negatived that claim that the petitioners have made the present petition. Delay of course there has been but I cannot accept that it is a case of gross negligence nor that the delay has not been properly explained. This,

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to my mind, is not a ground for the dismissal of the petition.

It is in the opinions of both the Members of respondent No. 2 that no review of its order is competent by respondent No. 2. But what the petitioners sought before respondent No. 2 was not in the strict sense review of its order. They averred that there had been no service at all on the assessee and they prayed that they should be permitted to prove that. This they were not allowed to do. Sub-section (4) of section 33 of the Indian Income-tax Act, 1922, says 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." The hearing of the parties is a statutory imperative an if a party can prove it as a fact that it was never properly served of the notice given by the Appellate Tribunal and, therefore, was not able to present its case at the hearing of the appeal, surely it cannot be said that such a party has had an opportunity of being heard within the meaning and scope of the said sub-section. It is true, and it has been so held by the Division Bench in the case already referred to between the parties, that the return of the registered cover marked as 'refused' is presumptive evidence of service and refusal, but even so if a party can prove it as a fact that such return is not a true return and that there was no presentation of the registered cover to it and no refusal by it, then to refuse to permit such a party to prove that as a fact is denying it an opportunity of being heard in connection with his appeal. It is an admitted position on both sides that neither the Indian Income-tax Act, 1922, nor the rules thereunder provide for an application by a party to have the appellate order of the Appellate Tribunal set aside and the appeal reheard on the ground

of proof of non-service of notice. The learned Advocate-General has pressed that though there is inherent power in a judicial tribunal like a Court to recall and quash its order in certain exceptional and rare circumstances, but that there is no such inherent power in a *quasi*-judicial tribunal. Now, it is a settled rule that a judicial tribunal can recall and quash its own order in exceptional and rare cases when it is shown that it was obtained by fraud or by palpable mistake or was made in utter ignorance of a statutory provision and the like. The learned Advocate-General does not admit that the same rule applies in the case of *quasi*-judicial tribunals. It appears to me that his emphasis is to the class of tribunal ignoring the nature of proceedings. The rule has bearing upon the nature of proceedings and not necessarily to the class of the tribunal. It is the judicial proceeding in which such a rule is made applicable. If the judicial proceedings are before a tribunal like a Court it is a judicial tribunal and if they are before an administrative tribunal it is a *quasi*-judicial tribunal. It appears to me that for the application of the rule the class of the tribunal is not a material matter but what is of substance and material is the nature of the proceedings before the tribunal. If the proceedings are in the nature of judicial proceedings, then, irrespective of the class of the tribunal, the rule will apply, and if an order has been obtained from or has been made by a judicial or a *quasi*-judicial tribunal because of practice of fraud, or because of palpable mistake, or because of ignorance of clear statutory provision and the like, it has inherent power to recall such an order, quash it, and make an order on merits and according to law in the ends of justice. To my mind the position in this respect is quite clear apart from authority, but if an authority is needed there is the case of *Bhagwan Radha Kishen* v.

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*Commissioner of Income-tax, U.P., Lucknow* (1), in which, at page 858, the learned Judges observed—

> "* * * 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."

This argument on behalf of the respondents cannot, therefore, be accepted.

In the view taken above respondent No. 2 had inherent jurisdiction to entertain and decide the first application, dated February 13, 1950, of the assessee and its order of October 27, 1950, treating it as a review application is not a correct order. So the order of respondent No. 2, dated October 27, 1950, is, in the circumstances, quashed, and under Article 227 respondent No. 2 is directed to dispose of the application, dated February 13, 1950, of the petitioners on merits and according to law. There is, in the circumstances of the case, no order as to costs in this petition.

Dua, J.

DUA, J.—I agree.

*R. S.*

(1) A.I.R. 1952 All. 857