
(1987) 06 KL CK 0024

In the High Court Of Kerala

Case No : T.R.C. No's. 146 to 149 of 1984

Andhra Steel Corporation

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-06-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1987) 67 STC 348

Hon'ble Judges : T.L. Viswanatha Iyer, J;K.S. Paripoornan, J

Bench : Division Bench

Advocate : C. Venkataraman, for the Appellant; The Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

T.L. Viswanatha Iyer, J.—The tax revision cases are filed by the assessee u/s 41 of the Kerala General Sales Tax Act, 1963 ("the Act" in brief) and relate to the assessments made on them for the years 1979-80, 1980-81, 1981-82 and 1982-83. The question involved is a short one, whether an appeal is maintainable before the Sales Tax Appellate Tribunal u/s 39 of the Act, against an order of the Appellate Assistant Commissioner rejecting in limine the appeal before him, for non-payment of admitted tax.

2. The assessee-petitioner is a dealer borne on the files of the Assistant Commissioner (Assessment) of Sales Tax, Special Circle, Ernakulam. They are dealing in iron and steel materials. In completing the assessments for the aforesaid four years, the assessing authority made additions to the turnover returned for certain reasons, with the correctness of which we are not concerned here.

3. The assessee filed separate appeals against these orders of assessment u/s 34(1) of the Act before the Deputy Commissioner of Sales Tax (Appeals), Ernakulam, he being an Appellate Assistant Commissioner as defined in Section

2(i). The assessing authority appears to have reported to the Deputy Commissioner that the assessee had not paid in full the tax admitted to be due as per the returns filed by them. The Deputy Commissioner was therefore of the view that the appeals were liable to be summarily rejected under the second proviso to Section 34(1), which reads :

Provided further that in the case of an order under Sub-section (2) or Sub-section (3) of Section 17, Sub-section (1), Sub-section (2) or Sub-section (3) of Section 18 or Sub-section (1) or Sub-section (2) of Section 19, no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax or other amounts admitted by the appellant to be due or of such instalment thereof as might have become payable, as the case may be.

He issued a notice dated March 28, 1984, pointing out the report of the assessing authority and directing the assessee to produce evidence, of having remitted the balance amounts of admitted tax mentioned, within fifteen days, failing which it was stated, the appeal petitions were liable to be rejected summarily for not complying with "the statutory provisions of the Act". On receipt of the notice, the assessee filed objections dated April 12, 1984 wherein they questioned the propriety of the assessments themselves and requested for an opportunity to be heard. According to the assessee, no question of payment of any amount as admitted tax arose, in the circumstances stated by them.

4. On receipt of these objections, and without anything more, the Deputy Commissioner proceeded to reject the appeals as "non-maintainable". He stated that no valid explanation has been given by the assessee for not remitting the admitted tax, and producing evidence, along with the appeal petitions. There was no provision in the Act to issue notice to such persons "for allowing opportunity of being heard before admission of appeals under the Act". The Deputy Commissioner was further of the view that the question of hearing comes only when appeals are duly filed and admitted "on records". The appeals filed by the petitioner had not even been "admitted" as they had not filed proof of payment of the admitted tax, and hence the Deputy Commissioner had no other alternative but to reject the appeals as not maintainable under the Act.

5. The petitioner took up this order of the Deputy Commissioner in separate appeals before the Appellate Tribunal. A preliminary objection was raised by the State Representative, before the Tribunal, that the appeals were not maintainable u/s 39. His contention was that an appeal lies u/s 39 only against an order passed u/s 34(3). The order of rejection of the appeal for non-payment of admitted tax was one passed under the second proviso to Section 34(1), which is not made appealable u/s 39.

