

(1981) 10 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 502 of 1976

Mahadeo Sahra and Sons

APPELLANT

Vs

Board of Revenue and Another

RESPONDENT

Date of Decision : 13-10-1981

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1982) JLJ 189 : (1982) 27 MPLJ 383 : (1982) 50 STC 347

Hon'ble Judges : G.P. Singh, C.J.; Faizanuddin, J

Bench : Division Bench

Advocate : M.M. Sapre, for the Appellant; M.V. Tamaskar, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, C.J.

The Assistant Commissioner of Sales Tax, Indore, by order dated 4th May, 1970, assessed the petitioner to Central sales tax at Rs. 11,280.18 for the period from 1st November, 1959, to 20th October, 1960. The petitioner filed an appeal to the Deputy Commissioner, Sales Tax, which was dismissed by order dated 28th November, 1970. The petitioner filed a second appeal to the Sales Tax Appellate Tribunal (Board of Revenue). The appeal was admitted and it was fixed for hearing on 18th May, 1972. The Tribunal sent a notice of the date of hearing to the petitioner's counsel, Ladha and Co. No one appeared on 18th May, 1972, before the Tribunal and the appeal was dismissed for default of appearance. The order was communicated to the petitioner on 23rd June, 1972. The petitioner then filed this petition under Article 226 of the Constitution for setting aside the order of the Tribunal dismissing the appeal for default.

The Tribunal dismissed the appeal for default of appearance of the petitioner under Rule 59 of the Madhya Pradesh General Sales Tax Rules, 1959. The contention of the learned counsel for the petitioner in support of the petition is

that the said rule in so far as it empowers the appellate authority to dismiss an appeal on default is in excess of the rule-making power, being in conflict with the provisions of the Madhya Pradesh General Sales Tax Act, 1958, and is ultra vires and void.

For examining the correctness of the above contention raised by the learned counsel, it is necessary to refer to the relevant provisions in the Act and the Rules. Sub-section (1) of Section 38 confers right of appeal against an original order of assessment with or without penalty. Sub-section (2) of the same section confers a right of second appeal against an order passed in first appeal. Sub-section (5) of Section 38 indicates the orders which can be passed in first or second appeal under Sub-section (1) or (2). Sub-section (6) relates to finality of these orders. These Sub-sections read as follows :

(5) Subject to such procedure as may be prescribed and after such further inquiry as it may think fit the appellate authority, in disposing of any appeal under Sub-section (1) or (2), may-

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

(b) set aside the assessment or the penalty or both, and direct the officer whose assessment order has been appealed against to make a fresh assessment, after such further inquiry, as may be directed ; or

(c) pass such orders, as it may think fit.

(6) In the case of an order passed in first appeal under this section against which an application for revision is filed to the Commissioner under Sub-section (1) of Section 39, the order passed in revision shall be final and in the case of every other order passed in first appeal or second appeal under this section such order shall, subject to the provisions of this section, Section 39 or Section 44, as the case may be, be final.

Section 44 makes provision for statement of case to the High Court. On an application made to it, the Tribunal can refer to the High Court any question of law arising out of its order passed in second appeal. In case the Tribunal refuses to make a reference, the High Court, on an application, may require the Tribunal to state the case and to refer a question of law arising out of the Tribunal's order." The High Court, upon hearing a reference, decides the question of law referred and the Tribunal disposes of the case in accordance with the decision of the High Court on the question referred. The power to make rules is conferred on the State Government by Section 51. Sub-section (2)(r)(ii) of this section empowers the State Government to make rules "prescribing the procedure to be followed by the appellate authority in disposing of appeals under Sub-section (5) of Section 38". Rule 59 of the Sales Tax Rules, 1959, made under the Act, deals with procedure of hearing before an appellate authority. This rule reads as follows :

59. Hearing.-(1) If the appellate or revising authority does not reject the appeal

or application for revision summarily, it shall fix a date for hearing the appellant or applicant or his duly authorised agent.

(2) The said authority may at any stage adjourn the hearing of an appeal or application for revision to any other date.

(3) If on the date fixed for hearing or any other date to which the hearing may be adjourned the appellant or applicant does not appear before the said authority either in person or through a person duly authorised by the appellant or the applicant as required by Sub-section (1) of Section 21, the said authority may dismiss the appeal or application for revision or may decide it ex parte as it thinks fit.

