
(1970) 03 MAD CK 0012

In the Madras High Court

Case No : Tax Case No. 379 of 1969 (Revision No. 254/69) and W.P. No's. 3036, 3555, 4613 to 4616 of 1968 and 2310, 2362, 3080 and 3282 of 1969

K.A. Bari

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 26-03-1970

Acts Referred:

Citation : (1970) 26 STC 290

Hon'ble Judges : Ramaprasada Rao, J;Ramanujam, J

Bench : Division Bench

Advocate : K. Srinivasan, K.C. Rajappa, C. Venkataraman, P.R. Ranganathan and T.S. Viswanatha Rao, for the Appellant; K. Venkataswami, First Assistant Government Pleader (C.T.), for the Respondent

Final Decision : Allowed

Judgement

Ramanujam, J.—As the above cases raise a common question of law they have been heard together. In all these cases the validity of

Regulation 9(1) of the Tamil Nadu Sales Tax Appellate Tribunal Regulations, 1959, is challenged. The question for our decision in all these cases is

whether the said regulation is ultra vires of Section 36(3) of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as the Act.

2. For the purpose of appreciating the said legal contention put forward by the petitioners, it is necessary to set out the facts in the first case, that is,

T.C. No. 379 of 1969. The petitioner in that case was assessed under the Act for the year 1965-66 on a taxable turnover of Rs. 48,581.49 as

against the reported turnover of Rs. 36,734 by an order of assessment dated 4th November, 1966. The said assessment order was appealed

against and the Appellate Assistant Commissioner by his order dated 18th

January, 1967, confirmed the assessment order. The petitioner took the matter in appeal before the Sales Tax Appellate Tribunal and the appeal was posted for hearing on 24th February, 1969. On that date neither the appellant nor his counsel was present. The Tribunal therefore dismissed the appeal for default of petitioner's appearance on 25th February, 1969.

The petitioner's application for restoration of the appeal was also dismissed on 23rd April, 1969. Hence the Tax Case No. 379 of 1969 before this court, questioning the power of the Tribunal to dismiss the appeal for default, as also the correctness of its order dated 23rd April, 1969, refusing to restore the appeal.

3. Before dealing with the legal contention relating to the power of the Tribunal to dismiss the appeal for default, it will be appropriate to refer to the relevant statutory provisions.

4. Section 2(b) of the Act defines "Appellate Tribunal" as one constituted u/s 30 and section 30 deals with the constitution and functions of the

Tribunal. Section 30(4) enables the Tribunal with the previous sanction of the Government, to make, by notification, regulations consistent with the

provisions of this Act and the Rules made thereunder for regulating the procedure and the disposal of its business. In exercise of the power u/s

30(4) the Tribunal had made the Tamil Nadu Sales Tax Appellate Tribunal Regulations, 1959. Regulation 2(ii) of the said Regulations defines

appeal" to mean a memorandum of appeal to the Appellate Tribunal u/s 36 of the Act. Regulation 9(1) enables the Tribunal to dismiss the appeal

for default of appearance of the appellant and Regulation 9(2) empowers the Tribunal to readmit the appeal if the appellant shows sufficient cause

for his non-appearance. Regulations 9(1) and 9(2) are set out hereunder :

Regulation 9(1).-After the appeal has been registered, notice of the day fixed for hearing under Regulation 8 shall be delivered or issued by

registered post to the party in Form C in the Schedule. The notice shall state that if he does not appear on the day so fixed or on any other day to

which the hearing may be adjourned, the appeal will be dismissed for default, or disposed of on merits ex parte.

Regulation 9(2).-When an appeal has been dismissed for default or disposed of ex parte, the appellant may apply to the Tribunal for readmission

of the appeal; and where it is shown to the satisfaction of the Tribunal that he

was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Tribunal shall readmit the appeal.

5. One other provision which is relevant for the present discussion is Section 36(3)(a)(i) to (iii) of the Act which is set out hereunder so far as it is relevant.

Section 36(3).-In disposing of an appeal, the Appellate Tribunal may, after giving the appellant a reasonable opportunity of being heard, (a) in the case of an order of assessment-(i) confirm, reduce, enhance or annul the assessment or 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 it may think fit.