6. The Tribunal accepted this preliminary objection and rejected the appeals before it as not maintainable. After quoting the second proviso to Section 34(1), the Tribunal observed :

This proviso is mandatory. An order of the appellate authority rejecting the appeal petition on the ground that the admitted tax is not paid or proof of payment of admitted tax is not produced along with the appeal petition would not ordinarily be an order passed u/s 34(3) of the Act and so the Tribunal would have no jurisdiction over an appeal against such an order of the first appellate authority. The Additional Deputy Commissioner (Appeals) has expressly specified in his order that the appeal petitions against the assessments for 1979-80 to 1982-83 are rejected as not maintainable under the second proviso to Section 34(1) of the Kerala General Sales Tax Act, 1963. Section 39(1) provides for an appeal before the Tribunal against the order of the Appellate Assistant Commissioner under Sub-section (3) of Section 34 only as expressly specified under the section.

The assessee is in revision before us against this common order.

7. We may at this point make reference to four original petitions filed by the assessee under Article 226 of the Constitution to call for the records relating to the order of the Deputy Commissioner referred to in paragraph 4 herein above, and to quash the same as illegal, and to direct the Deputy Commissioner to consider the appeals filed before him on merits. These original petitions were also heard along with the tax revision cases.

8. An order of assessment passed by the assessing authority is made appealable u/s 34(1) to the Appellate Assistant Commissioner (i.e., any person appointed to be an Appellate Assistant Commissioner u/s 3). The entertainability of the appeal is, however, subject to the condition that satisfactory proof of payment of the tax admitted to be due should accompany the appeal. The procedure to be followed and the power of the Appellate Assistant Commissioner, in disposing of an appeal are detailed in Sub-section (3) of Section 34. A second appeal lies to the Appellate Tribunal at the instance of the aggrieved party-be it the assessee, or the Revenue-against an order passed by the Appellate Assistant Commissioner u/s 34(3). The question for consideration is whether the order of rejection of the appeal by the Appellate Assistant Commissioner as not entertainable for non-payment of the tax admitted to be due is an order passed u/s 34(3) of the Act, and hence appealable.

9. Before dealing with this question, we would like to refer to the observations made by the Deputy Commissioner that the question of "hearing" the assessee arises only when the appeal is "filed" and admitted "on records". In stating so, the Deputy Commissioner appears to proceed as if he is exercising a mere ministerial function in rejecting an appeal as not entertainable under the second proviso to Section 34(1). This proviso states that the appeal shall not be entertained if the appeal is not accompanied by satisfactory proof of payment of tax or other amounts admitted by the appellant to be due. Even the decision not to entertain the appeal entails the passing of an order by the Appellate Assistant Commissioner as to why he refuses to entertain the appeal. The assessee is entitled to know the basis of and the reason why, his appeal has not been

entertained. It is not a mere ministerial order liable to be passed by the Appellate Assistant Commissioner with reference merely to the appeal before him, the figures mentioned therein and any report made by the assessing authority or even with reference to the assessment records and the returns filed by the assessee. There may be numerous circumstances why the assessee could contend that no admitted amount remains unpaid. The assessee may have to get amounts by way of refund from the department which he is entitled to set-off or adjust against the demand in question [Vijaya Oil Mills v. State of Kerala 1979 KLT 260 and Rajagiri Rubber & Produce Co. Ltd. v. Additional Sales Tax Officer 1983 KLT 475], or may be, he can contend having regard to subsequent events or decisions of superior courts, that certain amounts which had been included in the returns as taxable were nevertheless exempt from levy, or liable to tax at reduced rates. Various situations like this can be visualised, which an assessee may be able to put forward in alleviation of the non-payment of amounts "admitted" by him to be due. These are not matters which will be apparent from a perusal of the records. The first appellate authority will be able to ascertain the facts and determine whether any admitted amount remains unpaid only after affording an opportunity to the assessee-appellant to put forward his case. The assessee has to be apprised of the proposal to reject the appeal for non-compliance with the second proviso to Section 34(1), his objections called for, and the assessee heard before any order refusing to entertain the appeal is passed. An oral or personal hearing may not always be necessary, whether such a hearing should be afforded or not will depend on the facts of each case. If the facts put forward by the assessee are complex, or where evidence has to be produced in support of his case, an oral hearing will be advisable. But an opportunity to the assessee to put forward his case is imperative in every case.

