
(1992) 07 MP CK 0031

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 235 of 1986

Jamunadas Khanchand

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 27-07-1992

Acts Referred:

Madhya Pradesh General Sales Tax Act, 1958 — Section 44(1)(5)

Citation : (1993) 38 MPLJ 462 : (1993) MPLJ 462

Hon'ble Judges : S.K. Dubey, J; R.C. Lahoti, J

Bench : Division Bench

Advocate : M.C. Khedkar, A.G.A., for the Respondent

Judgement

R.C. Lahoti, J.

The Tribunal (Board of Revenue) has drawn up a statement of the facts of the case and referred questions of law arising therefrom for the opinion of this Court u/s 44(1) of M.P. General Sales Tax Act, 1958. On receipt of the reference, the assessee and Commissioner of Sales Tax were both noticed. Though the Commissioner of Sales Tax has made appearance through the Government Advocate, the assessee has chosen to remain absent in spite of having been served with notice of the date of hearing, followed by S. P. C. issued to him for a fixed date of appearance. Indeed, the office reports, that the assessee has not taken steps for preparation of the paper-books which are required to be prepared as per rules so as to enable hearing of the reference before the Division Bench.

It is clear that the assessee is in default duo. He has not only defaulted in appearance; he has also defaulted in taking steps for preparation of the paper-books. Needless to say, the reference being at the instance of the assessee, it was for him to have taken steps for preparation of the paper-books.

Section 44(5) of the Act provides : --

"The High Court upon the hearing of a reference under this section shall decide

the question of law raised thereby and shall deliver judgment thereon containing the grounds of decision and shall send to the Tribunal a copy of the judgment under the seal of the Court and the signature of the Registrar, and the Tribunal, shall dispose of the case accordingly."

The question arises whether the use of the word "shall" obligates this Court to decide the question of law and deliver judgment thereon though the party at whose instance the reference was made is in default?

The obligation of the High Court to decide the question of law is dependent upon the hearing of a reference being enabled. If there is no hearing, there is no occasion for deciding the question of law. Enabling the hearing is the obligation of the party at whose instance the Tribunal was persuaded to make the reference.

Section 256 of the Income Tax Act, 1961 is a provision in pari materia. Its predecessor provision contained in Section 66 of the Income Tax Act, 1922 came up for consideration of Division Bench of Calcutta High Court in M.M. Isphani Ltd. Vs. Commr. of Excess Profits Tax, West Bengal, The learned Chief Justice speaking for the Bench held:-

" before the duty contemplated by the section to decide the questions of law referred can arise, a hearing of the case must take place, because the section opens with the words :

"The High Court upon the hearing of any such case" etc. Where the party, who has caused the reference to be made and who is in the position of a plaintiff, fails to appear, no hearing of the case can take place and in my view since the preliminary condition of the Sub-section is not satisfied in such a case, the consequent obligation of deciding the questions of law and delivering a judgment does not also arise.

It appears to me, therefore, that is not required of us that we should answer the question referred to us in this reference at all since the assessee is not appearing before us.

We therefore, decline to answer the question."

A Division Bench of this Court in Gajadhar Prasad Nathu Lal Vs. Commissioner of Wealth-tax, held :-

"Though the party at whose instance a reference has been made to the Appellate Tribunal u/s 27 of the Wealth-Tax Act, 1957, does not have the right to withdraw a reference that has been made, yet if the party appears and says that it is not interested in the reference being answered, or makes an application for withdrawing the reference, or fails to appear at the hearing, the High Court is not bound to answer the question referred and can decline to answer the reference."

In Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. Commissioner of Income Tax, a Division Bench of this Court referring to its own earlier two decisions held: --

"Where both the assessee and the Revenue are not interested in the reference being answered, the High Court should decline to answer the question referred."

Similar is the view taken by the Division Bench of Delhi High Court in *Shanker Doss Sethi and Sons v. C.I.T. (Delhi)*, (1986) 127 ITR 770 and Allahabad High Court in *MALIK SINGH TIRATH SINGH Vs. COMMISSIONER OF Income Tax, U. P.*,

A Division Bench of Bombay High Court consisting of D.P. Madon and M.H. Kania, JJ. (as their Lordships then were) dealt with a reference u/s 34(1) of Bombay Sales Tax Act, 1953 in *United Provinces Commercial Corporation v. State of Maharashtra*. (1976) 37 STC 405. It was held : --

"The jurisdiction of the High Court u/s 34 of the said Act is an advisory jurisdiction. It may, therefore, appear at the first blush that when a question of law is referred by the Tribunal to the High Court, the High Court should answer such question and give its finding thereon and return the answer to the Tribunal so as to enable the Tribunal not only to dispose of the particular case in which the reference was made in accordance with the judgment of the High Court but also to have a decision which is binding on it in future cases on the question of law decided by the High Court. It, however, appears to us that it is not necessary for this High Court to decide the questions of law referred to it in all references academically, and to no practical effect.

This particular reference has been made because the applicant-assesseees were dissatisfied with the finding of law given by the Tribunal and the case has been stated and the question referred to us at the instance of the assesseees. The fact that the applicant-assesseees have not appeared before us and have not submitted any arguments on why this question of law was wrongly decided by the Tribunal clearly shows that the applicant-assesseees are not more interested in the proceedings and do not desire any answer by the Court on the question referred to it. In these circumstances, we fail to see why we should take up public time in deciding a question in which the party desiring it to be answered by the Court is not interested."

For the foregoing reasons, we are of the opinion that if the party at whose instance the reference is made, fails to appear at the hearing, or fails in taking steps for preparation of the paper-books so as to enable hearing of the reference, this Court is not bound to answer the reference. We refuse to answer the reference and also saddle the assessee with the costs of the department quantified at Rs. 150/-.