6. It was contended by the petitioners in all these cases that Regulation 9(1) enabling the Tribunal to dismiss an appeal for default of appearance of the appellant is repugnant to the provisions of Section 36(3) of the Act, that the Tribunal cannot frame such a regulation in the guise of regulating its

procedure and business, that the power to frame regulations is conditioned on their being consistent with the provisions of the Act and the Rules

framed thereunder and that Regulation 9(1), which is inconsistent with the substantive provision in Section 36 of the Act, should be held to be ultra

vires of its powers. It was also said that the Tribunal cannot enable itself to dismiss the appeals for default in the face of the statutory mandate

contained in Section 36(3) to dispose of the appeal and that a dismissal for default would not amount to a disposal of the appeal. Emphasis is

placed on the words "'in disposing of an appeal'" occurring in Section 36(3) for contending that the Tribunal has to dispose of the appeal before it

on merits without merely getting rid of the appeal by passing an order of dismissal for default. It was also urged that the words "'pass such other

orders as it may think fit'" occurring in Section 36(3)(a)(iii) will enable the Tribunal to pass an order only in relation to the appeal, meaning the

grounds of appeal and not an order of dismissal for default which is de hors the appeal, i.e., the memorandum of grounds and that the order of

dismissal for default cannot be said to be an order passed on the subject-matter of the appeal as it is an order de hors the subject-matter of the

appeal. According to the petitioners an order of dismissal for default cannot be said to deal with the grounds of appeal and it virtually means that

the Tribunal has refused to look into the grounds of appeal for non-appearance of the appellant at the time of the hearing of the appeal.

7. The learned Government Pleader, on the other hand, contends that the words ""pass such order as it thinks fit"" occurring in Section 36(3)(a)(iii)

will enable the Tribunal to pass any order it thinks fit, that the dismissal of the appeal for default is one method of disposing of the appeal and that

the Tribunal is empowered to frame Regulation 9(1) and (2) to regulate its own procedure to have an effective hearing and disposal of the appeal

filed before it.

8. We are, however, not inclined to accept the contention put forward on behalf of the State. In our view there is considerable force in the

contentions put forward on behalf of the assessee. On an examination of the scheme of the Act one finds that Section 36(1) of the Act enables an

assessee to have an adjudication on the merits of his appeal before the Tribunal and Section 38 gives a further right to the assessee to come up in

revision to the High Court against any adverse order of the Tribunal in appeal. The right of revision given to the assessee under the statute will be

lost if the Tribunal were to dismiss the appeals for default of appearance of the appellants without disposing of the appeal on its merits. It cannot be

said that the mandate given by the statute to the Tribunal to dispose of the appeal u/s 36 is conditional on the appearance of the parties before it.

Section 36 of the Act, in our opinion, requires the Tribunal to decide the appeal whether the appellant or his counsel is present at the hearing or

not. Further, a proper construction of Section 36 leads one to the conclusion that the Tribunal is not expected to dispose of the appeal for default

of appearance of the appellant. Section 36(3) enables the Tribunal to enhance the assessment at the instance of the State in an appeal filed by the

assessee and the said right of the State to have the assessment enhanced in the appeal before the Tribunal will be lost and made nugatory if Section

36(3) is construed as enabling the Tribunal to dismiss an appeal for default of appearance of the appellant. The appellant can always defeat the

attempt by the State to get the assessment enhanced by not appearing before the Tribunal and thus having the appeal dismissed for default.

9. As already stated the words ""in disposing of an appeal"" in Section 36(3) are of considerable significance in finding out the nature of the orders to

be passed by the Tribunal on the appeals. What is an "appeal" has come up for consideration before courts many a time. This is what was said in

AIR 1932 165 (Privy Council) .

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 a subordinate court, is an appeal within the ordinary acceptance of the term.