10. The Deputy Commissioner had in fact, accorded this opportunity to the assessee before us, but no oral hearing was given. On the facts of this case, we do not think an oral hearing was called for.

11. Section 34(3), which delineates the procedure, and the powers of the Appellate Assistant Commissioner, and enumerates the types of orders that he could pass in appeal before him, reads :

34. (3) In disposing of an appeal, the Appellate Assistant Commissioner may, after giving the appellant a reasonable opportunity of being heard,-

(a) In the case of an order of assessment or penalty,-

(i) confirm, reduce, enhance or annul the assessment or the penalty or both;

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed; or (iii) pass such other orders, as he may think fit; or

(b) In the case of any other order, confirm, cancel or vary such order :

Provided that, at the hearing of any appeal against an order of the assessing

authority, the assessing authority shall have the right to be heard either in person or by a representative.

Section 34 of the Act and Rule 38 of the Kerala General Sales Tax Rules, 1963 prescribe the procedure for filing of the appeal. Non-compliance therewith may make an appeal irregular or incompetent. Nevertheless the appeal is an appeal in the eye of law and does not become a nullity merely by reason of non-compliance with the conditions prescribed. In AIR 1932 165 (Privy Council) the Privy Council observed with reference to the word "appeal" in Article 182 of the Limitation Act, 1908 :

There is no definition of appeal in the Code of Civil Procedure; but their Lordships have no doubt that any application by a party to an appellate court, asking it to set aside or revise a decision of the subordinate court, is an appeal within the ordinary acceptance of the term, and it is no less an appeal because it is irregular or incompetent.

There is, therefore, an appeal even though its consideration on merits is precluded by reason of non-compliance with the second proviso to Section 34(1). As held by the Supreme Court in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner* [1968] 21 STC 154 the direction in the proviso is that the Appellate Assistant Commissioner shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of payment of the admitted tax. What is barred, therefore, is the consideration of the appeal on merits. An appeal so filed and which is an appeal in the eye of law, has necessarily to be disposed of. The provision relating to disposal of an appeal is that contained in Section 34(3). Any disposal of the appeal, whether on merits or on preliminary grounds like limitation, non-payment of admitted tax, irregularity in filing it or otherwise has necessarily to be referred to Section 34(3). Any such order is therefore first an order on the appeal and second, one u/s 34(3). It is therefore appealable u/s 39.

12. The matter can be viewed from another angle also. The order of rejection of the appeal for non-compliance with the second proviso to Section 34(1) and refusing to entertain it on merits, is in substance one confirming the assessment. The only difference between this and the regular disposal, is that, in one case, the appeal gets rejected at the threshold, before being entertained, while in the other, the disposal takes place after its being entertained. In either case, so far as the assessee is concerned, it is a dismissal of his appeal and confirmation of the assessment. Section 34(3) takes within its ambit not only orders passed on a consideration of the merits but also orders which dispose of the appeal on preliminary issues. Such an order confirming an assessment is therefore referable to Section 34(3) and hence appealable to the Tribunal u/s 39.

13. The Tribunal was therefore in error in holding that the appeals before it were not maintainable. The Tribunal has, in our opinion, erred in holding that Section 39 does not sanction an appeal against the order of the Deputy Commissioner

rejecting the appeal for non-compliance with the second proviso to Section 34(1).