(4) When an appeal or revision is dismissed or decided ex parte under Sub-rule (3) the appellant or the applicant, as the case may be, "may" within 30 days from the date of communication of such order apply to the appellate or revising authority for re-admission or re-hearing of the appeal or revision, as the case may be, and if the appellate or revising authority is satisfied that the appellant or the applicant or a person duly authorised under Sub-section (1) of Section 21, was prevented by any sufficient cause from appearing when the appeal or revision was called for hearing it may re-admit or re-hear the appeal or revision, as the case may be, upon such terms including terms as to cost and conditions as it may think fit.

A perusal of Sub-rules (3) and (4) of Rule 59 will go to show that if on the date fixed for hearing or any date to which the hearing may be adjourned the appellant fails to appear, the appellate authority may dismiss the appeal or may decide it ex parte as it thinks fit. In either case, the appellant may, within 30 days from the date of communication of the order, apply to the appellate authority for re-admission or re-hearing of the appeal. If the appellate authority is satisfied that there was sufficient cause for non-appearance, it may re-admit or re-hear the appeal. It is clear that the rule empowers the appellate authority to dismiss an appeal for default of appearance of the appellant and it also empowers the authority to restore the appeal so dismissed in case the appellant makes an application for restoration within the time allowed for that purpose and satisfies the authority that there was sufficient cause for his non-appearance on the date of hearing of the appeal. The learned counsel for the petitioner argues that this part of the rule is ultra vires. It is submitted that on a proper construction of Sub-section (5) of Section 38, the Tribunal is bound to decide the appeal on merits. In this context it is further submitted that the power of the appellate authority conferred under Sub-section (5) is for "disposing of any appeal" and that the words "pass such orders, as it may think fit" as they occur in Clause (c) of that Sub-section cannot be interpreted to include a power to dismiss an appeal for default as it would not amount to disposal of the appeal. It is also submitted that in case it is held that the appellate authority can dismiss an appeal for default, that would deprive the appellant of his right of approaching the High Court on a question of law involved in the appeal u/s 44 of the Act by

applying for a reference, for when an appeal is dismissed for default no application for reference can be made as there would be no question of law arising out of the Tribunal's order.

Having carefully considered the, submissions of the learned counsel, we are of the opinion that the contention raised is not sound and that Rule 59 which empowers the appellate authority to dismiss an appeal for default of appearance of the appellant is intra vires and valid. We have already noticed that the State Government has power to make rules u/s 51(2)(r)(ii) prescribing the procedure to be followed by the appellate authority in disposing of appeals u/s 38(5). Rule 59 empowering the appellate authority to dismiss an appeal for default of appearance and also empowering it to restore the appeal in case sufficient cause is shown for non-appearance, is a rule dealing with procedure to be followed in disposing of appeals. In *Povser v. Minirs* 50 LJ 555 the Court of Appeal held that Rule 17 of order XVI of the County Court Rules, 1875, which provided that any judgment of non-suit, unless the Judge otherwise directs, shall have the same effect of a judgment upon the merits for the defendant, was valid u/s 32 of the County Courts Act, 1856, which empowered the County Court Judges "to frame rules and orders for regulating the practice of the courts, and forms of proceedings therein". It was laid down in that case that "practice or procedure denotes the mode of proceeding by which a legal right is enforced". The decision of the Court of Appeal in this case supports our conclusion that a rule empowering the appellate authority to dismiss an appeal for default of appearance coupled with the power to restore the appeal in case the appellant shows sufficient cause for non-appearance on the date of hearing, is a rule of procedure to be followed by the appellate authority in disposing of appeals. The words "pass such orders, as it may think fit" as they occur in Sub-section (5)(c) of Section 38 confer very wide power on the appellate authority. These words do not mean that the order passed must be on the merits of the appeal. The words "in disposing of any appeal" as they find place in the opening part of Sub-section (5) cannot also be interpreted to mean that an appeal must be disposed of on merits. Disposal of an appeal does not necessarily mean that an appeal has been decided on merits. These words cover all orders by which an appeal is got rid of or is brought to an end. Therefore, an order dismissing an appeal for default would also be disposal of the appeal. The words "in disposing of any appeal" as they are used in Sub-section (5) are much wider than the words "in deciding an appeal". Further the words in Clause (c) of Sub-section (5) are merely "pass such orders, as it may think fit" and not "pass such orders thereon the appeal as it may think fit" which are some times found in such provisions. The aforesaid words used in Sub-section (5) are much wider and fully empower the appellate authority to dispose of an appeal for default of appearance. Even assuming that the aforesaid words do not empower the dismissal of an appeal for default, Sub-section (5) being "subject to such procedure as may be prescribed", the rule prescribing the procedure for dismissal of an appeal for default of appearance would override the Sub-section and would not be invalid. The argument that if

the appellate authority is permitted to dismiss for default an appeal, that would deprive the appellant of his right to approach the High Court on a reference, is equally unsound. If an appellant is so minded, he can apply to the appellate authority for restoration of appeal and by showing sufficient cause for his non-appearance he can get his appeal restored and heard on merits as there is a provision in the rule for restoration of appeal dismissed for default. It cannot, therefore, be said that the appellant will lose the right of approaching the High Court in a reference u/s 44 if the Tribunal is allowed to dismiss the appeal for default of appearance.