10. The Supreme Court in Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, had expressed that "an appeal is a process of civil

law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial. A writ of error is a process of common law

origin and it removes nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction ; the

latter, in suits at common law tried by a jury." Though there is no definition of "appeal" in the Act, Regulation 2(i) defines an appeal as the

memorandum of appeal, i.e., the grounds of appeal.

11. In Commissioner of Income Tax, Bombay Vs. Walchand and Co. Private Ltd., , the Supreme Court, while considering the words "pass such

orders thereon as it thinks fit" in Section 33(4) of the Income Tax Act, 1922, had expressed that the said expression is intended to define the

jurisdiction of the Tribunal to deal with and determine questions which arise out of the subject-matter of the appeal in the light of the evidence and

consistently with the justice of the case and that the said expression does not confer an arbitrary authority on the Tribunal. In the hierarchy of the

authorities the Appellate Tribunal is the final fact-finding body and its decisions on questions of fact are not liable to be questioned before the High

Court. According to the Supreme Court the nature of the jurisdiction of the Tribunal predicates that the Tribunal will approach and decide the case

in a judicial spirit and for that purpose it must indicate the disputed. questions before it with evidence pro and con and record its reasons in support

of the decision.

12. In S. Chenniappa Mudaliar Vs. Commissioner of Income Tax, , a question similar to the one on hand came up for consideration. There Rule

24 of the Appellate Tribunal Rules, 1946, framed in exercise of the powers of the Tribunal u/s 5A of the Income Tax Act enabling dismissal of an

appeal by the Tribunal for default of the appearance of the appellant came up for consideration. A Special Bench of this Court held that in

ascertaining the meaning of an expression used by a statute one has to look at the context and also ascertain the object with which that expression

has been employed by the Legislature and interpret it in accordance therewith, that the use of the word ""thereon"" in Section 33(4) indicated that the

decision of the Tribunal should relate to the subject-matter of the appeal, that an adjudication on the merits of the case is essential to enable the

High Court to perform its statutory duty u/s 66 and of the Supreme Court u/s 66A and that, as such, the impugned Rule 24 in so far as it enabled

the Tribunal to dismiss an appeal for default of appearance, was ultra vires. This decision was affirmed by the Supreme Court in Commissioner of

Income Tax, Madras Vs. S. Chenniappa Mudaliar, . The Supreme Court also held that the scheme of the provisions of the Income Tax Act, 1922,

relating to the Appellate Tribunal was that it has to dispose of an appeal by making such orders as it thinks fit on the merits, that the use of the

word ""thereon"" in Section 33(4) compels the Tribunal to go into the correctness or otherwise of the points decided by the departmental authorities

in the light of the grounds of appeal and that this can only be done by giving a decision on the merits on questions of fact and law and not by merely

disposing of the appeal for default of appearance of the party. The Supreme Court was clearly of the view that Rule 24 of the Appellate Tribunal

Rules, 1946 as amended in 1948, in so far as it enabled the dismissal of the appeal by the Tribunal for default of appearance of the party came into

conflict with Section 33(4) and was therefore ultra vires. We are of the view that this decision squarely applies to the case on hand.

13. The contention of the learned Government Pleader that the use of the word ""thereon"" in Section 33(4) was the reason for the decision in

Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, , that there is no such expression in Section 36(3)(a)(iii) and that the power

of the Tribunal to pass an order as it thinks fit has no limitations, is not acceptable to us. The mere fact that Section 36(3)(a)(iii) does not use the

expression ""thereon"" cannot make any difference to the interpretation which we have to place on Section 36(1) and (3). The setting in which

Section 36(3)(a)(iii) has occurred cannot be ignored. Section 36(1) enables an assessee objecting to an order passed by the Appellate Assistant

Commissioner or Deputy Commissioner to file an appeal to the Tribunal within 30 days and Sub-section (3) of Section 36 provides that the

Tribunal, in disposing of an appeal filed under Sub-section (1) may confirm, reduce, enhance or annul the assessment or penalty or both or set

aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed or pass such order

as it thinks fit. Clauses (i) to (iii) of Sub-section (3)(a) deal with the powers of the Tribunal in disposing of the appeal and any order passed by the