14. We may here refer to a few decisions which support the view we have taken. The Supreme Court, in *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, had occasion to deal with a case falling under Sections 30, 31 and 33 of the Income Tax Act, 1922. An appeal filed before the Appellate Assistant Commissioner was dismissed as time-barred. Section 30(2) of the Income Tax Act, 1922 prescribed that an appeal to the Appellate Assistant Commissioner should be filed within a period of thirty days. The Appellate Assistant Commissioner was, however, given the right to admit an appeal beyond the said period, if sufficient cause was shown. Section 31(1) prescribed the procedure to be followed by the Appellate Assistant Commissioner and Section 31(3) specified the types of orders that may be passed in appeals, against orders passed under one or other of the provisions of the Act, specified in Section 30(1). A second appeal lay to the Tribunal against an order passed by the Appellate Assistant Commissioner u/s 31. The position under the Act therefore was that while Section 30 conferred the right of appeal on the assessee, Section 31 provided for the hearing and disposal of the appeal, and Section 33 conferred a right of further appeal against an order passed u/s 31. The assessee, whose appeal was dismissed as time-barred, filed an appeal against that order before the Appellate Tribunal u/s 33. A preliminary objection was raised that the order passed by the Appellate Assistant Commissioner was one u/s 30(2) and not u/s 31 and hence it was not appealable to the Tribunal u/s 33. The High Court accepted this contention; the assessee went up in appeal to the Supreme Court. The matter was dealt with exhaustively by the Supreme Court with reference to the provisions of the Act and various decided cases on the point. Inter alia, the court accepted the various decisions relied on by the assessee and held that to fall within the ambit of Section 31, it was not necessary that the order should expressly address itself to, and decide on the merits of the assessment, and that it was sufficient that the effect of the order was to confirm the assessment, as when the appeal is dismissed on a preliminary point. The following observations of Justice Satyanarayana Rao in *Commissioner of Income Tax v. Shahzadi Begum* AIR 1952 Mad. 232 were approved in this context:

If the appeal is dismissed as incompetent or is rejected as it was filed out of time and no sufficient cause was established, it results in an affirmation of the order appealed against.

15. The following propositions emerge from this decision of the Supreme Court :

- (a) An appeal presented out of time is also an appeal.
- (b) An order dismissing an appeal as time-barred is one passed in the appeal.
- (c) Section 31 includes not only order passed on a consideration of the merits of the assessment but also orders which dispose of the appeal on preliminary issues, such as limitation and the like.

(d) Section 31 is the only provision relating to hearing and disposal of appeals and if an order dismissing an appeal as barred by limitation is one passed in appeal, it must fall u/s 31.

16. *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, was no doubt concerned with the question of the effect of dismissal of an appeal as barred by time. But the court treated such an appeal also as an appeal liable to be disposed of u/s 31. The disposal of the appeal was not referred to Section 30(2) which bars entertainment of an appeal beyond the prescribed period, but to Section 31 which was the only provision relating to disposal of the appeal. The consequence of rejection of an appeal as barred by time was held to be affirmation of the order appealed against and hence falling u/s 31. The ratio of this decision applies on all fours to the case before us as Section 34(3) is the only provision for disposal of appeals by the Appellate Assistant Commissioner and the effect of rejection of the appeal under the second proviso to Section 34(1) is affirmation of the assessment. The order passed by the Deputy Commissioner is therefore one squarely falling u/s 34(3).

17. In *MAHARANI GYAN MANJARI KUARI, DOWAGER MAHARANI OF HATHWA Vs. COMMISSIONER OF INCOME TAX BIHAR AND ORRISA.*, , the court was dealing with the question whether an appeal to the Tribunal lay when the Appellate Assistant Commissioner had refused to entertain the appeal for non-production of the notice of demand along with the appeal. After referring to the decision of the Full Bench of five Judges of the same court in *Ananda V. Commissioner of Income Tax* AIR 1931 Pat 306 the court held that the order of the Appellate Assistant Commissioner was one u/s 31 and hence appealable u/s 33 to the Tribunal.

18. There was a provision analogous to Section 34(3) in Section 30(1) of the Income Tax Act, 1922. As pointed" out earlier Section 30 of the said Act conferred a right of appeal against various orders passed under the Act. An appeal against an order imposing penalty did not however lie unless the tax had been paid because of the proviso to the section which was in these terms :

Provided that no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax has been paid.

The proviso and the right of second appeal have been the subject of consideration in the decisions to which we shall refer.

