(1995) 11 MAD CK 0049

In the Madras High Court

Case No : W.A. No''s. 1197 and 1198 of 1995

Reed Relays and Electronics India Limited	APPELLANT
Vs	
Appellate Assistant Commissioner (Commercial Taxes), Kancheepuram and another	RESPONDENT

Date of Decision : 27-11-1995

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 31, 31A, 33

Citation : (1995) 11 MAD CK 0049

Hon'ble Judges : K.A. Swami, C.J;Raju, J

Bench : Division Bench

Judgement

K.A. Swami, C.J.—At the stage of admission, the learned Additional Government Pleader for Taxes has been directed to take notice.

Accordingly, she has taken notice on behalf of the respondents, received instructions and secured records also. As the matter lies in a narrow

compass, the appeal is admitted and it is heard for final disposal.

2. In the writ petitions, the appellant-petitioner sought for quashing the orders dated October 28, 1993, passed by the Appellate Assistant

Commissioner (C.T.), Kancheepuram, in Appeal Nos. 38/90/CST and 39/90/CST, dismissing them for default. The last date on which the

appeals were posted for hearing was October 28, 1993. Before that date, the appeals were adjourned for a number of times. The orders

dismissing the appeals for default state all those dates. Even on October 28, 1993, the appellant-petitioner did not turn up. Hence, the Appellate

Assistant Commissioner took the view that there was no alternative but to dismiss the appeals. Thus, he did not go into the merits of the appeals

and dismissed them on the ground that neither the appellant nor its counsel was present. The learned single Judge has rejected the writ petitions on

the ground that the appellant-petitioner was well aware of the posting of the appeals for hearing as it was served with notices. Further, there was a

delay in filing the writ petitions inasmuch as the appeals were dismissed on October 28, 1993, whereas the writ petitions were filed only on June

30, 1994.

3. Before us, the only contention urged by the learned counsel for the appellant is that even assuming that the petitioner-appellant in spite of service

of notice remained absent on October 28, 1993, nevertheless having regard to the provisions contained in section 31(3) of the Tamil Nadu

General Sales Tax Act (hereinafter referred to as ""the Act"") and rule 27(5) of the Tamil Nadu General Sales Tax Rules (hereinafter referred to as

the Rules"") it was not open to the Appellate Assistant Commissioner to dismiss the appeals for default, inasmuch as he was bound to decide the

appeal on merits even in the absence of the appellant.

Section 31(3) of the Act provides the powers of the Appellate Assistant Commissioner and the manner of disposal of the appeals and it reads thus

:

In disposing of an appeal, the Appellate Assistant Commissioner may, after giving the appellant a reasonable opportunity of being heard, and for

the sufficient reasons to be recorded in writing,

(a) in the case of an order of assessment -

(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 inquiry 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.

Thus, according to the aforesaid provisions, it is open to the Appellate Assistant Commissioner to confirm, reduce, enhance or annul the

assessment or the penalty or either to set aside the assessment and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed or pass such other orders as he may think fit or in the case of any other order confirm, cancel or vary such order after

hearing the assessee either in person or by a representative. Rule 27(5) specifically provides thus :

The appellate authority shall, after giving the appellant reasonable opportunity of being heard, pass such orders on the appeal as such authority

thinks fit subject to the provisions of sub-section (3) of section 31 or sub-section (3) of section 31A, as the case may be.

The instant cases fall u/s 31(3) of the Act. Learned Additional Government Pleader (Taxes) submits that the words ""pass such other orders as he

may think fit"" occurring in clause (iii) of sub-section (3) of section 31 of the Act empowers the Appellate Assistant Commissioner even to dismiss

the appeal for default of appearance; whereas the learned counsel for the appellant submits that those words are to be read in conjunction with

clauses (i) and (ii) and as a result of such reading it would follow that the words ""such other orders as he may think fit"" only relate to the merits of

the appeal and not dismissing it for default because sub-section (3) relates to the exercise of power to confirm, reduce, enhance or annul the

assessment or the penalty or both or to remit the matter. Added to that the Rules also do not enable the Appellate Assistant Commissioner to

dismiss the appeal for default.

4. We are of the view that neither the Act nor the Rules specifically provide for dismissing the appeal for default in the event of non-appearance of

the assessee either in person or through the representative. The power conferred under sub-section (3) of section 31 of the Act upon the Appellate

Assistant Commissioner is to decide the appeal on merits and in so deciding the appeal, he can confirm, reduce, enhance or annul the assessment

or the penalty or both or remit the matter for fresh disposal. Sub-rule (5) of rule 27 of the Rules also does not enable the Appellate Assistant

Commissioner to dismiss the appeal for default, but it only says that he shall after affording the appellant reasonable opportunity of being heard

pass such order as he thinks fit. In our view, the matter is no more res integra. The Supreme Court in Commissioner of Income Tax, Madras Vs.