Tribunal should be only in relation to the appeal and the same cannot be de hors the appeal. If the Tribunal passes an order dismissing the appeal

for default of appearance of the appellant, it cannot be said to be an adjudication as to the correctness or otherwise of the points decided by the

departmental authorities in the light of the assessee's contentions set out in the grounds of appeal. Rule 29 of the Tamil Nadu General Sales Tax

Rules, 1959, provides that every appeal u/s 36(1) to the Tribunal shall be in Form III. In column 9 of the said form the assessee is directed to set

out the grounds of appeal. If the Tribunal dismisses the appeal for default of the appellant, it will not be a disposal of the appeal with reference to

the grounds set out in Form III as contemplated by the Act and the Rules framed thereunder. We are of the view that the absence of the word

thereon"" in Section 36(3)(a)(iii) will not make any difference to the principle of the decision of the Supreme Court in Commissioner of Income

Tax, Madras Vs. S. Chenniappa Mudaliar, being applied with reference to the interpretation of Section 36(3). The opening words of Section

36(3) ""in disposing of the appeal"" practically and substantially convey the same meaning as ""thereon"" used in Section 33(4) of the Income Tax Act.

14. Another reason suggested on behalf of the State for non-applicability of the decision of the Supreme Court to the case on hand is that there is a

provision in Regulation 9(2) to set aside an order of dismissal for default at the instance of the appellant if sufficient cause is shown for non-

appearance, while such a provision was not there under the Appellate Tribunal Rules framed under the Income Tax Act considered by the

Supreme Court. It was said that the reasoning adopted by the Supreme Court for invalidating Rule 24 of the Appellate Tribunal Rules that the

remedies available to the assessee to approach higher judicial Tribunals are taken away if the Tribunal's power to dismiss an appeal for default of

appearance is assumed, would not apply in view of the specific provision in Regulation 9(2) enabling the Tribunal to set aside an order of dismissal

for default. It was also said that the revisional jurisdiction of the High Court u/s 38 is not in any sense affected or taken away by the Tribunal's

dismissal of the appeal for default as it is always open to the assessee to convince the Tribunal that he had sufficient cause for non-appearance and

to have the appeal readmitted and reheard and to get a decision on merits on the appeal so readmitted and then take the matter in revision to the

High Court u/s 38. We are not inclined to hold that the existence of a provision for setting aside the order of dismissal for default under Regulation

9(2) makes any difference to the application of the decision of the Supreme Court. The Supreme Court in *Commissioner of Income Tax, Madras*

Vs. S. Chenniappa Mudaliar, gives two reasons for invalidating Rule 24 of the Appellate Tribunal Rules : (1) the scheme of the provisions of the

Act relating to the Appellate Tribunal suggested that the Tribunal has to dispose of the appeal by making such orders as it thinks fit on the merits

and (2) the Tribunal by passing orders of dismissal for default virtually takes away the further remedies provided to the appellant under the statute.

If at all, it is the second reason given by the learned Judges of the Supreme Court that can be said to have been met by the provision in Regulation

9(2) enabling the Tribunal to set aside the dismissal order and to readmit the appeal. But the reasoning given by the learned Judges as to the

scheme of the provisions of the Act and as to the constitution and the powers of the Tribunal has to equally apply in the interpretation of Section

36.

15. The learned Government Pleader also invoked the legal maxim, *vigilantibus non dormientibus jura subveniunt* (the laws assist those who are

vigilant, not those who sleep over their rights) and urged that the parties who come before the Tribunal are to be vigilant and that the Tribunal is

justified in framing a regulation to enforce vigilance on the part of the assessee by having a provision like Regulation 9(1). It is not possible to

accept the said argument. The Tribunal's power to frame a regulation such as Regulation 9(1) in exercise of its power to regulate its procedure and

disposal of its business is not being questioned as being ultra vires of Section 30(4) of the Act, but the same is challenged as being repugnant to

Section 36 of the Act. Any regulation framed in exercise of the power conferred by it u/s 30(4) is open to challenge on the ground that the same is

inconsistent with the provisions of the Act or of the Rules framed thereunder. For the reasons aforesaid we are of the view that Regulation 9(1) is

inconsistent with Section 36(3)(a)(iii) and Rule 29 of the Tamil Nadu General Sales Tax Rules, 1959.