The learned counsel for the petitioner strongly relied upon the case of Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, in which Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1946, which empowered dismissal of an appeal by the Tribunal for default of appearance, was held to be ultra vires being repugnant to the provisions of Section 33(4) of the Income Tax Act, 1922. Section 5-A(8) of the Income Tax Act, 1922, empowered the Income Tax Appellate Tribunal to regulate its own procedure. Section 33(4) of the said Act provided 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". It was held by the Supreme Court that the word "thereon" referred to the subject-matter of appeal before the Tribunal and that the words "pass such orders thereon" obliged the Tribunal to decide the appeal on merits, and therefore, the rule enabling the Tribunal to dismiss an appeal for default of appearance was in conflict with Section 33(4). The Supreme Court also observed that if the Tribunal dismissed an appeal for default of appearance without going into the merits, the appellant's right of invoking the provisions relating to reference to the High Court would be violated. The Supreme Court, however, held that the rule did not offend Section 5-A(8) by which the Tribunal was empowered to regulate its own procedure. The decision of the Supreme Court in Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, is distinguishable for various reasons. First, the language used in Section 38(5) of the Sales Tax Act is materially different from the language used in Section 33(4) of the Income Tax Act, 1922. As pointed out by us, Section 38(5) empowers the Sales Tax Appellate Tribunal to pass such orders, as it may think fit in disposing of any appeal. The words used therein are not "pass such orders thereon as it may think fit" which are the words used in Section 33(4) of the Income Tax Act. The words used in the Sales Tax Act are much wider and they, enable the Tribunal to dismiss an appeal for default of appearance, as that would also be disposal of appeal. Secondly, Section 38(5) of the Sales Tax Act is subject to such procedure as may be prescribed. Section 33(4) of the Income Tax Act is not subject to rules made by the Tribunal. Thirdly, Rule 24 made by the Income Tax Appellate Tribunal did not empower restoration of an appeal dismissed for default. As already seen, Rule 59 of the Sales Tax Rules specifically empowers restoration of appeal when sufficient cause is shown for non-appearance by the appellant and thereby the appellant is not deprived of his right to approach the High Court in a reference, for he can get his appeal

heard on merits even after it is dismissed for default of his appearance. These reasons clearly distinguish the Supreme Court ruling in Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, . Further the view taken in that case that Rule 24 of the Appellate Tribunal Rules could not be said to be ultra vires Section 5-A(8) of the Income Tax Act supports our conclusion that Rule 59 of the Sales Tax Rules is intra vires the provisions of Section 51(2)(r)(ii) of the Sales Tax Act. The learned counsel for the petitioner also relied upon Hindustan Metal Works v. Sales Tax Officer [1964] 15 STC 116, Abdul Subhan Saheb and Sons v. Mysore Sales Tax Appellate Tribunal [1965] 16 STC 17, Oversea Mica Exports v. Secretary, Sales Tax Appellate Tribunal [1970] 25 STC 425 and Wood Workers and Packing Case Works v. State of Punjab [1971] 28 STC 291. These cases are on provisions contained in different Sales Tax Acts which are analogous to the provisions considered in Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, . For the reasons already given, these cases are also distinguishable. Our attention was also drawn to Kamadhenu Metal Rolling Mills (P.) Ltd. v. State of Tamil Nadu [1971] 27 STC 536. This case dealt with a corresponding provision of appeal in the Madras Sales Tax Act. The case supports our construction of Section 38(5) of the Sales Tax Act. However, in the Madras Act there is no provision for reference to the High Court and that is one point of distinction which the learned counsel for the petitioner rightly pointed out.

For the reasons given above, we hold that power of dismissal of an appeal for default of appearance conferred by Rule 59 on an appellate authority is valid. It follows that the Sales Tax Appellate Tribunal, i. e., the Board of Revenue, was competent to dismiss the petitioner's appeal for default of appearance.

The petition fails and is dismissed, but without any order as to costs. The security amount be refunded to the petitioner.