S. Chenniappa Mudaliar, considered the provisions contained in sub-section (4) of section 33 of the Income Tax Act, 1922, as it stood then, and held, that the said provision did not provide for dismissal of the appeal for default and it only provided that the Appellate Tribunal may, after giving

an opportunity of being heard, pass such order as it thinks fit and shall communicate any such orders to the assessee and to the Commissioner.

This sub-section (4) of section 33 of the Income Tax Act is similar to sub-rule (5) of rule 27 of the Rules. The Rules framed under the Income Tax

Act, namely, Appellate Tribunal Rules, 1946, enabled the Tribunal to dismiss the appeal for default. The Supreme Court in Commissioner of

Income Tax, Madras Vs. S. Chenniappa Mudaliar, held that the said rule was ultra vires of the provisions contained in sub-section (4) of section

33 of the Act and the Appellate Tribunal could not dismiss the appeal for default. The relevant portion of the judgment is as follows :

The scheme of the provisions of the Act relating to the Appellate Tribunal apparently is that it has to dispose of an appeal by making such orders

as it thinks fit on the merits. It follows from the language of section 33(4) and in particular the use of the word ''thereon'' that the Tribunal has to go

into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. 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 on the ground that the

party concerned has failed to appear. As observed in Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, the

word ''thereon'' in section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and the words ''pass such orders as the

Tribunal thinks fit'' include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant

Commissioner by section 31 of the Act. The provisions contained in section 66 about making a reference on questions of law to the High Court

will be rendered nugatory if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been

properly filed, for default, without making any order thereon in accordance with section 33(4). The position becomes quite simple when it is

remembered that the assessee or the Commissioner of Income Tax, if aggrieved by the orders of the Appellate Tribunal, can have resort only to

the provisions of section 66. So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the

High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The

advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order

u/s 33(4). It follows from all this that the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only

be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant. It was laid down as far back as the year

1953 by S. R. Das J. (as he then was) in Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar, that the jurisdiction of

the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one u/s 33(4) and a

question of law arising out of such an order. The Special Bench, in the present case, while examining this aspect, quite appositely referred to the

observations of Venkatarama Aiyar, J., in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., indicating the necessity

of the disposal of the appeal on the merits by the Appellate Tribunal. This is how the learned Judge had put the matter in the form of interrogation :

''How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had

no opportunity of deciding whether the decision of the court should be sought ?''

Thus looking at the substantive provisions of the Act there is no escape from the conclusion that u/s 33(4) the Appellate Tribunal has to dispose of

the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance.

That being so, the Appellate Assistant Commissioner had no jurisdiction to dismiss the appeal for default, even though the appellant was guilty of

being absent on several dates of hearing.

5. We also notice a decision of a learned single Judge of this Court in Southern Steel Industries v. Appellate Assistant Commissioner (C.T.)

(printed at page 273 supra); (1995) 8 MTCR 137. We approve of the said decision of the learned single Judge in the aforesaid case, as it

confirms to the aforesaid decision of the Supreme Court in Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, , which has also

been followed therein.

6. Thus we hold that as per the provisions contained in sub-section (3) of section 31 of the Act and sub-rule (5) of rule 27 of the Rules, the

Appellate Assistant Commissioner had no jurisdiction to dismiss the appeals for default. He should have decided the appeals on merits even in the

absence of the appellant. Accordingly, these appeals are allowed and the order dated July 21, 1994, passed by the learned single Judge in W.P.

Nos. 11475 of 1994 and 11199 of 1994 is set aside. The aforesaid writ petitions are allowed and the impugned orders dated October 28, 1993,

in A.P. No. 38/90/CST and A.P. No. 39/90/CST passed by the Appellate Assistant Commissioner, Kancheepuram, are quashed. The said

appeals are remitted back to the Appellate Assistant Commissioner, Kancheepuram, with a direction to decide the appeals on merits and in

accordance with law. To avoid any further delay in these matters the appellant herein is directed to appear before the Appellate Assistant

Commissioner, Kancheepuram, on the 2nd day of January, 1996, without awaiting any further notice. If the appellant fails to appear on the said

date, the Appellate Assistant Commissioner shall proceed to decide the appeals on merits and in accordance with law. There will be no order as to

costs.

7. Appeals allowed.