16. The view we have taken seems to be in accord with the view taken by the Mysore High Court in Abdul Subhan Saheb and Sons v. Mysore

Sales Tax Appellate Tribunal [1965] 16 S.T.C. 17. In that case Regulation 8(2) of the Appellate Tribunal Regulations, 1957, empowering the

Appellate Tribunal to dismiss an appeal for default of appearance of the appellant was held to be ultra vires of Section 22(4) of the Mysore Sales

Tax Act, 1957, notwithstanding the existence of a provision in Regulation 9(1) providing for setting aside orders of dismissal for default on

sufficient cause being shown for non-appearance and for readmission of the appeal. The learned Judges in that case followed the decision of the

Full Bench of this court in S. Chenniappa Mudaliar Vs. Commissioner of Income Tax, which, as already said, had been affirmed by the Supreme

Court in Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, . An unreported decision of the Division Bench of the Andhra

Pradesh High Court in W.P. No. 1416 of 1965 Since reported as Oversea Mica Exports v. Secretary, Sales Tax Appellate Tribunal, A.P.,

Hyderabad and Anr. [1970] 25 S.T.C. 425 is also to the same effect. In that case Regulation 9(1) of the Regulations framed by the Appellate

Tribunal in exercise of the power conferred u/s 3(4) of the Andhra Pradesh General Sales Tax Act was held to be ultra vires of Section 21(4) of

the said Act. There also there was a provision for setting aside the order for dismissal for default at the instance of the appellant on satisfying the

Tribunal that there was sufficient cause for his non-appearance. The learned Judges there followed the decision of the Supreme Court in

Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, . In Hindustan Metal Works v. Sales Tax Officer [1964] 15 S.T.C. 116,

Rule 68 of the U.P. Sales Tax Rules, 1948, which empowered the appellate authority to dismiss an appeal for default was held to be ultra vires of

Section 9 of the U.P. Sales Tax Act. Under the U.P. Sales Tax Act the Tribunal was not. empowered ""to pass such order as it thinks fit"" with

regard to the appeal before it but, notwithstanding the absence of such an enabling provision, Rule 68 was held to be invalid on a due consideration

of the entire scheme of the Act and in particular the power vested in the appellate authority to enhance the tax once an appeal is filed before it.

17. The learned Government Pleader, however, brought to our notice a decision of a Division Bench of this court in W.P. No. 2102 of 1969

dismissing a writ petition at the stage of admission. On a perusal of the said judgment, we do not consider it as a pronouncement on the legal

question now raised before us. There the learned Judges have found that the circumstances existed to justify the order of dismissal by the Tribunal

and that the Tribunal was right in holding that there was no sufficient cause shown for non-appearance, to have the appeal dismissed for default

restored. Of course the court had observed:

There is nothing in the Act which makes it obligatory on the Tribunal to dispose of the appeal only on the merits. The scheme of the Income Tax

Act is entirely different, particularly the provisions in that Act for reference arising from orders of the Income Tax Appellate Tribunal.

18. The said observation has been made in the context of the provisions of Regulation 9(1) as it exists. The contentions as to the invalidity of the

impugned regulation was not put forward and the court was not called upon to decide as to the validity or otherwise of Regulation 9(1) with

reference to the scheme of the Act and the Rules framed thereunder. The question which has been urged before us and decided by us does not

seem to have been urged in that case and as such the said decision cannot be construed as a decision on the legal contentions now raised in these

cases.

19. In the view we have taken that all the orders passed by the Tribunal dismissing the appeals for default of appearance of the appellants are

inconsistent with the provision contained in Section 36(3)(a)(iii) and as such invalid, the subsequent orders passed by the Tribunal refusing to

restore the appeals dismissed for default have also to be held invalid.

20. In the result, the above tax cases and writ petitions are allowed and the Tribunal is directed to restore the respective appeals to its file and

dispose of the same in accordance with law. There will be no order as to costs.