19. We may first refer to the decision in *Commissioner of Income Tax, Bombay City I Vs. Filmistan Ltd.*, ; where the Supreme Court, dealing with the above proviso, observed :

The meaning of the words "no appeal shall lie" in the first proviso to Section 30(1) of the Income Tax Act is not that no memorandum of appeal can be presented. All that the proviso means is that the appeal will not be held to be properly filed until the tax has been paid. If, for instance, the memorandum of

appeal is filed on the 20th day, i.e., 10 days before the period of limitation expires and the tax is paid within the rest of the 10 days, the appeal will be a proper appeal; it will be within time and no question of limitation will arise, but if the tax is paid after the period of limitation has expired it will be taken to have been filed on the day when the tax is paid even though the memorandum of appeal was presented earlier and within the period of limitation. The question will then have to be decided whether there was sufficient cause for condonation of delay.

20. The matter has been dealt with at length by the High Court of Allahabad in *SANTOSH KUMAR Vs. COMMISSIONER OF Income Tax, U.P.*, . Both the learned Judges Gurtu, J., and Upadhyaya, J., have written separate, but concurring judgments upholding the appealability in the case of an order of the Appellate Assistant Commissioner rejecting the appeal for non-compliance with the proviso to Section 30(1). Gurtu, J., observed as follows :

It seems to me, therefore, upon a review of the entire position that when an appeal is filed u/s 30(1) against an order passed u/s 46(1) without tax being paid, any orders passed with reference to such an appeal have to be passed u/s 31. The proviso to Section 30 itself does not provide for the passing of any orders. It appears to me also that the right of appeal given from an order u/s 46(1) is not trammelled by the pre-requirement of payment of tax but that there is only a limitation placed on the hearing of the appeal on the merits that if no tax had been paid before the hearing of the appeal then this appeal will not be heard on the merits.

Upadhyaya, J., who dealt with the matter independently observed :

It appears that Section 30 does not deal with the disposal of an appeal by an Appellate Assistant Commissioner at all. It only says when an appeal may be filed and how it is to be filed. Sub-section (2) says that it shall ordinarily be presented within 30 days and empowers the Appellate Assistant Commissioner to admit an appeal after the expiration of this period. Section 30(2) therefore empowers the Appellate Assistant Commissioner to condone the delay and to admit the appeal. It does not go on further to say that the Appellate Assistant Commissioner may reject it or dismiss it or refuse to entertain it. In fact an appeal having been filed its disposal is entirely covered by Section 31 of the Act.

21. The position therefore is that the order of the Deputy Commissioner in these cases is one passed under the power of disposal vested in him u/s 34(3) of the Act. There is a confirmation of the assessments, which opens up the remedy of appeal for the aggrieved assessee to the Appellate Tribunal u/s 39.

22. The scope of the appeal before the Tribunal will however be limited to the question whether the non-entertainment of the appeal for non-compliance with the second proviso to Section 34(1) of the Act was proper or not. Questions relating to the merits of the assessment are beyond the purview of this appeal [vide *Bhubaneswar Flour Mills Vs. State of Orissa*,].

23. The Tribunal has not gone into the question whether the rejection of the appeals by the Deputy Commissioner was valid or not. The matters have therefore to go back to the Tribunal for fresh disposal. The Tribunal will take back the appeals on file and deal with the question whether the Deputy Commissioner was justified in rejecting the appeals in limine and whether he should have entertained the appeals on merits.

24. The tax revision cases are disposed of as above.

25. The writ petitions had been filed by the assessee challenging the validity of the second proviso of Section 34(1) of the Act. Counsel states that these petitions are filed only in the alternative and that they will be unnecessary, and may be allowed to be withdrawn, if the tax revision cases are allowed. In view of this submission, we do not enter into the merits of the various contentions raised in the original petitions. They are allowed to be withdrawn with liberty to raise the points urged, if necessary, at any subsequent stage.

26. There will be no order as to costs in the tax revision cases and in the original petitions.